

IRFAN HASSAN AND LITTLE MASON	:	SUPERIOR COURT OF NEW JERSEY
PROPERTIES, LLC,	:	APPELLATE DIVISION
	:	
Plaintiffs/Appellants	:	DOCKET NO.: A-002759-22T4
	:	
vs.	:	
	:	
MARC-ROLAND THEOPHILE; EIGHT	:	DOCKET BELOW: UNN-C-0005-20
COPELAND ROAD GROUP, LLC; JEST	:	
HOLDINGS, LLC; REVOLVING MORTGAGE	:	
INVESTMENT TRUST 2017-BRQ1, BY U.S.	:	Sat Below:
BANK NATIONAL ASSOCIATION, AS	:	HON. ROBERT J. MEGA, P.J.Ch.
TRUSTEE; U.S. BANK NATIONAL	:	
ASSOCIATION AS TRUSTEE FOR VELOCITY	:	
COMMERCIAL CAPITAL LOAN TRUST 2018	:	
A/K/A U.S. BANK NATIONAL ASSOCIATION	:	
AS TRUSTEE FOR VELOCITY COMMERCIAL	:	
CAPITAL LOAN TRUST 2018-1; U.S. BANK	:	
NATIONAL ASSOCIATION AS TRUSTEE FOR	:	
VELOCITY COMMERCIAL CAPITAL LOAN	:	
TRUST 2018-2; WILMINGTON SAVINGS FUND	:	
SOCIETY, FSB D/B/A CHRISTIANA TRUST, AS	:	
CERTIFICATE TRUSTEE FOR NRP	:	
MORTGAGE TRUST 1; LH-NP STRAT	:	
DELAWARE OWNER TRUST; U.S. BANK, N.A.,	:	
AS INDENTURE TRUSTEE FOR VCC 2022	:	
MC-1 TRUST AND VELOCITY COMMERCIAL	:	
CAPITAL, LLC; EDDY JEAN JACQUES; 1 ST	:	
RATE TITLE AND SETTLEMENT SERVICES,	:	
LLC; EDWARD MCCLOUD; CLOSE NOW, LLC;	:	
AND ANTHONY BARBER,	:	
	:	
Defendants/Respondents.	:	

**APPELLANTS, IRFAN HASSAN AND LITTLE MASON PROPERTIES, LLC'S
BRIEF**

RICHARD T. WELCH, ESQ.
(Attorney ID #032972006)
STARR, GERN, DAVISON & RUBIN, P.C.
105 Eisenhower Parkway, Suite 401
Roseland, NJ 07068
Tel.: (973) 403-9200 / Fax: (973) 226-0031
Email: rwelch@starrgern.com
*Attorneys for Appellants, Irfan Hassan
And Little Mason Properties, LLC*

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF JUDGMENTS AND ORDERS BEING APPEALED.....	vii
TABLE OF AUTHORITIES	vii
PRELIMINARY STATEMENT	1
FACTS.....	4
<i>Hassan and Little Mason</i>	4
<i>Hassan's Involvement with Theophile</i>	5
<i>Theophile Fraudulently Transfers Title to the Subject Properties and Loots them for Cash.</i>	11
<i>The JEST/Hillside Transaction</i>	11
<i>The Velocity/Close Now Transactions (all other Subject Properties)</i>	14
<i>Hassan's Discovery of the Theophile Loans</i>	16
<i>The Numbers</i>	19
PROCEDURAL HISTORY	21
LEGAL ARGUMENT.....	28
POINT I. STANDARD OF REVIEW – TRIAL DECISIONS	28
POINT II. THE TRIAL DECISION IS MANIFESTLY UNSUPPORTED BY THE RECORD (Pa524-525.)	29
A. APPLICABLE LAW	31
B. THE COURT'S FINDINGS OF FACT	31

C.	THE EVIDENCE CITED BY THE COURT DOES NOT SUPPORT ITS INFERENCE THAT HASSAN MADE THEOPHILE A PARTNER IN LITTLE MASON, OR OTHERWISE GRANT HIM THE AUTHORITY TO DISPOSE OF LITTLE MASON’S ASSETS.	33
1.	Theophile’s Testimony	33
a.	Theophile on His Authority to Execute the Subject Deeds	34
b.	Theophile On Hassan’s Knowledge of the Theophile Loans.....	39
2.	Hassan’s Testimony	41
3.	Spingarn’s Testimony.....	43
4.	McCloud’s Testimony	43
5.	Exhibits J-91 and J-92	44
6.	Exhibit P-67.....	47
7.	Exhibit J-66 and J-147	49
8.	Azikiwe’s Testimony	52
D.	Circumstantial Evidence.....	52
E.	Credibility	56
F.	Summary	60
	POINT III. THE COURT ERRED BY PERMITTING COUNSEL FOR THE LENDERS TO TREAT THEOPHILE AS A HOSTILE WITNESS (5T 7:4-9:9.)	64

POINT IV. THE COURT ERRED BY NOT ENTERING A MONEY JUDGMENT AGAINST THEOPHILE ON THE BASIS OF ITS HOLDING THAT THEOPHILE WAS REPOSIBLE TO HASSAN FOR 50% OF THE PROCEEDS OF THE THOPHILE LOANS (Pa543.) 68

POINT V. THE STANDARD OF REVIEW FOR DECISIONS ON SUMMARY JUDGMENT 69

POINT VI. THE TRIAL COURT’S GRANTS OF SUMMARY JUDGMENT ON THE NEGLIGENCE COUNTS IN FAVOR OF 1ST RATE, McCLOUD AND CTIC SHOULD BE OVERTURNED BECAUSE THE TRIAL COURT ERRED IN HOLDING THAT, AS A MATTER OF LAW, 1ST RATE CANNOT BE HELD LIABLE FOR DAMAGES TO PLAINTIFFS CAUSED BY ITS NEGLIGENCE, AND ALSO IN FINDING THAT THERE WAS NO FACTUAL ISSUE AS TO WHETHER 1ST RATE HAD MET THE APPLICABLE STANDARD OF CARE (Pa491-493.) 71

A. RELEVANT FACTUAL BACKGROUND 72

B. THERE IS NO LAW THAT IMMUNIZES A TITLE INSURANCE AGENT FROM LIABILITY FOR DAMAGES CAUSED BY ITS NEGLIGENCE WHEN IT IS NOT IN A CONTRACT WITH THE DAMAGED PARTY..... 73

C. UNDER THE FAMILIAR STANDARDS FOR RECOGNIZING THE EXISTENCE OF A DUTY OF REASONABLE CARE, 1ST RATE OWED A DUTY TO PLAINTIFFS..... 77

1. The harm to Plaintiffs that resulted from the Theophile Loans was foreseeable to 1st Rate. 79

2. Considerations of fairness and public policy warrant recognizing a duty of care in this case. 80

a. The nature of the risk is substantial. 81

b.	1 st Rate could have prevented the harm in this instance merely by adhering to clear professional standards already applicable to their work under professional consensus, statute, and its own agency agreement, so recognizing a duty in this case would not be unduly burdensome.	81
c.	Public Policy considerations support the imposition of a duty in this case.	84
d.	Fairness in general, including the relative roles of the parties, strongly favors recognition of a duty.	85
C.	THE TRIAL COURT ERRED IN FINDING THAT 1 ST RATE HAD MET THE APPLICABLE STANDARD OF CARE BECAUSE PLAINTIFFS PRODUCED EVIDENCE MORE THAN SUFFICIENT TO PERMIT A RATIONAL TRIER OF FACT TO FIND THAT IT DID NOT.	88
D.	THE TRIAL COURT’S GRANT OF SUMMARY JUDGMENT TO CTIC ON THE NEGLIGENCE COUNT WAS ERROR BECAUSE PLAINTIFFS PRESENTED EVIDENCE SUFFICIENT TO ESTABLISH THAT 1 ST RATE WAS THE AGENT OF CTIC AND WAS ACTING WITHIN THE SCOPE OF THAT AGENCY WHEN IT MADE DETERMINATIONS AS TO THE INSURABILITY OF THE TITLES IN EACH OF THE THEOPHILE LOANS.	89
POINT VII. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE LENDERS ON PLAINTIFFS’ COUNT FOR EJECTMENT UNDER N.J.S.A. § 2A:35-2 BECAUSE IT INCORRECTLY INTERPRETED THE STATUTE TO LIMIT RELIEF TO CASES IN WHICH THE DEFENDANT IS IN PHYSICAL POSSESSION OF THE DISPUTED PROPERTY (Pa491.)		91
POINT VIII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE LENDERS ON THEIR		

CLAIM FOR EQUITABLE SUBROGATION BECAUSE THAT ISSUE DID NOT APPLY WHEN THE MOTION WAS DECIDED, AND THERE ARE GENUINE DISPUTES OF MATERIAL FACT AS TO WHETHER THE PLAINTIFFS WERE UNJUSTLY ENRICHED THAT WOULD PRECLUDE SUMMARY JUDGMENT REGARDLESS.(Pa493.) 98

POINT IX. THE TRIAL COURT ERRED IN GRANTING 1ST RATE’S MOTION FOR SUMMARY JUDGMENT ON THE INTENTIONAL TORTS BECAUSE PLAINTIFFS PRESENTED EVIDENCE SUFFICIENT TO CREATE GENUINE ISSUES OF MATERIAL FACT AND BECAUSE EDWARD MCCLOUD IS SUBJECT TO INDIVIDUAL LIABILITY BOTH FOR HIS OWN ACTIONS AND AS THE OWNER AND OPERATOR OF 1ST RATE TITLE AND SETTLEMENT SERVICES, LLC (Pa492-493.). 102

A. PLAINTIFFS PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A FINDING IN THEIR FAVOR BY A RATIONAL TRIER OF FACT ON THE INTENTIONAL TORTS AND NEGLIGENCE COUNTS AGAINST 1ST RATE..... 103

B. MCCLOUD IS INDIVIDUALLY SUBJECT TO LIABILITY FOR HIS OWN ACTIONS AND INACTIONS, AND ALSO AS THE SOLE OWNER AND OPERATOR OF 1ST RATE TITLE AND SETTLEMENT SERVICES, LLC. 105

POINT X. THE TRIAL COURT ERRED IN GRANTING THE MOTION OF CLOSE NOW AND ANTHONY BARBER FOR SUMMARY JUDGMENT BECAUSE PLAINTIFFS PRESENTED EVIDENCE SUFFICIENT TO CREATE GENUINE ISSUES OF MATERIAL FACT AND BECAUSE ANTHONY BARBER IS SUBJECT TO INDIVIDUAL LIABILITY BOTH FOR HIS OWN ACTIONS AND AS THE OWNER AND OPERATOR OF CLOSE NOW, LLC. (Pa490-491.) 107

A. PLAINTIFFS PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A FINDING IN THEIR FAVOR BY A RATIONAL TRIER OF FACT ON THE INTENTIONAL TORTS COUNTS AGAINST CLOSE NOW AND BARBER. 107

B. PLAINTIFFS PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A FINDING IN THEIR FAVOR BY A RATIONAL TRIER OF FACT ON THE INTENTIONAL TORTS COUNTS AGAINST CLOSE NOW AND BARBER.	109
C. ANTHONY BARBER IS SUBJECT TO INDIVIDUAL LIABILITY UNDER BOTH THE NEGLIGENCE COUNTS AND THE INTENTIONAL TORTS COUNTS BECAUSE HE TOOK PERSONAL RESPONSIBILITY FOR THE INFORMATION SUBMITTED TO VELOCITY IN SUPPORT OF THE THEOPHILE LOANS AND BECAUSE HE IS PERSONALLY LIABLE FOR FRAUDULENT CONDUCT BY CLOSE NOW.	110
CONCLUSION	111

TABLE OF JUDGMENTS AND ORDERS BEING APPEALED

JUDGMENTS/ORDER	ORDER	DECISION
Trial Judgment Dismissing Plaintiffs' Claims	Pa495	Pa535
Order for Summary Judgment in Favor of Anthony Barber and Close Now, LLC	Pa471	Pa490
Order for Summary Judgment in Favor of Chicago Title Insurance Company	Pa471	Pa491
Order for Summary Judgment in Favor of JEST Holdings, LLC	Pa471	Pa491
Order for Summary Judgment in Favor of Edward McCloud and 1 st Rate Title and Settlement Services, LLC	Pa471	Pa492
Order for Summary Judgment in Favor of the Lender Defendants	Pa471	Pa493

TABLE OF AUTHORITIES

Cases

<u>Alfano v. Schaud,</u> 429 N.J. Super. 469, 475 (App.Div. 2013), certif. denied, 214 N.J. 119 (2013)	71
<u>Bhagat v. Bhagat,</u> 217 N.J. 22, 38 (2014)	69
<u>Bose Corp. v. Consumers Union of United States, Inc.,</u> 466 U.S. 485, 512 (1984)	71
<u>Brill v. Guardian Life Ins. Co. of America,</u> 142 N.J. 520, 535 (1995)	69
<u>Carter Lincoln–Mercury, Inc. v. EMAR Group, Inc.,</u> 135 N.J. 182, 194 [1994]	77
<u>Carvalho v. Toll Bros. & Developers,</u> 143 N.J. 565, 573 (1996)	78, 80
<u>Cocco v. Hamilton,</u> 2010 N.J. Super. Unpub. LEXIS 1047, 2010 WL 2011003 (App. Div., 2010)	76
<u>Denman v. Gans,</u> 607 N.W. 2d 788, 793 (Minn. Ct. App., 2000)	96
<u>Durrah v. Wright,</u> 63 P.3d 184 (Wash. App., 2003)	97
<u>Estate of Desir ex rel. Estiverne v. Vertus,</u> 214 N.J. 303, 317 (2013)	80

<u>First Union Nat'l Bank v. Nelkin,</u> 354 N.J. Super. 557, 565 (App.Div.2002)	99
<u>G.A.-H v. K.G.G.,</u> 238 N.J. 401, 439 (2019)	80
<u>Gilborges v. Wallace,</u> 153 N.J. Super. 121 (App. Div. 1977), aff'd in part and rev'd in part, 78 N.J. 342 (1978)	70, 103
<u>Girard Trust Co. v. Dixon,</u> 6 A.2d 813, 814 (Pa., 1939).....	97
<u>Hopkins v. Fox & Lazo Realtors,</u> 132 N.J. 426, 438-39 (1993).....	80, 85
<u>In re State ex rel. A.D.,</u> 212 N.J. 200, 219 (2012)	53
<u>Investors Sav. Bank v. Keybank Nat'l Assn's,</u> 424 N.J. Super. 439 (App. Div. 2012)	99, 100
<u>Jerkins v Anderson,</u> 191 NJ 285, 305 (2007)	109
<u>Johnson v. Peterson,</u> 90 Minn. 503, 505–06, 97 N.W. 384, 384–85 (1903)	96
<u>Johnson v. Usdin Louis Co., Inc.,</u> 248 N.J. Super. 525, 529, (App.Div.1991)	74
<u>Lyon v. Barrett,</u> 89 N.J. 294, 300 (1981)	106
<u>Manalapan Realty, L.P. v. Twp. Comm.,</u> 140 N.J. 366, 378, 658 A.2d 1230 (1995)	28

<u>Marder v. Realty Const. Co.,</u> 84 N.J. Super. 313, 320 (App. Div., 1964)	94, 98
<u>McAndrew v. Mularchuk,</u> 33 N.J. 172, 190 (1960)	89
<u>N.J. Dep’t of Env. Prot. v. Ventron Corp.,</u> 94 N.J. 473, 500 A.2d 150 (1983)	106
<u>Parks v. Rogers,</u> 176 N.J. 491, 502 (2003)	70, 103
<u>Perlstein v. Pierce,</u> 12 N.J. 198, 204 (1953)	94
<u>Primmer v. Harrison,</u> 472 N.J. Super. 173, 186 (App. Div. 2022), <u>cert. denied</u> , 253 N.J. 47 (2023)	28
<u>Rognrud v. Zubert,</u> 282 Minn. [430,] at 434	96, 97
<u>Saltiel v. GSI Consultants, Inc.,</u> 170 N.J. 297, 303 (2002)	106
<u>Seidman v. Clifton Sav. Bank, S.L.A.,</u> 205 N.J. 150, 169 (2011)	28
<u>Siskos v. Britz,</u> 790 A.2d 1000, 1007 (Pa., 2002)	97
<u>Smith v. Boyd,</u> 272 N.J. Super. 186 (Law Div. 1993)	74, 87
<u>State v. Avena,</u> 281 N.J. Super. 327, 340 (App. Div. 1995)	28, 56

<u>State v. Corby,</u> 28 N.J. 106, 114, 145 A.2d 289 (1958)	53
<u>State v. Mance,</u> 300 N.J. Super. 37, 62 (App. Div., 1997)	65
<u>Telis v. Telis,</u> 132 N.J.Eq. 25 (E. & A.1942)	106
<u>Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh,</u> 224 N.J. 189, 199, (2016)	69
<u>Thurber v. Thurber,</u> 2017 N.J. Super. Unpub. LEXIS 106, 2017 WL 164480 (App. Div. 2017)	76
<u>Trachman v. Trugman,</u> 117 N.J.Eq. 167, 170 (Ch.1934)	106
<u>Trus Joist Corp. v. Nat'l Union Fire Ins. Co.,</u> 190 N.J. Super. 168, 179 (App.Div.1983), rev'd on other grounds, 97 N.J. 22, 477 (1984)	99
<u>Walker Rogge, Inc. v. Chelsea Title & Guaranty Co.,</u> 116 N.J. 517 (1989)	76

Statutes

<u>N.J.S.A. § 2A:35-1</u>	91, 92, 93
<u>N.J.S.A. § 17:22A-29</u>	83
<u>N.J.S.A. § 17:46B-9</u>	83
<u>N.J.S.A. § 25:1-11(a)</u>	31
<u>N.J.S.A. 42:2C-1 et. seq.</u>	31

<u>N.J.S.A.</u> 42:2C-11	32
<u>N.J.S.A.</u> 42:2C-31	32, 33, 53
<u>N.J.S.A.</u> 42:2C-37	32

Other Authorities

2 Harper & James, <i>Law of Torts</i> , § 18.6, at 1052 (1956)	75
<i>Black's Law Dictionary</i> 793 (8th ed. 2004)	53
Grant S. Nelson & Dale A. Whitman, <u>Real Estate Finance Law</u> , § 10.6, at 22-23, 25-26 (5th ed. 2007)	100
<u>N.J.A.C.</u> Chapters 17A – 17D	83
Pomeroy, <i>Equity Jurisprudence</i> (5th ed.), sec. 1399, p. 1028	95

Rules

<u>R.</u> 1:36-3	76
<u>R.</u> 4:46	69, 89
<u>R.</u> 4:46-2(c)	69
<u>Rule</u> 4:101-1	69
<u>N.J.R.E</u> 611(c)	63, 65, 75

PRELIMINARY STATEMENT

This is an action by Appellants/Plaintiffs Irfan Hassan and Little Mason Properties, LLC, (“Little Mason”), a single-member LLC owned at all times by plaintiff Hassan (together, “Plaintiffs”), to recover title to properties they purchased and held for years in operating a residential rental business. Plaintiffs claim that title to 18 properties owned by Little Mason was fraudulently transferred to defendant Eight Copeland Road Group, LLC (“ECRG”), a single-member LLC owned by defendant Marc Theophile. The question of whether those transfers of title are effective turns on whether Theophile had authority on behalf of Hassan’s company, Little Mason, to execute the deeds transferring title to from Little Mason to ECRG.

At the time Theophile signed the Subject Deeds, Theophile entered into mortgage loans on each of the Subject Properties for a total principal amount of \$3.4 million (the “Theophile Loans”). To establish his purported authority to act on behalf of Little Mason, Theophile relied on a fraudulent document that he created which appeared to establish that he was the owner of Little Mason, instead of Hassan. He signed the Subject Deeds and entered into the Theophile Loans without the knowledge or consent of Hassan. He put the money into his pocket and defaulted on the loans. The mortgage holders subsequently filed foreclosure actions against each of the Subject Properties, and as a result of

Theophile's fraud, Hassan stands to lose property with a documented value at the time of \$5.1 million, in which Hassan's equity was at least \$4.4 million.

In a decision entered after a bench trial on the question of the validity of the Subject Deeds (the "Trial Decision"), the trial judge upheld their validity, holding that Theophile had authority to execute the deeds on the basis of a finding that Hassan had implicitly ceded 50% ownership of Little Mason to Theophile. The Trial Decision is manifestly contrary to the weight of the evidence. There is no direct evidence that Hassan ever ceded control over Little Mason or its assets to Theophile or that he ever had any reason to do so, and the circumstances do not give rise to an inference that he did.

To the contrary, the evidence explicitly and unequivocally contradicts any transfer of control over Little Mason to Theophile, either direct or implied. It establishes instead that Hassan exercised complete control over Little Mason and its assets at all times, including during the period that Theophile was assisting Hassan in seeking financing that would be secured by the properties. Among other evidence demonstrating that fact are documented communications in which Hassan specifically and repeatedly made it clear that Theophile had no authority to take any action concerning Little Mason or its properties, which Theophile directly acknowledged.

The direct evidence, establishes the uncontested fact that Theophile used a forged, fraudulent document to transfer the Subject Properties to ECRG and enter into the Theophile Loans. He alone approached the original lenders and the title insurance agent who approved of and closed those transactions and presented an admittedly fraudulent operating agreement for Little Mason which provided that he had been the 99% owner of Little Mason since its formation (the “Faked LLC Agreement”). The circumstances are equally incompatible with the trial court’s decision. Hassan had every reason to protect his interests, and no reason to cede any authority over his company or its assets to Theophile. The trial court’s conclusion that he did so is entirely contrary to any reasonable expectation of a person in Hassan’s circumstances.

The findings of fact set forth in the Trial Decision are conclusory and incomplete. The few references to the evidence that are included are unspecific, and do not support the Court’s inference of an implicit, undocumented, and uncompensated agreement by Hassan to give Theophile 50% of Little Mason and its assets. It takes no more than a straightforward review of the record to conclude that the only conclusion compatible with this record is the conclusion, which is immediately apparent at first glance, i.e., that Theophile committed fraud to siphon cash out of the Subject Properties into his pocket and walked away with the money.

FACTS

Hassan and Little Mason

Plaintiff Irfan Hassan is the founder and owner of plaintiff Little Mason Properties, LLC (“Little Mason”). Hassan formed Little Mason and registered it under the laws of Delaware in December 2013 and has been its sole member and owner at all times since its formation. (1T85:6-86:13, 89:13-90:16; Pa565-591.) Hassan is a systems engineer, who earned a bachelor’s degree and a Master’s Degree in Computer Science from New Jersey Institute of Technology in 2001 and 2002, respectively, and a master’s degree in Electrical and Systems Engineering from the University of Pennsylvania in 2006. (1T 74:19-T76:13) After graduating from NJIT in 2001, he worked for the United States Department of Defense as a computer scientist and a project manager until 2016. (1T76:14-77:12)

At the time Little Mason was formed in 2013, Hassan owned a number of properties that his family operated as a residential rental business. (1T 80:10-82:12, 85:6-23.) After he formed Little Mason, Hassan transferred title to most of these rental properties to Little Mason and operated them together as a business through Little Mason and as of 2017, Hassan owned at least 41 rental properties. (1T 92:4-7; J-4 Pa628.) In 2016, because the business had grown, and Hassan’s father, who had handled much of the daily operation of it, became

less able to do so because of his age, Hassan left the Department of Defense and took over the full-time operation of the business. (1T 77:9-81:13.)

