VALLEY PLAZA REALTY, HIGHVIEW PROPERTIES III, FRANK GREEK AND SON, INC., HIGHVIEW PROPERTIES I, and TICES PROPERTIES, on behalf of themselves and all others similarly situated, Plaintiffs, vs. VERIZON NEW JERSEY, INC., formerly known as Bell Atlantic New Jersey, Inc., and NYNEX LONG DISTANCE COMPANY, d/b/a/ Verizon Enterprise Solutions, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002516-23T1 Civil Action On Appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. MID-L-817-15 Sat Below: Ana C. Viscomi, J.S.C.

BRIEF OF APPELLANTS-PETITIONERS CARL J. MAYER, ESQ. AND THE MAYER LAW GROUP, LLC

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PRELIMINARY STATEMENT

Petitioners Carl J. Mayer, Esq. and his law firm the Mayer Law Group, LLC ("Mayer" or together "MLG") appeal from trial court orders sending various arbitration disputes back to arbitrator retired judge Stephen M. Orlofsky and confirming an award entered by Judge Orlofsky **made while he was *functus officio*—**meaning Judge Orlofsky "performed his office." Once an arbitrator publishes a final award, his authority to re-examine or change a final decision ends. The parties—MLG (Carl Mayer) and the now defunct law firm Marcus & Auerbach ("M&A")—served as co-counsel in a years-long successful class action litigation against Verizon. M&A and its attorneys had no prior experience with Verizon cases. The class action plaintiffs' counsel (MLG and M&A) signed a fee sharing agreement and an arbitration agreement appointing retired Judge Stephen M. Orlofsky as arbitrator and/or mediator of various disputes.

In January 2023, Judge Orlofsky entered a final order (the "Final Arbitration Award") granting Mayer the "sole responsibility for the prosecution of the E911 claims, including whether such claims can be reasonably pursued, and the selection of expert witnesses. Accordingly, Mayer shall be entitled to the entire fee awarded in connection with the prosecution of the E911 matter". Judge Orlofsky left no doubt that this was a "final order"—**writing that the**

"foregoing email constitutes my conclusions and findings" "SO ORDERED." 127a.

Despite being *functus officio* as to the E911 fee issue for over one year, Judge Orlofsky, by order and opinion dated March 20, 2024 (and confirmed by the trial court), issued another arbitration opinion and order (the "Illegal Award") reversing the Final Arbitration Award by "reassigning" the "investigation, and prosecution, for the potential E911 class action" to M&A and permitting MLG to recover only "25% of any fee recovered in the E911 case, whether by settlement or trial." 28a; 59a-60a. Judge Orlofsky did not provide any basis under case law or the New Jersey Arbitration Act ("NJAA") that would permit him to arbitrarily and unilaterally reverse and revise the Final Arbitration Award to Mayer's detriment. Id.

In the same Final Arbitration Award issued on January 18, 2023, Judge Orlofsky rejected M&A's attempt to "deduct" or "adjust" the attorneys' fee allocation related to costs purportedly incurred by M&A in an Order to Show Cause action before Judge Viscomi in 2022. 127a. Again—in direct contradiction of his final order—Judge Orlofsky (in the Illegal Award dated March 20, 2024 confirmed by the trial court) reversed himself and awarded M&A approximately $200,000 in legal fees related to the Order to Show Cause MLG filed in 2022—the precise issue Judge Orlofsky one year prior said he was

without jurisdiction to decide. Compare 127a; 330a; 361a, with 47a-48a; 59a. Judge Orlofsky did not provide any legally cognizable reasoning to support the Illegal Award, i.e., any basis under case law or the NJAA to substantively revise and reverse the Final Arbitration Award issued in January 2023 to MLG's detriment. The trial court committed reversible error by confirming the Illegal Award, where Judge Orlofsky reversed his prior final decisions while *functus officio*.

Where an arbitrator—like Judge Orlofsky—issues a final award that decides the issues presented, "his effort to alter or supplement his initial award" is a "legal nullity" under the *functus officio* doctrine. Kimm v. Bisset, LLC, 388 N.J. Super. 14, 26-27, 34 (App. Div. 2006). Moreover, M&A's December 2023 application for Judge Orlofsky to "revise" or "amend" his prior January 2023 final award was made nearly one year after M&A received the Final Arbitration Award, well outside the NJAA's twenty (20) day statutory period where a party may ask an arbitrator to revise an award. See N.J.S.A. 2A:23B–20b.

For these reasons and the reasons that follow, this Court should vacate the trial court's orders: (1) sending the parties back to Judge Orlofsky; and (2) confirming Judge Orlofsky's *functus officio* award. The Court should remand to the trial court for confirmation of Judge Orlofsky's initial and binding Final Arbitration Award.

COMBINED PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. RELEVANT BACKGROUND, HISTORY OF UNDERLYING CASE AND MAYER AND MLG'S EXPERIENCED ROLE IN THE CASE.

Appellant Carl J. Mayer, Esq. has been a member of the New Jersey bar since 1986 and a leading class action and public interest lawyer, having been profiled on the show 60 Minutes for his public interest work. 314a-318a. In his forty (40) year career as a public advocate, Mayer and his law firm MLG have brought many cases that have advanced the public interest in New Jersey and nationally, including the case at bar. 315a-324a. Mayer and his firm MLG have also brought successful cases against Verizon, including class actions that resulted in substantial relief to customers and public benefits, including a challenge to Verizon's unlawful participation in a "warrantless wiretapping" program used to spy on Americans. Id.

In May 2006, Mayer and MLG filed a federal lawsuit in the District of New Jersey against Verizon challenging the National Security Agency's wiretapping operations and alleging that the company unlawfully turned over all call records to the NSA. Id. After Congress retroactively immunized the phone

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

company participants and after years of litigation, Verizon abandoned the "warrantless wiretapping" program. 315a-324a; 335-338a.

Mayer filed another successful case against Verizon for illegally charging New Jersey customers multiple installation fee for installing a "jack" in a customer's home or business. Id. (citing Enerson v. Verizon, New Jersey, Inc., BER-L-344-13 (Wilson J.) (involving multi-million-dollar class action settled on behalf of hundreds of thousands of Verizon customers double-charged in violation of New Jersey law and the court approving as *cy pres* payment one million dollars to New Jersey public interest groups)). Id.

Verizon installed boxes usually in basements that allows the wires in a home to communicate with the wires outside of the house on telephone poles. 243a-256a; 336a-338a; T1 at 4 to 10.[2] New Jersey's tax only allows Verizon to charge once for the installation of each box. Id. Verizon, however, was charging the same installation fee multiple times in violation of the tariff which is a *per se* violation of the New Jersey Consumer Fraud Act. Id. Mayer guided the case to a multimillion-dollar settlement before Judge Wilson in the Superior Court of New Jersey, Bergen County. 317a-322a; 336a-339a.

[2] "T1" refers to the transcript dated October 10, 2023 filed separately.

Valley Plaza case class action clients approached Mayer and retained his firm MLG based on his high-profile litigation successes and extensive experience in litigating against Verizon. 317-322a; 336a-348a. Mayer and MLG vetted and retained all the experts and guided the case to a successful settlement after 17 years. 152a-241a. As such, Mayer's MLG firm lodestar was more than double that of the now dissolved Marcus and Auerbach (M&A) firm—who Mayer invited to participate in the case. Id. The settlement in the Verizon case successfully stopped Verizon's practice of illegally putting small business customers on a more expensive bundle of services called Custopak, instead of on Plain Old Telephone Service (POTS), which is much cheaper and required by tariff. 272a-277a; 318a; 333a-356a. The result was tens of millions of dollars in savings to small business customers. Id.

B. THE FEE SHARING AGREEMENT.

M&A and MLG signed a "Fee Sharing Agreement" for the "Frank Greek v. Verizon and Progeny" matter on January 23, 2012. 30a-34a. The Fee Sharing Agreement "governs the division of any attorney's fees that may be awarded by the court in the case of Frank Greek and Sons, Inc. v. Verizon, Docket Number

L-1341-09 filed in Middlesex County, New Jersey, and certain other litigation."[3] Id.

The Fee Sharing Agreement, in relevant part, states that both "M&A and MLG agree that both firms are entitled to be, and shall be involved in all settlement negotiations in all cases covered by this agreement, and that both must agree in writing to the terms of any settlement agreement in any such case." 34a. The Fee Sharing Agreement also states that "Except as otherwise ordered by a court, M&A and MLG will seek to submit a joint or omnibus application for award of attorneys' fees and reimbursement of expenses that will include as an appropriate lodestar and expense analysis or reports for M&A and MLG as may be applicable." 33a.

C. THE ARBITRATION AGREEMENT.

In August 2021, Appellants Carl J. Mayer, Esq., on behalf of himself and MLG, entered into an Arbitration Agreement labeled a "Dispute Resolution Agreement" with Respondents Jonathan Auerbach, Esq., Jerome M. Marcus, Esq., and Marcus & Auerbach LLC (together M&A) appointing retired Judge Stephen M. Orlofsky as arbitrator and/or mediator of various disputes among the parties. 36a-37a.

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[3] Frank Greek & Sons, Inc. v. Verizon, Docket No. MID-L-1341-09 (filed February 16, 2009) (the "Greek Action") was eventually subsumed into the Valley Plaza Class Action when the amended complaint was filed in April 2015.

The Arbitration Agreement signed by the parties states that Judge Orlofsky will resolve:

> (1) Any issue governed by the Affiliation Agreement dated January 23, 2012, including: (a) the fee in *Valley Plaza Realty, Inc. v. Verizon*;[4] (b) any litigation regarding the Emergency 911 ("E911") protective refund case filed by Verizon against the State of New Jersey requesting a refund for its customers; (c) any case that would constitute "follow-on Custopak litigation" as that term is defined by the Affiliation Agreement; and (d) whether, or to what extent, the Affiliation Agreement is applicable or enforceable and binding as between the parties (the Dispute); and (2) The process by which Mayer and M&A will determine the position taken by Plaintiff's counsel in *Valley Plaza Realty, Inc. v. Verizon* on the attorney's fees and expenses to be paid by Verizon in settlement of that case, and the substantive terms which Mayer and M&A will agree to accept in resolution and settlement of the fees and expenses dimension of that case.
>
> [36a].

In the Arbitration Agreement, the parties (M&A and MLG) agreed that "Judge Orlofsky may choose a Baseball Arbitration format for resolution of the Dispute or any element of the Dispute." 37a. Further, the parties agreed that

[4] Valley Plaza Reality, Inc. is a class action case that was pending before Judge Viscomi in the Superior Court of New Jersey, Middlesex County. 36a. Mayer (and MLG) is a nationally recognized attorney and public advocate who has successfully pursued claims in New Jersey state court, the District of New Jersey, Southern District of New York, and the United States Court of Appeals for the Third Circuit. 152a-165a.

Judge Orlofsky will consult with the parties to this Agreement on the "conduct of the mediation" but "will have sole power to determine the manner in which the mediation is conducted and the Dispute resolved," including the "sole power to determine what submissions, and what evidence, to accept and review in his conduct of the mediation and his resolution of the Dispute." 36a.