Hassan's Involvement with Theophile

In 2017, Hassan met defendant Theophile. (1T 121:35-122:4; 5T10:25-11:5.) At the time, Hassan was investigating selling off some or all of his rental properties to invest in other ventures. (9T 83:1-17.) Theophile held himself out to Hassan as an experienced real estate investor, and an expert in real estate finance. (1T 123:8-131:18; 7T 10:9-12.) Theophile suggested that instead of just selling the properties, Hassan could take loans against them to pull out cash that could be used to improve them for sale at an enhanced value or for other investments. (1T 124:10-128:13.) Theophile offered to use his expertise and experience to secure financing, and Hassan agreed that they should investigate the possibility. (1T 128:14-129:25, Pa3421.) At the time, Hassan and Little Mason owned properties the two men both estimated as having a value of between \$20 million and \$30 million. (7T 78:1-98:24.) These properties consisted both of residential properties owned by Hassan through Little Mason, and commercial properties (primarily gas stations) owned by other entities of Hassan's. (Id.)

Theophile told Hassan he believed they might receive better credit terms if Theophile was the nominal borrower, and that the transactions could be

structured to make ECRG the nominal borrower, even though the assets would still be owned and controlled by Hassan. (1T 134:22-135:18; 2T 21:16-24; Pa1372.) Hassan consulted his attorney to ask his attorney if this were possible, and his attorney responded that although he had never seen a transaction like that, it could be possible as long as it was properly documented. (1T 135:19-136:7, 83:14 – 83:17, 84:21-85:7; 9T 83:1-87:25.) So, Hassan agreed to investigate financing on that basis. Theophile knew that even though his LLC, ECRG, would be the nominal borrower if they identified and accepted financing on that basis, neither he nor ECRG owned the properties and any decision to proceed would be made by Hassan. (7T 201:3-202:20.) Hassan liked Theophile and had no reason to believe Theophile would or could harm his interests, and as they investigated financing options for Hassan, they also contemplated various joint ventures they might pursue together. (1T123:9-131:25, Pa3421.)

Hassan made it clear to Theophile that although he agreed to Theophile helping him identify financing to raise money from his properties, he had no authority over Little Mason or its properties. On June 29, 2017, Theophile went online and registered Little Mason, as a foreign (i.e., out-of-state) LLC authorized to do business in New Jersey and listed himself as the registered agent for Little Mason in New Jersey. (Pa3418-3419.) When Hassan discovered that Theophile had made himself Little Mason's registered agent in New Jersey,

he explicitly clarified with Theophile, in writing, that Theophile had no authority over Little Mason or its property, and was not authorized to take any action involving Little Mason's property. (Id.) Theophile promptly acknowledged Hassan's admonition. (Id.) On repeated occasions, Theophile indicated that he was nearing identifying a deal that they could close on, and Hassan reminded him that nothing could be done unless Hassan were present and he (or his attorney) had reviewed and approved all the documents. (E.g., Pa3548.)

Theophile began soliciting proposals for financing on Hassan's properties in June 2017. (Pa2922.) The proposals they received, without exception, consisted of specific written proposals prepared by the prospective lender that identified the lender and the terms of the proposed lending. (Pa614, Pa2107, Pa2120, Pa2135, Pa2138, Pa2144.) In every such instance, the two exchanged and discussed those proposals in emails and other documented communications. (Pa612, Pa2106, Pa2119, Pa2127, Pa2137, Pa2143.) In every case in which the proposal initially was received by Theophile, he transmitted it to Hassan. (Id.)

In soliciting and securing proposals from lenders, Theophile acted as the primary communicator with the lenders, and Hassan helped to assemble and provide to Theophile information about the properties to provide to lenders, to provide access to the properties where necessary, and to clear up any title issues that might preclude their use as collateral. (E.g., 1T T158:21-161:3; 7T 197:23-

198:19; Pa1342.) The communications between the two men at all material times were well documented in emails, texts, and voicemails, which collectively numbered in the thousands. (E.g., Pa612, Pa2106, Pa2119, Pa2127, Pa2137, Pa2143; Pa1452-1517; Pa1518-2069.)

The men never reached a specific agreement on compensation for Theophile's assistance in obtaining financing, but discussed various options, including a commission consisting of a percentage of the financing, and a structure by which Theophile would become an investor in Little Mason by taking responsibility for repayment of some part of the financing. (1T T16:24-163:12; 7T 110:5-115:4, Pa1372, Pa3469-3470.) Ultimately, because no satisfactory financing was ever identified, no arrangement between the two was ever specified. (1T 188:21-193:19; 194:19-25.)

So, Theophile looked for possible lenders and put together applications for financing on the properties. (Pa614, Pa2107, Pa2120, Pa2135, Pa2138, Pa2144.) Hassan provided Theophile with a credit card to use for expenses related to valuing the properties and searching for financing, such as paying application fees and fees, and also provided all of the information necessary about Little Mason and its income from the properties. (1T T158:21-161:3; 7T 197:23-198:19; Pa1342.) The credit line on the card was low, less than \$2,000,

so providing Theophile with the credit card was a convenience obtained at low risk. (Id.)

Hassan and received and reviewed financing proposals solicited by Theophile from June 2017 through March 2018, in connection with their joint effort to find financing for Little Mason's properties. (Jan. 5, T158:21-181:10; Pa614, Pa2107, Pa2120, Pa2135, Pa2138, Pa2144.) Hassan was not satisfied with any of them, though, because the cost of raising cash on the proposed terms was too high, so he declined to proceed with any of them. (Jan. 5, T138:15-139:11; 143:3-14; 7T 160:18-189:10, Pa1437, Pa2127.)

During this time, in the fall of 2017, Hassan also separately solicited and received financing proposals on his properties separate without Theophile's involvement. (1T T143:21-151:11; T8104:25-110:19; Pa702, Pa704, Pa1437.) He worked with Brad Spingarn from Close Now. (Id.) Spingarn helped Hassan secure financing proposals from Velocity Commercial Capital, first for the Hillside Property, and then for 32 of his other residential properties. (Pa 4350-4381.) Those proposals had nothing to do with Theophile and specifically made reference to Hassan's own credit standing. (Pa702.) When working with Hassan on these proposals, Spingarn did not know that he was working separately with Theophile. (8T115:14-23.) Velocity was aware of encumbrances against the properties but would make the loans assuming the liens were satisfied from the

proceeds, which Hassan acknowledged. (1T 185:21-20; 8T 105:18-109:25; Pa2930-2938.) Hassan was not satisfied with the terms offered by Velocity, however, because the interest rates were too high, as he communicated to Spingarn. (Pa1437.) He did not accept any of the Velocity proposals.

As the financing offers continued to be unsatisfactory, it became clear to Hassan that borrowing money against the properties to raise investment cash represented no substantial benefit over selling them as a means of raising cash. (1T T143:2-14; 162:19-174:5; Pa614, Pa2107, Pa2120, Pa2135, Pa2138, Pa2144.) Hassan had expected that Theophile's purported expertise would lead to advantageous financing, but the proposals Theophile generated were no better than the standard for the market. (Id.)

In about January 2018, Hassan told Theophile that he had lost interest in financing the properties and would raise money by selling them, and in response, Theophile told Hassan that he believed that he (Theophile) could raise enough financing to buy the properties himself. (1T T139:12-140:12; 2T T228:5-230:2.) Hassan told Theophile he would be open to selling the properties to Theophile if Theophile could secure financing for a sufficient purchase price. (Id. T141:21-142:21) He did not specify a price for the properties but would decide whether to sell to Theophile based on how much money Theophile could raise. (Id. T230:3-231:23; 233:3-9; 235:15-25)

In January 2018, Theophile told Hassan that he had secured a conditional offer of financing from a lender named Corevest that he thought would provide sufficient cash for him to purchase the properties, but that the offer was contingent upon appraisals which Theophile could not afford. (3T T12:1-24.) Hassan agreed to pay for the appraisals. (1T 140:24-142:15.)

When the appraisals secured for Corevest were too low to support financing of an amount Hassan would accept to sell the properties, he told Theophile that he was no longer interested in pursuing a deal. (1T T142:16-143:2; 2T T8:18-9:9.) In response, Theophile claimed that he could obtain higher appraisals that would allow him to obtain sufficient financing to buy the properties at a price Hassan would accept. (2T T9:10-11:1; 7T 75:7-77:13.) Hassan told Theophile that he was not willing to pay for additional appraisals but agreed to let Theophile seek his own appraisals in pursuit of financing to purchase the properties. (Id.) Theophile thereafter secured and paid for a second set of appraisals (the “Theophile Appraisals”). (Id.)

Theophile Fraudulently Transfers Title to the Subject Properties and Loots them for Cash.

The JEST/Hillside Transaction

In about February 2018, without telling Hassan that he was doing so, Theophile approached a mortgage broker, Yonasin Rubin, seeking assistance in obtaining financing on the most valuable of the Subject Properties, located at

1576 Maple Avenue in Hillside (the “Hillside Property”), and Rubin connected Theophile with defendant JEST Holdings, LLC (“JEST”), which agreed to offer financing on the property. (Pa2939-2943; Pa2980-2984.) Theophile approached 1st Rate about serving as the title and settlement agent for the loans and 1st Rate agreed to do so. (11T 24:13-19.) Theophile represented to 1st Rate Title that he had authority to act on behalf of Little Mason. (11T 26:9-28:10.) In support of his claim to have authority to act on behalf of Little Mason, Theophile presented to 1st Rate a document titled “Limited Liability Company Agreement for Little Mason Properties, LLC” (the “Faked LLC Agreement”). (11T 35:11-36:2; Pa592-611.)

To create the Faked LLC Agreement, Theophile altered an incomplete, sample operating agreement that had been given to Hassan at the time he formed Little Mason in December 2013 by the service company that helped him register Little Mason as a Delaware limited liability company. (1T 198:12-201:4, 202:5-22; Pa572-591.) That sample operating agreement was among documents related to Little Mason, including its certification of formation in Delaware and an IRS form assigning it an EIN number, that Hassan provided to Theophile in the course of Theophile’s efforts to help identify financing for the properties. (Id.) The Faked LLC Agreement purported to establish that Little Mason had been formed in December 2013 with Hassan and Theophile as members, with

Theophile owning 99% of the company and Hassan owning 1% of the company. (Pa592-611.)

Hassan did not sign the Faked LLC Agreement. (1T 197:25-198:4; 9T 198:19-199:22.) The Faked LLC Agreement bears the certification, seal and signature of a notary, defaulted defendant Eddy Jean Jacques (“Jacques”), purporting to affirm that the parties appeared before him and signed the document on December 4, 2013. (Pa853.) When Jacques notarized the signatures on the document, he affixed his notarial stamp, which showed that his notary license was set to expire in November of 2020. (Id.) Because notary licenses in New Jersey have a term of five years, the stamp and license could not possibly have been used to notarize documents signed earlier than November 2015. (9T 153:9-154:9, 198:19-199:2; Pa611.) Jacques admitted that he dated the notarization on December 4, 2013, at the request of Marc Theophile, and that he has never met or spoken to Hassan. (9T 192:10-24.) Theophile alone took the Faked LLC Agreement to Jacques and requested that Jacques attest to the signatures on the document. (9T:198:19-199:2.) Jacques admitted that he had never met Hassan. (Id.)

When he presented the Faked LLC Agreement to McCloud, Theophile knew the information in it was false, and provided the document with the specific purpose that McCloud would rely on that false information to accept

Theophile's authority to transfer title to the Subject Properties from Little Mason to ECRG. (5T 11:6-10, 13:16-14:4.) The Faked LLC Agreement was the only information provided to McCloud sufficient to establish Theophile's authority to sign deeds on behalf of Little Mason. (11T 33:1-15.)

On March 28, 2018, the Subject Transaction involving the Hillside Property was closed. (Pa705-06.) To effect that transaction, Theophile, purporting to act on behalf of Little Mason, executed a no-consideration quitclaim deed transferring title to the Hillside Property from Little Mason to his own entity, ECRG, and executed documents taking out the mortgage loan on the property in the name of ECRG. (Pa846-853.) Theophile never told Hassan anything about this transaction, and Hassan received none of the proceeds. (5T 18:21-23:15; 7T 46:8-49:24, 57:3-58:14; Pa705-727; Pa3602; Pa3647-3652; Pa3653.)

The Velocity/Close Now Transactions (all other Subject Properties)

Velocity Commercial Capital, LLC was the lender in all of the Theophile Loans except for the transaction involving the Hillside Property (the "Velocity Loans"), and Defendant Close Now LLC ("Close Now") served as the mortgage broker for each of the Velocity Loans. (Pa705-727.)

Sometime after Close Now had issued the 32 CLA's on the Subject Properties in the name of Hassan, Spingarn was contacted by Theophile, who

told Spingarn he was working together with Hassan; prior to that time, Spingarn did not know that Hassan and Theophile were working together and had never spoken to Theophile about any of the properties he had discussed with Hassan. (8T 115:14-23.) Shortly after that phone call from Theophile, Spingarn spoke one more time with Hassan, who told Spingarn that he was working with Theophile, but gave no details about their work or their relationship. (8T 156:6-157:1.) Spingarn did not recall ever speaking to Hassan again or ever discussing the Theophile Loans with him. . (8T 114:4-122:10, 130:15-131:24, 134:15-135:4, 148:1-148:24, 156:6-157:1.)

After he was contacted by Theophile, Spingarn submitted applications to Velocity on behalf of Theophile for loans against 17 of the Subject Properties and Velocity issued CLAs for each of the Subject Properties listing Theophile as the person responsible for the property and the loan. (Pa3624-30.) Spingarn sent the CLA's to Theophile by email, as he had sent the earlier CLA's to Hassan. Theophile never forwarded those financing proposals to Hassan, as he had every prior proposal except for the JEST financing of the Hillside Property. (7T 46:8-49:24, 57:3-58:14.)

Theophile accepted the financing proposals from Velocity and approached 1st Rate about serving as the title and settlement agent for the loans and between April 20, 2018, and July 6, 2018, Theophile closed on 20 additional loans

secured by the 18 Subject Properties, on six separate closing dates over that time. (Pa705-727; Pa3422-3439.) As in the first of the Theophile Loans, for the Hillside Property, the only evidence Theophile gave to 1st Rate to establish his authority was the Faked LLC Agreement. (11T 33:1-15.) 1st Rate never had any contact or communications with Hassan regarding any of the Theophile Loans or the closing until it was contacted by Hassan's attorney in July 2017, after all of the Theophile Loans had closed. (11T 39:18-40:18.)

As was the case with the Hillside Loan, Theophile never told Hassan anything about the Velocity Loans, and Hassan received none of the proceeds from those loans. (5T 18:21-23:15; 7T 46:8-49:24, 57:3-58:14; Pa705-727; Pa3602; Pa3647-3652; Pa3653.)

Hassan's Discovery of the Theophile Loans

The communications between Hassan and Theophile throughout the period in which Theophile was closing the Theophile Loans were as frequent and well-documented as all their communications had been prior to that time. (E.g., Pa612, Pa2106, Pa2119, Pa2127, Pa2137, Pa2143; Pa1452-1517; Pa1518-2069.) Those communications were of the same nature as previous communications between the men, regarding information being needed by Theophile, or information about the ongoing appraisals or the need for access, etc., which Hassan as the now routine process of Theophile continuing to seek

better financing terms. (Id.) In all of those thousands of documented communications that spanned the time in which Theophile was closing on the Theophile Loans and pocketing millions of dollars extracted from Hassan's properties, there is not a single reference to the Theophile Loans – no information about the terms, the closings, or any administrative minutiae that are required to prepare even for the closing of a single real-estate loan. (Id.)

Hassan discovered the Theophile Loans in the course of reaching an agreement with a commercial real estate agent to list all of his residential properties for sale. (1T T210:11-216:4; 10T 27:12-32:22; Pa3440; Pa3654-3655; Pa3749; Pa4282-4294.) In Spring 2018, Hassan began discussing the possibility of listing his portfolio of residential properties with Drukarov. (Id.) Hassan had decided to enter into a listing agreement with Drukarov to sell the Hillside Property and was making arrangements to list the rest of his portfolio with him, as well. (1T T15:11-16:1; Pa3654-3655.) On June 28, 2018, Drukarov sent Hassan a listing agreement for the Hillside Property for Hassan's signature. (Pa3440.) At the same time, Drukarov started to check the tax listings for the properties, pursuant to his ordinary procedure, and noticed that some of them (the Subject Properties) were not listed in Little Mason's or Hassan's name and contacted Hassan. He told Hassan that the owners in the tax records did not match, and asked Hassan to confirm. (Pa3749.) When Hassan received this

message, he searched the tax records himself for one of the properties, 1576 Maple Ave., and saw that it was listed as being owned by ECRG, Theophile's Company. He called his lawyer, Richard Azikiwe, in a panic, asking for help in determining what was going on. (1T 188:21-193:3; 2T 16:14-22; 9T 88:20-91-4.) At the same time, he acknowledged the difference to Drukarov, without comment, and set aside the proposed listing agreement while he and Azikiwe investigated. (Pa3749.)

Azikiwe pulled the title documents for the rest of Little Mason's properties and discovered that that several of them had been transferred to ECRG pursuant to deeds signed by Theophile and subsequently mortgaged by ECRG. (2T 1623-17:10; 9T 88:20-91-4.) When Hassan confronted Theophile, he admitted that he had not told Hassan about the Theophile Loans. In a text message sent to Hassan on July 11, 2019 Theophile wrote that "Despite me not telling you that I was closing the deals, it is a great opportunity with this lender to just close all of the rest of the premieres, get the cash . . ." (Pa3603.)

Theophile directed Hassan and Azikiwe to McCloud and 1st Rate. (9T 91:9-98:12.) Azikiwe contacted McCloud on July 9, 2018, and McCloud agreed to forward all of the closing documents for the Theophile Loans. (Id., Pa3751.) The closing documents revealed to Hassan and Azikiwe for the first time the full scope of the Theophile Loans and of Theophile's fraud. (9T 98:13-101:9;

Pa3750-3765.) When Azikiwe asked Theophile how he had established his authority to act for Little Mason, Theophile identified the Fake LLC Agreement, and when Azikiwe asked whether Hassan agreed to it, Theophile said no. (T9 101:2-10.)

Hassan subsequently sought litigation counsel and filed suit against Theophile and the mortgagees, seeking to quiet title and recover damages.

The Numbers

Contemporaneous with the Theophile Loans, Theophile obtained his own appraisals of the Subject Properties. (2T T9:10-10:15; 7T 75:7-77:13.) This was the second set of appraisals of the Subject Properties. They were commissioned and paid for by Theophile after the appraisals Hassan had agreed to pay for would not support financing sufficient cash for a price at which he would sell to Theophile. (2T 9:10-10:15; 7T 75:7-77:13.) The appraisals were conducted by professional appraisers selected by Velocity and took place beginning in late March 2018 and continuing through May 2018. (7T 75:7-77:13, Pa854-878.) These appraisals identified the total market value of the 18 Subject Properties as \$5,180,000. (Pa854-878.)

The total principal borrowed by ECRG (after having refinanced four of the initial loans), was \$3,415,250, or sixty-six percent (66%) of the total value of the Subject Properties. (Pa705-727.) Of those proceeds, \$669,157 was used

to pay pre-existing encumbrances against the properties, and \$22,410 was used to pay current expenses of the properties (taxes and utilities), for a total of \$691,567. (Id.) The remaining \$2,723,683 of the proceeds of the Theophile Loans went to Theophile. (5T 19:8-20:9, 21:1-23:15.) He used \$299,267 of that amount to pay closing costs. (Pa705-727.) 1st Rate had failed to update the amount of a DEP lien against the Hillside Property prior to closing, and so they withheld an additional \$800,000 of Theophile's proceeds to establish an escrow to pay that lien. (Pa3439.)¹ That lien has not been paid, and that \$800,000 is currently being held in escrow by counsel for the Lenders. (Id.)

Hassan lost property independently appraised at the time of the Theophile Loans to be worth \$5,180,000, leaving a net loss to him, after accounting for the \$691,567 in prior encumbrances and current expenses, of \$4,534,433, in property value alone.

All of the Subject Properties were operated as rental properties by Plaintiffs. In the wake of the fraud by Theophile, they have been unable to do so as a result of interference by Theophile, the loss of their apparent legal rights as

¹ The conduct of 1st Rate and McCloud as licensed insurance producers and title examiners for the Theophile Loans was replete with failures to adhere to even the most fundamental requirements that apply to those functions. Facts and evidence related to Plaintiffs' negligence claim against those defendants and their principal, defendant Chicago Title Insurance Company, are set forth below in the section addressing the court's Summary Judgment Decision.

to those properties, and the assertion by the Lenders of their purported rights to possession and control of the Subject Properties, under their mortgages via foreclosure actions.

As a result, they have lost net rental income of \$270,000 per year. (Pa469.) Moreover, Plaintiffs have been forced to incur the substantial costs not only of pursuing this action to restore their titles to the Subject Properties but defending against the Lenders' foreclosure claims in separate actions as to 17 of the 18 Subject Properties. Counsel fees and expenses to date amount to approximately \$660,000.

PROCEDURAL HISTORY

Plaintiffs filed this action seeking to quiet title to the Subject Properties in their name, and to recover money damages for having been dispossessed of the Subject Properties and the income they produced on the basis of the Theophile Loans and the subsequent foreclosure actions against the Subject Properties. Defendants/Respondents are:

- Theophile and ECRG;
- The notary who falsely attested to the signatures on the forged LMP operating agreement used by Theophile to claim authority to act on behalf of LMP, Eddy Jean Jacques ("Jacques");
- the current mortgage holders who are foreclosing on the Subject Properties (the "Lenders"), who in the case of 17 of the Subject Properties are successors to the original lender Velocity Commercial Capital, LLC

(“Velocity”), and in the case of one of the Subject Properties is the original lender, JEST Holdings, LLC;

- the title and settlement agent 1st Rate Title and Settlement Services, LLC, who performed the title examinations and closings for the Theophile Loans, and its sole owner and operator, Edward McCloud (together, 1st Rate);
- the title insurance carrier, Chicago Title Insurance Company (“CTIC”) for whom 1st Rate acting as an agent when it performed the title examinations for the Theophile Loans; and
- the mortgage broker, Close Now, LLC, who brokered the mortgage loans funded by Velocity for 17 of the Subject Properties, along with its sole owner and operator, Anthony Barber (together, “Close Now”).

In their Fourth Amended Complaint (Pa13-36), Plaintiffs asserted the following causes of action against the specified parties:²

- Count One – Quiet Title: Against all defendants;
- Count Two – Ejectment: Against the Lenders, Theophile and ECRG;
- Count Three – Fraud: Against Theophile, ECRG, Close Now, 1st Rate, CTIC, and Jacques;
- Count Four – Tortious Interference: Against Theophile, ECRG, Close Now, 1st Rate, CTIC, and Jacques;
- Count Five – Civil Conspiracy: Against Theophile, ECRG, Close Now, 1st Rate, CTIC, and Jacques;
- Count Six – Negligence: Against 1st Rate, CTIC, and Close Now;

² This listing of counts and defendants is adjusted from the original of this pleading to exclude claims voluntarily dismissed by Plaintiffs following discovery.

- Count Seven – Negligence: Dismissed as to all parties;
- Count Eight – Negligent Misrepresentation: Against 1st Rate, CTIC, and Close Now;

Following Discovery, motions for summary judgments were filed by a number of parties and decided by the trial court, the Hon. Robert J. Mega, P.J.Ch., presiding, in an order and decision filed on August 2, 2022 (the “Summary Judgment Decision”) (Pa471-494). Those motions and their disposition by the trial court are as follows:

- Motion for Summary Judgment by Plaintiffs on Count One (Quiet Title) – Motion denied.
- Motion for Summary Judgment by 1st Rate on All Counts – Motion granted.
- Motion for Summary Judgment by the Lenders on Count Two (Ejectment) – Motion granted.
- Motion for Summary Judgment by Close Now on all Counts – Motion Granted.
- Motion for Summary Judgment by CTIC on all Counts – Motion Granted.
- Motion for Summary Judgment by the Lenders on Counterclaim for Equitable Subrogation – Motion Granted.