D. THE ARBITRATION PROCEEDINGS AND JUDGE ORLOFSKY'S FINAL ARBITRATION AWARD.

On January 18, 2023, Judge Orlofsky issued the Final Arbitration Award via email. 123a-127a. Relevant here, Judge Orlofsky ordered that: "Mayer shall take sole responsibility for the prosecution of the E911 claims, including whether such claims can be reasonably pursued, and the selection of expert witnesses. Accordingly, Mayer shall be entitled to the entire fee awarded in connection with the prosecution of the E911 matter, and M&A shall forfeit any right to receive any fee in connection with the prosecution of the E911 claim, and shall have no role in the prosecution of that claim." 126a (emphasis added). Judge Orlofsky further decided that "Mayer shall be entitled to 30% of the amounts available for attorney's fees after expert witness fees and expenses have been paid, and that Marcus and Auerbach shall each be entitled to 35% of the

amounts available for attorney's fees after expert witness fees and expenses have been paid." 126a.[5]

M&A also sought to "deduct" and/or "adjust" MLG's share of attorney's fees purportedly for expenses MLG "forced" M&A to incur because of MLG's "conduct," "including the lawsuit and Order to Show Cause MLG filed against M&A before Judge Viscomi." 127a. Judge Orlofsky rejected M&A's proposed "adjustment" because the:

> allocation of attorneys fees is beyond the scope of [his] authority under the [Arbitration] Agreement, and [he] has no jurisdiction under that Agreement to make such an adjustment for litigation fees or expenses. The agreement does not authorize me to sanction Mayer for his alleged misconduct. M&A will have to pursue a remedy for those claims in another forum to recover those litigation expenses.
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> [Id].

The Final Arbitration Award also stated that "The foregoing email constitutes my conclusions and findings regarding the disputed issue of whether to accept the 'settlement offer from Verizon of $5 million all in' in accordance with the Dispute Resolution Agreement. SO ORDERED STEPHEN M. ORLOFSKY." Id.

[5] 30 percent of the fee award in this matter comes to approximately $1,245,000. MLG only received approximately $794,000 to date. 133a; 140a.

In September 2023 and consistent with the Arbitration Agreement, MLG asked Judge Orlofsky to decide the question of whether "The Chalfin Group Inc. is entitled to recover its fees as an expense incurred on behalf of the class in this matter." 129a. Judge Orlofsky again refused to address the Chalfin issue. Id. Reiterating his September 9, 2023 email, Judge Orlofsky "concluded that [he] was without jurisdiction to consider the issue under the [Arbitration] Agreement in light of Judge Viscomi's Order of June 27, 2023 scheduling a Fairness Hearing on October 10, 2023 at which she will consider the reasonableness and fairness of the settlement in accordance with New Jersey Court Rule 4:32-2(e), as well as Class Counsel's Fee and Expense Request." Id.

Judge Ana C. Viscomi, J.S.C., the Superior Court of New Jersey trial court judge that has been supervising the Verizon class action litigation in Middlesex County, New Jersey, entered a signed "Stipulation and Agreed Upon Order" dated November 14, 2023, which stated in part that M&A "agree[s] to direct the Settlement Administrator to make a payment of $16,000.00, from the portion of the settlement proceeds designated to pay their attorneys' fees, to be applied to the Chalfin expenses incurred by Carl Mayer." 118a-121a.

E. JUDGE ORLOFSKY IMPERMISSIBLY REVERSES HIS 2023 FINAL ARBITRATION AWARD AND PERMITS RESPONDENTS M&A TO PROSECUTE THE E911 CLAIM IN DIRECT CONFLICT WITH THE 2023 FINAL ARBITRATION AWARD.

1. M&A Re-Opens E911 and Attorneys' Fees Issues That Judge Orlofsky Dispositively and Finally Resolved by Final Order in 2023.

In a January 16, 2024 letter to Judge Orlofsky, Respondent Marcus asked Judge Orlofsky to alter his January 2023 final arbitration award. 42a-44a. In part, Mr. Marcus claimed that MLG's

> conduct, and his repeated improper, baseless and error-filled filings in the *Valley Plaza* matter, make clear that Mayer is not capable of serving as counsel to the classes in the prosecution of the E911 claim which has been assigned to the classes as part of the settlement, which became effective on January 8. Moreover, pursuant to the Final Order entered in the *Valley Plaza* case, . . ., Mayer is not Settlement Class Counsel and he is therefore not authorized by the Court to represent the interests of the classes. Accordingly, we request that Marcus and Auerbach be authorized to investigate and, if meritorious, prosecute that claim. We propose that Mayer receive a fee, if one is earned in the case, in the amount of 25% of the net fee generated by any such litigation.
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> [43a].

On January 18, 2024, Judge Orlofsky responded to Mr. Marcus' request. 115a-116a. In direct conflict with his January 2023 final order, Judge Orlofsky stated that M&A was "authorized to direct the Settlement Administrator in the Valley Plaza Realty v. Verizon class action ("Settlement Administrator") to place in escrow $368,615.08, the amount of funds otherwise due to Mayer, but at issue in this dispute." Id. That same day, MLG received an extension of time to respond to Marcus' request. 49a.

2. The Trial Court Rejects MLG's Attempts to Enforce Judge Orlofsky's Final Arbitration Award and Directs the Parties Back to Judge Orlofsky For Adjudication of Issue He Lacked Jurisdiction to Decide.

On September 8, 2023, MLG wrote to Judge Orlofsky objecting to the fact that his "arbitral opinion did not award any expert fees to the Chalfin Group, Inc. even though . . . the firm worked for three years on this matter" with "roughly $31,000 of time expended on this case." 314a. MLG asked Judge Orlofsky to confirm whether "the decision not to compensate the Chalfin Group was inadvertent or if [he had] a rationale for not compensating the firm." Id. The next day, Judge Orlofsky suggested to Mayer that he "discuss the Chalfin Group's fee request with" M&A as class counsel. 148a. Judge Orlofsky then expressed "no view as to the Chalfin Group's fee request," and that he was "without jurisdiction to consider it now." Id. Instead, Judge Orlofsky directed MLG back to the trial court for adjudication. Id.

However, on September 12, 2023, Judge Orlofsky received an email from M&A contending that he "did have jurisdiction to decide this issue under the Dispute Resolution Agreement, and that the Chalfin Group: 1. was never retained as an expert on behalf of the class; 2. that it was not entitled to any fee; and 3. that Mayer had agreed to pay the Chalfin Group himself." 129a. By email dated September 16, 2023, Judge Orlofsky reiterated his prior September 8, 2023 email where he "concluded that [he] was without jurisdiction to consider"

various issues, including the whether the "Chalfin Group, Inc. is entitled to recover its fees as an expense incurred on behalf of the class in this matter." 129a. Judge Orlofsky then directed the parties back to the trial court. Id.

The parties signed a stipulation dated November 14, 2023, which in part states that M&A agrees "to direct the Settlement Administrator to make a payment of $16,000.00, from the portion of the settlement proceeds designated to pay their attorneys' fees, to be applied to the Chalfin expenses incurred by Carl Mayer." 118a-121a. In exchange, MLG withdrew its motion for reconsideration regarding this dispute, and waived its right to file any appeal or otherwise object to the court's prior orders. Id.

In January 2024, MLG filed a motion to enforce the November 14, 2023 stipulation and order, including the agreed payment of fees contained therein, because M&A never directed the Settlement Administrator to pay the Chalfin Group $16,000.00. 131a-140a. The trial court denied the motion and stated that "this court lacks jurisdiction to adjudicate the dispute as to the distribution of attorneys' fees that has resulted in this case." 40a-41a. The trial court also declined to exercise jurisdiction over the dispute and referred the parties "to the Dispute Resolution Agreement of August 5 and 6, 2021, they all executed with the Honorable Stephen Orlofsky (retired) to mediate and ultimately arbitrate the claims." Id. The trial court directed MLG back to Judge Orlofsky and the

Arbitration Agreement. Id. The trial court ordered MLG to "comply with the referenced agreements and Order of the court by returning to mediation or, seek appropriate relief before the Appellate Division."[6] Id.

3. Judge Orlofsky Unlawfully Reverses the Final Arbitration Award.

On March 20, 2024, Judge Orlofsky issued another "final" arbitration award (the "Illegal Award") (again in direct conflict with his January 18, 2023 final order) awarding M&A various legal fees and expenses, including: "the total amount of $374,101.07." 59a. The Illegal Award stated that "Marcus and Auerbach are authorized to direct the Settlement Administrator in the Valley Plaza Class Action, who is holding those funds in escrow, to disburse the $374,101.07 to them." 59a-60a. In direct conflict with his prior final January 2023 order, the Illegal Award ordered that "Marcus and Auerbach and their respective law firms are assigned to investigate, and if appropriate, prosecute the E911 claim. Mayer shall be entitled to receive 25% of any fee realized in the prosecution of the E911 claim." 60a.[7]

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[6] The Court also referred "counsel to this court's Final Order of October 20, 2023, Approving the Settlement and Related Relief as well as the November 14, 2023, Stipulation and Agreed Upon Order Dismissing Mayer's motion for Reconsideration and Related Relief." 40a-41a.

[7] In his illegal March 20, 2024 *functus officio* "Arbitration Opinion," Judge Orlofsky purportedly reversed his prior final E911 decision based on MLG's "conduct" and because "allowing [MLG] investigate, and if appropriate, prosecute the E911 claim, would not be in the best interests of the potential E911 class." 57a-59a. Accordingly, Judge Orlofsky "reassign[ed] the investigation,

The Illegal Award also reversed the Final Arbitration Award on the issue of M&A's fees application/sanctions against Mayer—the issue Judge Orlofsky expressly refused to adjudicate because he admittedly lacked jurisdiction in January 2023. Compare 127a, with 27a-28a; 59a-60a. The Illegal Award (confirmed by the trial court) also granted M&A "$97,277.30 for legal fees paid to outside counsel in defending the Order to Show Cause filed by Mayer" and "$26,892.50 for legal fees Marcus & Auerbach incurred personally in defending the Order to Show Cause filed by Mayer" 24a-28a; 59a-60a.[8]

By order dated April 12, 2024, the trial court confirmed Judge Orlofsky's Illegal Award issued by Judge Orlofsky while he was *functus officio* as to the E911 claim and sanction attorney's fees issues. 24a-28a. This appeal followed. 1a-23a.

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and prosecution, of the potential E911 class action, to Jerome Marcus of Marcus & Marcus, LLC and Jonathan Auerbach of Resolution Strategy Group, LLC. Mayer shall be entitled to receive 25% of any fee recovered in the E911 case, whether by settlement or trial." Id.

[8] In his illegal March 20, 2024 "Arbitration Opinion," Judge Orlofsky discarded his prior statements that he lacked jurisdiction to adjudicate attorneys' fees issues related to the Order to Show Cause hearing in 2022. 54a-57a. Judge Orlofsky concluded that "Marcus and Auerbach should be reimbursed for the legal fees of their outside counsel to defendant against this Order to Show Cause" because, in his mind, the application had "no basis in law or fact." Id. Judge Orlofsky also deemed MLG's "settlement positions and legal arguments" as "irrational from start to finish," "frivolous," and "meritless" without explanation or substantive discussion. Id.

ARGUMENT

POINT I

STANDARD OF REVIEW

Appellate courts review a trial court's decision denying a motion to vacate or order confirming an arbitration award *de novo*, see Manger v. Manger, 417 N.J. Super. 370, 376, (App. Div. 2010) (citation omitted), that is, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995); accord Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013) (same).

POINT II

THIS COURT SHOULD VACATE THE TRIAL COURT'S ORDER CONFIRMING THE ILLEGAL AWARD BECAUSE JUDGE ORLOFSKY WAS *FUNCTUS OFFICIO* AND LACKED AUTHORITY TO ISSUE THE ILLEGAL MARCH 20, 2024 ARBITRATION AWARD, WHICH CONFLICTED WITH AND REVERSED HIS FINAL ARBITRATION AWARD DATED JANUARY 18, 2023. (24A-28A; 59A-60A; 123A-127A).

A. THE *FUNCTUS OFFICIO* DOCTRINE.

The common law doctrine of *functus officio*, which literally means "office performed," means that with issuance of a final award, an arbitrator's commission is terminated, as is the authority to go back and modify or revise the award. See Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 360-61 (1994); Kimm v. Bisset, LLC, 388 N.J. Super. 14, 26-27 (App. Div.

2006); Held v. Comfort Bus Line, Inc., 136 N.J.L. 640, 641 (Sup. Ct. 1948). "As described by the United States Supreme Court, the doctrine provides that '[a]rbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end.'" Kimm, 388 N.J. Super. at 26 (quoting Bayne v. Morris, 68 U.S. (1 Wall.) 97, 99 (1863)). See FUNCTUS OFFICIO, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "functus officio" as one "having performed his or her office" and "(Of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.").

"When 'arbitrators have executed their award and declared their decision they are *functus officio* and have no power or authority to proceed further.'" Kimm, 388 N.J. Super. at 26 (quoting Teamsters Local 312 v. Matlack, Inc., 118 F.3d 985, 991 (3d Cir.1997) (citing Mercury Oil Refining Co. v. Oil Workers Int'l Union, 187 F.2d 980, 983 (10th Cir.1951))). "An arbitrator's power, traditionally, is terminated immediately after making a final decision and is then at an end, regardless of the correctness of that decision." Id. (citing Teamsters Local 312, 118 F.3d at 991); see Goerke Kirch Co. v. Goerke Kirch Holding

Co., 118 N.J. Eq. 1, 5 (E. &A. 1935) (noting that arbitrator's authority ends after making an award notwithstanding the invalidity of the award).

The *functus officio* doctrine shields a sporadic quasi-judicial officer from "the potential evil of outside communication and unilateral influence which might affect a new conclusion." Kimm, 388 N.J. Super. at 26–27 (citation omitted); see also Glass, Molders, Pottery, Plastics and Allied Workers Int'l Union v. Excelsior Foundry Co., 56 F.3d 844, 847 (7th Cir. 1995) (stating that "arbitrators are less sheltered than sitting judges, and it is feared that disappointed parties will bombard them with ex parte communications and that the arbitrators, not being professional judges or subject to the constraints of judicial ethics, will yield").

The *functus officio* doctrine "applied strictly at common law to prevent an arbitrator from in any way revising, re-examining, or supplementing his award." Kimm, 388 N.J. Super. at 26–27 (quoting Teamsters Local 312, 118 F.3d at 991); Colonial Penn Ins. Co. v. Omaha Indemnity Co., 943 F.2d 327, 331-34 (3d Cir.1991) (discussing purpose and history of *functus officio* doctrine). The policy underlying the doctrine of preventing an arbitrator from, in essence, reconsidering his decision is the "perception that arbitrators, lacking the institutional protection of judges, may be more susceptible to outside influences pressuring for a different outcome and also ... the practical concern that the ad

hoc nature of arbitral tribunals makes them less amenable to re-convening than a court." Office & Professional Employees Int'l Union, Local No. 471 v. Brownsville Gen. Hosp., 186 F.3d 326, 331-32 (3d Cir. 1999).

The common law recognized three exceptions to the *functus officio* rule. Kimm, 388 N.J. Super. at 27. These exceptions permit an arbitrator to: (1) correct a mistake, generally of a clerical or computational nature, which is apparent on the face of his award, (2) "adjudicate an issue which has been submitted" but not decided, and as to which the agreement between the parties to arbitrate continues to authorize him to act, or (3) "clarify" an award "[w]here the award, although seemingly complete, leaves doubt whether the submission has been fully executed, [such that] an ambiguity arises which the arbitrator is entitled to clarify." Id. (quoting La Vale Plaza, Inc. v. R.S. Noonan, Inc., 378 F.2d 569, 573 (3d Cir.1967)).

This Court has repeatedly affirmed that an arbitrator cannot modify or correct a final award for any reason other than the limited bases enumerated in the NJAA. In Kimm v. Blisset, LLC, this Court held that an arbitrator's "mistake; either of law or fact" cannot support a "supplemental award" because "once the arbitrator issued the award, his function was completed and, in the absence of an agreement by the parties or a basis for him to act identified in the new statute, his powers ceased." 388 N.J. Super. at 33. The Kimm Court rejected

a party's attempt to obtain a "supplemental award" because the application did not call attention to the arbitrator's "evident mathematical miscalculation or an evident mistake in . . . description." Id.

Moreover, this Court affirmed the trial court's order vacating the arbitrator's unlawful "supplemental award" because the application also did not "suggest an imperfection in 'form not affecting the merits.'" Id. (citing N.J.S.A. 2A:23B-20 to -24). Moreover, the application "did not point out a failure to make 'a final and definite award' or seek "clarification of an ambiguity in the award." Id.[9] Where an arbitrator issues a final award—like Judge Orlofsky did here that decides the issues presented—"his effort to alter or supplement his initial award" is a "legal nullity." 388 N.J. Super. at 34.

B. THE NEW JERSEY ARBITRATION ACT AND CASE LAW.

Under the New Jersey Arbitration Act, an arbitrator may only "modify or correct" an award where: (1) "there was an evidence mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award"; (2) "the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted"; (3) "if

[9] The Kimm Court noted that as a matter of law—absent consent by all parties (which did not exist here or in Kimm)—a party to arbitration cannot indefinitely "preserve" the right to re-submit an issue conclusively and finally decided for further review. 388 N.J. Super. at 34-35.

the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding"; or (4) to "clarify" the award. N.J.S.A 2A:23B-20(a)(1)-(3); id. at -24(a)(1), (3). A court may only vacate or modify an arbitration award for limited reasons, including that an "arbitrator exceeded the arbitrator's powers." N.J.S.A. 2A:23B-23(a)(4). See Kimm, 388 N.J. Super. at 29-31 (discussing same).

The NJAA also sets forth "strict time frames within" which the arbitrator may "modify or correct" an award. Kimm, 388 N.J. Super. at 29-31. An application for an arbitrator to modify or correct an award "shall be made and notice given to all parties within 20 days after the aggrieved party receives notice of the award." Id. at 31 (quoting N.J.S.A. 2A:23B-20b) (emphasis added).[10]

C. The Court Should Vacate and Reverse the Trial Court's Order Confirming Judge Orlofsky's Illegal Award Concerning the E911 Fee Because He Was *Functus Officio* When He Issued the Illegal Award.

The Court should vacate and reverse the trial court's order confirming the Illegal Award on the E911 issue because Judge Orlofsky was *functus officio* and unlawfully altered the Final Arbitration Award dated January 18, 2023.

[10] MLG does not dispute that Judge Orlofsky had jurisdiction under the Arbitration Agreement to generally adjudicate issues related to the E911 fee issue.

Where an arbitrator—like Judge Orlofsky—issues a final award that decides the issues presented, "his effort to alter or supplement his initial award" is a "legal nullity." Kimm, 388 N.J. Super. at 34. The *functus officio* doctrine applies "strictly at common law to prevent an arbitrator from in any way revising, re-examining, or supplementing his award." Id. at 26–27.

Judge Orlofsky conclusively and finally decided the E911 claim prosecution issue in the Final Arbitration Award dated January 18, 2023, which he transmitted to all parties via email. 123a-127a. The Final Arbitration Award conclusively decided that:

> Mayer shall take sole responsibility for the prosecution of the E911 claims, including whether such claims can be reasonably pursued, and the selection of expert witnesses. Accordingly, Mayer shall be entitled to the entire fee awarded in connection with the prosecution of the E911 matter, and M&A shall forfeit any right to receive any fee in connection with the prosecution of the E911 claim, and shall have no role in the prosecution of that claim."
>
> [126a (emphasis added).][11]

Judge Orlofsky left no doubt this was a "final order"—writing that the "foregoing email constitutes my conclusions and findings" "SO ORDERED."

[11] Judge Orlofsky further decided that "Mayer shall be entitled to 30% of the amounts available for attorney's fees after expert witness fees and expenses have been paid, and that Marcus and Auerbach shall each be entitled to 35% of the amounts available for attorney's fees after expert witness fees and expenses have been paid." 126a-127a.

126a-127a. Judge Orlofsky—by his own words—was *functus officio* as to the E911 issue, and he could not further rewrite his final decision granting MLG the sole right to prosecute the E911 claims and receive the entire fee award for those claims. Id.

Despite this fact, by order and opinion dated March 20, 2024 (and confirmed by the trial court), the Illegal Award reversed the Final Arbitration Award by "reassigning" the "investigation, and prosecution, for the potential E911 class action" to M&A and permitted MLG to recover only "25% of any fee recovered in the E911 case, whether by settlement or trial." 26a-28a; 59a-60a. Judge Orlofsky therefore unilaterally (and illegally) revised MLG's E911 fee award. Compare 126a-127a (final order awarding Mayer "entire fee awarded in connection with the prosecution of the E911 matter"), with 24a-28a; 60a (awarding MLG only 25% in E911 fees). Neither Judge Orlofsky nor M&A ever articulated any basis under the NJAA to alter the Final Award on the E911 issue. Id.; see also 46a-60a. Instead, M&A described the motion to confirm as a pro forma step without acknowledging the Final Arbitration Award or that Judge Orlofsky was *functus officio* and could not legally alter his prior award. 29a.

Neither the NJAA nor case law provides a legal basis for Judge Orlofsky to reverse the Final Arbitration Award. Instead, Judge Orlofsky declared years later that MLG's "conduct" "in this case" and the "best interests of the potential

E911 class" permitted him as arbitrator to alter a final award. 58a-60a. But Judge Orlofsky does not have the authority to create a "best interests" or "conduct" standard under common law or the NJAA to re-write a final award. None of the limited exceptions to the *functus officio* doctrine as outlined in the NJAA or case law apply here, and Judge Orlofsky did not attempt to invoke any of them. Compare 52a-60a, with Kimm, 388 N.J. Super. 14 at 27-28 (discussing limited statutory exceptions and noting that *functus officio* exceptions are limited to: (1) "correct a mistake" of "clerical or computational nature" "apparent on the face" of the award, (2) adjudicating a submitted but unresolved issue, or (3) "clarify" an award based on an ambiguity under common law and N.J.S.A 2A:23B-20, -24).

Once Judge Orlofsky's "powers to act ceased,"—when he issued the Final Arbitration Award on January 18, 2023—M&A's only "rights to seek to alter the award"—including the "merits of the award"—"were those granted pursuant to the" NJAA. Kimm, 388 N.J. Super. at 35-36. Judge Orlofsky's "powers" as an arbitrator "are simply not co-extensive with the authority of a judge to grant relief" absent authorization or consent from the parties to revise final awards—authority he did not possess here. Id. at 35.

For these reasons, the Court should vacate the trial court's order confirming the *functus officio* Illegal Award and reverse the Illegal Award

because Judge Orlofsky's "effort to alter or supplement his initial award" is a "legal nullity." Id. at 34.

D. The Court Should Vacate and Reverse the Trial Court's Order Confirming Judge Orlofsky's Illegal Award Concerning the Order to Show Cause Attorneys' Fees/Sanctions Issue Because He Was *Functus Officio* When He Issued the Illegal Award and He Admittedly Had No Jurisdiction to Decide the Issue.

The Court should vacate and reverse the trial court's order confirming the Illegal Award on the Attorneys' Fees and Sanctions issue because Judge Orlofsky was *functus officio* and unlawfully altered the award.