The counts remaining for trial were:

- Count One – Quiet Title: Theophile, ECRG, and the Lenders;
- Count Two – Ejectment: Against Theophile and ECRG;

- Count Three – Fraud: Against Theophile, ECRG, and Jacques;
- Count Four – Tortious Interference: Against Theophile, ECRG, and Jacques;
- Count Five – Civil Conspiracy: Against Theophile, ECRG, and Jacques.

These counts were the subject of a bench trial held before Judge Mega in eleven trial sessions between January 5, 2023, and February 22, 2023.³

In an order and decision entered on March 31, 2023 (the “Trial Decision,” Pa495-549), the court entered judgment against Plaintiffs on all remaining counts, although it held that Theophile was responsible to Hassan for 50% of the proceeds of the Theophile Loans, pursuant to the agreement it inferred by which it held that Hassan had surrendered 50% ownership in Little Mason to Theophile.

³ The transcript is in the following volumes, to be used for reference in citations:

<u>VOL</u>	<u>TRIAL DATE</u>
1T	January 5, 2023
2T	January 11, 2023
3T	January 12, 2023
4T	January 24, 2024
5T	January 25, 2024
6T	January 26, 2023
7T	January 31, 2023
8T	February 1, 2023
9T	February 14, 2023
10T	February 21, 2023
11T	February 22, 2023

In this appeal, Plaintiff seeks reversal of the Trial Decision and the Summary Judgment Decision on the following bases:

1. The Trial Decision, including the court's findings as to credibility, ignores the clear and detailed record of the material facts as established by the contemporary documents and the testimony of third party witnesses. Moreover, the Court made critical inferences underlying its conclusions that do not logically proceed from the circumstances that are established by the evidence.
2. The court erred in permitting the Lenders to take the testimony of Theophile as a hostile witness because they shared with him an interest in defending Theophile's asserted title to the Subject Properties. In critical areas, his cross-examination by them was an exercise in prompting his testimony.
3. The Court erred by making a finding of fact that Plaintiffs are entitled to a judgment against Theophile and ECRG for half of the net proceeds of the loans taken out against mortgages on the Subject Properties and failing to reduce that finding to a judgment against Theophile and ECRG.
4. The court committed clear legal error in dismissing on summary judgment Plaintiffs' negligence counts against title insurance agent 1st

Rate and its principal, CTIC, on the basis that the law provides does not hold title insurance agents responsible for damages caused by their negligence in examining title absent a contractual relationship with the damaged party. New Jersey law does not, and should not, provide for such immunity.

5. The court committed error by ignoring substantial, reliable, and competent evidence in granting defendants summary judgment on Plaintiffs' Counts Three, Four, Five, Six, and Eight, for fraud, tortious interference, civil conspiracy, negligence, and negligent interference, respectively, on the basis that there were no genuine disputes of material fact and the respective defendants in those counts prevailed as a matter of law.
6. The court erred by granting the Lenders' counterclaim against Plaintiffs' for equitable subrogation, because that equitable cause of action does not apply in this case, and because even if it were to apply, there are genuine disputes of material fact that preclude summary judgment.

Plaintiffs seek reversal of the Trial Court's decision finding that Theophile had authority to transfer Plaintiffs' properties to his own company, and judgment invalidating the Subject Deeds and the mortgages that rest on them. Plaintiffs

further seek a reversal of the court's decisions granting summary judgment in favor of the defendants, permitting Plaintiff's claims for money damages to proceed to trial against the defendants named in the dismissed counts.

LEGAL ARGUMENT

POINT I. STANDARD OF REVIEW – TRIAL DECISIONS

“[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., 140 N.J. 366, 378, 658 A.2d 1230 (1995).

Factual determinations made by the trial court sitting in a non-jury case are subject to substantial deference and should be disturbed only where they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice. See Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). Deference to findings of fact may be even greater when the court is called on to make assessments of credibility to determine the facts. See, Primmer v. Harrison, 472 N.J. Super. 173, 186 (App. Div. 2022), cert. denied, 253 N.J. 47 (2023).

Such deference, however, is subject to the compatibility of the factual findings with the records evidence: “The role of an appellate court on review is to determine whether the trial judge's inferences were rationally based on evidence in the record.” State v. Avena, 281 N.J. Super. 327, 340 (App. Div. 1995).

This standard exists as a recognition both that trial judges have the best perspective from which to view the evidence presented at trial, and that they

can and do make mistakes in their role as triers of fact. When a trial court's findings are manifestly unsupported by the evidence, they can and must be reversed.

**POINT II. THE TRIAL DECISION IS MANIFESTLY
UNSUPPORTED BY THE RECORD (Pa524-25)**

The critical question in deciding Plaintiffs' quiet title claim is whether or not the evidence establishes that Theophile had the authority to execute the deeds transferring title from Little Mason to himself. The evidence in this case does provide a detailed record of the relevant events, as established by a comprehensive and detailed collection of contemporary documents supported by the testimony of disinterested witnesses. That record unequivocally demonstrates that Theophile did not have authority to sign the Subject Deeds. Little Mason is a single-member LLC, formed and owned only by Hassan, in which Theophile has never owned any interest. The record evidence makes it clear that at no time during their association did Hassan ever transfer any interest in Little Mason to Theophile or otherwise grant him the authority to act on behalf of Little Mason. It also establishes that Theophile entered into the Theophile Loans completely independently of Hassan, by fraudulently claiming to be the owner of Little Mason, and that Hassan neither knew of, approved of, or benefited from those transactions.

Despite this evidence, the court inferred the existence of an unwritten and undefined agreement by which Hassan had ceded 50% ownership of Little Mason to Theophile and upheld the validity of the Subject Deeds on that basis. The court did not identify what consideration it considered Theophile to have paid to Hassan in exchange for that interest, nor did it identify the particular evidence from which it inferred that Hassan had surrendered that interest, or otherwise discuss why its inference was a conclusion that flowed naturally from the evidence.

In fact, the evidence conclusively establishes that at all times, there was never any question in the mind of either man that Hassan always controlled Little Mason and its assets. That understanding is reflected both in the documented communications between the two men, and by their actions throughout. If there were any doubt as to that fact, it cannot survive consideration of the undisputed fact that Theophile was only able to take out loans against the properties by fraudulently claiming that he already owned them. That fact is irreconcilable with a conclusion that Hassan knew of and approved the Theophile Loans and is only made more emphatically certain that those transaction resulted in only disastrous losses to Hassan and millions of dollars of cash in Theophile's pockets.

The trial court's decision is manifestly unsupported by the evidence and must be reversed for that reason.

A. APPLICABLE LAW

As set forth in N.J.S.A. § 25:1-11(a):

A transaction intended to transfer an interest in real estate shall not be effective to transfer ownership of the interest unless:

- (1) a description of the real estate sufficient to identify it, the nature of the interest, the fact of the transfer and the identity of the transferor and the transferee are established in a writing signed by or on behalf of the transferor; . . .

In this case, the Theophile Deeds are not effective to transfer title to the Subject Properties because Theophile did not have authority to sign the deeds on behalf of the transferor, LMP. The only support Theophile ever provided for his claim that he was the 99% owner of Little Mason was the Fake LLC Agreement, which he admitted was false during his testimony at trial.

B. THE COURT'S FINDINGS OF FACT

The trial court's findings of fact are set forth here in their entirety:

The Court finds that Hassan and Theophile met in or around June or July of 2017. See Theophile's Testimony; J-91; J-92. Soon after meeting, **it is apparent that the two parties came to an agreement to form an alliance/business relationship.** See Theophile's Testimony; Spingarn's Testimony; J-91; J-92; J-67. As part of this business relationship, Theophile was to obtain loans using Little Mason Properties' residential properties as collateral. See Theophile's Testimony; Spingarn's Testimony; J-91; J-92; J-67. The Court further acknowledges that at this time it is uncontested that Little Mason Properties did not have a valid operating agreement filed in Delaware or any other state. See Hassan's Testimony; Theophile's Testimony; J-1; J-147. Pursuant to N.J.S.A. 42:2C-1 et. seq. (the "RULLC"), if there is no valid Operating

Agreement or if the operating agreement does not otherwise outline rules for adding members to a pre-existing LLC, the rules outlined by the RULLC will apply. See N.J.S.A. 42:2C-11 & 31. **The Court finds that pursuant to N.J.S.A. 42:2C-31, Theophile was made an equitable, equal member of Little Mason Properties based on actions of Theophile and Hassan as well as the apparent and continuously evidenced agreement by all members of Little Mason Properties to mortgage, manage, or sell the real estate owned by Little Mason Properties (of which Hassan was previously the sole member).** See N.J.S.A. 42:2C-31; Theophile's Testimony; Spingarn's Testimony; McCloud's Testimony; Azikiwe's Testimony; J-67; J-91; J-92.

However, the Court recognizes that both Hassan and Theophile appear to agree that said membership was only intended to apply to the extent that Theophile was to collateralize certain residential properties. Hassan's Testimony, Theophile's Testimony; J-67; J-91; J-92. While Theophile contends that this arrangement was originally meant to apply to all residential properties owned by Hassan and Little Mason Properties, the fact that Theophile stopped seeking loans after the 18 properties at issue in this case were collateralized indicates that said arrangement was limited solely to those 18 properties. Hassan's Testimony, Theophile's Testimony; J-67; J-91; J-92. As such, the Court finds that Theophile did have the requisite authority to act on behalf of Little Mason Properties and otherwise enter into agreements approved by both himself and Hassan. See N.J.S.A. 42:2C-37; Equity Regards That As Done Which Ought To Be Done. Additionally, the Court finds that Theophile's equitable membership in Little Mason Properties extends only as to the 18 properties at issue in this case. Hassan's Testimony, Theophile's Testimony; J-67; J-91; J-92.

Based on the testimony provided by the various witnesses and documents entered into evidence, this Court finds that Irfan Hassan and Marc Theophile were acting in accordance with a common plan and agreement when entering into the 18 loans and mortgages at issue in this

case. See Theophile's Testimony; Spingarn's Testimony; McCloud's Testimony; Azikiwe's Testimony; J-67; J-91; J-92. This Court further finds that Theophile was acting with Hassan's knowledge and approval when seeking loan proposals, when registering Little Mason Properties as an LLC in New Jersey, when transferring title to the subject properties from Little Mason Properties to Eight Copeland Road Group, and when entering into the contested loan agreements. See Theophile's Testimony; J-66; J-67; J-91; J-92; J-147; D-5.

(Pa524-525 (emphasis added).)

C. THE EVIDENCE CITED BY THE COURT DOES NOT SUPPORT ITS INFERENCE THAT HASSAN MADE THEOPHILE A PARTNER IN LITTLE MASON, OR OTHERWISE GRANT HIM THE AUTHORITY TO DISPOSE OF LITTLE MASON'S ASSETS.

While the court makes references to the evidence in support of its findings, it does so only generally, i.e, without identifying the substance of the referenced evidence or its connection to the findings. A review of the referenced evidence does not reveal any support for the court's conclusion that Hassan agreed to cede to Theophile any interest in authority over Little Mason or its assets.

1. Theophile's Testimony

The Court finds that pursuant to N.J.S.A. 42:2C-31, Theophile was made an equitable, equal member of Little Mason Properties based on actions of Theophile and Hassan as well as the apparent and continuously evidenced agreement by all members of Little Mason Properties to mortgage, manage, or sell the real estate owned by Little Mason Properties (of which Hassan was previously the sole member).

(Pa524-525.)

a. Theophile on His Authority to Execute the Subject Deeds

The court does not identify the testimony by Theophile it relied on to support its conclusion that Hassan had agreed to cede 50% ownership in Little Mason to Theophile, or to otherwise explicitly or implicitly grant him any interest in Little Mason or any authority to sign the Subject Deeds. In fact, as to the question of when or how Hassan had granted Theophile authority over Little Mason and his assets, the court ignored Theophile's testimony as to that issue.

Theophile did testify that he had been given the authority to control Little Mason and its assets, but the agreement he claimed to have reached with Hassan was not referenced by the court, nor did it bear any resemblance to the no-consideration transfer ultimately imposed by the Court.

The most consistent of explanations concerned an alleged agreement whereby Hassan would pay Theophile approximately \$8.5 to 11 million (depending on the amount financed) to help arrange financing on the Subject Properties (and the rest of the properties owned by Hassan) and then leave the country. According to Theophile's repeated testimony both at his deposition and at trial, the deal was as follows: in exchange for Theophile helping Hassan to obtain financing on the properties, (1) Hassan would pay him a flat fee of \$2.5 million from the proceeds of the financing, (2) Hassan would keep the rest of

the proceeds of the financing and transfer ownership of the properties to Theophile, and then (3) Hassan would move to some “middle eastern” place (the “Theophile Version”). (7T 78:1-98:24.)

Theophile testified that they reached that arrangement sometime very shortly after they met in 2017 and before he began to assist Hassan. (Id.) As they both testified at trial, at that time, both men estimated the total value of Hassan’s property holdings at somewhere between \$20 and \$30 million, (Id.) Theophile told Hassan he could obtain loans for 70% of the value of the properties. Pursuant to Theophile’s Version, then, total benefit to Theophile for helping Hassan to arrange financing would therefore be \$2.5 million in cash and at least \$6 million equity in the properties (30% of \$20 million the lower property value estimate, unencumbered by the loans). (Id.)

It is not surprising that the court would decline to refer to that testimony as reliable evidence of an agreement by which Hassan granted Theophile ownership in or control of Little Mason. The Theophile Version is unbelievable on its face, of course, and moreover contradicted by all of the other evidence. For example, in July 2017, Hassan sent Theophile an email referring to a possible transaction they were considering by which Theophile might acquire a 49% interest in Little Mason. (Pa3418-3419.) Despite his later, sworn insistence

that the men had just agreed on the Theophile Version, Theophile made no reference to that in his response to that email.

Also, during the course of the time the two men cooperated to identify suitable financing, they continued to discuss how Theophile might be compensated if they successfully did so. In December, Hassan suggested that he would be willing to pay Theophile a commission of \$50,000 if they identified financing for the Hillside Property, and 5% for successful financing of a larger package of properties. (Pa3469-3470). In his testimony, Theophile insisted that Hassan intended those amounts to be in addition to what Theophile would receive in the Theophile Version, and that the additional compensation was because Theophile was working so hard. (5T 53:17-54:14.)

Theophile testified that Hassan was amenable to the Theophile Version because Hassan was crippled by the liens and/or debt on his properties and was desperate to receive Theophile's assistance because he had no other way to resolve those encumbrances. In fact, the encumbrances against Hassan's properties were a fraction of their value, and the evidence establishes that if he had needed to immediately resolve those encumbrances, he had the option either to sell some or all of them, or to finance them without Theophile's assistance.

Hassan's independent investigation of financing made it clear that encumbrances against the properties were no barrier to obtaining financing in

his own name. He received offers of financing similar to those procured by Theophile for the same properties. (Pa4350-4381.) Spingarn, the mortgage broker, testified that property value was the primary consideration for lending against such properties, and that while an individual's credit standing might affect the loan terms, it would not ordinarily preclude lending against a property with sufficient value to secure a loan, and did not preclude the issuance of loan proposals to Hassan on the Subject Properties. (Id., 8T 109:4-25.)

Further, both before and after he worked cooperatively with Theophile, Hassan discussed listing properties for sale, and went so far as to agree to list the properties with Roman Drukarov before he discovered Theophile's fraud. (9T 83:1-17; Pa3440.)

Moreover, Hassan had no reason to be desperate, not only because he had plenty of money and options to satisfy the liens as he might want to, but also because managing such liens was a familiar and ordinary part of the operation of his business. It was common throughout Hassan's operation of his business that tax liens would be placed against some properties, but he had a long-standing practice of paying off liens on the properties that were profitable, and letting non-profitable be sold to satisfy the liens, and records illustrating that practice over a number of years (including during 2017 and 2018), and Hassan's ability to pay off liens should he chose to, are among the evidence on the record.

(Pa3688-3743.) Theophile's portrayal of Hassan as so desperate that he would enter into disastrous financial transactions blindly and without any documentation exists only in his unsupported testimony. The actual evidence firmly establishes that Hassan was perfectly capable of continuing to operate his business as he saw fit.

Taken as a whole, Theophile's testimony stands as clear evidence that no agreement was ever reached between the two men by which Theophile was granted authority over Little Mason and its assets. If there ever had been any legitimate agreement between Hassan and Theophile that led to the Theophile Loans, presumably Theophile's testimony would have reflected that – that is, if Hassan had really granted him authority to dispose of Little Mason's properties, why did he not simply testify as to how and when that occurred? Further, Theophile had no explanation for why, if Hassan was privy to and in favor of the loans, it was necessary to commit fraud to effect the transactions. If Hassan wanted the Theophile Loans to take place, why did he not simply sign the deeds transferring the property to Theophile? Theophile's testimony amounts to a gaping hole where a rational explanation should be if Hassan had really agreed to grant him any interest or authority in Little Mason.

Most relevant for purposes of applying the standards of review in this appeal, however, is that the trial court imposed an agreement of its own creation,

rather than the agreement testified to by Theophile, or some other agreement reflected in the evidence of record.

b. Theophile On Hassan's Knowledge of the Theophile Loans

This Court further finds that Theophile was acting with Hassan's knowledge and approval . . . when transferring title to the subject properties from Little Mason Properties to Eight Copeland Road Group, and when entering into the contested loan agreements.

(Pa525.)

There is no record of any communication to Hassan by any other party or person regarding the Theophile Loan transactions prior to Hassan's discovery of the fraud. By itself, that may not seem to be weighty evidence, but that changes when it is considered in light of the sheer volume of documented correspondence between Theophile and Hassan during the time in which the transactions were taking place. During that the period in which Theophile was loading his own bank account with the proceeds of loans totaling over \$3.4 million drawn from the value of Hassan's properties, the two men exchanged hundreds and hundreds of emails, texts, voice messages, all of which are present in the record evidence. In volume and substance they are no different than the myriad communications exchanged between the two before Theophile began pursuing his loans. They involve various miscellaneous topics and reflect Theophile's ongoing effort to

identify and obtain suitable financing, and Hassan's assistance in matters such as providing access for appraisals.

There is a single, glaring difference, though. Not a single one of those communications contains any acknowledgement of the Theophile Loans or any proposals or terms or amounts or closing dates or proceeds or any other information to suggest that they were happening. (T7 58:16-64:18.) That is in sharp contrast to their communications regarding all of the other financing proposals secured by Theophile, despite the fact that these transactions proceeded all the way through underwriting, closing, and disbursement of funds.

The prior loan proposals, none of which survived consideration, were the subject of numerous documented communications in all that established a detailed record of those events, including specific, written proposals, discussion and negotiation of terms, preparation of applications, and the other activities inherent in obtaining and considering complex business proposals. The Theophile Loans were the subject of all of those similar preliminary communications, including specific, written proposals from the lenders, and also the subject of all of the additional extensive communications required to negotiate, approve, and affect them. Just as none of the documented communications between Theophile and Hassan during this period made any reference to the Theophile Loans, none of the multitude of documented

communications undertaken by Theophile to effect those transactions was ever shared with Hassan. (Id., and id., at 44:10-55:16.)

Theophile's testimony at trial addressed this disparity. When asked how it could be that in the vast record of documented communications between himself and Hassan there could possibly be no reference whatsoever the transactions that actually occurred, Theophile replied that it was just coincidence that with regard to the loan proposals that were actually accepted and closed, they discussed those only over the phone, and happened not to have them in any of their thousands of documented communications. (Id.)

Accordingly, Theophile's bare testimony is the only evidence whatsoever that supports his claim that Hassan was aware of and approved the Theophile Loans. Given that his testimony on that issue is contradicted by an enormous body of documented communications in which those transactions would be expected to be the primary topic of conversation, but which contain no reference to them whatsoever, the evidence does not support the court's conclusion that Hassan was aware of and approved of them.

2. *Hassan's Testimony*

It is not immediately apparent what testimony by Hassan the court relies on to support its conclusions. Hassan consistently testified that he never surrendered any ownership interest in or authority over Little Mason to

Theophile, and that he had no knowledge of the Theophile Loans until he discovered and interrupted them (more transactions had already been scheduled when Hassan raised the alarm). (P3605-3606.) That testimony is supported by all the competent, relevant and reasonably credible evidence. There is no competent, relevant and credible evidence, either direct or circumstantial, that contradicts his testimony to that effect.

The judge's application of the maxim "false in one, false in all" cannot apply where Hassan's testimony is universally supported by the objective evidence. Further, on the critical question of whether Hassan had granted Theophile authority to execute the Subject Deeds, the only evidence that suggested he had done so was the Theophile Version, which the judge clearly did not accept because he did not rely on it. Instead, the judge apparently dismissed all of Hassan's testimony wholesale, and when there was no other credible evidence establishing Theophile's authority, the judge created an implicit agreement between them to support its validation of the deeds he signed. In doing so, the judge made no reference whatsoever to the plain fact that the means by which Theophile actually established his purported authority to sign the deeds in entering into the Theophile Loans was to a faked document showing that he owned Little Mason. Hassan's testimony fits with the rest of the evidence,

but Theophile's does not. The court's apparent decision to dismiss the entirety of Hassan's testimony was therefore objectively unwarranted.

3. *Spingarn's Testimony*

The testimony of Brad Spingarn is also devoid of any support for the court's conclusion. Spingarn was the agent for Close Now, the mortgage broker who first secured financing proposals for Hassan separate from those solicited by Theophile. When he secured those loan proposals on behalf of Hassan, he had no knowledge that Hassan was separately investigating financing with Theophile. (8T 115:13-23.) He testified that he was later contacted directly by Theophile regarding proposals for ECRG on the same properties, and that Theophile told him he was working with Hassan. (8T 156:6-157:1.) He testified that he called Hassan in or around January 2017, and that Hassan said that he was working with Theophile, but that he (Spingarn) did know any particulars about the nature of that connection. (*Id.*) He testified that that did not recall any contact with Hassan after that point. (8T 114:4-122:10, 130:15-131:24, 134:15-135:4, 148:1-148:24, 156:6-157:1.)

4. *McCloud's Testimony*

Edward McCloud, the owner of 1st Rate Title, which performed the title examination necessary to close the Theophile loans and issued title insurance as the agent of Chicago Title, testified that he never met or communicated with

Irfan Hassan until he was approached by Hassan's attorney in July 2018, after Hassan had discovered the Theophile Loans. (11T 39:18-40:18.) He testified that he had no knowledge of any relationship between Theophile and Hassan except information that was provided by Theophile, with the exception of Spingarn's having told him that the two were connected somehow. (*Id.*) He testified that he had no knowledge of any of the previous efforts by Hassan and Theophile to solicit proposals from other lenders. (T11 36:18-38:1.) He testified that he understood from Theophile that Hassan was providing access to the properties for the appraisals, and reviewed documents identifying Theophile as Little Mason's registered agent in New Jersey and its general partner. (T11 30:10-31:18.) Regarding his acceptance of Theophile's authority to sign deeds transferring the Subject Properties from Little Mason to ECRG, McCloud testified that could not have accepted Theophile's authority without the Faked LLC Agreement, because no other information he had was sufficient to establish that authority. (11T 33:1-15.) He testified that he believed that Little Mason had been formed in 2013 with Theophile as the 99% owner, as was set forth in the Faked LLC Agreement. (11T 35:11-36:2.)

5. *Exhibits J-91 and J-92*

In reaching the conclusion that Hassan and Theophile entered into an enforceable agreement, the court also made reference to Exhibits J-91, J-92, and

P-67. Exhibits J-91 and J-92 are a record of all text messages sent between Hassan and Theophile between July 2017 and June 2021 using their cell phone messaging app (J-91) and the WhatsApp messaging app (J-92). Together they comprise over 600 pages containing thousands of text messages between the two men which span the breadth of the relevant period and later. These exhibits, along with emails and voicemails between the two men, establish a critical record of the material events and the contemporaneous discussions between the men and. In referencing these exhibits, though, as is the case with trial testimony, the Court does not specify what communications it relies on to support its imposition of an agreement between the two men.