In the same Final Arbitration Award issued via email on January 18, 2023, Judge Orlofsky rejected M&A's attempt to "deduct" or "adjust" the attorneys' fee allocation related to costs purportedly incurred by M&A in an Order to Show Cause action before Judge Viscomi in 2022. In the Final Arbitration Award, Judge Orlofsky rejected M&A's claims for "adjustments" because:

> the "allocation of attorney's fees is beyond the scope of my authority under the Dispute Resolution Agreement, and I have no jurisdiction under that Agreement to make such an adjustment for litigation fees or expenses. The agreement does not authorize me to sanction Mayer for his alleged misconduct. M&A will have to pursue a remedy for those claims in another forum to recover those litigation expenses.
>
> [127a].

Judge Orlofsky admitted that he had "no jurisdiction under the [Arbitration] Agreement" to award M&A "litigation fees or expenses" or "authorize" him to "sanction Mayer for his alleged misconduct." Id.

Again—in direct contradiction with the Final Arbitration Award—Judge Orlofsky reversed himself and awarded M&A approximately $200,000 in legal fees related to the Order to Show Cause MLG filed in 2022—the precise issue Judge Orlofsky one year prior said he was without jurisdiction to decide. Compare 127a (deciding in January 18, 2023 final order that "adjustment in the allocation of attorney's fees is beyond the scope of my authority under the [Arbitration] Agreement" and declining to award M&A attorney's fees to "sanction Mayer for his alleged misconduct" including the lawsuit and Order to Show Cause before Judge Viscomi"); 330a (same); 361a (same), with 47a-48a; 59a; 112a (deciding in Illegal Award that MLG must pay M&A nearly $200,000 total for "legal fees Marcus & Auerbach incurred personally in defending Order to Show Cause filed by Mayer" and "legal fees paid to outside counsel in defending the Order to Show Cause filed by Mayer.").

Courts adopted the *functus officio* doctrine to prevent and discourage the exact conduct Judge Orlofsky engaged in here—an arbitrator giving a losing party like M&A a "rematch" or "second bite at the apple" by constantly revising final awards to the detriment of the parties and the purpose of arbitration. See,

e.g., Washington-Baltimore Newspaper Guild, Loc. 35 v. Washington Post Co., 442 F.2d 1234, 1238 (D.C. Cir. 1971) (noting that permitting remand to arbitrator would "undercut the finality and therefore the entire usefulness of arbitration as an expeditious and generally fair method of settling disputes").

For these reasons, the Court should vacate the trial court's order confirming the *functus officio* Illegal Award and reverse the Illegal Award because Judge Orlofsky's "effort to alter or supplement his initial award" is a "legal nullity." Kimm, 388 N.J. Super. at 34.

E. The Court Should Vacate and Reverse the Trial Court's Order Confirming Judge Orlofsky's Illegal Award Because M&A Did Not Seek to "Modify" or "Correct" the Final Arbitration Award Within Twenty (20) Days of Receipt as Required by N.J.S.A. 2A:23B-20b.

The Court should vacate and reverse the trial court's order confirming Judge Orlofsky's Illegal Award because M&A filed its post-award request with Judge Orlofsky on or about January 16, 2024, one year after Judge Orlofsky issued the Final Arbitration Award on January 18, 2023, in violation of N.J.S.A. 2A:23B-20b's twenty-day filing deadline.

N.J.S.A. 2A:23B–20b provides that an application to an arbitrator to change an award pursuant to subsection (a) of the statute "shall be made and notice given to all parties within 20 days after the aggrieved party receives notice of the award." Kimm, 388 N.J. Super. at 31, 35 (discussing "stringent

time constraints" imposed by NJAA and noting that the NJAA does not provide any basis to "relax the twenty-day filing deadline").

Here, M&A improperly filed an application or "dispute" with Judge Orlofsky one year after he issued the Final Arbitration Award, wherein Judge Orlofsky refused jurisdiction over the Order to Show Cause and/or attorneys' fees issues. M&A improperly sought (and received) a whole-sale rewriting of the unfavorable Final Arbitration Award (issued in January 2023 (125a-127a)) one year later by belatedly "disputing" the decision on January 16, 2024. 42a-44a. M&A's "dispute" sent to Judge Orlofsky was made well outside the 20-day statutory period in the NJAA. Therefore, as a matter of law, Judge Orlofsky should not have entertained M&A's long-time barred application "dispute" and it his subsequent order is a "legal nullity." Kimm, 388 N.J. Super. at 31-35. For these reasons, the Court should vacate and reverse the trial court's order confirming Judge Orlofsky's Illegal Award on the Order to Show Cause and/or attorneys' fees sanctions issues.

POINT III

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT IT LACKED JURISDICTION TO ADJUDICATE ISSUES CONCERNING ATTORNEYS' FEES DISTRIBUTIONS BECAUSE AT THE TIME THE COURT REFUSED JURISDICTION, JUDGE ORLOFSKY HAD ALREADY CONCEDED THAT HE LACKED JURISDICTION AND THE STIPULATION AGREED TO BY THE PARTIES AND THE COURT REQUIRED M&A TO PAY THE CHALFIN GROUP FEES. (40A-41A).

The trial court erred when it determined that it lacked jurisdiction (and sent the issue back to Judge Orlofsky) to adjudicate the Chalfin Group fee issue because it had already ordered M&A to pay the Chalfin Group $16,000.00 plus fees and costs in November 2023. In September 2023, Judge Orlofsky expressed "no view as to the Chalfin Group's fee request," and that he was "without jurisdiction to consider it now." 148a. Instead, Judge Orlofsky directed MLG back to the trial court for adjudication. Id.

By email dated September 16, 2023, Judge Orlofsky reiterated his prior September 8, 2023 email where he "concluded that [he] was without jurisdiction to consider" various issues, including the whether the "Chalfin Group, Inc. is entitled to recover its fees as an expense incurred on behalf of the class in this matter." 129a. Judge Orlofsky sent the parties back to the trial court. Id.

The parties signed a stipulation dated November 14, 2023, which in part states that M&A agrees "to direct the Settlement Administrator to make a payment of $16,000.00, from the portion of the settlement proceeds designated

to pay their attorneys' fees, to be applied to the Chalfin expenses incurred by Carl Mayer." 118a-121a. In exchange, MLG withdrew its motion for reconsideration regarding this dispute, and waived its right to file any appeal or otherwise object to the court's prior orders. Id. M&A never made the Chalfin Group payment ordered by the trial court. MLG moved to enforce the November 14, 2023 stipulation to compel payment to Chalfin Group.

The parties (or the court) never agreed (in writing or otherwise) that Judge Orlofsky would decide these issues. Compare 40a-41a, with 118a-121a (M&A agrees "to direct the Settlement Administrator to make a payment of $16,000.00"). Contrary to the November 2023 stipulation, the trial court instead sent the issue back to Judge Orlofsky, who never acted on the issue further or compelled payment to Chalfin. For these reasons, the Court should vacate the trial court's March 21, 2024 order and remand so that the trial court may compel compliance with the November 14, 2023 stipulation the trial court and all parties agreed to, including the full 1.245 million dollar payment to MLG.

CONCLUSION

For these reasons, this Court should vacate the trial court's orders: (1) sending the parties back to Judge Orlofsky; and (2) confirming Judge Orlofsky's *functus officio* award. The Court should remand to the trial court for confirmation of Judge Orlofsky's binding Final Arbitration Award.

FOX ROTHSCHILD LLP

Attorneys for Appellants
Carl J. Mayer, Esq. and the Mayer Law Group, LLC

Dated: October 8, 2024

By: */s/ Jeffrey M. Pollock*
JEFFREY M. POLLOCK
MICHAEL W. SABO

VALLEY PLAZA REALTY, HIGHVIEW PROPERTIES III, FRANK GREEK AND SON, INC., HIGHVIEW PROPERTIES I, and TICES PROPERTIES, on behalf of themselves and all others similarly situated,
Plaintiffs,
vs.
VERIZON NEW JERSEY, INC., formerly known as Bell Atlantic New Jersey, Inc., and NYNEX LONG DISTANCE COMPANY, d/b/a/ Verizon Enterprise Solutions,
Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002516-23TI
Civil Action

On Appeal from the Superior Court of New Jersey, Law Division, Middesex County, Docket No. MID-L-817-15

Sat Below
Ana C. Viscomi, J.S.C.

BRIEF OF APPELLEES-RESPONDENTS JEROME M. MARCUS, JONATHAN AUERBACH, MARCUS & MARCUS LLC and RESOLUTION STRATEGY GROUP, LLC

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FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This appeal comes at the end of a nearly 14-yearlong litigation that resulted in the settlement of a class action on behalf of small businesses in New Jersey in connection with allegedly deceptive trade practices by Verizon that the trial court found "represents a 100% recovery for the classes" as well as service awards to the representative plaintiffs and all costs of Notice and administration. App. 63a (Order Granting Plaintiffs' Motion for Final Approval of Class Action Settlement and Related Relief, dated October 20, 2023).

Although settlement discussions, began in late 2018, and after conducting targeted discovery focused on damages and class member identification an agreement was reached between Plaintiffs and Defendants on the underlying substantive terms of a settlement in 2020, the settlement was approved after a Fairness Hearing on October 20, 2023, and was not implemented until early 2024. Mayer's conduct was the sole cause of this delay, as found by the arbitrator whose decisions are attacked on this appeal.

Retired federal judge Stephen Orlofsky, initially retained by Defendant Verizon and counsel for Plaintiffs to mediate a resolution of the litigation, was jointly appointed by Mayer and by Marcus and Auerbach as an arbitrator to resolve all disputes between these parties. Mayer, Marcus and Auerbach had signed a Fee

Agreement (the "Fee Agreement") App. 30a, in 2012 governing the parties' rights and duties with respect to this case. (Indeed, it was Mayer who first recommended and insisted upon Marcus and Auerbach that retired Judge Orlofsky be engaged as a mediator. See Transcript of Order to Show Cause Hearing, August 16, 2022 (Judge Viscomi noted that "it was Mr. Mayer who suggested and implored the parties to utilize Steve Olofsky as a mediator in this case") App. 108a.

The agreement appointing Judge Orlofsky to arbitrate between Mayer and Marcus and Auerbach is a Dispute Resolution Agreement, App. 36a, that vests Judge Orlofsky with authority to resolve "all disputes between Mayer and M&A relating to (A) any issue governed by the Affiliation Agreement dated January 23, 2012."

Orlofsky, in his Arbitration Opinion, dated March 20, 2024, App. 46a, found that Mayer had engaged in a years'-long course of inappropriate and unethical conduct, including the submission of inflated bills, and the filing of meritless motions and appeals, in an effort to hold hostage the implementation of the settlement until the other lawyers representing the Plaintiff classes agreed to give Mayer more money.

Judge Orlofsky, in his March 20, 2024 Arbitration Opinion, made the following factual findings:

> *Mayer insisted on presenting settlement demands to Verizon which were excessive and unreasonable Mayer's insistence on demanding his excessive, inflated lodestar from Verizon made settlement with Verizon virtually*

> *impossible. It was clear that Mayer's lodestar included many thousands of hours in the case he could not have reasonably have spent in prosecuting the case, particularly when Marcus & Auerbach performed most of the significant legal work in the case.*
>
> *Id. at 8, App. 53a.*
>
> *[B]ecause of Mayer's unreasonable settlement demands, it became virtually impossible to negotiate a settlement with Verizon, and the "mediation within a mediation" failed. For this separate mediation, Marcus & Auerbach, incurred $66,808.28 in attorney's fees to their outside counsel, John E. Keefe, Jr.*
>
> *Id. at 8. Ibid.*
>
> *Given Mayer's unreasonable positions and settlement tactics, I conclude that Marcus & Auerbach are entitled to be reimbursed for the fees paid to their outside counsel in the separate mediation they were forced to conduct with Mayer.*
>
> *Id. at 9, App. 54a.*

Mayer filed an Order to Show Cause before Judge Viscomi in an effort to have Judge Orlofsky disqualified as mediator/arbitrator. The filing accused Judge Orlofsky of a series of unethical actions. Judge Viscomi denied the Order to Show Cause from the bench immediately after Mayer presented his evidence in support of the Rule. She concluded that Judge Orlofsky had done nothing improper as a mediator or arbitrator, and, from the bench, stated that she was "horrified, to put it mildly, regarding the aspersions that were cast upon Mr. Orlofsky." App. 106a (Transcript of Order to Show Cause Hearing, August 16, 2022).