In fact, these exhibits contain no such support. To the contrary, they demonstrate over and over again that Hassan did not grant control over Little Mason to Theophile and that he would never have considered doing so. A thorough reading of all of these messages provides a deep, highly detailed portrait of what the two men did together and how they related to each other. Particular highlights that specifically concern the question of whether they ever agreed to any deal, and particularly any deal that shared ownership or control of Little Mason between them, however, conclusively demonstrate, with the support of all of the rest of the evidence, that there was no such agreement.

For example, in December 2017, Theophile writes to Hassan indicating he wants to come to an agreement on “his cut.” (Pa3469-3470.) Theophile suggests that for the mixed commercial/residential property on Maple Ave. and Hillside, the most valuable of Little Mason’s residential properties, if they get financing, he should receive a fee of \$150,000 and Hassan’s Range Rover (because he needs a car). Hassan suggests \$50,000. Theophile pushes and Hassan suggests that if they get the \$10 million in financing on large package of Little Mason’s properties, he would consider a fee of 5% and the Range Rover. Theophile pushes for receiving the car when the Hillside Property is financed, but Hassan says the car must wait for the larger deal. (Id.)

This exchange is just one a snapshot illustrating the overall landscape of the evidence. It makes it clear not only that Theophile’s \$10 Million Deal is an utter fabrication, but that no deal at all had been reached about what would happen when and if suitable financing were identified. There was no agreement even as to what compensation Theophile might receive, much less as to a business structure they might use to form a joint venture in which Theophile would have some ownership stake.

When asked about this exchange during his testimony, Theophile’s response was to claim that the work he was doing was harder than he anticipated, and so when he was bargaining with Hassan in these messages, he is actually

demanding compensation from Hassan above and beyond the \$10 Million Deal to which he claimed they had already agreed.

6. *Exhibit P-67*

Exhibit P-67 is an email from Hassan to Theophile dated July 21, 2017. Hassan had learned that Theophile had gone online and registered Litte Mason, which is a Delaware corporation, as a foreign business entity in the State of New Jersey and listed himself as Little Mason's registered agent in New Jersey. In that email, Hassan wrote to Theophile as follows:

MARC:

Please confirm this email.

I was very disturbed to find out you are trying to get personal loan to take care of your IRS lien using my properties as collateral for the loan.

You have added your name to little mason properties llc as registered agent in State of New Jersey without my consent. You have used my credit card to pay for New jersey registration without my consent even though I gave you the card info to pay for loan fee only.

Please confirm: You have no partnership or shareholder or signature authority or any responsibility of liability with Little Mason properties LLC.

Please confirm Irfan hassan is sole owner of Little Mason properties and other properties address given to you so you can get loan to get partnership as 49% share into my real-estate portfolios.

As we agreed and please confirm, You are planning to get cash out loan under your name on my real estate and use that equity to

become partner with me where I will be 51% share holder and you will be 49% share holder. If you get 60% loan to value ratio I will give you back from the loan 11% to bring your share of 49%. you will manage properties and distribute proceeding of rent as based on our shares.

Please confirm you will not use any of my properties anywhere for loan without my written approval by email or text message.

Thank you.
Irfan

Theophile did specifically acknowledge Hassan's message in a return email of the same day, in which he responded to Hassan by writing: "I acknowledge and Agree." (Pa3420.) Hassan wrote back that he hoped Theophile understood that Hassan's use of strong language was simply out of concern for the security of his affairs and his family. (Pa3421.) When asked to reconcile his acknowledgment of Hassan's admonition with his insistence on the Theophile Version, Theophile said that he just considered Hassan to be having mental problems.

The email establishes: (1) that Hassan made it clear to Theophile, in explicit and forceful terms, that Theophile had no interest in Little Mason and no authority to act on its behalf, (2) that while they were considering a general framework for possible joint ownership of Little Mason, as Hassan had testified, even that general framework would require consideration from Theophile, would leave Hassan with control of the joint business, and in any event could

only happen if suitable financing were identified; and (3) that the Theophile Version of an agreement that established his authority to sign the deeds is fictional.

Far from supporting any conclusion that Hassan had ceded control of Little Mason to Theophile, this evidence directly refutes a conclusion that he ever intended to do so, even in the context of a potential formal agreement with Theophile. Moreover, Hassan had been advised by his attorney that any such agreement would need to be carefully documented, so there is no reason to believe that Hassan would accept an undocumented oral agreement in return for surrendering any interest in his company or assets. Moreover, the fact that the men continued to discuss other forms of compensation for Theophile's assistance in finding financing, as evidenced in their other communications include the text messages referenced above, precludes any conclusion that there was never any agreement between Hassan and Theophile as to the specifics of how they would proceed if suitable financing were identified, much less any agreement by which Hassan transferred any interest in or control of Little Mason to Theophile.

7. *Exhibit J-66 and J-147*

Exhibit J-66 is an email dated October 23, 2019, from Theophile to McCloud and to his own counsel and counsel for the Lenders. In that email,

Theophile purports to forward a prior email he had sent to Hassan, dated June 29, 2017. The email to McCloud and counsel attaches documents related to Theophile's registration of Little Mason as a foreign entity in New Jersey, along with a copy of the Faked LLC Agreement. Exhibit J-145 is an email from Theophile to his own counsel, again attaching those documents and again purporting to forward the same June 2017 email.

In the email in Exhibit J-66, Theophile claims that he sent the same documents, including the Faked LLC Agreement, to Hassan in the original message in June 2017. There is no evidence to support that claim.

As an initial matter, the original of the email supposedly sent to Hassan has never been produced by Theophile and is not in evidence. The original email contains a link, but no identification of the documents or other information stored at that link. The fact that Theophile attached particular documents to emails he sent to his attorney and others after the fraud had been discovered is no evidence whatsoever that the same documents were included in the link sent in the original email.

Further, any suggestion that Theophile sent the Faked LLC Agreement to Hassan is refuted by all other available evidence. As discussed above with regards to Exhibit J-67, just three weeks after the date on which Theophile claims to have sent the Fake LLC Agreement to Hassan, Hassan abruptly

chastised Theophile for listing himself as Little Mason's registered agent in New Jersey (a designation that carries no actual authority to act on behalf of the company) and insisted that Theophile acknowledge that he had no ownership interest in, or authority over Little Mason. That is entirely inconsistent with Hassan's having received and assented to a document that provides that Little Mason was formed and owned by Theophile years before the two had even met, with Hassan as a 1% participant.

There is also no evidence that any fraudulent document such as the Faked LLC Agreement would be necessary to affect any transaction the two might contemplate. Neither Theophile in his testimony, nor any other evidence, ever suggest why, if Hassan was a knowing and willing party to any transaction involving property he owned, there would be any need to commit fraud.

Finally, Theophile testified that during his efforts working cooperatively with Hassan to obtain financing, he never provided the Faked LLC Agreement to anyone. Theophile only ever used the Fake LLC Agreement beginning in March 2018, when he gave it to Ed McCloud to support his claim that he was the owner of Little Mason. (7T 205:18-206:7.)

Accordingly, Theophile's claim that the Fake LLC Agreement was created at the very beginning of his relationship with Hassan, and that Hassan was aware

of and consented to its creation from that time forward, is contrary to all of the other evidence and incompatible with the circumstances generally.

8. *Azikiwe's Testimony*

Richard Azikiwe, Hassan's Attorney, testified that at the time Hassan first met Theophile, Hassan was working on a possible sale of his portfolio of properties, and had an offer in hand. (9T 83:1-17.) He testified that when Hassan asked him shortly after he had met Theophile whether financing such as that suggested by Theophile was possible, he advised him that he had never done anything like that, and that if he did it, he would need to make sure that "everything was in order." (9T 83:1-87:25.) He testified that Hassan approached him shortly after he discovered that title one of his properties had been transferred to ECRG without his knowledge. (9T 88:20-91:4.) He testified that he demanded and received the closing documents for the Theophile Loan from McCloud. (9T 91:9-98:12.) He testified that when he asked Theophile how he had established his authority to act for Little Mason, Theophile identified the Fake LLC Agreement, and when Azikiwe asked whether Hassan agreed to it, Theophile said no. (T9 101:2-10.)

D. Circumstantial Evidence

. . .it is apparent that the two parties came to an agreement to form an alliance/business relationship.

...

The Court finds that pursuant to N.J.S.A. 42:2C-31, Theophile was made an equitable, equal member of Little Mason Properties based on actions of Theophile and Hassan as well as the apparent and continuously evidenced agreement by all members of Little Mason Properties to mortgage, manage, or sell the real estate owned by Little Mason Properties (of which Hassan was previously the sole member).

(Pa524-525.)

“An inference is a deduction which may or may not be made from certain proven facts.” *State v. Corby*, 28 N.J. 106, 114, 145 A.2d 289 (1958). It is defined as “[a] conclusion reached by considering other facts and deducing a logical consequence from them.” *Black's Law Dictionary* 793 (8th ed. 2004).

In re State ex rel. A.D., 212 N.J. 200, 219 (2012)

That this conclusion was an inference, rather than a fact proven by the direct evidence, is clear not only from the lack of specific references to the evidence, but by the language of the Trial Decision. The judge wrote that the agreement between the two men was “apparent.” When making reference to the evidence that supports his conclusion, the judge referred to that evidence only generally, neither citing specific documents or testimony nor explaining how that evidence supports the conclusion. The absence of a specific connection between the evidence cited by the judge and his conclusion, it appears that the judge inferred that because the two men had worked together toward a common goal of obtaining financing and discussed possible joint ventures, both men must have been aware of and approved of the Theophile Loans.

That inference is unwarranted, though, in the face of both the evidence, as described above, and the circumstances. There is no dispute that Hassan and Theophile agreed to work cooperatively to try to find favorable financing, and that they contemplated doing so in a manner that might bring them into business together. That, however, is a far cry from actually creating a joint venture and transferring millions of dollars in valuable assets, and there is nothing in the evidence to which the Court refers, that reflects any such agreement. Cooperation, the prospect of benefit (if uncertain) and investigation do not establish a binding contract or any other enforceable agreement, particularly when it involves the transfer of valuable real property and other business interests, and particularly true in this case, where the direct evidence uniformly contradicts the existence of such an agreement.

Furthermore, an existence of an agreement such as that imposed by the court does not flow naturally from the facts that are established by the evidence. Rather, those facts suggest that Hassan would be likely to act precisely as the direct evidence establishes that he did act. He was open to a possible deal, participated in investigating and pursuing it, and declined to proceed when the prospects were not as favorable as he had hoped – all while making sure that his ownership and interest in his company and his property were protected. An

inference that he would have blithely granted Theophile authority to dispose of Little Mason's property would be entirely unnatural under these circumstances.

Moreover, if Hassan had been aware of, and had approved of the Theophile Loans, why would it have been necessary for Theophile to create a fraudulent document to prove his authority. If Hassan intended for the properties to be transferred to ECRG, why did he not sign the deeds himself, or simply appoint Theophile as the Company's agent with appropriate credentials?

If Hassan knew about the Theophile Loans and the fact that Subject Properties were owned and mortgaged by ECRG as a result, why would he have agreed to list the properties for sale by Little Mason after those loans had closed, which the evidence (beyond his own testimony) establishes he did? The evidence (beyond his own testimony) also establishes that immediately upon discovering that Theophile had fraudulently transferred the titles Hassan immediately called his attorney, and that upon their discovery of the Theophile Loans, they immediately confronted the title agent and Theophile himself. After being confronted, Theophile admitted that he had not told Hassan about the transactions. All of these facts are established by clear and unchallenged evidence independent of (but supporting) Hassan's testimony. All of these facts are directly and conclusively contrary to an inference (meaning a conclusion is

not itself established in the evidence by which that flows naturally from the proven facts), that Hassan knew of and approved of the Theophile Loans.

The only natural inference from the circumstances established by the evidence is the same conclusion that is so apparent in the direct evidence. Theophile simply forged a document appearing to establish his ownership of the Subject Properties and took out millions of dollars of loans on those properties, on which he immediately defaulted, pocketing the money. That conclusion is manifest in both the evidence and the circumstances, in contrast to the trial court's decision, which cannot be reconciled with either.

E. Credibility

When acting as finders of fact, trial judges clearly have a duty to judge witness credibility, including by applying their own subjective impressions as may be required, and those subjective impressions are properly afforded substantial deference on review. However, a trial judge's subjective perception as to witness credibility is not immune from testing against the overall record of evidence. See, State v. Avena, 281 N.J. Super. 327, 340 (App. Div. 1995) ("The role of an appellate court on review is to determine whether the trial judge's inferences were rationally based on evidence in the record.")

This is not a "he said/he said" case where the primary evidence is conflicting accounts of the material facts by the opposing party witnesses. The

other evidence before the Court, along with the testimony of other witnesses, provides a comprehensive record of the material events in this case that stands independently of the parties' testimony. In fact, the testimony of the two principal witnesses, Hassan and Theophile, tells the same story for the most part. They differ materially only as to whether Theophile had authority to execute deeds on behalf of Little Mason and did so with Hassan's knowledge and approval, and on those questions, as discussed above, the independent documentary and testimonial evidence is more than sufficient to direct a finding on those questions without any input from the principal parties at all.

Even if the testimony of Hassan and Theophile were to be considered necessary to make the necessary factual determinations, that same evidence establishes that Hassan's testimony is objectively more credible. His recounting of the events and of his understanding of them as they occurred is entirely consistent with the extensive documentary evidence and witness testimony and is supported by the overall logic of the circumstances. Theophile's testimony, in contrast, at least inasmuch as it conflicts with Hassan's, is uniformly and explicitly contradicted by all of the other available evidence, and flies in the face of reason.

In this case, the judge's subjective perception that Hassan was a less credible witness than Theophile is insufficient to overcome the weight of the

objective evidence on the dispositive factual issues. In supporting his conclusion as to credibility, the issues to which the judge referred are not with differences between his testimony and the evidence on those critical questions, but rather on matters that have little or no bearing on them.

For example, the judge clearly found Theophile not credible on the single most critical factual question of the case and dismissed his obviously false testimony as a basis for his findings. In reviewing Theophile's testimony as to credibility, the judge made no reference at all to the Theophile Version, which was Theophile's explanation of how he came by the authority to execute deeds on behalf of Little Mason. That explanation is facially unbelievable, and the Judge clearly did not find it credible because in making the finding that Theophile did have authority to execute the deeds the judge relied instead on a different, entirely unevicenced agreement, that the judge imposed by inference.

Nor in assessing Theophile's credibility did the judge make any reference to the fact that there was never any dispute as to whether Theophile himself had committed fraud in obtaining the Theophile Loans. Theophile used the Faked LLC agreement to claim ownership of Little Mason, which allowed him to purportedly transfer title to himself and drain the cash from the properties. His suggestion that Hassan was involved in those transactions is belied not only by the utter lack of any evidence whatsoever linking Hassan to them, but by the

obvious fact that if Hassan and known and approved of the transactions, he could simply have provided appropriate documentation of that approval and the delegation to Theophile of appropriate authority.

Further, if the transactions had been intended to be legitimate, as Theophile claimed, Theophile could simply have used the proceeds of the loans to service the mortgages and protect the mortgaged value of the properties. Instead, because he himself had no interest in the properties, he simply kept the cash and left the Lenders to foreclose.

Another example of Theophile's obvious and material dishonesty is his repeated insistence that Hassan was desperate to make some kind of deal because he was buried by liens or other encumbrances. (7T 91:23-98:10.) As discussed above, that assertion is flatly contradicted by the substantial net value of Hassan's assets, his ability to get financing on his own, and his routine management of various liens on his properties, all of which are established by substantial, independent direct evidence. In making that claim, though, Theophile apparently hoped the court would overlook the fact that those very same liens were no impediment at all to his taking out loans against those very same properties. Rather, those liens were satisfied with a portion of the proceeds of the financing, not only with the approval of the lenders, but as a condition of

making the loans, just as they would have been had Hassan himself taken the financing.

F. Summary

In the Trial Decision, the judge invoked the equitable maxim that “Equity regards as done what ought to be done.” (Pa508.) His reference to this principle suggests that he had a clear perception of what “ought to be done” and resolved the case according to that perception. The disparity between that resolution and the overwhelming weight of the evidence, though, suggests that his review of the evidence was driven by that perception, rather than that his perception flowed from the evidence.

Neither the direct evidence nor the overall circumstances provides a basis on which to conclude that Hassan simply handed half of the value of his family’s business to Theophile and along with the authority to dispose of its assets. On the contrary, the evidence conclusively establishes that throughout their activities, Hassan exercised control over whether or not he and Little Mason would accept any proposed financing, or enter into any arrangement with Theophile to enter into a joint venture involving Little Mason’s assets. Their clear and abundant communications throughout make it clear that Hassan was explicit on that point, and further, that Theophile understood that he had no such interest in or authority over Little Mason. That understanding is reflected in the

undisputed actions of the men throughout their involvement, as testified to by Theophile himself, in which Hassan was the one who made decisions as to any proposals or other questions involving Little Mason. In contrast, there is no evidence whatsoever (save testimony by Theophile that the court clearly discredited) that Hassan ever authorized Theophile to dispose of Hassan's properties or control Little Mason.

As for whether Hassan was aware of or approved of the transfer of title of his properties to Theophile and of the resulting mortgage loans that lined Theophile's pockets in cash and left Hassan holding the bag, nothing could be clearer than that Theophile entered into them without the knowledge, approval, or participation of Hassan. Those transactions were effected by clear and admitted fraud by Theophile. He created a forged document that appeared to show that he was the owner and founder of Little Mason. As testified to by title agent who approved the transactions, that document was the basis on which he accepted the authority of Theophile to act for Little Mason. The title agent had no knowledge of any of the joint activities of Hassan and Theophile prior to approving those transactions, and never had any contact of any kind with Hassan. As far as the title agent was concerned, Theophile was the documented 99% owner of Little Mason as established by the Fake LLC Agreement, and was therefore free to do what he pleased with its assets.

During the period over which the Theophile Loans were closed, the two men maintained their copious recorded communications. As regards all of the prior lending proposals obtained with Theophile's assistance, each of them was the subject of substantial correspondence between Theophile, Hassan, and others, and all of them included detailed, written proposals that were exchanged by email, and rejected by Hassan. In contrast, in the period in which Theophile was closing the Theophile loans, he and Hassan maintained that extensive communication with each other, as recorded in ongoing texts, voicemails, and emails, but in all of those communications there is not a single instance in which they make any reference whatsoever to the Theophile Loan transactions. No proposals, no discussion of terms, no negotiation, no agreement, no closing requirements or closing dates, and, most glaringly, no discussion of the money that Theophile was depositing into his bank account. It is effectively impossible that these two men, who initially had a common goal of finding financing on Hassan's properties, would, after 9 months of effort, achieve that goal and raise millions of dollars in cash, but never mention anything about it to each other in their thousands of document communications while that money was flowing into the bank accounts of only one of them.

There is no evidence to support Theophile's claim that Hassan and Little Mason were in desperate financial straits and could only recover with

Theophile's support. To the contrary, the independent, documented evidence establishes not only that Little Mason's assets were worth many times more than its obligations, but that Hassan could raise cash either by obtaining financing without Theophile's assistance, or by selling some of those assets.

The circumstances do not support an inference that Hassan was involved in the Theophile Loans. If Hassan had been involved, there would have been no need to commit fraud to obtain financing. Hassan could have simply executed appropriate documents either directly or in a transaction creating a joint venture with Theophile. Any such joint venture would have required substantial investment by Theophile, though, and no consideration for the value transferred to him pursuant to the judge's imposed agreement was ever identified or discussed in the evidence or in the Trial Decision.

Again, there is no question that when sitting as trier of fact, a judge's own, subjective impressions are an expected and appropriate part of the court's decision-making process. They are not an alternative to the weight of the evidence, though, but rather are constrained by it. In this case, the evidence

In this case, the trial court's critical findings – that Hassan had ceded ownership and authority over Little Mason to Theophile and that Hassan knew of and approved of the Theophile Loans – are manifestly unsupported by the evidence. There is no direct evidence to support either conclusion, and the

circumstances do not give rise to an inference in their favor. The judge's perception of what "ought to be done" is manifestly unsupported by the record and his validation of the Subject Deeds by which Theophile transferred title to the Subject Properties to himself should be reversed.

**POINT III. THE COURT ERRED BY PERMITTING COUNSEL FOR
THE LENDERS TO TREAT THEOPHILE AS A
HOSTILE WITNESS (5T 7:4-9:9)**

The central question of this case was whether or not Theophile had the authority to transfer title to the Subject Properties to himself. The primary interest of both the Lenders and Theophile was to establish that he did have such authority. Absent that authority, Theophile would be personally responsible for repayment of the loans but could not rely on the value of the Subject Properties to offset the debt, and the Lenders would be unlikely to recover their losses from Theophile himself.

When Plaintiffs called Theophile for direct examination in presenting their case, the judge acknowledged the adversity of Theophile's interests to Plaintiffs' and permitted Plaintiffs to use leading questions on that basis. (5T 7:4-9:9.) While the Lenders' examination of Theophile followed that direct examination, Plaintiffs objected to permitting them to conduct that examination using leading questions, as if he were an adverse witness. (*Id.*; 5T 29:17-32:14.) All counsel and the judge had acknowledged that in the interest of efficiency,

Mr. Theophile would not be called separately in the presentation of Plaintiffs' and defendants' respective cases, and that his examination by the Lenders would encompass their direct examination of him. . (5T 7:4-9:9.) The Court overruled that objection. (Id.)

New Jersey Rule of Evidence 611 provides that ordinarily, leading questions should be permitted on cross-examination. See, N.J.R.E 611(c). However, the rule also recognizes that actual antagonism is the cornerstone of the presumption in favor of permitting leading questions on cross-examination, by providing that leading questions may be permitted even on direct examination if the witness is clearly adverse to the examining party. See, id. Accordingly, given the emphasis of the rule, and the fact that the preference for leading questions on cross-examination is presumptive, but not mandatory, the mere fact that an examination is technically a "cross-examination" does not ensure a party's right to use leading questions. See, State v. Mance, 300 N.J. Super. 37, 62 (App. Div., 1997) (upholding a trial court's denial of the right to use leading questions in the cross-examination of a witness called by a co-defendant).

There is no question as to the mutual interests of Theophile and the Lenders in upholding the validity of the Subject Deeds. The Lenders' argued that Theophile was a hostile witness because they had claims against him as well. While it is true that the Lenders had claims against Theophile based on his

default on the Theophile loans, the elements required for them to establish those claims were admitted to by Theophile. (Pa3422-3439.) In those stipulations Theophile accepted responsibility for repayment of the Theophile Loans both on behalf of ECRG and on behalf of himself individually. There was therefore no adversity at trial between the Lenders and Theophile on any factual issue.

That ruling substantially prejudiced Plaintiffs because, as a result, counsel for the Lenders were able to suggest the answers necessary to establish the defenses to Plaintiffs' claims that were common to both them and Theophile, an advantage Plaintiffs' did not have when examining Hassan. A comparison of Theophile's conduct during the examination conducted by the Lenders' counsel and that conducted by Plaintiffs' counsel stands as a stark demonstration of the effect of true adversity of interests in the examination of a witness. During the Lenders' examination, the testimony was more in the questions than in the answers. The Lenders assisted the presentation of Theophile's otherwise unsupported claims by guiding him through them. They did not contradict him, and he had no reason to push back against the answers suggested in their questions.

When genuinely challenged by the disparity between his story and the evidence, and by his own contradictory and plainly false testimony, though,

Theophile was openly quarrelsome and universally refused to provide clear responsive answers to the questions asked of him.

Theophile's entire body of trial testimony stands as evidence of this point and is relied on by Plaintiffs here, but they rely in this brief on the specific citations to that testimony made elsewhere for specific illustrations of the point. No reference to any part of Theophile's trial testimony can fail to capture the advantage enjoyed by the Lenders in eliciting testimony from him.

That advantage is correspondingly magnified by the particular focus of the trial court on its perception of the relative credibility of the testimony of Theophile and Hassan in reaching its decision. The Lenders' examination of Theophile was many times more lengthy and detailed than his brief examination by his own counsel. It therefore constituted the primary means by which both the Lenders and Theophile himself presented his testimony in defense of Hassan's claim to title to the properties. The judge experienced that testimony with the benefit of mutual purpose of Theophile and the Lenders shape both its substance and presentation. In every material aspect, in particular as to whether he had any ownership of or authority over Little Mason, and whether or not Hassan knew of an authorized the Theophile Loans, Theophile's testimony is entirely unsupported by the other evidence, and is completely contrary to the natural interpretation of the overall circumstances. Given that his testimony was

nonetheless seemed more credible than that of Hassan's, which was entirely supported by that evidence, that advantage must be considered as a factor that could have contributed to the judge's findings and this Court should reverse the trial court judgment on that basis in the interest of fairness and justice.

POINT IV. THE COURT ERRED BY NOT ENTERING A MONEY JUDGMENT AGAINST THEOPHILE ON THE BASIS OF ITS HOLDING THAT THEOPHILE WAS REPONSIBLE TO HASSAN FOR 50% OF THE PROCEEDS OF THE THOPHILE LOANS (Pa543)

In the Trial Decision, the court concluded that on the basis of its inferred agreement between Hassan and Theophile that provided the authority by which Theophile executed the Subject Deeds, pursuant to which each of them was considered to own 50% of Little Mason and the Subject Properties, Hassan was entitled to 50% of the proceeds of the Theophile Loans. In the event that this Court affirms the trial court's finding of such an inferred agreement, Plaintiffs argue that the trial court erred by failing to reduce its finding that Hassan was entitled to half of the loan proceeds to an enforceable money judgment in his favor against Theophile and ECRG.

The total proceeds of the Theophile Loans were \$3,415,250. Accordingly, Plaintiffs respectfully request that if this Court sustains the trial court's validation of the deeds transferring the Subject Properties to ECRG, it enter judgment against Theophile and ECRG and in favor of Hassan in the amount of

\$1,707,625 (50% of the proceeds), which Plaintiffs may have entered on the Civil Judgment and Order Docket pursuant to Rule 4:101-1 or direct the trial court to do so.

POINT V. THE STANDARD OF REVIEW FOR DECISIONS ON SUMMARY JUDGMENT

In reviewing the grant or denial of summary judgment, the standard of review is de novo. See, Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199, (2016). The reviewing court “must review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law. Bhagat v. Bhagat, 217 N.J. 22, 38 (2014).

A motion for summary judgment must be denied when a review of the evidence presented demonstrates that there is a “genuine issue” as to any material fact challenged or when the moving party cannot demonstrate that it is entitled to judgment as a matter of law on the undisputed facts. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 535 (1995). To determine whether a genuine issue of material fact exists, the court must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving

party.” Brill, supra, at 540. The court’s function is not to weigh the evidence or to decide the matter, but rather, to simply determine if there is a genuine issue for trial. Id.

In determining whether there is sufficient evidence to create a genuine issue of material fact, “the court must accept as true all the evidence which supports the position of the party defending against the motion and must accord him the benefit of all reasonable inferences which can be deduced therefrom, and if reasonable minds could differ, the motion must be denied.” Id. at 535.

A motion for summary judgment should be denied when determination of material disputed facts depends primarily on credibility evaluations or when the existence of a genuine issue of material fact appears from the discovery materials or from the pleadings and affidavits on the motion. Parks v. Rogers, 176 N.J. 491, 502 (2003); Gilborges v. Wallace, 153 N.J. Super. 121 (App. Div. 1977), aff’d in part and rev’d in part, 78 N.J. 342 (1978). Nonetheless, that rule is not sufficient to permit parties to defend summary judgment based on their own testimony alone, when that testimony is contradicted by documentary or other evidence. For purposes of ruling on a motion for summary judgment, when opposing parties tell two different stories, one of which is blatantly contradicted and discredited by conclusive physical evidence so that no reasonable jury could believe it, the trial court should not adopt that version of the facts. Alfano v.

Schaud, 429 N.J. Super. 469, 475 (App.Div. 2013), certif. denied, 214 N.J. 119 (2013); see also, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512 (1984) (“Normally . . . discredited testimony is not considered a sufficient basis for drawing a contrary conclusion”).

POINT VI. THE TRIAL COURT’S GRANTS OF SUMMARY JUDGMENT ON THE NEGLIGENCE COUNTS IN FAVOR OF 1ST RATE, McCLOUD AND CTIC SHOULD BE OVERTURNED BECAUSE THE TRIAL COURT ERRED IN HOLDING THAT, AS A MATTER OF LAW, 1ST RATE CANNOT BE HELD LIABLE FOR DAMAGES TO PLAINTIFFS CAUSED BY ITS NEGLIGENCE, AND ALSO IN FINDING THAT THERE WAS NO FACTUAL ISSUE AS TO WHETHER 1ST RATE HAD MET THE APPLICABLE STANDARD OF CARE (Pa491-493)

In the Summary Judgment Decision, the trial court wrote the following regarding its decision to grant summary judgment to 1st Rate on the Negligence Counts

[A] title agent cannot be liable to a non-insured [party]. . . . The Court finds that Defendant Edward McCloud . . . complied with the applicable standard of care. For the foregoing reasons, Defendants 1st Rate Title and Settlement Services, LLC and Edward McCloud’s Motion for Summary Judgment is hereby **GRANTED** as against Plaintiffs.

(Pa492). That summary of the Court’s holding on the Negligence Counts concisely captures the Court’s errors. First, as a matter of law, it is not the case that a title agent who causes damages to a non-insured party cannot be held liable for those damages. While there is caselaw establishing that an insured

party damaged by a title agent or insurer's conduct is limited to contract remedies, there is no authority in statute or caselaw that provides that a damaged party who is not party to an insurance contract has no remedy whatsoever for damages caused by a title agent or insurer.

Second, the trial court also erred when it made the factual finding that 1st Rate complied with the applicable standard of care. Plaintiffs presented a large body of substantial and credible documentary evidence and a detailed report by a highly regarded expert in New Jersey title practice that demonstrates the several and substantial failures by McCloud to adhere to the clear standard of care that undisputable applied to his work. The quantity and quality of that evidence went far beyond what is necessary to create a genuine dispute of material fact.

A. RELEVANT FACTUAL BACKGROUND

1st Rate and McCloud performed the title examination necessary to issue title insurance necessary to close the Theophile Loans pursuant to a contract between them and their principal, CTIC. (Pa441-455.)

Joseph Grabas, among the most experienced and credentialed experts in title assurance in New Jersey, reviewed the documents that were relied on by 1st Rate in conducting its title examinations for the Theophile Loans, as well as other documents related to those transactions that were produced by 1st Rate and

Mr. McCloud's deposition testimony. Mr. Grabas issued a report indicating that 1st Rate had failed to adhere to the professional standards applicable to its work on the Theophile Loans in a number of distinct ways, including, but not limited to, failing to confirm the competency of Little Mason to transfer title, failing to notice obvious flaws in the documents presented by Theophile to assert his authority to act for Little Mason, and failure to notice numerous other indications in the title records that ECRG did not have good title to the Subject Properties. (Pa262-287.)

B. THERE IS NO LAW THAT IMMUNIZES A TITLE INSURANCE AGENT FROM LIABILITY FOR DAMAGES CAUSED BY ITS NEGLIGENCE WHEN IT IS NOT IN A CONTRACT WITH THE DAMAGED PARTY.

In its Summary Judgment Decision, the trial court did not identify the source of its legal conclusion that a title agent cannot be held liable for damages caused by its negligence when the damaged party is not insured. In fact, neither cases nor other authority supports that conclusion. Instead, New Jersey courts have clearly accepted that unless their liability is governed by a contract with the complaining party, title agents and their insurance carrier principals are no less subject to negligence or other relevant legal principles than are any other individuals or entities.

For example, in Smith v. Boyd, 272 N.J. Super. 186 (Law Div. 1993), which involved contract and negligence claims against an insurer by a party that did not have a contract with the insurer, the court applied standard negligence principles to resolve the negligence claim. In that case, plaintiff, who was not party to a contract with the defendant title insurer, purchased property at a foreclosure, relying in part on a title examination report prepared by the defendant that failed to identify an outstanding mortgage. Plaintiff filed contract and negligence claims against the title insurer. Smith, 272 N.J. Super., at 188-190. The court dismissed the contract claims on the basis that the plaintiff was not a party to the insurance contract under which the report had been prepared. In addressing the negligence claim against the insurer, however, the court did not recognize or apply a rule excluding the insurer from liability on the basis that plaintiff was not party to the contract, but applied standard negligence principles to reach its decision:

Plaintiff's claim of negligence depends upon both the existence of a duty and the breach of that duty. . . "The question of whether a duty exists is a matter of law properly decided by the court . . . The question of duty involves largely a matter of policy and fairness, 'a weighing of the relationship of the parties, the nature of the risk, . . . , the public interest in the solution,' . . . 'and all of the surrounding circumstances'" Johnson v. Usdin Louis Co., Inc., 248 N.J. Super. 525, 529, (App.Div.1991) (citations omitted).

As discussed above, the purchase of real estate essentially requires the purchaser to beware of the seller, to exercise such protections as are reasonably available to the purchaser. The seller is not obligated

by common law to advise a buyer of the state of title. As a matter of policy and fairness, plaintiff was obligated to seek his own protection. [The insurer's] having made a title report does not create a common law duty to plaintiff. That report was for the benefit of the foreclosing plaintiff; to ascertain the proper parties defendant and to give the appropriate information to the sheriff for the advertisement and the announcements at sale.

2 Harper & James, *Law of Torts*, § 18.6, at 1052 (1956), suggests various policy considerations in determining the existence of a duty, including: the burden that would be put on defendant's activity (here, no greater than that actually undertaken); the extent to which the risk is normally one incident to that activity (here, the activity *is* undertaken to determine the specific risk); the risk and burden to plaintiff; the respective availability and cost of insurance to the two parties (here the insurance was available to plaintiff and the cost would have been the same as that to the foreclosing mortgagee); the prevalence of insurance in fact (certainly available to plaintiff, even from Chicago); and the desirability and effectiveness of putting the pressure to insure on one rather than the other (here, caveat emptor). Under the circumstances, affording plaintiff the protection paid for by the foreclosing mortgagee without cost to plaintiff when it is likewise available to plaintiff would be unfair and unjust.

Id., at 196-97. Smith demonstrates that where the benefits and obligations of the parties is not defined by a contract between them, whether or not liability lies is subject to the standard application of other principles. In Smith, the court found that the defendant was not liable for negligence, but, as discussed below, did so on the basis of factors not present in this case.

In addition to the Smith case, there have been other cases in which the Appellate Division has considered claims made against title insurers and their agents by non-insured parties in which there is no reference to any rule

immunizing such defendants from non-contract claims. See, e.g., Thurber v. Thurber, 2017 N.J. Super. Unpub. LEXIS 106, 2017 WL 164480 (App. Div. 2017) (dismissing claims under an insurance policy on the basis that the plaintiff was not a party to the policy contract, but dismissing non-contract claims by that plaintiff on the basis of other principles); Cocco v. Hamilton, 2010 N.J. Super. Unpub. LEXIS 1047, 2010 WL 2011003 (App. Div., 2010) (holding that even in a case in which the plaintiff was an insured, there could still be a basis for a claim against a title agent on non-contractual grounds and upholding a such a claim – in that instance on the basis of a duty voluntarily undertaken by the defendant).⁴

Neither the trial court in its Summary Judgment Decision, nor defendants in their summary judgment briefing, identified any case in which New Jersey courts recognize a rule that insulates title agents and insurers from liability for any claims under any cause of action other than contract claims made by insured parties. In their summary judgment briefing, 1st Rate and CTIC relied heavily on Walker Rogge, Inc. v. Chelsea Title & Guaranty Co., 116 N.J. 517 (1989) and related cases in arguing that the law precludes holding them responsible.

⁴ Pursuant to R. 1:36-3, a copies of the unpublished opinions cited herein are submitted to the Court herewith at Pa4330-4349. The undersigned certifies that a diligent search revealed no opinions that contradict Plaintiffs' use of these cases.

However, the court in Walker-Rogge did not address claims by non-insured parties. Rather, that case and its progeny, the Court addresses the question of what remedies for wrongdoing by title agents and insurers are available specifically to those who are parties to contracts with them, and holds that as to claimants covered by contracts, those remedies are generally (but not completely) limited to the terms of those contracts. See, Walker Rogge, 116 N.J. at 535. The Walker-Rogge decision does not address claims by non-insured parties, and neither that nor any other New Jersey case establishes a rule that immunizes title agents and insurers from liability to such parties on the basis of non-contract claims.

B. UNDER THE FAMILIAR STANDARDS FOR RECOGNIZING THE EXISTENCE OF A DUTY OF REASONABLE CARE, 1ST RATE OWED A DUTY TO PLAINTIFFS.

The existence of a duty of care is predicated on the foreseeability of the harm complained of and imposed unless considerations of issues of fairness and public policy would make it inappropriate to do so:

The foreseeability of harm is a significant consideration in the determination of a duty to exercise reasonable care. The “[a]bility to foresee injury to a potential plaintiff does not in itself establish the existence of a duty, but it is a crucial element in determining whether imposition of a duty on an alleged tortfeasor is appropriate.” Carter Lincoln–Mercury, Inc. v. EMAR Group, Inc., 135 N.J. 182, 194 [1994] (citations omitted).

Once the foreseeability of an injured party is established, ... considerations of fairness and policy govern whether the imposition of a duty is warranted.” Id. at 194–95.

Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 573 (1996).

In the Smith case, the court found that the facts of that case did not give rise to a duty on the part of the insurer to the plaintiff because as a long-settled matter of law and practice, a buyer of property such as the plaintiff in that case is responsible for making its own assessment of title risks and taking its own action to mitigate them. Here, title to the Plaintiffs’ own properties was transferred under the auspices of a fraudulent document, and without Plaintiffs’ knowledge. Plaintiffs were not buyers, and they did not have any opportunity to mitigate the risk because they could not anticipate a transfer of title of which they were not aware.

As discussed below, applying those standards for recognizing a duty of care to the facts of this case leads to the clear conclusion that the law does recognize a duty of care owed by 1st Rate to Plaintiffs. The harm suffered by Plaintiffs was both generally and specifically foreseeable, and no consideration of fairness or public policy suggests any reason not to recognize a duty to take reasonable steps to reduce the risk of that harm. In fact, considerations of fairness and public policy both weigh heavily in favor of the recognition of that duty.

1. The harm to Plaintiffs that resulted from the Theophile Loans was foreseeable to 1st Rate.

As a general matter, it is a simple proposition that a title examiner can reasonably foresee that a failure to exercise ordinary care in the performance of its title examination can lead to an improper transaction that could result in substantial injury to a party with rights to the property. Moreover, while that proposition stands generally, it applies even more directly in this case, because 1st Rate had specific knowledge that established a risk of harm to Hassan and Little Mason because 1st Rate knew both that Hassan was involved in the ownership and management of Little Mason and its properties and that he had an individual financial interest in at least several of them.

It is undisputed that as part of its examination of the titles to the Subject Properties, 1st Rate was required to review recorded title documents, including documents that established that Hassan had purchased many of the properties for cash in his individual capacity before the formation of Little Mason, and then transferred those properties to Little Mason for no consideration upon its formation. Even the Faked LLC Agreement, on which 1st Rate relied in accepting Theophile's authority to execute the Subject Deeds, itself acknowledged that Hassan had an ownership interest in Little Mason. Moreover, 1st Rate knew that it was Hassan, rather than Theophile, who controlled access to the Subject Properties.

It was, therefore, both generally foreseeable that an improper transfer would injure owners and/or other parties holding rights in a property, and specifically foreseeable that Hassan and Little Mason would suffer harm from an improper transfer arising from improper transfers of the Subject Properties resulting from a failure by 1st Rate to exercise ordinary care in conducting the title examinations necessary for the Theophile Loans to proceed.

2. *Considerations of fairness and public policy warrant recognizing a duty of care in this case.*

When harm is foreseeable, the question of whether the law imposes a duty to avoid that harm is ultimately governed by considerations of fairness and public policy. See, *Carvalho*, 143 N.J. at 572. In applying those considerations, courts are called upon to conduct a fact-sensitive analysis that incorporates a number of factors including (1) the nature of the risk, (2) the ability to exercise care, (3) public policy considerations and (4) the relationship of the parties. See, *Estate of Desir ex rel. Estiverne v. Vertus*, 214 N.J. 303, 317 (2013), citing *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 438-39 (1993). Courts “should balance those factors in a ‘principled’ fashion, leading to a decision that both resolves the current case and allows the public to anticipate when liability will attach to certain conduct.” *G.A.-H v. K.G.G.*, 238 N.J. 401, 439 (2019), citing *Hopkins*, 132 N.J. at 439 (1993). Here, all of those factors suggest that 1st Rate

had a duty to use reasonable care in examining the soundness of ECRG's claim to the titles at issue in the Theophile Loans.

a. The nature of the risk is substantial.

The nature of the risk of failure by a title examiner to exercise ordinary care is vividly demonstrated by this case, in which Plaintiffs were fraudulently stripped of title to 18 properties worth millions of dollars, and years' worth of the income that they generated, all of which damages could have been prevented had 1st Rate exercised ordinary care. Moreover, the risk of such catastrophic losses is shared by every property owner who relies on the system of publicly recording documents affecting title to real property and examining those documents prior to transactions involving such property. Real property is the most valuable asset most individuals will ever own and represents financial security for nearly everyone who owns it. Negligence in the application of the system that secures that ownership poses a risk of devastating loss to an immense segment of the public, and that system deserves all the reasonable protection the law can offer it.

b. 1st Rate could have prevented the harm in this instance merely by adhering to clear professional standards already applicable to their work under professional consensus, statute, and its own agency agreement, so recognizing a duty in this case would not be unduly burdensome.

In response to 1st Rate's and CTIC's motions for summary judgment, Plaintiffs offered detailed expert evidence regarding the professional standards applicable to 1st Rate's determinations of insurability of title and whether 1st Rate adhered to them. 1st Rate acknowledged the applicability of those standards both in testimony and in its agency agreement with CTIC. Plaintiffs' expert, Joseph Grabas, reviewed the work performed by 1st Rate relative to those standards by examining 1st Rate's documentation and processes, with direct reference to the governing standards. Based on that review, he concluded that 1st Rate's performance fell substantially short of meeting those standards, and that had 1st Rate adhered to those standards, it would have discovered that ECRG's claim to ownership of the Subject Properties was unsound.

Among other things, adherence to professional standards would have established that one of the Subject Properties was subject to a mortgage in Hassan's name, an inquiry into which would immediately have revealed the fraud to Hassan. He also concluded that a brief and routine online inquiry as to the status of Little Mason's registration in its home state of Delaware, which 1st Rate failed to conduct, would also have required further action that would have exposed Theophile's fraud. Mr. Grabas's report contains those and numerous other examples of how 1st Rate failed to exercise due care.

More generally, any title examiner in 1st Rate's position is, and should be, expected to conform its behavior to the accepted minimum standards of its profession. In fact, such conformance of behavior is more than just a reasonable expectation. Rather, it is the explicit intended result of statutes applicable to 1st Rate and its work, which impose a licensing requirement on title professionals and require that they undertake reasonable measures to ensure the accuracy of their determinations as to the insurability of titles involved in property transactions. (See, N.J.S.A. § 17:22A-29 (requiring licensure); N.J.S.A. § 17:46B-9 (requiring a determination of insurability to be based on a "reasonable examination of the title" according to "sound underwriting practices"); see also, N.J.A.C. Chapters 17A – 17D, (imposing standards of conduct on licensed insurance agents.) The establishment by the title industry of the professional standards applicable to such determinations is the realization and application of the statutory requirement for such reasonable measures, and the profession's definition of "sound underwriting practices".

Accordingly, a duty that title agents exercise ordinary care is already imposed on title agents by law, by their profession, and by their contracts with issuers. Therefore, the recognition of that duty in this context does not amount to any additional burden on their work, much less one that is undue.

c. Public Policy considerations support the imposition of a duty in this case.

That there is already a clearly established public policy interest in ensuring reasonable care in conducting title examinations is evident in the applicable statutory and regulatory provisions identified above. That policy reflects the recognized function of title examiners within the system on which the public relies to ensure the security of real property ownership. That system functions by the structured maintenance of publicly available records and the implementation of reasonable safeguards against mistake and fraud in keeping those records and in transferring property. Among those safeguards are legislative regulation of the work of title examiners, and the development of professional standards that set a baseline for reasonable procedures. As this case demonstrates, those measures serve a critical role in mitigating risk posed by fraud and carelessness in its operation, not only to property owners, but to far more parties than only those who directly contract with title agents and insurers in the course of specific transactions. Those others relying on their work include every party affected by transfers of real property, including at least lenders, taxing municipalities, surrounding property owners, and courts.

Failure of licensed title examiners to exercise ordinary care raises a risk of substantial harm broad categories of parties who own real property, or who have an interest in transactions in real property, including those who are not

specifically covered by a title insurance contract. There is already clear recognition and acceptance that public policy favors mitigating that risk, and it is entirely in keeping with that policy to recognize a duty of reasonable care on the part of title examiners to any party who would foreseeably suffer harm from a breach of that duty.

d. Fairness in general, including the relative roles of the parties, strongly favors recognition of a duty.

Reviewing the relationship between the parties is part of the fairness element in determining the existence of a duty or care. The inquiry is “whether in light of the actual relationship between the parties under all of the surrounding circumstances, the imposition ... of a general duty to exercise reasonable care in preventing foreseeable harm ... is fair and just.” Hopkins, 132 N.J. at 438. As discussed above, the nature of the system for public recognition of rights in real property establishes that the professionals who contribute to the operation of that system have a relationship both to the public in general, because the system plays an important public function, and also to each of the diverse parties who have stakes in individual transactions in real property.

In this case, Plaintiffs counted on that system and its proper functioning to recognize its rights in the Subject Properties, as does any property owner, and if the title examinations undertaken by 1st Rate had been performed with

reasonable care, the system would have been effective. Accordingly, although Plaintiffs themselves and 1st Rate were not in contractual privity and did not directly interact with each other in the course of the Theophile Loans, their relationship was real, and significant.

As to fairness generally, recognizing that title examiners are not exempt from the ordinary strictures of negligence law is hardly unfair in principle, nor would it be in its application. The duty of title agents to adhere to standards of reasonable care in performing title examinations already exists in the statutory, industry-recognized, and contractual requirements that are imposed on them. In contrast, excluding non-contractual parties from the protection of that duty would serve only to advance the interests of title examiners who breach the duty, by relieving them of responsibility for the damages they cause by that breach.

It is self-evident that neither title examiners, nor the insurers who are their principals, can or should be guarantors of perfect title, but recognizing that they owe a duty of reasonable care to parties beyond their contractual partners is a far cry from imposing on them liability for every title issue that emerges in the wake of an insured transaction. To the contrary, reinforcement of that duty of reasonable care would serve both to reduce the likelihood that such title problems may occur and provide a safe harbor for the title professionals involved in the transaction. The professional standards of care are clear, broadly

accepted, do not impose unrealistic expectations on the licensed title examiners to whom they apply, and Adherence to them would protect title examiners from unwarranted liability.

Finally, as a further consideration in assessing the fairness of recognizing their duty of care, it must be recognized that, like other professionals subject to being held to recognized standards of reasonable care, title examiners may protect themselves by the purchase of insurance for the errors and omissions that inevitably occur despite their best intentions. Such insurance is readily available to title professionals and is a regular requirement in the contracts between title insurers and their agents.⁵ The ability to insure against a loss is a factor appropriately considered in assessing the existence of a duty of care. See, Smith, supra, 272 N.J. Super. at 196-97.