Judge Orlofsky further found:

> *[G]iven Mayer's dilatory tactics, stubborn intransigence to negotiate in*

good faith with his co-counsel and counsel for Verizon, the case languished without any meaningful effort by Mayer to negotiate a settlement. The case was finally resolved and a motion for preliminary approval was filed in May, 2023, 28 months later than it should have been filed. Even after the motion for preliminary approval was filed, Mayer delayed the settlement another two months, by filing a frivolous objection to the proposed settlement.

Id. at 10, App. 55a.

From the outset of the mediation of this case, which began in mid-March, 2020, Mayer has taken frivolous and meritless settlement and legal positions at every stage of the process. His settlement positions and legal arguments have been irrational from start to finish. The filing of a frivolous Order to Show Cause, which "horrified" Judge Viscomi further delayed and disrupted the settlement process. He also filed a "meritless" objection to the settlement presented to Judge Viscomi for approval.

Id. at 11, App. 56a.

Based on Mayer's conduct and behavior since I began the mediation in the Valley Plaza v. Verizon case in mid-March, 2020, I have serious reservations about whether he is capable of investigating and prosecuting a lawsuit on his own, particularly a complex class action presented by the E911 claim. He delayed the negotiation of the original settlement term sheet in the Valley Plaza case. He advanced frivolous litigation and settlement strategies at each stage of the mediation. He was often difficult to reach, did not return phone calls or respond to emails in a timely fashion. He was often angry and intransigent. He insisted on demanding an unreasonable lodestar from Verizon. In April, 2020, he provided a summary claiming a lodestar of $5,314,400. He then submitted another claim for a lodestar of$8.l million. Finally, he submitted a third lodestar, claiming over 10,000 hours, for $9,429,225.00. Clearly, his lodestars were inflated and not likely to be viewed as credible or reasonable by a defendant, or for that matter any court considering such a fee petition. His behavior prohibited any serious settlement discussions with Verizon. His behavior towards his co-counsel was so acrimonious that I was asked to conduct a separate mediation with Marcus & Auerbach to resolve their disputes. His filing of a frivolous and meritless Order to Show Cause, seeking to enjoin me from conducting further mediation and arbitration proceedings, and set aside the Dispute Resolution Agreement he had signed when he was represented by counsel,

> *reflects poor legal judgment. Judge Viscomi not only denied his Order to Show Cause in its entirety, but noted on the record that she found some of his allegations "horrifying." He placed his own self-interest above that of the class to whom as class counsel, he owed a fiduciary obligation.*
>
> *Id. at 12-13, App. 57a-58a.*
>
> *He was invited to participate in the in-person mediation in the Valley Plaza Class Action conducted at my office in Princeton, but ignored all the emails that were sent to him, inviting him to participate. He did not appear at the mediation, and the mediation proceeded without him. He filed frivolous objections to the Valley Plaza Class Action settlement, which delayed approval of the settlement and were rejected by the Court.*
>
> *Id. at 13, App. 58a.*
>
> *Given the manner in which Mayer has conducted himself in this case, I find that allowing him to investigate, and if appropriate, prosecute the E9 l l claim, would not be in the best interests of the potential E9 l l class. Accordingly, I shall reassign the investigation, and prosecution, of the potential E911 class action, to Jerome Marcus of Marcus & Marcus, LLC, and Jonathan Auerbach of Resolution Strategy Group, LLC. Mayer shall be entitled to receive 25% of any fee, recovered in the E911 case, whether by settlement or trial.*
>
> *Id. at 13-14, App. 58a-59a.*

Orlofsky Arbitration Opinion, March 20, 2024, at 8-14. The trial court's Final Approval Order of October 20, 2023 ("the Final Approval Order" or "October 20th Order"), App. 62a, expressly directed Judge Orlofsky to resolve all issues arising under the Fee Agreement between Mayer and Marcus and Auerbach. Mayer threatened to appeal this order so that he could extort funds from Marcus and Auerbach in order to pay fees charged by the expert Mayer insisted on retaining over their objections and had previously agreed to pay, Mr. Robert Chalfin.

Marcus and Auerbach, concerned about the continued delays fomented by Mayer that were delaying finalization and implementation of the Settlement to the Classes, agreed to pay Mayer $16,000 that was supposed to go towards Mr. Chalfin's fee. In return, Mayer agreed not to challenge any aspect of the October 20th Order — including, necessarily, the provision directing Judge Orlofsky to address *any disputes* between Mayer and Marcus and Auerbach arising under the fee agreement. This agreement was embodied in a Stipulation and Agreed Upon Order, dated November 14, 2023:

> In consideration of Marcus and Auerbach's agreement to make the Chalfin payment set forth in paragraph No. 1, above, Mayer hereby withdraws his motion for Reconsideration, and waives any right to file an appeal or otherwise further object to or move to reconsider the Court's Order, dated October 20, 2023, or any of the Court's rulings at the October 10, 2023 Final Approval Hearing.

Id. at ¶2). This Stipulation appears at App. 118a. Indeed, the trial court made clear that all of Mayer's filings in the trial court after the October 20, 2023, Final Order were nothing more than repeated efforts to escape from his duty to arbitrate before Judge Orlofsky:

> This is now the third motion filed by Mr. Mayer seeking this court decide disputes that counsel all agreed in writing would be decided by Mr. Orlovsky [sic] and for which this court has repeatedly ordered back to mediation. The motion is DENIED in its entirety. The court directs Mr. Mayer not to file another motion before this court that violates this court's order, but rather, comply with the referenced agreements and Order of the court by returning to mediation or, seek relief before the Appellate Division.

App. 41a. Mayer, however, did not return to the dispute resolution process to

which he had again, been ordered by the trial court, and he also did not at that time seek relief before this Court. Instead, he allowed the dispute resolution process to go forward; and defaulted and failed to file any submission before Judge Orlofsky.

When Marcus and Auerbach moved before the trial court to confirm Judge Orlofsky's Arbitration decision, Mayer did not oppose the motion but again defaulted.[1] Judge Viscomi confirmed the award by Order of April 12, 2024. App. 24a.

Only after all of this had occurred did Mayer seek to appeal the trial court's denial of his request for reconsideration of its previous order sending the parties back to Judge Orlofsky. Mayer did not seek to appeal the Confirmation Order until well after the date for such an appeal had run, which is why he had to ask this Court for permission to add the Confirmation Order to his appeal before this Court.

[1] This Court has also experienced Mayer's propensity to default on his obligations as a lawyer to comply with Court deadlines and rules (See Order Dismissing Appeal, dated May 23, 2024 and Order Reinstating Appeal, dated June 20, 2024).

I. BECAUSE MAYER FILED NO BRIEF IN OPPOSITION TO THE MOTION TO CONFIRM JUDGE ORLOFSKY'S AWARD, NONE OF THE ARGUMENTS HE MAKES TO THIS COURT WERE RAISED BELOW OR ARE PRESERVED FOR APPEAL

"It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, 300 A.2d 142 (1973) (citation and internal quotation marks omitted)." State v. Robinson, 200 N.J. 1, 20, 974 A.2d 1057 (2009). Indeed, Rule 2:6-2(a)(1) provides that "It is mandatory that for every point, the appellant shall include in parentheses at the end of the point heading the place in the record where the opinion or ruling in question is located or if the issue was not raised below a statement indicating that the issue was not raised below." Mayer's brief in this Court does not comply with this rule.

None of the points Mayer argues in the present appeal were raised below, because Mayer did not file a brief in opposition to Marcus and Auerbach's Motion to Confirm the Award. The motion was granted as unopposed.

Mayer makes no claim that any exception applies to the well-settled rule quoted above. He has not argued that the trial court lacked jurisdiction to confirm the arbitration award. And, indeed, no such argument could possibly be made: the

trial court clearly had jurisdiction to confirm the award. The trial court had, pursuant to the parties' agreement, directed Judge Orlofsky to make "all determinations regarding any issue or dispute arising under counsel's fee agreement." Judge Orlofsky obeyed the trial court's directive. Pursuant to N.J.S.A. 2A § 23B-22 and N.J.Rule 4:21A-6, Judge Viscomi properly entertained, considered and granted, the motion to confirm the award that had been issued at her instruction.

Mayer also makes no argument that any public policy principle justifies his evasion of the principle that issues must be raised at the trial court if they are to be raised on appeal. There is no reason why Mayer could not have raised these issued before the trial court – he simply chose not to file any brief in response to Marcus and Auerbach's motion to confirm the arbitration award.

Quite to the contrary: New Jersey policy clearly favors the enforcement of agreements to arbitrate. See *Arafa v. Health Express Corp.*, 243 N.J. 147 (2020) (noting the "established State interest in favoring arbitration," citing *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 85, 800 A.2d 872 (2002)). The agreement at issue here was entered into by an attorney, who claims to be extraordinarily talented. See Appellant's Brief at 4 (representing that Mayer is "and a leading class action and public interest lawyer, having been profiled on the show 60 Minutes for his public interest work.") and so of course knew what he was doing when he signed an

agreement authorizing arbitration of "all disputes between Mayer and M&A relating to (A) any issue governed by the Affiliation Agreement dated January 23, 2012." App. 36a.

The Dispute Resolution Agreement, including its provision committing "all disputes" to Judge Orlofsky for resolution, provides the proper basis for the trial court's confirmation of Judge Orlofsky's arbitration decision, and the trial court acted well within its authority by confirming that award.

II. MAYER EXPLICITLY WAIVED THE RIGHT TO APPEAL THE COURT'S REMAND TO JUDGE ORLOFSKY OF THE ISSUES THAT JUDGE ORLOFSKY DECIDED AND WHICH MAYER NOW SEEKS TO ATTACK

The trial court's Final Approval Order of October 20, 2023, expressly directed Judge Orlofsky to resolve *all issues* arising under the Fee Agreement between Mayer and Marcus and Auerbach. As previously noted, Mayer threatened to appeal this order so that he could extract money from Marcus and Auerbach related to the fee charged by the expert Mayer had wanted to hire, Mr. Chalfin. To end the delay that was keeping the settlement in this case from becoming final, Marcus and Auerbach entered into an agreement and proposed stipulated order with Mayer and agreed to pay Mayer $16,000 towards Mr. Chalfin's fee. In return, Mayer agreed not to challenge any aspect of the October 20 Order — including, necessarily, the provision directing Judge Orlofsky to address any disputes between Mayer and Marcus and Auerbach arising under the fee agreement. In the Stipulation and Agreed Upon Order, dated November 14, 2023, Mayer agreed:

> In consideration of Marcus and Auerbach's agreement to make the Chalfin payment set forth in paragraph 1 above, Mayer hereby withdraws his Motion for Reconsideration, and waived any right to appeal or otherwise further object to, or move to reconsider the Court's Order, dated October 20, 2023, or any of the Court's rulings at the October 10, 2023 Final Approval Hearing.