Given the degree and breadth of risk of potential harm that can occur if a title examiner does not exercise ordinary care, the manageable burden on title examiners of exercising such care, and the ability for them to protect themselves against in the event they are held liable for a failure to do so, it cannot be considered unfair to recognize their duty to do so under the law. What the recognition in this context of a general duty of reasonable care would

⁵ 1st Rate maintained such a policy, as required pursuant to the terms of the Agency Agreement with CTIC. (Pa441-455)

accomplish is the same policy goal it accomplishes in the myriad other contexts in which it is applied without controversy, i.e., it drives the exercise of reasonable precautions against known risks of harm and provides relief to injured parties when they suffer harm that might reasonably have been prevented.

C. THE TRIAL COURT ERRED IN FINDING THAT 1ST RATE HAD MET THE APPLICABLE STANDARD OF CARE BECAUSE PLAINTIFFS PRODUCED EVIDENCE MORE THAN SUFFICIENT TO PERMIT A RATIONAL TRIER OF FACT TO FIND THAT IT DID NOT.

Plaintiff's expert witness as to title practice, Mr. Grabas, is an eminent leader in the title industry in New Jersey. His report details his extensive review of the work of 1st Rate in examining the titles and making determinations of insurability for each of the Theophile Loans. Mr. Grabas's review of the work performed on the Theophile Loans was based on the title files produced by 1st Rate itself and on Edward McCloud's deposition testimony. That review led to the conclusion Mr. Grabas arrives at in his report, which is that 1st Rate's work fell substantially short of the applicable professional standards, which are set forth in New Jersey Title Practice, by Lawrence J. Fineberg, published by the New Jersey Land Title Institute. There is no question as to the applicability of those standards because they are incorporated into the agreement with CTIC pursuant to which 1st Rate issued title insurance for the Theophile Loans. Mr. Grabas's conclusions as to 1st Rate's failure to adhere to those standards are

explained in detail and with copious reference to the relevant documents and to the testimony of Mr. McCloud at his deposition. (Pa262-287.)

That detailed and extensive evidence, presented by a highly qualified expert, is more than sufficient to support a finding by a rational trier of fact that 1st Rate failed to meet the standard of care applicable to its work. The trial court's apparent finding that there was no genuine dispute on that question was therefore improper under the standard for awarding summary judgment pursuant to R. 4:46 and cannot serve as the basis for an award of summary judgment in favor of 1st Rate.

D. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT TO CTIC ON THE NEGLIGENCE COUNT WAS ERROR BECAUSE PLAINTIFFS PRESENTED EVIDENCE SUFFICIENT TO ESTABLISH THAT 1ST RATE WAS THE AGENT OF CTIC AND WAS ACTING WITHIN THE SCOPE OF THAT AGENCY WHEN IT MADE DETERMINATIONS AS TO THE INSURABILITY OF THE TITLES IN EACH OF THE THEOPHILE LOANS.

In the Complaint, Plaintiffs' alleged that CTIC is liable for the wrongdoing of 1st Rate because 1st Rate was an agent of CTIC, and the actions complained of were taken within the scope of that agency. See, McAndrew v. Mularchuk, 33 N.J. 172, 190 (1960) (principals are liable for the wrongdoing when committed by their agents acting within the scope of their agency). In the Decision, the trial

court wrote the following regarding granting CTIC's motion for summary judgment:

The Court finds that a title insurer cannot be held liable to a non-insured based on an agency theory. . . The Court finds that there is not sufficient evidence to support Plaintiffs' claims against Defendant Chicago Title Insurance Company.

(Pa491).

In arriving at its conclusion, the trial court appeared to rely on the same error of law it applied in granting summary judgment to 1st Rate, incorrectly stating a general rule that there can be no liability of title agents and insurers to parties with whom they are not in contract. As discussed above, there is no such rule, nor is there any principle of agency law that would apply to insulate CTIC from liability for the wrongdoing of its agent 1st Rate in this matter. The application of agency principles here is clear: CTIC is liable for the wrongdoing of 1st Rate because that wrongdoing occurred when 1st Rate was acting within the scope of its agency for CTIC, as defined in the written contract governing their relationship. (Pa441-455.)

The evidence that establishes that 1st Rate was acting within the scope of its agency for CTIC when it performed the title examinations and made the insurability determinations for the Theophile Loans is clear and undisputed. Both CTIC and 1st Rate acknowledge that they entered into an agency agreement that was in place at all times relevant to Plaintiffs' claims, pursuant to which

they agreed that 1st Rate was appointed by Chicago Title's as its agent in the "issuing of title insurance commitments, policies, endorsements and other title assurances." (Pa441.) The scope of 1st Rate's duties as Chicago Title's agent are set forth in detail in the Agency Agreement, and generally include all activities that are necessary to achieve those purposes, including, among other things, obtaining and examining the publicly recorded title records. (Pa441-455.) In fact, in its answers to Plaintiffs' interrogatories, 1st Rate specifically admitted that it acted as CTIC's agent in the work it performed for the Theophile Loans. Accordingly, the trial court erred as a matter of law when it granted summary judgment to CTIC on the basis that there is no principle of agency under which it could be held liable for 1st Rate's actions.

POINT VII. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE LENDERS ON PLAINTIFFS' COUNT FOR EJECTMENT UNDER N.J.S.A. § 2A:35-2 BECAUSE IT INCORRECTLY INTERPRETED THE STATUTE TO LIMIT RELIEF TO CASES IN WHICH THE DEFENDANT IS IN PHYSICAL POSSESSION OF THE DISPUTED PROPERTY (Pa491)

In Count 2 of the Complaint (the "Ejectment Count"), Plaintiffs seek money damages against the Lenders pursuant to the ejectment statute, N.J.S.A. § 2A:35-1, et seq., for damages they suffered as a result of having been excluded from the Subject Properties on the basis of the Lenders assertions of claims to

the right to possess those properties pursuant to the mortgages issued granted by Theophile in the Theophile Loans. The first two sections of the statute provide as follows:

N.J.S.A. § 2A:35-1: Any person claiming the right of possession of real property in the possession of another, or claiming title to such real property, shall be entitled to have his rights determined in an action in the Superior Court.

N.J.S.A. § 2A:35-2: In any such action, the plaintiff shall be entitled to recover from the defendant any and all incidental damages, including mesne profits, and the full value of the use and occupation of the premises for the time, not exceeding 6 years, before the commencement of the action, during which the defendant was in possession thereof.

Plaintiffs allege in the Ejectment Count that they are the legal and equitable owners of all rights in the Subject Properties, and that they have been excluded from possession of those properties on the basis of rights asserted by the Lenders, purportedly arising from the mortgages executed by Theophile for ECRG, and rights afforded them by foreclosure judgments on those mortgages.

In the Decision, the trial court wrote the following in granting summary judgment in favor of the Lenders on the Ejectment Count:

N.J.S.A. § 2A:35-2 is about those in physical possession of property. N.J.S.A. § 2A:35-2 requires that a defendant have been in possession of property as a prerequisite to recovery. The filing of a foreclosure action does not amount to possession of a property. Plaintiffs' claim for monetary damages under N.J.S.A. § 2A:35-2 is

hereby dismissed. For the foregoing reasons, [the Lenders']⁶ Motion for Partial Summary Judgment is hereby **GRANTED**.

(Pa491-492.) That trial court was incorrect as a matter of law when it held that the reference to possession in the ejectment statute establishes that a defendant may only be held liable under the statute if it is in physical possession of the property in question. The text of the statute does not specify the nature of the “possession” required, and the history, purpose and of the statute, along with authoritative cases interpreting it, all unequivocally establish that physical possession of the property is not a necessary element of liability. Rather, when it becomes an issue in ejectment cases, the question of possession is whether the plaintiff has been excluded from the property as the result of the assertion of an adverse possessory claim by the defendant. Those elements are met in this case.

The ejectment statute is the statutory replacement for the common law ejectment cause of action:

There can be no doubt that N.J.S.A. 2A:35-1, . . . is intended to allow a remedy to one who claims title to property in the possession of another. The statute replaces the common law action of ejectment, which generally was maintained against a defendant in possession of the property in question

⁶ The motion for summary judgment against Plaintiffs on the Ejectment Count was filed by one of the Lenders, defendant JEST Holdings LLC, and subsequently joined by all other Lenders.

Marder v. Realty Const. Co., 84 N.J. Super. 313, 320 (App. Div., 1964). In ejectment cases, the requirement that the property be in the possession of another party is applied, though, not by examining the specific nature of the possession by the defendant, but rather by its possession relative to the plaintiff's. The critical aspect is not any particular form of possession of the property, but rather that the plaintiff was excluded from the property on the basis of the defendant's assertion of a possessory right. Accordingly, for example, as the Marder court explained, ejectment will lie against a defendant claiming title to lands even when those lands are unoccupied, i.e., not physically possessed by anyone:

‘Possession’ in this sense may aptly be described as occupancy of land with the intent to control it or, in cases where the land is vacant, the right as against all persons to immediate occupancy thereof.

Marder, 84 N.J. Super. at 321 (emphasis added). That characterization was consistent with the Supreme Court's formulation in Perlstein v. Pierce, 12 N.J. 198, 204 (1953), in which the court held that “ejectment will lie against one out of possession claiming title when the lands are vacant and unoccupied.” Although the land in question here is not vacant, it is, like such land, in absolute possession of neither the plaintiff nor the defendant, although both claim the right to possession.

The focus in an ejectment action on the dispossession of the plaintiff on the basis of rights asserted by the defendant is also evident in cases that discuss

the differences between quiet title actions and ejectment actions. Because of the availability of money damages in ejectment, but not in quiet title, such discussions were germane to identifying proper venue when courts of law and equity were still formally separate. Traditionally, ejectment was a legal cause of action, while an action to quiet title was equitable in nature, and where a plaintiff asserting ownership of a property was in possession of the property at the commencement of the action, that plaintiff was limited to a quiet title action in a court of equity. Conversely, if the claiming party was not in possession, it could bring an action for ejectment in a court of law and seek money damages. Considering the distinction between the two causes of action in Perlstein, the Supreme Court reviewed the general rule on this question:

The rule is stated in Pomeroy, Equity Jurisprudence (5th ed.), sec. 1399, p. 1028, to be:

. . . a plaintiff out of possession, holding the legal title, will be left to his remedy by ejectment under ordinary circumstances. But where he is in possession, and thus unable to obtain any adequate legal relief, he may resort to equity. Where on the other hand, a party out of possession has an equitable title, or where he holds the legal title under circumstances that the law cannot furnish him full and complete relief, his resort to equity to have a cloud removed ought not to be questioned.

Id., at 202. Accordingly, a plaintiff out of possession of the subject property presumptively had a right to an ejectment action in a court of law, and under

many circumstances also had a right to proceed in equity. A plaintiff actually in possession of the property, in contrast, was limited to quiet title.

While the jurisdictional line between law and equity is no longer as absolute as it once was, the distinction between these two similar causes of action is still relevant on the issue of the right to a jury trial, where a jury trial is generally available for the formerly legal cause of action of ejectment but not for the equitable quiet title action. Modern cases discussing the distinction rely on particulars of the possession requirement to distinguish one from the other. For example, the Minnesota Court of Appeals, considering this question wrote that:

An ejectment action, in which the “*recovery of * * * specific real * * * property*” is sought, is an action at law to which the right to a jury trial applies. Rognrud v. Zubert, 282 Minn. [430,] at 434 . . . (emphasis added [in original]). On the other hand, where the plaintiff is in possession of the property and brings an action to determine an adverse claim to the property, the case is equitable and triable by the court. Johnson v. Peterson, 90 Minn. 503, 505–06, 97 N.W. 384, 384–85 (1903). . .

Appellants claim that their action is one for ejectment. But their pleadings do not allege that they have been ousted from possession of the property or that respondents are in possession. In fact, appellants allege that they are in actual possession of the property. Simply stated, appellants are not seeking “recovery” of the property.

Denman v. Gans, 607 N.W. 2d 788, 793 (Minn. Ct. App., 2000) (emphasis added except as indicated); see also, e.g., Siskos v. Britz, 790 A.2d 1000, 1007 (Pa.,

2002). (“When a plaintiff [files an action to quiet title], “[t]he existence of possession on the part of the [plaintiff] at the time of the institution of the proceeding is an essential jurisdictional fact” quoting Girard Trust Co. v. Dixon, 6 A.2d 813, 814 (Pa., 1939)); Rognrud v. Zubert, 282 N.W.2d 244, 247- (Minn. 1969) (ejectment is an action for the recovery of specific real property); Durrah v. Wright, 63 P.3d 184 (Wash. App., 2003), citing Denman, supra).

It is therefore clear that there is no strict requirement in the ejectment cause of action that a defendant be in physical possession of the property in dispute. Rather, the critical factor, as noted by New Jersey courts in Marden and Perlstein, is that the plaintiff has been dispossessed on the basis of adverse rights asserted by the defendant. As formulated by the Minnesota court in Denman, ejectment is intended to relieve the owner “seeking recovery of the property.” Denman, 607 N.W. at 793.

This is not only the established application of the law, but the logical one. Both the common law and statutory causes of action for ejectment provide for an award of money damages on the premise that a plaintiff has been improperly denied possession of the property and has suffered losses as a result. It would therefore be contrary to that underlying purpose of ejectment to interpret the law to deny money damages under circumstances in which the plaintiff’s dispossession has caused such damages, merely because the defendant itself has

not physically occupied the property while plaintiff was excluded from it based on the defendant's assertion of rights. Such has been explicitly recognized by the New Jersey courts in decisions holding that ejectment may lie when neither party is in direct possession and control of the property. See, e.g., Marder, 84 N.J. Super. at 321.

The trial court therefore erred in determining that a claim for damages under the ejectment statute will lie only when the defendant is in physical control of the property. For that reason, Plaintiffs' respectfully request that the Court reverse the order granting summary judgment on the Ejectment Count, and remand this issue for trial.

POINT VIII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE LENDERS ON THEIR CLAIM FOR EQUITABLE SUBROGATION BECAUSE THAT ISSUE DID NOT APPLY WHEN THE MOTION WAS DECIDED, AND THERE ARE GENUINE DISPUTES OF MATERIAL FACT AS TO WHETHER THE PLAINTIFFS WERE UNJUSTLY ENRICHED THAT WOULD PRECLUDE SUMMARY JUDGMENT REGARDLESS (Pa493)

The Lenders' counterclaim for equitable subrogation seeks liens against the Subject Properties for amounts paid from the proceeds of the Theophile Loans to satisfy pre-transaction liens against the properties. However, unless and until title is restored to Plaintiffs, there is no need for a lien against the

properties, because the Lenders' hold mortgages securing the full amount of their losses, and liens against the Subject Properties would not be effective to assign to Plaintiffs the responsibility for the original liens. Moreover, the purpose of the doctrine is the prevention of unjust enrichment, and given Plaintiffs' losses, even restoration of title to them free of those liens would not result in their enrichment, unjust or otherwise.

The Appellate Division reviewed the application of the doctrine of equitable subrogation in Investors Sav. Bank v. Keybank Nat'l Assn's, 424 N.J. Super. 439 (App. Div. 2012):

Under the doctrine of equitable subrogation, "a mortgagee who negligently accepts a mortgage without knowledge of intervening encumbrances will subrogate to a first mortgage with priority over the intervening encumbrances to the extent that the proceeds of the new mortgage are used to satisfy the old mortgage." Trus Joist Corp. v. Nat'l Union Fire Ins. Co., 190 N.J. Super. 168, 179 (App.Div.1983), rev'd on other grounds, 97 N.J. 22, 477 (1984). "In that situation, the new mortgagee by virtue of its subrogated status can enjoy the priority afforded the old mortgagee." First Union Nat'l Bank v. Nelkin, 354 N.J. Super. 557, 565 (App.Div.2002). "This result is reached so that the holders of the intervening encumbrances not be unjustly enriched at the expense of the new mortgagee." Trus Joist, supra, 190 N.J. Super. at 179. However, in this State the new mortgagee "is not entitled to subrogation, absent an agreement or formal assignment, if it possesses actual knowledge of the prior encumbrance." Nelkin, supra, 354 N.J. Super. at 565-66, 808 A.2d 856.

The prototypical situation in which a court will apply the doctrine of equitable subrogation is where a mortgage with priority over other liens on a property is refinanced by a new mortgage used to

pay off the outstanding balance on the old mortgage. As explained by a leading commentary in the field of real estate finance law:

By far the most important context in which subrogation arises with a refinancing mortgage occurs when there are intervening junior liens on the property, and the refinancing mortgagee asserts subrogation to gain priority over them. The basis for subrogation in this context is the lender's justified expectation of receiving security. . . .

[Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law, § 10.6, at 22-23, 25-26 (5th ed. 2007) (footnotes omitted).]

Investors Sav. Bank, 424 N.J. Super. at 444 (bracketed material in original, footnotes omitted).

The doctrine as typically applied is simply a recognition that, as an equitable matter, a lender refinancing a first-lien mortgage without knowledge of intervening encumbrances is awarded priority over the holders of those encumbrances, notwithstanding that its mortgage arose later in time. The mortgage replacing the original first-priority mortgage is placed in the same position as the original.

That is not the remedy sought by Lenders. They seek application of the doctrine to assert liens against the Subject Properties to recover their losses on default by a fraudulent borrower, on loans secured by fraudulent mortgages, which loans were obtained without knowledge of the actual title holder or benefit to him. The lenders request that application on the basis of the general purpose of the doctrine which is to protect against the unjust enrichment of a

party. Typically, where equitable subrogation applies, the unjustly enriched party is a secondary lien-holder mistakenly given priority over a later first-priority mortgagee. Here the Lenders argue that the doctrine must be enforced to avoid Plaintiffs' unjust enrichment. The Lenders argue that if title to the Subject Properties is restored to Plaintiffs, Plaintiffs will be unjustly enriched at their expense, because title would be restored to them clear of liens that were satisfied with the Loan Proceeds, and that they should be given liens against the Subject Properties with the same priority as the lienholders whose liens were satisfied with the proceeds of the Theophile Loans.

Inherent in the Lenders' position, though, is the recognition that unless and until title is restored to Plaintiffs, there can be no claim that Plaintiffs have been enriched at all, unjustly or otherwise, under the circumstances. To the contrary, absent the restoration of title, Plaintiffs will sustain losses in property value and damages of nearly \$7 million. Moreover, if title is not restored to Plaintiffs, the Lenders already hold first-priority mortgages against the properties for the full amount of their losses, and an additional lien would have no legal or practical effect. Accordingly, even the broader application of the doctrine suggested by the Lenders would not apply under the circumstances of this case, unless and until Plaintiffs have recovered their losses.

Furthermore, even were title to be restored to Plaintiffs, they would still be in a position of loss if they do not recover damages for the loss of use of the property for several years, because those damages are substantially greater than the value of the liens satisfied with the proceeds of the fraudulent loans.

Accordingly, the question of whether equitable subrogation should be applied under these circumstances is not only uncertain, because Plaintiffs are not in a position of being unjustly enriched, but unripe, because they presently hold no title against which liens in the Lenders' favor may be asserted. Therefore, the trial court's grant of summary judgment to the Lenders on their claim for relief under the doctrine of equitable subrogation was error both as a matter of law and because the predicate facts (title held by Plaintiffs, and unjust enrichment of Plaintiffs at the Lenders' expense) have not been established and can only be established by a trial on the evidence.

**POINT IX. THE TRIAL COURT ERRED IN GRANTING 1ST
RATE'S MOTION FOR SUMMARY JUDGMENT ON
THE INTENTIONAL TORTS BECAUSE PLAINTIFFS
PRESENTED EVIDENCE SUFFICIENT TO CREATE
GENUINE ISSUES OF MATERIAL FACT AND
BECAUSE EDWARD MCCLOUD IS SUBJECT TO
INDIVIDUAL LIABILITY BOTH FOR HIS OWN
ACTIONS AND AS THE OWNER AND OPERATOR
OF 1ST RATE TITLE AND SETTLEMENT SERVICES,
LLC (Pa492-493)**

A. PLAINTIFFS PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A FINDING IN THEIR FAVOR BY A RATIONAL TRIER OF FACT ON THE INTENTIONAL TORTS AND NEGLIGENCE COUNTS AGAINST 1ST RATE.

A determination of whether 1st Rate is liable under the Intentional Tort Counts turns on the question of whether the 1st Rate knew that Theophile was committing fraud and/or acted in concert with him. The resolution of that is entirely predicated on the credibility of the relevant witnesses, and for that reason, summary judgment cannot be granted. See, Parks v. Rogers, supra, 176 N.J. at 502; Gilborges, supra, 153 N.J. Super. at 131-32.

In this case, as discussed above, there is ample evidence on which a reasonable trier of fact could conclude that 1st Rate knew that Theophile's claim to authority over Little Mason was fraudulent. In more than one instance, Theophile's fraud was evident on the face of documents 1st Rate was required to examine in the course of its work on the Theophile Loans. 1st Rate earned substantial fees from serving as the title and closing agent for the Theophile Loans, and at least \$55,000 in additional funds are unaccounted for in 1st Rate's recordkeeping. (Pa705-727.)

While the evidence of 1st Rate's complicity in Theophile's fraud is circumstantial, that is often the case regarding allegations of intentional torts.

Accordingly, the trier of fact's finding as to the credibility of the accused and other witnesses is often dispositive on such counts, as would be the case here. McCloud's testimony during his deposition was often evasive and lacking in substance. (Pa232-240.) The report of Plaintiffs' title expert identified numerous instances in which the documents 1st Rate was required to review in making a determination as to the insurability of title for the Theophile Loans contained indications that Theophile's claim to title was unsound. (Pa262-287.) 1st Rate resisted discovery, failing to timely produce responsive documents repeatedly, resulting in delays in discovery, and almost certainly in the absence of evidence that should be before the Court. (Pa1.) One example is the final transaction ledgers for the Theophile Loans, detailing the final disposition of the proceeds of the Theophile Loans. (Pa705-727.) Those ledgers, containing information critical to all claims by all parties, were only produced when it served 1st Rate's purposes to do so, despite repeated requests for documents by Plaintiffs to which they were clearly responsive. Under the circumstances, a trier of fact could reasonably infer that 1st Rate has withheld other information, as well.

A trier of fact has ample evidence to support a conclusion that 1st Rate had knowledge of Theophile's fraud, was thereby complicit in that fraud, and is therefore liable under each of the Intentional Torts Counts. The means by which to test such evidence, and the inferences and conclusions that may be drawn

from it, is the evaluation at trial of the testimony and credibility of McCloud and other witnesses. Such evaluations are critical to the determination of a party's intentions when those parties are naturally disposed to deny culpability, and summary judgment should not be imposed where, as here, it precludes a plaintiff's opportunity to evince those evaluations. Therefore, the trial court erred in determining that there were no genuine issues of material fact as to 1st Rate's liability under the Intentional Torts Counts, and its grant of summary judgment was error.

B. MCCLOUD IS INDIVIDUALLY SUBJECT TO LIABILITY FOR HIS OWN ACTIONS AND INACTIONS, AND ALSO AS THE SOLE OWNER AND OPERATOR OF 1ST RATE TITLE AND SETTLEMENT SERVICES, LLC.

1st Rate's arguments concerning McCloud's personal liability are belied by the law and the evidence. As an initial matter, McCloud took individual responsibility for the conduct of the title examinations on the Theophile Loans when he signed the title commitments as the responsible licensed insurance producer. Accordingly, there is no need for Plaintiffs to invoke the doctrine of piercing the corporate veil or the participation theory to impose liability on him. However, even if they were required to do so, they could do so successfully.

While, ordinarily, courts will not assign liability for corporate actions to the owners of the corporation, the purpose of the doctrine of piercing the

corporate veil is to prevent a corporation from being used to defeat the ends of justice, and so the protection of the corporate veil does not apply where the entity is accused of fraudulent conduct, to accomplish a crime, or otherwise to evade the law. See, N.J. Dep't of Env. Prot. v. Ventron Corp., 94 N.J. 473, 500 A.2d 150 (1983), citing Lyon v. Barrett, 89 N.J. 294, 300 (1981), Telis v. Telis, 132 N.J.Eq. 25 (E. & A.1942), and Trachman v. Trugman, 117 N.J.Eq. 167, 170 (Ch.1934). As discussed above, there is sufficient evidence to support a conclusion by a rational trier of fact that the 1st Rate LLC is subject to liability under the Intentional Tort Counts, and therefore McCloud is also subject to personal liability for those counts as the sole principal of the entity, because they involve allegations of fraud and other intentional torts.

The participation theory of individual liability provides that an officer can be held personally liable for the acts of a corporation if the officer is sufficiently involved in the tortious conduct. See, Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 303 (2002). McCloud dismisses that theory as applying to make him liable on the basis that it is ordinarily applied only in instances involving intentional torts, and that even if it were applied as to negligence, it would fail because 1st Rate owed no duty to Plaintiffs. As to the first of those arguments, as noted, the evidence is sufficient to establish 1st Rate's liability for intentional torts. As to the second, 1st Rate did, in fact, owe a duty of reasonable care to Plaintiffs, as

indicated above and discussed in full in Plaintiffs' opposition to Chicago Title's motion for summary judgment.

Accordingly, McCloud may be held liable as an individual not only for his own personal conduct in this case, but because he is subject to liability under both the doctrine of piercing the corporate veil and the participation doctrine.

POINT X. THE TRIAL COURT ERRED IN GRANTING THE MOTION OF CLOSE NOW AND ANTHONY BARBER FOR SUMMARY JUDGMENT BECAUSE PLAINTIFFS PRESENTED EVIDENCE SUFFICIENT TO CREATE GENUINE ISSUES OF MATERIAL FACT AND BECAUSE ANTHONY BARBER IS SUBJECT TO INDIVIDUAL LIABILITY BOTH FOR HIS OWN ACTIONS AND AS THE OWNER AND OPERATOR OF CLOSE NOW, LLC (Pa490-491)

A. PLAINTIFFS PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A FINDING IN THEIR FAVOR BY A RATIONAL TRIER OF FACT ON THE INTENTIONAL TORTS COUNTS AGAINST CLOSE NOW AND BARBER.

In the Decision, the trial court held that there was insufficient evidence to create a genuine issue of material fact as to whether Close Now or its agent, Brad Spingarn, who brokered the loans for all of the Theophile Loans but for that involving the Hillside property, knew of and/or participated in the fraudulent actions that led to the Theophile Loans. The trial court commented on the general role of any mortgage broker but not on any of the evidence that establishes the actual actions and knowledge of Spingarn and Close Now in this

matter. (Pa490-491.) In fact, the evidence is more than sufficient to support a finding in Plaintiffs' favor on that question by a rational trier of fact. The evidence unequivocally demonstrates that Spingarn and Close Now knew that there were conflicting claims of ownership of the Subject Properties between Hassan and Theophile, and that they had a duty to act on that information.

Plaintiffs submitted documentary evidence establishing that Spingarn, Close Now's agent, was aware that the Subject Properties were owned and controlled by Hassan before he brokered the loans secured by those same properties for Theophile and ECRG. (Pa4350-4381.) Spingarn knew of, but made no attempt to reconcile, the competing claims of ownership of the Subject Properties, despite a contractual obligation to do so. (Pa260.)

In their answers to Plaintiffs' interrogatories, which were prepared by Barber and Spingarn and certified to by Barber, Close Now made the affirmative statement that Hassan had told Spingarn that Theophile was a member of Little Mason, Hassan's company, but Spingarn later admitted that was not true. (Pa220-231.) The story sworn to by Close Now in its response to Plaintiffs' interrogatories not only appears to have been an affirmative fabrication that was directly contradicted by Spingarn's testimony under examination, it appears to have been calculated to confirm defendants' unsubstantiated position that Hassan knew about and approved the Theophile Loans. (Id.)

There are other examples in the evidence of testimony by Close Now that strains credulity. Under the circumstances, a decision as to the liability of Close Now under the Intentional Torts Counts rests squarely on the finder of fact's assessment of its credibility, which must be made on the presentation of evidence at trial where the full issue of Close Now's role is at issue, which was not the case during the trial after the counts against them were dismissed. Accordingly, the trial court's grant of their motion for summary judgment should be reversed.

B. PLAINTIFFS PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A FINDING IN THEIR FAVOR BY A RATIONAL TRIER OF FACT ON THE INTENTIONAL TORTS COUNTS AGAINST CLOSE NOW AND BARBER.

As regards the Negligence Counts, even accepting all of Close Now's statements as true, summary judgment is precluded by disputes of material fact as to whether they breached their duty of care to Plaintiffs, causing damages. The existence of that duty is certain, given that the duty is acknowledged by Close Now in its agreements with Velocity, which governed its actions as to the Theophile Loans. (Pa257-261.) Once the existence of a duty is determined, whether that duty was breached, causing damages, is a question of fact for trial. See, Jerkins v Anderson, 191 NJ 285, 305 (2007). Accordingly, the trial court's decision to grant Close Now summary judgment on these counts was error.

C. ANTHONY BARBER IS SUBJECT TO INDIVIDUAL LIABILITY UNDER BOTH THE NEGLIGENCE COUNTS AND THE INTENTIONAL TORTS COUNTS BECAUSE HE TOOK PERSONAL RESPONSIBILITY FOR THE INFORMATION SUBMITTED TO VELOCITY IN SUPPORT OF THE THEOPHILE LOANS AND BECAUSE HE IS PERSONALLY LIABLE FOR FRAUDULENT CONDUCT BY CLOSE NOW.

The trial court granted summary judgment to Barber on the additional grounds that he was protected from personal liability on the basis of the New Jersey LLC Act. (Pa492-493.) For reasons similar to those discussed above in reference to the trial court's grant of summary judgment in favor of defendant Edward McCloud, the principal of 1st Rate, the court's decision as to Close Now's principal, Anthony Barber was also error. Barber is subject to liability both because he participated in the wrongdoing by executing agreements with Velocity, the lender in all but one of the Theophile Loans, and by accepting responsibility, on behalf of Close Now, for taking reasonable efforts to ensure the accuracy of loan applications. (Pa257-261.) Further, because the court's grant of summary judgment in favor of Close Now on the Intentional Torts counts was supported by sufficient evidence to require a trial, those counts should still stand against Barber, as well, pursuant to the fraud exception to the protection of the corporate veil.

CONCLUSION

The evidence in this case is complete. There is no reason to conduct a second trial that would only serve to elicit the same evidence on the questions that were tried. That evidence cannot possibly support a conclusion that Irfan Hassan, the founder and only member of Little Mason for its entire existence, ever granted Theophile any authority over Little Mason or its properties, much less authority to present a fraudulent operating statement for Little Mason to lenders and title companies and transfer its properties to himself.

The evidence in this case is capable of only one interpretation. Marc Theophile simply committed fraud, against Hassan, the Lenders, and the Title Agents. He benefited from that fraud by pocketing millions of dollars that he has not accounted for. To arrive at any other conclusion requires the imposition on the evidence a dense layer of untethered suppositions and assumptions that obscures and distorts the strong and clear record of what actually happened that is contained in that evidence. Those suppositions and assumptions cannot be called inference, because they do not arise naturally from the evidence – they are, in fact utterly incompatible with the evidence and any result that might reasonably or naturally be drawn from it. If the trial judge’s decision stands,

Theophile will succeed in his fraud, with the assistance of a multi-million dollar defense provided by the title insurers who shared his interest in validating the mortgages.

The decision of the court below on the issues tried court is manifestly not grounded its decision in the evidence before it. It's decisions on summary judgment are legally unsound. Accordingly, Appellants' respectfully request that this Court reverse those decisions, enter judgment invalidating the Subject Deeds and holding that title to the Subject Properties has at all relevant times been held by Little Mason, holding the ECRG, and Theophile liable for money damages to Appellants, and remanding for trial Plaintiffs' claims for money damages against the Lenders, Chicago Title, First Rate, and Close Now.

Respectfully submitted,
STARR, GERN, DAVISON & RUBIN
Attorneys for Plaintiffs

/s/ Richard T. Welch

Richard T. Welch, Esq.

September 30, 2024

IRFAN HASSAN, LITTLE MASON
PROPERTIES, LLC,

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-002759-22

Plaintiffs/Appellants,

v.

CIVIL ACTION

MARC-ROLAND THEOPHILE; EIGHT
COPELAND ROAD GROUP, LLC; JEST
HOLDINGS. LLC; REVOLVING
MORTGAGE INVESTMENT TRUST 2017-
BRQI, BY U.S. NATIONAL BANK
ASSOCIATION AS TRUST FOR VELOCITY
COMMERCIAL CAPITAL LOAN TRUST
2018-1; U.S. BANK NATIONAL
ASSOCIATION AS TRUSTY FOR
VELOCITY COMMERCIAL LOAN
TRUST 2018-2; WILMINGTON SAVINGS
FUND SOCIETY, FSB D/B/A CHRISTIANA
TRUST, AS CERTIFICATE TRUSTEE FOR
NRP MORTGAGE TRUST 1; LH-NP STRAT
DELAWARE OWNER TRUST; U.S. BANK
N.A., AS INDENTURE TRUSTEE FOR VCC
2022 MC-1 TRUST AND VELOCITY
COMMERCIAL CAPITAL, LLC; EDDY
JEAN JACQUES; 1ST RATE TITLE AND
SETTLEMENT SERVICES, LLC; EDWARD
MCCLOUD; CLOSE NOW, LLC;
AND ANTHONY BARBER,

Docket Below: UNN-C-0005-20

Sat Below:

Honorable Robert J. Mega, P.J. Ch.

Defendants/Respondents.

RESPONDENTS' ANTHONY BARBER AND CLOSE NOW, LLC BRIEF IN
SUPPORT OF OPPOSITION TO PLAINTIFFS' APPEAL OF TRIAL COURT'S
AUGUST 2, 2022 ORDER OF SUMMARY JUDGMENT

JEFFREY S. QUINN, ESQ.
ATTORNEY ID#019831992
PRINGLE QUINN ANZANO, P.C.
jeffquinn@pringle-quinn.com
701 Seventh Avenue
Belmar, New Jersey 07719
(732) 280-2400
Attorneys for Defendants Anthony
Barber and Close Now, LLC

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF ORDER(s) BEING APPEALED FROM	iii
TABLE OF AUTHORITIES	iv
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	3
STATEMENT OF FACTS	5
LEGAL ARGUMENT	13
I. The Trial Court properly applied the Summary Judgment standard in Granting the Close Now Defendants’ Motion for Summary Judgment and Dismissing Plaintiffs’ Complaint	13
A. Plaintiffs Have Failed to Present Sufficient Evidence to Support a Finding in Their Favor by a Rational Trier of Fact on the Intentional Tort Counts against Defendants Barber and Close Now	17
B. Plaintiffs’ contention that the Close Now Defendants are liable to Plaintiffs under a theory of Negligence is Moot based upon the Stipulation of Dismissal with Prejudice entered between the Parties as to Defendants Anthony Barber and Close Now	18
C. Defendant Anthony Barber is Not Subject to Liability under the Negligence Counts or Intentional Tort Counts consistent with the Law of the State of New Jersey and there are No Genuine Issues of Material Fact in Dispute in Regard to Same	18

II.	The Trial Court appropriately entered Summary Judgment in favor of Defendants Anthony Barber and Close Now as to Count I – Quiet Title of Plaintiffs’ Fourth Amended Complaint.	19
III.	The trial Court properly entered Summary Judgment in favor of Defendants Anthony Barber and Close Now, LLC as to Count Three (Fraud) of Plaintiffs’ Fourth Amended Complaint.	21
IV.	The trial Court properly entered Summary Judgment in favor of Defendants Anthony Barber and Close Now, LLC, as to Count Four (Tortious Interference) of Plaintiffs’ Fourth Amended Complaint ...	23
V.	The trial Court properly entered Summary Judgment in favor of Defendants Anthony Barber and Close Now, LLC, as to Count Five (Conspiracy) of Plaintiffs’ Fourth Amended Complaint	25
VI.	The trial Court properly entered Summary Judgment in favor of Defendants Anthony Barber and Close Now, LLC, as to Count Eight (Negligent Misrepresentation) of Plaintiffs’ Fourth Amended Complaint.	27
VII.	Plaintiff’s Appeal in regard to the Negligence Count(s) against Defendants Anthony Barber and Close Now must be Denied as the Negligence Counts were dismissed with prejudice by virtue of a Stipulation of Dismissal entered into between the parties	29
VIII.	Plaintiffs have failed to provide any factual or legal basis, as well as any genuine issue of material fact in order to impose individual liability against Defendant Anthony Barber and/or to disturb the Trial Court’s Order of Summary Judgment.	29
CONCLUSION		31

TABLE OF ORDER(S) BEING APPEALED FROM BY PLAINTIFFS

	<u>ORDER</u>	<u>DECISION</u>
Order of Summary Judgment in Favor of Defendants Anthony Barber and Close Now, LLC	Pa471	Pa490

TABLE OF AUTHORITIES

Cases

<i>Allstate Ins. Co. v. Chaney</i> , 804 F. Supp. 1219 , 1221-22 (N.D. Cal. 1992)	28
<i>Am. States Ins. Co. v. Canyon Creek</i> , 786 F. Supp. 821 , 825 (N.D. Cal. 1991) ...	16
<i>Anderson v. Liberty Lobby</i> , 477 <u>U.S.</u> 242 (1986)	16
<i>Banco Popular N. Am. v. Gandi</i> , 184 N.J. 161, 177, (2005)	26
<i>Bhagat v. Bhagat</i> , 217 N.J. 22, 40 (2014)	26, 19
<i>Brill v. Guardian Life Insurance Company of America</i> , 142 N.J. 520 (1995)	15
.....	16, 19, 25
<i>First Am. Title Ins. Co. v. Lawson</i> , 177 N.J. 125, 136-37 (2003) (quoting <i>Liebling v. Garden State Indem.</i> , 337 N.J. Super. 447, 453 (App. Div.), certif. denied, 169 N.J. 606 (2001)	28
<i>Fox v. Mercedes Benz Credit Corp.</i> , 281 N.J. Super. 476, 484 (App. Div. 1995) ...	22
<i>H. Rosenblum, Inc. v. Adler</i> , 93 N.J. 324, 334 (1983)	27
<i>Jewish Ctr. of Sussex County v. Whale</i> , 86 N.J. 619, 624 (1981)	28
<i>Johnson & Johnson v. Guidant Corp.</i> , 525 F. Supp. 2d 336, 360 (S.D.N.Y. 2007).	24
<i>Judson v. Peoples Bank and Trust Company of Westfield</i> , 17 N.J. 67, 73 (1954) ..	15
<i>Liberty Mutual Insurance Company v. Land</i> , 186 N.J. 163, 175 (2006)	22
<i>Morgan v. Union County Bd. of Chosen Freeholders</i> , 268 N.J. Super. 337, 364, (App.Div.1993), certif. denied, 135 N.J. 468, 640 A.2d 850 (1994))	26

<i>Printing Mart-Morristown v. Sharp Elec. Corp.</i> , 116 N.J. 739, 746, 751 – 752 (1989)	23, 24
<i>Rankin v. Sowinski</i> , 119 N.J. Super. 393 (App. Div. 1972)	15, 19
<i>Safeco Ins. Co. of Am. v. Andrews</i> , 915 F.2d 500, 502 (9th Cir. 1990)	28
<i>Templo Fuente De Vida Corp. v. Nat’l Union Fire Ins., Co. of Pittsburgh</i> , 224 N.J. 189, 199 (2016)	13

Statutes

N.J.S.A. 2A:62-1

N.J.S.A. 42:2C-30

Other Authorities

Pressler & Verniero, <i>Current N.J. Court Rules</i> , comment 2.2 to <u>R.</u> 4:46-2 (2017) ...	14, 15, 19
---	------------

Court Rules

<u>R.</u> 4:46-2(b)	14, 15
<u>R.</u> 4:46-2(c)	14, 15, 19, 25
<u>R.</u> 4:37-2(b)	15

Stipulation of Dismissal

June 9, 2022 Stipulation of Dismissal with Prejudice	DBCNa1
.....	1, 4, 29

Preliminary Statement

Defendants Anthony Barber and Close Now, LLC, commercial mortgage brokers, (collectively referred to herein as “the Close Now Defendants”) oppose Plaintiffs’ Appeal of the August 2, 2022 Summary Judgment Order entered by the Honorable Robert P. Mega, P.J.Ch., wherein, among other things, Judge Mega granted summary judgment to Defendants Anthony Barber and Close Now, LLC, and properly dismissed all Counts that remained of Plaintiffs’ Fourth Amended Complaint as to the Close Now Defendants. Pa471. More specifically, the trial Court in its August 2, 2022 Order dismissed all Counts as alleged in Plaintiffs’ Fourth Amended Complaint in regard to Defendants Anthony Barber and Close Now, LLC: Count I – Quiet Title; Count III – Fraud; Count IV - Tortious Interference; Count V - Conspiracy; and Count VIII – Negligent Misrepresentation inasmuch as there are and were no genuine issues of material fact in dispute and the law was on the side of the Close Now Defendants. Pa471. Further, prior to the entry of summary judgment in favor of the Close Now Defendants, on June 9, 2022, a Stipulation of Dismissal with Prejudice was filed with the Court that dismissed Plaintiffs’ negligence counts, Counts VI and VII, as against Defendants Anthony Barber and Close Now, LLC, as well as other of the Defendants. *See* DBCNa1. Consequently, Plaintiffs’ continued claims of negligence as to the Close Now Defendants are moot.

At all relevant times herein, Defendant Close Now, LLC is/was a New Jersey Limited Liability Company engaged in the business of commercial mortgage brokering. Pa241. Similarly, at times relevant hereto, Defendant Anthony Barber is/was a member and broker agent of Close Now, LLC. Pa241. Commercial mortgage brokers assist business owners and investors in obtaining loans by bringing borrowers together with commercial lenders. *Id.* A commercial mortgage broker is not a title insurance company, nor a lender or appraiser, but rather, simply brings borrowers and commercial lenders together. *Id.*

The gravamen of Plaintiffs' Fourth Amended Complaint alleges that a series of fraudulent transfers involving eighteen (18) real estate properties owned by Plaintiff LMP occurred between March through June 2018 wherein "[Defendant] Marc Theophile fraudulently transferred title to each of the Subject Properties from [Plaintiff] LMP to [Defendant] ECRG for no valuable consideration." *See* Pa13, paragraphs 22 and 30. Plaintiffs' Fourth Amended Complaint further alleges in paragraphs 24 through 59 that Defendant Marc Theophile engaged in a scheme to defraud Plaintiffs. *See Id.*

Plaintiffs' Fourth Amended Complaint generically includes Anthony Barber and Close Now, LLC, as defendants, and inasmuch as there is absolutely no competent factual evidence of any kind to support any theory of liability alleged by Plaintiffs in their Fourth Amended Complaint as against Defendants Anthony Barber

and/or Close Now, LLC, together with the fact that no genuine issue of material fact in dispute exists in regard to Plaintiffs' alleged causes of action against Defendants Anthony Barber and Close Now, LLC, the trial court appropriately entered summary judgment in favor of Defendants Anthony Barber and Close Now, LLC, which contrary to Plaintiffs' generic and factually unsupported and baseless contentions, summary judgment is entirely supported by the facts and law inasmuch as there are is/was no genuine issue of material fact in dispute, which would support denial of summary judgment in favor of Defendants Anthony Barber and Close Now, LLC. *See* Pa471.

Procedural History

On April 14, 2020, Plaintiffs filed a Second Amended Complaint in this matter,¹ which among others, named Anthony Barber and Close Now, LLC (also referred to herein as "the Close Now Defendants") as defendants. On May 28, 2020, Plaintiffs filed a Third Amended Complaint, which continued to name, among others, Anthony Barber and Close Now, LLC, as defendants. On June 11, 2020, Plaintiffs filed a Revised Third Amended Complaint. *See* Pa7315. On January 20, 2021, an Answer together with Separate Defenses, Reply to all Crossclaims, Counterclaim; Demand for Statement of Damages, and Jury Demand was filed on

¹ It is unclear as to when Plaintiffs' initial Complaint was filed in this matter and/or if Anthony Barber and Close Now, LLC were named as Defendants inasmuch as eCourts fails to include same in its online electronic filing system.

behalf of Defendants Anthony Barber and Close Now, LLC in response to Plaintiffs' Revised Third Amended Complaint. *See* Pa7340. On March 17, 2021, Plaintiffs filed a Fourth Amended Complaint, which virtually mirrors Plaintiffs' Revised Third Amended Complaint.² *See* Pa13.

On June 9, 2022, a Stipulation of Dismissal with Prejudice was entered by the trial court, which, among other things, dismissed Plaintiffs' negligence counts (Counts VI and Counts VII) as against Defendants Anthony Barber and Close Now, LLC. *See* DBCNa1. As a result of the June 9, 2022 Stipulation of Dismissal, the only remaining counts of Plaintiffs' Complaint against the Close Now Defendants consisted of Plaintiffs' intentional tort counts consisting of the following: Count I – Quiet Title; Count III – Fraud; Count IV - Tortious Interference; Count V - Conspiracy; and Count VIII – Negligent Misrepresentation. *See* Pa13; *see also* DBCNa1.

On August 2, 2022, the trial Court entered an Order that granted Summary Judgment in favor of Defendants Anthony Barber and Close Now, LLC, and dismissed all of Plaintiffs' remaining counts, *i.e.* all of Plaintiffs' intentional tort counts as against Defendants Anthony Barber and Close Now, LLC. *See* Pa471. Subsequent to the August 2, 2022 Order granting summary judgment, a bench trial

² Plaintiffs' Fourth Amended Complaint added Chicago Title Insurance Company as a Defendant. All parties, allegations, and causes of action contained in Plaintiffs' Revised Third Amended Complaint remained the same.

as to the remaining Defendants and Counts of Plaintiffs' Complaint resulted in a dismissal of all of Plaintiffs' remaining claims. *See* Pa495.

STATEMENT OF FACTS

Initially, Defendants Anthony Barber and Close Now, LLC, incorporate by reference herein the contents of their Notice of Motion for Summary Judgment together with Statement of Undisputed Material Facts and all exhibits, which Plaintiffs have included in their Appendix at Pa7292 through Pa7407.

Plaintiffs Irfan Hassan ("Hassan") and Little Mason Properties, LLC ("LMP") (hereinafter also collectively referred to as "Plaintiffs") allege that they are the victims of a fraudulent scheme perpetrated by their business partner Defendant Marc Theophile (hereinafter "Theophile") wherein Defendant Theophile fraudulently transferred title of eighteen (18) real estate properties owned by Plaintiff LMP to Defendant Eight Copeland Road Group ("ECRG") for no valuable consideration between March through June 2018. *See* Pa13, paragraphs 22, 24-59. Plaintiffs have alleged, without any factual support, that numerous Defendants including, but not limited to, Defendants Anthony Barber and Close Now, LLC, commercial mortgage brokers, somehow participated in the fraudulent scheme. *See* Pa13.

Contrary to Plaintiffs' factually baseless allegations and unsupported legal arguments, there is absolutely no competent factual evidence of any kind to support any theory of liability alleged by Plaintiffs in their Fourth Amended Complaint as

against Defendants Anthony Barber and/or Close Now, LLC. *See* Pa13. Nor is there any genuine issue of material fact in dispute that would support Plaintiffs prevailing in their instant appeal as to the Close Now Defendants. *Id*; *see also* Pa471.