App. 118a.

The arguments Mayer is making now are all direct attacks on the trial court's directive to the parties and to Judge Orlofsky to continue to arbitrate the disputes between Mayer and Marcus and Auerbach. Mayer's current effort violates the Stipulation and Agreed Upon Order, dated November 14, 2023, and directly contravenes his commitment not to advance any such challenge in this Court. Mayer is bound by his agreement. Indeed, he makes no argument in his brief about why the agreement does not bind; he simply ignores it.

III. JUDGE ORLOFSKY'S JURISDICTION TO ADDRESS THE ISSUES HE DECIDED WAS EXPRESSLY CONFIRMED BY THE TRIAL COURT IN A DECISION WHICH MAYER HAS NEVER CHALLENGED AND WHICH HE EXPRESSLY WAIVED THE RIGHT TO CHALLENGE

Mayer's discussion of the scope of Judge Orlofsky's jurisdiction ignores both the content of the parties' arbitration agreement and Judge Viscomi's express Order directing Judge Orlofsky to address "all issues" arising under the parties' Fee Agreement.

First, the parties' Dispute Resolution Agreement could not be clearer in its definition of the scope of the issues governed: the Agreement states that Judge Orlofsky is empowered to resolve "all disputes between Mayer and M&A relating to (A) any issue governed by the Affiliation Agreement dated January 23, 2012." While, in 2023, reflecting his conservative approach regarding the scope of his jurisdiction and deference to the trial court, Judge Orlofsky had held that he lacked jurisdiction to address some of the claims that he resolved in his March, 2024 decision, the trial court's directive of October 20, 2023 made clear that Judge Orlofsky had the authority to resolve "all disputes" between Mayer and Marcus and Auerbach.[2]

[2] The decision by Judge Orlofsky that Mayer now challenges *did not revise that fee allocation.* It awarded damages to Marcus and Auerbach which partially compensated them for the expenses they incurred as a result of Mr. Mayer's repeated unethical filings in this case and the delays that such filings, and his other unethical conduct, had caused.

Mayer also defaulted in the arbitration itself and filed no brief relating to Judge Orlofsky's jurisdiction or any other issue. Judge Orlofsky expressly discussed the question of his jurisdiction and found that he had the authority and so the obligation to address and resolve all issues including the ones raised by Respondents. By failing to file anything before Judge Orlofsky, and by failing again to oppose the Motion to Confirm Judge Orlofsky's award, Mayer has acquiesced in this determination that Judge Orlofsky had jurisdiction to resolve the disputes he resolved.

IV. THE *FUCTUS OFFICIO* DOCTRINE IS IRRELEVANT HERE FOR THREE REASONS: (1) JUDGE ORLOFSKY WAS NEVER DISCHARGED AS ARBITRATOR; (2) MAYER'S OBJECTION TO THE FEE PETITION RAISED AN ISSUE SQUARELY WITHIN JUDGE ORLOFSKY'S JURISDICTION AS ARBITRATOR; AND (3) JUDGE VISCOMI'S ORDER OF OCTOBER 20, 2023 EXPRESSLY DIRECTED JUDGE ORLOFSKY TO MAKE THE DECISIONS MAYER NOW SEEKS TO ATTACK

The *functus officio* doctrine is irrelevant here for at least three independent reasons.

First, Judge Orlofsky has never been discharged as arbitrator. Even Mayer has never directed a communication to Judge Orlofsky purporting to discharge him or claiming that there is nothing left for him to decide.

Second, when the Motion for Final Approval of Class Action Settlement was finally filed on September 18, 2023, Mayer objected to it, *inter alia* on the grounds that what he claimed were "additional costs" should be reimbursed to him. This Objection raised an issue that was, by any conceivable account, an issue of the allocation of fees and costs that was expressly within Judge Orlofsky's decision as arbitrator. Even if Judge Orlofsky had been formally discharged, which of course he had not, Mayer's objection would have required him to re-appear and resolve this issue.

In addition, in January, 2024, Mayer filed yet another Rule to Show Cause demanding that funds be re-allocated in a completely different way, including the

subtraction of hundreds of thousands of dollars in fees that Judge Orlofsky had ordered be paid to Marcus and Auerbach, and the award of these funds to others. See Mayer's Proposed Order on Attorneys Fees and Expense Request, App. 166a (proposing numerous changes in Judge Orlofsky's fee and expense allocation, subtracting hundreds of thousands of dollars from the amounts due to Messrs. Marcus and Auerbach). Judge Viscomi denied this relief by Order of March 21, 2024, and, for the third time, directed Mayer to arbitrate all such issues before Judge Orlofsky. App. 41a.

The *functus officio* doctrine is no obstacle to Judge Orlofsky's performance of his duty to address Mayer's objection. While the doctrine "prevents an arbitrator from in any way revising, reexamining, or supplementing the merits of his or her award once it has been issued," the cases defining the doctrine make clear that an arbitrator **"can decide other issues submitted by the parties.**" *Prospect Capital Mgmt. L.P. v. Stratera Holdings, LLC* 2023 U.S. Dist. LEXIS 92474 (D. DE May 26, 2023) at *25 (emphasis added). See also *Office & Pro. Emps. Int'l Union v. Brownsville Gen. Hosp.,* 186 F.3d 326, 331 (3d Cir. 1999); *Teamsters Local 3112 v. Matlack, Inc.,* 118 F.3d 985, 991 (3d Cir. 1997). Both Mayer's objection, and the issues raised before Judge Orlofsky by Respondents, are such issues. Nothing in the cases that Mayer has cited, or any other authority, precludes Judge Orlofsky from resolving these issues.

Third, far from Judge Orlofsky's being discharged, Judge Viscomi's Order of October 20, 2023, expressly directed Judge Orlofsky to resolve all disputes between Mayer and Marcus and Auerbach. The decision by Judge Orlofsky which Mayer asks this Court to undo is nothing other than Judge Orlofsky's adherence to Judge Viscomi's directive.

Mayer's actions provided the factual basis for Judge Orlofsky to rule as he did. First, during the summer and fall of 2023, Mayer had placed his own interest in extracting money from his former co-counsel above the classes' interest in getting this case settled definitively. In October, immediately prior to the hearing on Final Approval, Mayer threatened to delay implementation of any aspect of the settlement unless the allocation of fees and expenses was modified so that Mayer was paid an additional $32,036.50, ostensibly to cover the fee of an expert Mayer had decided on his own to hire.

That objection further delayed approval of the settlement, and Mayer made clear his intent to appeal approval of the settlement if it were ordered by the trial court without the award he sought. This would have further delayed the resolution of this 15-year old case by at least many more months.

The decision by Judge Orlofsky, which Mayer now attacks, was made after this unethical action, and fully empowered Judge Orlofsky to revisit the question whether Mayer was the appropriate person to represent the class in the E911 claim.

It wasn't until after the final approval of the class action settlement by Judge Viscomi and when the settlement became "final" after the time to appeal had run that the E911 claim could be prosecuted, as that was an element of the relief embodied in the settlement. See Settlement Agreement ¶7.7, Respondents' Appendix at 16.

Second, Judge Orlofsky also found that Mayer's long string of unethical actions included Mayer's submission to the trial court, in August of 2023, of what Judge Orlofsky found to be "excessive," "unreasonable" and "inflated" fee requests, "included many thousands of hours in the case he could not have reasonably have spent in prosecuting the case, particularly when Marcus & Auerbach performed most of the significant legal work in the case." Moreover, Judge Viscomi had appointed Marcus and Auerbach as Settlement Class Counsel, authorized to act on behalf of the classes and to oversee the implementation of the relief embodied by the terms of the settlement that the Court had approved. Mayer was not appointed Settlement Class Counsel and had no authority to act on behalf of the classes.

The trial court's designation of only Messrs. Marcus and Auerbach, and not Mr. Mayer, as Settlement Counsel, was a step the trial court found necessary to take at the time it granted Preliminary Approval of the Settlement, only in June of

2023, because of Mayer's repeated unethical and irrational conduct before the trial court:

> In accordance with the Arbitration Decision issued to Jerome Marcus, Jonathan Auerbach, and Carl Mayer by Hon. Stephen Orlofsky (ret.) dated January 18, 2023, Jerome Marcus and Jonathan Auerbach shall have sole responsibility for all briefing on behalf of the Plaintiffs and the Settlement Class in this matter including but not limited to all submissions for Plaintiffs and the Settlement Class on Preliminary and Final Approval, and for all other matters and actions taken on behalf of Plaintiffs and the Settlement Class in connection with this case, including but not limited to settlement administration.

Order Granting Plaintiffs' Agreed Motion for Preliminary Approval of Class Action Settlement and Related Relief, dated June 27, 2023. App. 458a-459a.

This, combined with Mayer's effort to delay implementation of the settlement so he could extract additional money from Marcus and Auerbach, were actions that took place only in the fall of 2023 and January of 2024. They fully explain why Judge Orlofsky found that Mayer could not no longer be vested with the responsibility of representing a class of consumers in the E911 claim.

For similar reasons, Judge Viscomi's approval of the fee request in this case was based entirely on the fee petition submitted by Marcus and Auerbach. Judge Viscomi expressly refused to assess or rely upon Mayer's fee petition, explaining:

> It should be noted that affiliated co-Plaintiffs· counsel, Carl Mayer, has submitted his request for attorneys fees. The court has considered his

> expertise in this field and his time in this case since its inception. As he is the sole objector to the allocation of attorneys' fees, the court does not approve the awarding of the fees as the allocation is in dispute and returns the dispute to the Hon. Stephen M. Orlofsky (ret.) who has jurisdiction pursuant to the Dispute Resolution Agreement of August 5 and 6, 2021.

See Final Approval Order, October 20, 2023, App. 65a. By Stipulation dated November 14, 2023, App. 118a, Mayer expressly agreed to this directive and committed not to appeal from it.

V. JUDGE ORLOFSKY'S DECISION WAS WELL WITHIN HIS AUTHORITY AS ARBITRATOR, WAS EMINENTLY REASONABLE, AND MUST BE AFFIRMED IN LIGHT OF THE PARTIES' ARBITRATION AGREEMENT AND NEW JERSEY'S CLEAR POLICY IN FAVOR OF ARBITRATION

The Dispute Resolution Agreement between Mayer and Marcus and Auerbach covers "all disputes between Mayer and M&A relating to (A) any issue governed by the Affiliation Agreement dated January 23, 2012." App. 36a.

Never has Mayer made any argument claiming that the matters Judge Orlofsky decided were not covered by this broad language. He makes no such argument in this appeal, and indeed no such argument would be possible: Mayer had duties under the Fee Agreement. Marcus and Auerbach claimed Mayer had breached those duties; and Judge Orlofsky indeed found that Mayer had breached those duties, over and over again, for years, in ways that gravely impeded the settlement of this case.

Judge Orlofsky found that Mayer's breaches of his duties as co-counsel had directly injured Marcus and Auerbach, and Judge Orlofsky ordered Mayer to make Marcus and Auerbach whole for some of those injuries. All of this was well within Judge Orlofsky's authority under the parties' Dispute Resolution Agreement. Moreover, such authority was confirmed by Judge Viscomi, whose October 20, 2023 Order expressly directed Judge Orlofsky to resolve "all disputes" between the

parties. Mayer makes no argument to the contrary; his brief to this Court simply ignores this issue.

CONCLUSION

Mayer's conduct has been censured repeatedly by the trial court and by retired federal judge Stephen Orlofsky, whom Mayer himself invited to serve as first as mediator in the underlying litigation and then as arbitrator between himself and Marcus and Auerbach. Time and again Mayer defaulted on his obligations at all levels of judicial oversight and involvement (arbitration, trial court, appellate court), waived his right to appeal and failed to file briefs to preserve issues, among other defaults. His request that this Court undo the work of the trial court and Judge Orlofsky is nothing more than a demand that he be freed from his agreement to arbitrate his dispute with his former co-counsel because he does not like the result. Judge Viscomi rejected Mayer's numerous attempts to escape from this commitment starting in 2022, when Mayer asked the trial court to fire Judge Orlofsky and continuing until this year. The trial court rightly refused, and Mayer has never appealed that determination.

None of the issues he seeks to raise before this Court are properly reserved, and all of them are meritless.

Accordingly, the April 12 ,2024 Order of the trial court Confirming the March 20, 2024, Arbitration Award issued by the Hon. Stephen Orlofsky (ret.) , should be affirmed.

Respectfully submitted,

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VALLEY PLAZA REALTY, HIGHVIEW PROPERTIES III, FRANK GREEK AND SON, INC., HIGHVIEW PROPERTIES I, and TICES PROPERTIES, on behalf of themselves and all others similarly situated, Plaintiffs, vs. VERIZON NEW JERSEY, INC., formerly known as Bell Atlantic New Jersey, Inc., and NYNEX LONG DISTANCE COMPANY, d/b/a/ Verizon Enterprise Solutions, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002516-23T1 Civil Action On Appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. MID-L-817-15 Sat Below: Ana C. Viscomi, J.S.C.

REPLY BRIEF OF APPELLANTS-PETITIONERS CARL J. MAYER, ESQ. AND THE MAYER LAW GROUP, LLC

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PRELIMINARY STATEMENT

Petitioners Carl J. Mayer, Esq. and his law firm the Mayer Law Group, LLC ("Mayer" or "MLG") appeal from trial court orders sending various arbitration disputes back to arbitrator retired judge Stephen M. Orlofsky and confirming an award entered by Judge Orlofsky made while he was admittedly *functus officio* and lacked jurisdiction. One year after entering his January 2023 "final order" (the "Final Arbitration Award"), wherein he stated the "foregoing email constitutes my conclusions and findings" "SO ORDERED," Judge Orlofsky entered a March 20, 2024 award (the "Illegal Award"), reversing final decisions allocating the parties' attorneys' fees, among other issues. Compare 127a; 330a; 361a (final award), with 28a; 47-48a, 59a-60a (illegal award). The Illegal Award, among other things, awarded Respondent Marcus & Auerbach ("M&A") approximately $200,000 in legal fees related to the Order to Show Cause MLG filed in 2022—one of the issues Judge Orlofsky earlier said he lacked jurisdiction to decide. Compare 127a; 330a; 361a, with 47a-48a; 59a.

In opposition, M&A does not dispute that Judge Orlofsky issued (and the trial court confirmed) the Illegal Award over one year after Judge Orlofsky entered the Final Arbitration Award and well outside the twenty (20) day statutory period when a party like M&A may ask an arbitrator to revise a final award. See N.J.S.A. 2A:23B–20b. And M&A does not dispute the Final

Arbitration Award meant what it said—Judge Orlofsky's "final" order including his "conclusions and findings." M&A levels personal attacks at MLG rather than refute any of the case law cited and statutory arguments raised by MLG.

M&A's waiver arguments lack merit. MLG preserved the issues on appeal when it argued before the trial court that Judge Orlofsky's *functus officio* status meant he could not alter the Final Arbitration Award to MLG's sole detriment. See, e.g., 377a-378a (MLG trial court brief arguing the "Doctrine of *functus officio* Requires" relief sought); 374a (MLG January 2, 2024 brief seeking relief based on the doctrine of *functus officio*); 371a-372a (MLG arguing to trial court that *functus officio* doctrine bars Judge Orlofsky's actions). Therefore, MLG preserved the issues raised on appeal because it made "known to the court specifically the action which the party desires the court to take or the party's objection to the action taken and the grounds therefor." See Rule 1:7–2. Then, MLG did exactly what the trial court ordered it to do: "seek appropriate relief before the Appellate Division." 40a-41a. Judge Orlofsky had no basis to enter the Illegal Award, and the trial court had no jurisdiction to confirm the Illegal Award. For these reasons and the reasons that follow, this Court should: (1) vacate the trial court's orders (a) sending the parties back to Judge Orlofsky; and (b) confirming Judge Orlofsky's *functus officio* Illegal Award; and (2) reinstate or confirm the Final Arbitration Award dated January 18, 2023.

COMBINED PROCEDURAL HISTORY AND STATEMENT OF FACTS

MLG incorporates by reference and adopts the "Combined Procedural History and Statement of Facts" detailed in its October 8, 2024 opening brief.

ARGUMENT

POINT I

MLG PRESERVED THE ISSUES ON APPEAL BECAUSE IT RAISED ISSUES RELATED TO JUDGE ORLOFSKY'S *FUNCTUS OFFICIO* CONDUCT AND LACK OF JURISDICTION MULTIPLE TIMES BEFORE THE TRIAL COURT. (371A-379A).

A. MLG Did Not Waive Any Arguments Because It Raised the Issues in This Appeal Multiple Times Before the Trial Court and this Court.

MLG did not waive the arguments it raises before this Court because it raised *functus officio* doctrine and jurisdiction-related issues before the trial court several times. Indeed, MLG preserved the issues on appeal and argued before the trial court that Judge Orlofsky's *functus officio* status meant he could not alter prior final arbitration awards to MLG's sole detriment. See, e.g., 377a-378a (MLG trial court brief arguing the "Doctrine of *functus officio* Requires Reconsideration of this Court's October 10, 2023 Order"); id. (MLG seeking relief, including that the trial court implement "the January18, 2023 Arbitration Award as issued"); 374a (MLG January 2, 2024 brief asking trial court to reject M&A's attempts "to push these issues back to Judge Orlofsky when Judge Orlofsky has repeatedly stated he lacks jurisdiction" and the doctrine of *functus*

officio supports relief); 371a-372a (MLG January 24, 2024 brief seeking order from the trial court confirming Final Arbitration Award because "Judge Orlofsky is Barred From Taking Further Action In this Matter Because He Is *Functus Officio*. Having issued an Award, Judge Orlofsky has no right, power, or authority to modify or supplement that Award, as the Appellate Division held in Kimm v. Blisset,[], 388 N.J. Super. 14, 26 (App. Div. 2006).").

Based on the above, MLG's briefing filed with the trial court (and this Court) preserved the issues on appeal because the trial court knew MLG's repeated objections. See Rule 1:7–2 (requiring, for issue to be preserved for appeal, that a party "make known to the court specifically the action which the party desires the court to take or the party's objection to the action taken and the grounds therefor"); accord State v. Mohammed, 226 N.J. 71, 83 (2016) (same); Compare 1a-23a (NOA); Rule 2:6-2(a)(5).[1] The fact that MLG's objections on *functus officio* grounds were made prior to the application to confirm the award does not effect a waiver. State v. Hernandez, 334 N.J. Super. 264, 268, n.1 (App. Div. 2000), aff'd as mod., 170 N.J. 106 (2001) (objection to evidence raised in pretrial hearing but not at trial preserves question for appeal); Waterson v. Gen.

[1] Pursuant to Rule 2:6-1(a)(2), MLG provides the briefs submitted to the trial court because Respondents dispute whether an issue was raised below. See 371a-379a (MLG trial court briefing raising *functus officio* and jurisdiction issues).

Motors Corp., 111 N.J. 238, 250 (1988) (holding that a party preserved an issue for appeal by making it "known" and noting that appellate courts should consider "jurisdictional" issues raised by a party even if not "fully presented").

Significantly, the trial court explicitly directed MLG to not file further applications and "seek appropriate relief before the Appellate Division" in response to argument regarding the *functus officio* issue. 40a-41a. MLG sought relief in this Court as the trial court ordered, and finding waiver based on an alleged failure to re-raise the issues below for a third (or fourth time) based on the trial court's clear directive to seek relief in this Court would be unjust. See Rule 2:10-2 (reversal warranted for issue not raised below when error is "clearly capable of producing an unjust result"). As such, MLG did not waive the issues in this appeal since it made "known to the court specifically the action which [it] desired the court to take" and MLG's "objection to the action taken and the grounds therefor." See Rule 1:7–2; Mohammed, 226 N.J. at 83 (same).

B. MLG Did Not Waive the Issues in This Appeal Because the Trial Court Lacked Subject Matter Jurisdiction to Confirm the Illegal Award, Which Unlawfully Revised a Prior Final Award Outside the Twenty-Day Limit in N.J.S.A. 2A:23B-20b.

MLG did not waive any of its arguments because the trial court lacked subject matter jurisdiction to confirm the Illegal Award (revising a Final Arbitration Award) entered by Judge Orlofsky one year after he entered the Final

Award in violation of N.J.S.A. 2A:23B-20b. Subject matter jurisdiction cannot be waived, and the trial court lacked jurisdiction to confirm a legal nullity.

M&A concedes—through its silence in opposition—that its belated January 2024 request asking Judge Orlofsky to re-write the Final Arbitration Award entered in January 2023 was untimely and precluded by N.J.S.A. 2A:23B-20b's twenty (20) day deadline to seek revision of a final arbitration award. The New Jersey Arbitration Act ("NJAA") sets forth "strict time frames within" which the arbitrator may "modify or correct" an award. Kimm v. Bisset, LLC, 388 N.J. Super. 14, 26-27, 34 (App. Div. 2006). An application for an arbitrator to modify or correct an award "shall be made and notice given to all parties within 20 days after the aggrieved party receives notice of the award." Id. at 31 (quoting N.J.S.A. 2A:23B-20b) (emphasis added). M&A's failure to mention this issue—let alone refute it in opposition—confirms Judge Orlofsky entered the Illegal Award well out of time under the NJAA. Id. at 31, 35 (discussing "stringent time constraints" imposed by NJAA and noting that the NJAA does not provide any basis to "relax the twenty-day filing deadline"). The Court should vacate the trial court's order and confirm or reinstate the Final Arbitration Award consistent with the NJAA.

Even if MLG never alerted the trial court to its arguments raised here (it did), the trial court lacked subject matter jurisdiction to confirm the Illegal

Award. Whether a court lacks subject matter jurisdiction is not waivable, and a litigant (or a court *sua sponte*) may raise that issue at any time in the proceedings. Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 65-67 (1978). A "court cannot hear a case as to which it lacks subject matter jurisdiction even though all parties thereto desire an adjudication on the merits." Id. Despite M&A's claims, subject matter jurisdiction "cannot be vested by agreement of the parties" or "conferred by waiver resulting from a party's failure to interpose a timely objection to the assumption of jurisdiction." Id. at 66 (emphasis added).

In sum, M&A's waiver arguments lack merit, and the trial court committed plain (and reversible error) by confirming a legal nullity—(i.e., the Illegal March 20, 2024 Arbitration Award) it lacked jurisdiction to act on—an arbitration award issued nearly one year after Judge Orlofsky issued the Final Arbitration Award in violation of N.J.S.A. 2A:23B-20b.

C. MLG Did Not Waive the Issues Raised on Appeal Because Judge Orlofsky Admittedly Lacked Jurisdiction to Re-Decide Issues Dispositively and Finally Ordered in the Final Arbitration Award.

The Court should vacate the trial court's order confirming the Illegal Award and confirm the Final Arbitration Award because Judge Orlofsky admittedly lacked jurisdiction to re-decide issues, including attorneys' fees M&A sought related to a 2022 OTSC matter resolved in the Final Arbitration

Award. A party may challenge subject matter jurisdiction at any time, and the issue cannot be waived. Peper, 77 N.J. at 65-67.

Here, the Court should vacate the trial court's order confirming the Illegal Award and confirm the Final Arbitration Award because Judge Orlofsky admitted he lacked jurisdiction to adjudicate: (1) whether the "Chalfin Group, Inc. is entitled to recover its fees as an expense incurred on behalf of the class in this matter" (129a; 148a) (Judge Orlofsky admitting that he was "without jurisdiction to consider [Chalfin Group issue] now."); and (2) awarding M&A $200,000 in legal fees related to the Order to Show Cause MLG filed in 2022, (Compare (330a; 361a) (Judge Orlofsky declining jurisdiction), with 24-28a; 47a-48a; 59a-60a; 112a (later awarding M&A legal fees for same issue). The Court should: (1) vacate the Illegal Award—which Judge Orlofsky admittedly lacked jurisdiction to enter; and (2) confirm the Final Arbitration Award.

POINT II

THIS COURT SHOULD VACATE THE TRIAL COURT'S ORDER CONFIRMING THE ILLEGAL AWARD AND CONFIRM THE FINAL ARBITRATION AWARD BECAUSE JUDGE ORLOFSKY WAS *FUNCTUS OFFICIO* AND LACKED AUTHORITY TO ISSUE THE ILLEGAL MARCH 20, 2024 ARBITRATION AWARD, WHICH CONFLICTED WITH AND REVERSED HIS FINAL ARBITRATION AWARD DATED JANUARY 18, 2023. (24A-28A; 59A-60A; 123A-127A).

A. The Court Should Vacate the Trial Court's Order Confirming Judge Orlofsky's Illegal Award and Confirm the Final Arbitration Award Concerning the E911 Fee Because Judge Orlofsky Was *Functus Officio* When He Issued the Illegal Award.

The Court should vacate the trial court's order confirming the Illegal Award and confirm the Final Arbitration Award on the E911 issue because Judge Orlofsky was *functus officio* and unlawfully altered the Final Arbitration Award dated January 18, 2023, which granted MLG the sole right to prosecute the E911 case. Where an arbitrator—like Judge Orlofsky—issues a final award that decides the issues presented, "his effort to alter or supplement his initial award" is a "legal nullity." Kimm, 388 N.J. Super. at 34. The *functus officio* doctrine applies "strictly at common law to prevent an arbitrator from in any way revising, re-examining, or supplementing his award." Id. at 26–27.

Judge Orlofsky conclusively and finally decided the E911 claim prosecution issue in the Final Arbitration Award dated January 18, 2023, which he transmitted to all parties via email. 123a-127a. The Final Arbitration Award conclusively decided that "Mayer shall take sole responsibility for the prosecution of the E911 claims, including whether such claims can be reasonably pursued, and the selection of expert witnesses. Accordingly, Mayer shall be entitled to the entire fee awarded in connection with the prosecution of the E911 matter . . .." 126a (emphasis added). Judge Orlofsky left no doubt this was a "final order"—writing that the "foregoing email constitutes my conclusions and findings" "SO ORDERED." 126a-127a. Judge Orlofsky—by his own words—was *functus officio* as to the E911 issue, and he could not

rewrite his final decision granting MLG the sole right to prosecute the E911 claims and receive fees from those claims. Id.

Despite this fact, by order and opinion dated March 20, 2024 (and confirmed by the trial court), Judge Orlofsky issued the Illegal Award, reversing the Final Arbitration Award by "reassigning" the "investigation, and prosecution, for the potential E911 class action" to M&A and permitting MLG to recover only "25% of any fee recovered in the E911 case, whether by settlement or trial." 26a-28a; 59a-60a. Judge Orlofsky therefore unilaterally (and illegally) revised MLG's E911 fee award. Compare 126a-127a (final order awarding Mayer "entire fee awarded in connection with the prosecution of the E911 matter"), with 24a-28a; 60a (awarding MLG only 25% in E911 fees).

Neither Judge Orlofsky in his Illegal Award nor M&A in opposition articulate any legal basis that permits Judge Orlofsky to alter the Final Arbitration Award on the E911 issue. Id.; see also 46a-60a. M&A's *ad hominem* attacks on MLG (and Judge Orlofsky's apparent dislike for MLG) is not a valid basis to reverse a final arbitration award under the NJAA or New Jersey law. Compare Opp. Br. at 20-22; 52a-60a (claiming, without citing any precedent, that Judge Orlofsky could reverse the Final Arbitration Award because of alleged "unethical" and "irrational conduct"), with Kimm, 388 N.J. Super. 14 at 27-28 (discussing limited statutory exceptions and noting that *functus officio*

exceptions are limited to: (1) "correct a mistake" of "clerical or computational nature" "apparent on the face" of the award, (2) adjudicating a submitted but unresolved issue, or (3) "clarify" an award based on an ambiguity under common law and N.J.S.A 2A:23B-20, -24). Neither Judge Orlofsky nor M&A claim the Illegal Award corrected a clerical mistake, adjudicated an unresolved issue, or "clarified" any "ambiguity" in the Final Arbitration Award.

Simply put, Judge Orlofsky's "powers to act ceased" when he issued the Final Arbitration Award on January 18, 2023, and M&A's only "rights to seek to alter the award"—including the "merits of the award"—"were those granted pursuant to the" NJAA. Kimm, 388 N.J. Super. at 35-36. Judge Orlofsky's "powers" as an arbitrator "are simply not co-extensive with the authority of a judge to grant relief" and nothing in the trial court's class action orders or settlement conclusions permitted: (1) Judge Orlofsky to act *functus officio*; or (2) M&A to seek reversal of a final arbitration award one year after enactment. Whether Judge Orlofsky was "discharged" as an arbitrator generally—to the extent that term has meaning here—is irrelevant to whether Judge Orlofsky acted consistent with the Arbitration Agreement and law. Any orders concerning settlement, months after the Judge Orlofsky entered the Final Arbitration Award, also did not permit him (or M&A) to change course to MLG's prejudice.

B. The Court Should Vacate the Trial Court's Order Confirming Judge Orlofsky's Illegal Award and Confirm the Final Arbitration Award

Concerning the Order to Show Cause Attorneys' Fees/Sanctions Issue Because He Was *Functus Officio* When He Issued the Illegal Award, and He Admittedly Had No Jurisdiction to Decide these Issues.

The Court should vacate the trial court's order confirming the Illegal Award and confirm the Final Arbitration Award on the attorneys' fees and sanctions issue because Judge Orlofsky was *functus officio* and unlawfully altered the award. In the same Final Arbitration Award issued via email on January 18, 2023, Judge Orlofsky definitively rejected M&A's initial attempt to "deduct" or "adjust" the attorneys' fee allocation related to costs purportedly incurred by M&A in an Order to Show Cause action before Judge Viscomi in 2022. In the Final Arbitration Award, Judge Orlofsky rejected M&A's claims for "adjustments" (the same issue he later reversed himself on) because:

> the allocation of attorney's fees is beyond the scope of my authority under the Dispute Resolution Agreement, and I have no jurisdiction under that Agreement to make such an adjustment for litigation fees or expenses. The agreement does not authorize me to sanction Mayer for his alleged misconduct. M&A will have to pursue a remedy for those claims in another forum to recover those litigation expenses.
>
> [127a (emphasis added)].

Contrary to the Illegal Award and M&A's contradictory claims in opposition, Judge Orlofsky admitted that he had "no jurisdiction under the [Arbitration] Agreement" to award M&A "litigation fees or expenses" or "authorize" him to "sanction Mayer for his alleged misconduct." Id. (emphasis added).

Then—in direct contradiction with the Final Arbitration Award—Judge Orlofsky belatedly found jurisdiction, reversed himself, and awarded M&A approximately $200,000 in legal fees related to the Order to Show Cause MLG filed in 2022—the precise issue Judge Orlofsky one year prior said he was without jurisdiction to decide. Compare 127a (deciding in January 18, 2023 final order that "adjustment in the allocation of attorney's fees is beyond the scope of my authority under the [Arbitration] Agreement" and declining to award M&A attorney's fees to "sanction Mayer for his alleged misconduct" including the lawsuit and Order to Show Cause before Judge Viscomi"); 330a; 361 (same), with 47a-48a; 59a; 112a (deciding in Illegal Award that MLG must pay M&A $200,000 total for legal fees incurred in defending MLG's Order to Show Cause). The Court should vacate the trial court's order confirming the *functus officio* Illegal Award and confirm the Final Arbitration Award because Judge Orlofsky's "effort to alter or supplement his initial award" is a "legal nullity" where he admittedly lacked jurisdiction. Kimm, 388 N.J. Super. at 34.

POINT III

MLG DID NOT WAIVE ANY OF THE ISSUES ON APPEAL BY SIGNING THE NOVEMBER 14, 2023 STIPULATION (40A-41A).

The trial court erred when it determined that it lacked jurisdiction (and sent the issue back to Judge Orlofsky) to adjudicate the Chalfin Group fee issue because it had already ordered M&A to pay the Chalfin Group $16,000.00 plus

fees and costs in November 2023. After Judge Orlofsky reiterated his prior September 8, 2023, email where he "concluded that [he] was without jurisdiction to consider" various issues, including the whether the "Chalfin Group, Inc. is entitled to recover its fees as an expense incurred on behalf of the class in this matter," Judge Orlofsky sent the parties back to the trial court. 129a.

The parties signed a November 14, 2023 stipulation, wherein MLG only withdrew its motion for reconsideration regarding M&A's agreement to pay the Settlement Administrator. 118a-121a; 129a. Contrary to M&A's claims, see Opp. Br. at 14-16, the November 2023 stipulation did not abrogate MLG's right to challenge the Illegal Award or seek confirmation of the Final Arbitration Award under the NJAA or *functus officio* grounds. Instead, the November 2023 stipulation only states that MLG "waived any right to appeal or otherwise further object to, or move to reconsider the Court's Order, dated October 20, 2023." 118a (emphasis added). MLG does not appeal the October 20, 2023, order here—which merely confirms Judge Orlofsky's undisputed original jurisdiction under the Arbitration Agreement to resolve fee disputes. 62a-68a. MLG did not waive its right to raise the issues before this Court, including that Judge Orlofsky abused his authority as arbitrator to re-write the Final Arbitration Award.

The parties (or the court) never agreed (in writing or otherwise) that Judge Orlofsky would be able to violate the NJAA or undo a final arbitration award.

Compare 40a-41a, with 118a-121a (M&A agrees "to direct the Settlement Administrator to make a payment of $16,000.00"). M&A's brief conflates meritorious MLG's *functus officio*/NJAA challenges to the Illegal Award and the trial court's confirmation award with an October 2023 order (and November 2023 stipulation) MLG does not appeal. The trial court's October 2023 order for Judge Orlofsky to resolve "all issues" between MLG and M&A post-dated the Final Arbitration Award and does not obviate MLG's *functus officio* (NJAA) challenges to same, or the trial court's erroneous confirmation of the time-barred Illegal Award in January 2024—decisions Judge Orlofsky already made and stated he lacked jurisdiction to alter or adjudicate in the future.

CONCLUSION

For these reasons, this Court should: (1) vacate the trial court's orders (a) sending the parties back to Judge Orlofsky; and (b) confirming Judge Orlofsky's *functus officio* Illegal Award; and (2) reinstate or confirm the Final Arbitration Award dated January 18, 2023.

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Dated: March 5, 2025

By: */s/ R. James Kravitz*
R. JAMES KRAVITZ
MICHAEL W. SABO