According to Plaintiffs, in or around early 2017, Defendant Theophile approached Plaintiff Hassan and initiated discussions about the potential sale or refinancing of the LMP properties, which included consideration of Theophile purchasing all of the LMP properties. *See* Pa13, at paragraph 33. In the course of investigating sale and/or refinance options, among other things Plaintiff Hassan paid \$41,000.00 for appraisals of the real properties. *See Id.*, at paragraph 34. Plaintiff Hassan also provided Defendant Theophile with a number of blank checks as well as Plaintiff's credit card information to pay for related expenses. *See Id.*, at paragraphs 36 and 37. Plaintiffs' further allege that as negotiations continued, Defendant Theophile sought out various financing options. *See Id.*, at paragraph 39.

Plaintiffs allege, however, that "[b]y Late 2017, and into early 2018, and unknown to plaintiffs, Theophile undertook a fraudulent scheme to make it appear that title to the Subject Properties had been transferred from LMP to ECRG, and to hold himself and ECRG out as the owners of the properties, so as to obtain loans secured by mortgages on those properties." *See Id.*, at paragraph 40. Plaintiffs further allege that "[u]sing his apparent authority over the assets of LMP, Theophile

arranged for 21 loans to be taken out by ECRG, using each of the 18 Subject Properties as mortgage collateral for a loan.” *See Id.*, at paragraph 57.

The only allegation with specific regard to the Close Now Defendants in Plaintiffs’ Fourth Amended Complaint reflect that: “For each of the mortgage loans, an origination fee was paid to defendant Close Now, LLC”, “[o]n information and belief, Close Now is wholly owned by Defendant Anthony Barber”, and “[o]n information and belief, for each of the mortgage loans taken out on the Subject Properties, Close Now operated as a mortgage broker who connected with the lender to Theophile and ECRG.” *See Id.*, at paragraphs 63 – 65.

A 108 paragraph typewritten statement produced in discovery and prepared by Plaintiff Hassan captioned “About Little Mason Properties:- and how Marc took 18 properties to his LLC named Eight Copeland Road Group” was provided by Plaintiff Hassan to the Union County Prosecutor’s Office, which declined to prosecute Theophile, however similarly asserts the alleged fraudulent scheme perpetrated by Defendant Theophile, and, fails to identify any and all wrongdoing of any kind engaged in by Defendants Anthony Barber and/or Close Now, LLC. *See* Pa7126.

Among other things, Plaintiffs’ 108 paragraph statement reflects that in approximately July 2017, Plaintiff Hassan met Marc Theophile, whom introduced himself as a loan officer and whom started pitching the idea that Plaintiff Hassan

obtain loans on the properties in order to renovate them and then sell them instead of renting them. *See* Pa7126, paragraphs 16-19. Consequently, on or around November 2017, Plaintiff Hassan started entertaining the idea of obtaining a loan, renovating the properties, and then selling them for a higher value. *See Id.*, paragraph 20. Loans would be paid off and the profit margin would be higher. *See Id.*, paragraph 21. According to Plaintiff Hassan, “I asked him to start looking for loan[s] for me so he spoke to [a] few brokers and sent me the loan term sheets.” *See Id.*, paragraph 24. Due to the high interest rates that were associated with the potential loans, Plaintiff Hassan stated that he rejected all loan offers, and then Marc Theophile proposed that he could sell the properties as a portfolio, which Marc indicated he wanted to buy. *See Id.*, paragraphs 25-38.

According to Plaintiff Hassan, “[t]he goal was to appraise all the properties under Little Mason Properties LLC” and then Marc Theophile would obtain a loan under his name or LLC to the appraised value of the properties. *See Id.*, paragraphs 40-43; *see also* Pa5071, May 25, 2021 Deposition Transcript of Irfan Hassan, page 78. In connection with an agreement between Plaintiff Hassan and Defendant Marc Theophile, Plaintiff Hassan agreed to pay and did pay for appraisal fees related to the eighteen properties and others in order to ascertain whether the portfolio would appraise to the desired valuation. *See* Pa7126, paragraphs 45-49; *see also* Pa5071, pages 81-82. Unsatisfied with the appraisal reports, Plaintiff Hasan states that he

refused the valuations. *See* Pa7126, paragraph 53. According to Plaintiff Hassan, “[t]he goal was for Marc to obtain the loans on the appraised value and during the closing of the loans, I would transfer the properties over to Marc and he would in return transfer the proceeds of the loan (80% loan to value) over to me as purchase price for the properties.” *See Id.*, paragraph 61; *see also* Pa 5071, at page 78.

In late 2017, Plaintiffs and Defendant Theophile sought out the services of Defendant Close Now, LLC, a commercial mortgage broker in regard to obtaining refinancing of the subject properties. *See e.g.* Pa5071, pages 63, 78, 82-83, 107, 133. Consistent with Plaintiff Hassan’s statements, testimony, and knowledge, Defendant Close Now provided commercial mortgage services, only, to Plaintiffs. *See Id.*

Plaintiff Hassan claims that in or about July 2018, he discovered that eighteen (18) of his properties including his personal residence had been transferred to Defendant Theophile’s LLC, Eight Copeland Road Group, LLC. *See* Pa7126, paragraphs 67–71. In his 108 paragraph statement, Plaintiff Hassan asserts that “Marc then obtained loans on eighteen of my rental properties including my personal residences and the closing of those loans were done by 1st Rate title company.” *See Id.*, paragraphs 73-79. According to Plaintiff Hassan, Marc Theophile defrauded him. *Id.*, paragraphs 80 – 108.

Within Plaintiff Hassan's 108 paragraph statement that he provided to the Union County Prosecutor's Office, there is not one reference of any kind to Defendants Anthony Barber and/or Close Now. *See* Pa7126. Neither Defendant Anthony Barber nor Close Now are named nor identified in Plaintiff Hassan's document, nor are they identified as having engaged in any form or wrongdoing. *See Id.*

On May 25, 2021 and June 14, 2021, Plaintiff Hassan was deposed in connection with this instant matter. *See* Pa5071 and Pa6199, Deposition Transcripts of Irfan Hassan, respectively. Plaintiff Hassan's deposition testimony was consistent with the statements contained in his 108 paragraph statement. *See Id.* Plaintiff Hassan testified that he was aware that Defendant Theophile was the one who was going to obtain the loans to buy the subject properties, since he was listing himself as borrower on loan applications. *See* Pa5071, page 107. Plaintiff Hassan further testified that he authorized Mr. Theophile to try to market for the best loans to acquire Plaintiff Hassan's properties, *see* Pa5071, page 133, and that he was aware all along that Theophile was pursuing loans because Theophile was only able to purchase the subject properties if Mr. Theophile was able to secure a loan. *See* Pa5071, page 205.

With regard to Defendants Anthony Barber and Close Now, LLC, on day two of his deposition, Plaintiff Hassan testified that he was aware that Defendant Close

Now is a mortgage broker for commercial lending and that he was referred to Mr. Brad Spingarn, a representative of Defendant Close Now, by Tom McGuire³, another commercial mortgage broker who Plaintiff Hassan was initially put in touch with by Defendant Theophile in 2017. *See* Pa6199, pages 63, 219-220. The purpose of Plaintiff Hassan communicating with Mr. McGuire and Mr. Spingarn was to obtain loans on certain properties that are now the subject of Plaintiffs' Fourth Amended Complaint. *See Id.* Plaintiff Hassan testified that he was aware that Mr. Spingarn was a commercial mortgage broker and that a commercial mortgage broker is not a lender, does not close loans, does not transfer title to property, and is not a title agency. *See* Exhibit Pa6199, pages 224-225.

Plaintiff Hassan admitted that he never had any communications or dealings with Anthony Barber and he was unaware of any wrongdoing engaged in by Defendants Anthony Barber or Close Now, LLC in regard to the commercial loan transactions that are the subject of Plaintiffs' Complaint. *See* Pa6199, page 233. More specifically, Plaintiff Hassan testified that he was not aware of any facts to support Plaintiffs' allegations that Defendants Anthony Barber and/or Close Now engaged in any fraud or any other wrongdoing in regard to the subject loan transactions. *See* Pa6199, page 236. Similarly, Plaintiff Hassan testified that he was

³ Tom McGuire is actually Tom McGrath whose name was apparently confused and/or imprecisely remembered by Hassan.

unaware of any facts to support Plaintiffs' claims that Defendants Anthony Barber or Close Now intended to deceive Plaintiffs and/or that Anthony Barber or Close Now conspired with Marc Theophile or with any of the other defendants to deceive Plaintiffs. *See* Pa6199, pages 237-238. Similarly, Plaintiff Hassan testified that he was unaware of Defendants Anthony Barber and/or Close Now ever making any misrepresentations in regard to the commercial loan transactions that are the subject of Plaintiffs' Complaint. *See* Pa6199, pages 238-239.

There has been no testimony of any kind from Plaintiffs, from any of the Defendants, and/or any other witnesses that Defendants Anthony Barber and/or Close Now engaged in any wrongdoing in connection with this matter. Nor has there been production of any competent relevant evidence of any kind that supports any of Plaintiffs' allegations and/or causes of action contained in Plaintiffs' Fourth Amended Complaint that Defendants Anthony Barber and/or Close Now are liable in any regard to Plaintiffs in connection with any of the causes of action pleaded in Plaintiffs' Fourth Amended Complaint. *See* Pa7292, Pa7294, Pa7311, Pa7315, Pa7340, Pa13, Pa7126, Pa241, Pa5071, Pa6199, Pa5192, Pa5253, Pa7393, Pa262, Pa7395, Pa7407, and Pa7412. In addition, Plaintiffs' proposed expert's report also fails to suggest, identify, and/or establish any wrongdoing of any kind engaged in by the Close Now Defendants in connection with this matter. *See* Pa262. Simply put,

in regard to Defendants Anthony Barber and Close Now, Plaintiffs are left with only their bare and unsupported allegations and baseless contentions.

Inasmuch as Plaintiffs failed to submit any credible evidence of any kind in support of their Fourth Amended Complaint causes of action brought against the Close Now Defendants, together with the absence of any genuine issue of material fact in dispute, the trial court properly entered summary judgment in favor of Defendants Anthony Barber and Close Now. *See* Pa471.

LEGAL ARGUMENT

I. The Trial Court properly applied the Summary Judgment standard in Granting the Close Now Defendants' Motion for Summary Judgment and Dismissing Plaintiffs' Complaint.

Although the standard of review by this Appellate Court in reviewing the trial court's granting of summary judgment to Defendants Anthony Barber and Close Now is *de novo*, see Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins., Co. of Pittsburgh, 224 N.J. 189, 199 (2016), it is clear that the trial court properly applied the summary judgment standard in granting the Close Now Defendants' Motion for Summary Judgment, and there exists no factual or legal basis to reverse the trial court's decision.

As reflected in the trial Court's August 2, 2022 Order, the standard regarding motions for Summary Judgment is governed in pertinent part by New Jersey Court Rule 4:46-2(c), which provides in relevant part:

The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact....

“[A]ll material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed [by respondent] by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact.” R. 4:46-2(b). Bare conclusions without factual support will not defeat a motion for summary judgment. Pressler & Verniero, Current N.J. Court Rules, comment 2.2 to R. 4:46-2 (2017) (emphasis added.) The purpose and design of the rule permitting summary judgment is to provide “a prompt, business-like and inexpensive method of disposing of a cause which a discriminating search of the merits in the pleadings, depositions and admissions on file together with the affidavits submitted on the motion, clearly shows not to be present a genuine issue of material fact requiring

disposition at a trial.” *Judson v. Peoples Bank and Trust Company of Westfield*, 17 N.J. 67, 73 (1954).

The Supreme Court, in *Brill v. Guardian Life Insurance Company of America*, 142 N.J. 520 (1995), reconsidered the standard under which motions for summary judgment are granted in New Jersey. Specifically, the Court tied the test for summary judgment determinations to the standard for an involuntary dismissal under R. 4:37-2(b). The Court, *supra* at 540, further described the standard for awarding summary judgment in this way:

A determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The judge’s function is not himself or herself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

Emphasis added.

“Even if there is a denial of an essential fact, a motion for summary judgment should be granted if the rest of the record viewed most favorable to the party opposing the motion, including depositions and interrogatories, demonstrates the absence of a material and genuine factual dispute.” Pressler & Verniero, *supra*, comment 2.1 to R. 4:46-2 (2017) (*citing Rankin v. Sowinski*, 119 N.J. Super. 393

(App. Div. 1972)). The essence of the inquiry is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Brill, supra* at 536, citing *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) (emphasis added).

Moreover, the motion court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried. See *Bhagat v. Bhagat*, 217 N.J. 22, 40 (2014). Further, if the non-moving party “points only to disputed issues of fact that are of an insubstantial nature, the proper disposition is summary judgment.” *Brill v. Guardian Life Ins. Co. Am.*, 142 N.J. at 529. In this regard, the Court in *Brill* encouraged trial courts not to hesitate in granting summary judgment the evidence is so one-sided that the moving party must prevail as a matter of law. *Brill*, 142 N.J. at 540.

In this matter, the trial Court correctly applied the summary judgment standard to the facts of this matter, and appropriately entered an Order of Summary Judgment in favor of Defendants Anthony Barber and Close Now, LLC, as to all counts of Plaintiffs’ Complaint, *i.e.* the remaining intentional tort counts. In this regard, not only did the trial Court find that there were no genuine issues of material fact in dispute, but the Court also correctly found that there was no evidence to support Plaintiffs remaining causes of action in this matter as against Defendants Anthony Barber and Close Now, LLC. See Pa471. Inasmuch as the Court correctly

determined that there was no evidence to support Plaintiff's remaining causes of action, clearly a genuine issue of material fact could not exist. Defendants' appeal has done nothing to upset the trial court's determination.

Further, the trial Court also correctly observed consistent with Plaintiff Hassan's deposition testimony that Defendant Anthony Barber, whom had absolutely no involvement in the matter other than being a member/owner of Defendant Close Now, LLC, was insulated from personal liability by virtue of the provisions contained in New Jersey's Revised Limited Liability Company Act. *See* Pa471.

In light of the above and for the reasons set forth in the trial Court's August 2, 2022, *see* Pa471, Plaintiffs' appeal must be denied as to Defendants Anthony Barber and Close Now, LLC inasmuch as Plaintiffs there are no genuine issues of material fact in dispute, and the law is on the side of Defendants Anthony Barber and Close Now, LLC.

A. *Plaintiffs Have Failed to Present Sufficient Evidence to Support a Finding in Their Favor by a Rational Trier of Fact on the Intentional Tort Counts against Defendants Barber and Close Now*

Contrary to Plaintiffs' factually and legally unsupported contention, Plaintiffs have unequivocally failed to present any credible evidence in support of any their theories of liability against the Close Now Defendants. A review of the record

clearly supports the Close Now Defendants' contention. Similarly, Plaintiffs have also failed to establish any genuine issue of material fact in dispute that supports Plaintiffs' baseless contentions. Further in this regard, and as addressed in further detail, *infra*, Plaintiffs have failed to establish any facts supported by credible evidence in support of any of their causes of action brought against the Close Now Defendants.

B. Plaintiffs' contention that the Close Now Defendants are liable to Plaintiffs under a theory of Negligence is Moot based upon the Stipulation of Dismissal with Prejudice entered between the Parties as to Defendants Anthony Barber and Close Now.

On June 9, 2022, a Stipulation of Dismissal with Prejudice was filed by the the Court that dismissed Plaintiffs' negligence counts (Counts Six and Seven) as against Defendants Anthony Barber and Close Now, LLC. *See* DBCNa1. Consequently, Plaintiffs' claims sounding in negligence are moot and Plaintiffs are barred from attempting to continue to pursue same.

C. Defendant Anthony Barber is Not Subject to Liability under the Negligence Counts or Intentional Tort Counts consistent with the Law of the State of New Jersey and there are No Genuine Issues of Material Fact in Dispute in Regard to Same.

Based upon the facts and law reflected above, Defendant Anthony Barber is not subject to liability in connection with Plaintiffs' negligence counts. *See*

DaBCN1. Moreover, not only is Defendant Anthony Barber not subject to any liability due to Plaintiffs' blatant failure to establish any factually supported genuine issue of material fact in dispute, but Defendant Anthony Barber is also insulated by liability due to application of New Jersey's Limited Liability Company Act. *See* Legal Argument *supra*. Moreover, Plaintiffs have failed to come forward with any credible evidence in order to establish a genuine issue of material fact in regard to each and every element necessary to sustain Plaintiffs' burden of proof in connection with their alleged intentional tort causes of action. Factually unsupported conclusory statements will not carry the day for Plaintiffs. *See* Pressler & Verniero, *supra*, comment 2.1 to R. 4:46-2 (2017) (citing *Rankin v. Sowinski*, 119 N.J. Super. 393 (App. Div. 1972)); *see also Bhagat v. Bhagat*, 217 N.J. 22, 40 (2014). Further, as reflected above, if the non-moving party "points only to disputed issues of fact that are of an insubstantial nature, the proper disposition is summary judgment." *Brill v. Guardian Life Ins. Co. Am.*, 142 N.J. at 529.

II. The Trial Court appropriately entered Summary Judgment in favor of Defendants Anthony Barber and Close Now as to Count I – Quiet Title of Plaintiffs' Fourth Amended Complaint.

"Count One – Quiet Title" of Plaintiffs' Fourth Amended Complaint generically asserts that "all defendants have interfered with Plaintiff's rightful title to and right to peaceable possession of the Subject Properties." *See* Pa13. Plaintiffs'

Count One Wherefore clause seeks a declaration that “LMP is the owner in fee simple of all right, titles, and interests to the Subject Properties and that Defendants have no right, title, estate, or interest in or lien on the described Subject Properties.”

Id. As part of its Count One caption, Plaintiffs’ Complaint contains a reference to N.J.S.A. 2A:62-1.

N.J.S.A. 2A:62-1 provides:

Any person in the peaceable possession of lands in this state and claiming ownership thereof, may, when his title thereto, or any part thereof, is denied or disputed, or any other person claims or is claimed to own the same, or any part thereof or interest therein, or to hold a lien or encumbrance thereon, and when no action is pending to enforce or test the validity of such title, claim or encumbrance, maintain an action in the superior court to settle the title to such lands and to clear up all doubts and disputes concerning the same.

See N.J.S.A. 2A:62-1.

Initially, the relief sought in Plaintiffs’ Count One is unavailable to Plaintiffs as against Defendants Anthony Barber and Close Now, LLC, inasmuch as these Defendants have not made any claim of any kind to any right, title, estate, or interest in or lien on the described Subject Properties. Moreover, Plaintiffs have not come forward with any competent evidence of any kind that supports an inference of any kind that Defendants Anthony Barber and/or Close Now, LLC, engaged in any wrongdoing or interfered with anything in connection with the transactions involving the Subject Properties. To the contrary, Plaintiffs’ have specifically

denied any wrongdoing of any kind engaged in by Anthony Barber and Close Now, LLC in connection with this matter. *See e.g.* Pa7126, Pa5071, and Pa6199. Consequently, there exists no genuine issue of any material fact in dispute relative to Plaintiffs' allegation that Anthony Barber and/or Close Now, LLC interfered with Plaintiffs' alleged rightful title and peaceable possession of the Subject Properties. Thus, summary judgment in favor of the Close Now Defendants as to Court I is entirely appropriate.

III. The trial Court properly entered Summary Judgment in favor of Defendants Anthony Barber and Close Now, LLC as to Count Three (Fraud) of Plaintiffs' Fourth Amended Complaint.

As reflected above and consistent with the trial Court's August 2, 2022 Order, Plaintiff Hassan testified at deposition that he was not aware of any facts to support Plaintiffs' allegations that Mr. Barber and/or Close Now engaged in any fraud in regard to the subject loan transactions. *See* Pa6199, page 236. Plaintiff Hassan also testified that he was unaware of any facts that support Plaintiffs' allegations that Defendant Mr. Barber or Close Now intended to deceive Plaintiffs and/or that Mr. Barber or Close Now conspired with Marc Theophile or with any of the other defendants to deceive Plaintiffs. *See* Pa6199., pages 237-238. Plaintiffs have failed to produce any credible and/or competent evidence of any kind to the contrary.

In order to establish a cause of action under a theory of common law fraud,

Plaintiffs are required to prove five elements. *See generally Liberty Mutual Insurance Company v. Land*, 186 N.J. 163, 175 (2006). The five elements consist of: “a material misrepresentation by the defendant of a presently existing fact or past fact; knowledge or belief by the defendant of its falsities; an intent that the plaintiff rely on this statement; reasonable reliance by the plaintiff; and resulting damages to the plaintiff.” *Id.*, at 175. Further, common law fraud must be proven by clear and convincing evidence. *See Fox v. Mercedes Benz Credit Corp.*, 281 N.J. Super. 476, 484 (App. Div. 1995).

Here, there is absolutely no evidence of any kind that Defendants Anthony Barber and/or Close Now engaged in any misrepresentation of any kind to Plaintiffs, let alone, a material misrepresentation. Further, there is absolutely no evidence of any kind that Defendants Anthony Barber and/or Close Now had any knowledge or belief in regard to any, albeit there is none, material misrepresentation. Moreover, there is absolutely no evidence of any kind of any intent by Defendants Anthony Barber and/or Close Now to deceive Plaintiffs. Similarly, there is absolutely no evidence of any kind available to Plaintiffs and/or produced in this matter that would allow Plaintiffs to satisfy any of the other elements necessary to establish a cause of action of “fraud” against Defendants Anthony Barber and/or Close Now.

Thus, due to the absence of any genuine issue of material fact in dispute together with the law being of the side of Defendants Anthony Barber and Close

Now, LLC, the trial Court properly granted summary judgment in favor of the Close Now Defendants as to Plaintiffs' Fraud Count.

IV. The trial Court properly entered Summary Judgment in favor of Defendants Anthony Barber and Close Now, LLC, as to Count Four (Tortious Interference) of Plaintiffs' Fourth Amended Complaint

Consistent with the above, Plaintiffs have failed to produce any competent factual evidence in support of their Count Four (Tortious Interference) claim as against Defendants Anthony Barber and Close Now, LLC, and there is/are no genuine issues of material fact in dispute in this regard.

Under New Jersey law, the tort of interference with a prospective economic advantage (tortious interference) contains four elements: (1) a protectable interest; (2) malice-the defendant's intentional interference without justification; (3) a reasonable likelihood that the interference caused the loss of a prospective gain; and (4) resulting damages. *Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 746, 751 – 752 (1989).

A Complaint based on tortious interference must allege facts that show a protectable right such as a prospective economic or contractual relationship. See *Printing Mart*, 116 N.J. at 751. Here, Plaintiffs' Fourth Amended Complaint, as well as, Plaintiffs' proofs fail to show a protectable right as required by the *Printing Mart* Court. Irrespective, however, of Plaintiffs' ability or inability to properly plead and/or establish a protectable interest, Plaintiffs are entirely unable to satisfy

the second element “interference” necessary for a cause of action sounding in tortious interference with regard to Defendants Anthony Barber and/or Close Now. In *Printing Mart*, the Court observed that as to the second element, an interference can be malicious, or "without justification or excuse," in either of two ways: (1) the interest pursued is illegitimate, or (2) the means used are inappropriate. *Printing Mart* citing *Johnson & Johnson v. Guidant Corp.*, 525 F. Supp. 2d 336, 360 (S.D.N.Y. 2007). The inquiry's focus, however, is on the defendant's acts. *Printing Mart*, *supra*, 116 N.J. at 756. As clearly reflected above as well as in the trial Court’s August 2, 2022 Order, there exists no evidence any kind that Defendants Anthony Barber and/or Close Now engaged in any wrongdoing or deceit of any kind in connection with this action. *See* Pa13, Pa471, Pa6199; *see also* Pa7294. Finally, in this regard, for the sake of completeness, Plaintiffs are/were also unable to establish elements three and four against Defendants Anthony Barber and Close Now in order to establish a cause of action under tortious interference, and there are no genuine issues of material fact in dispute.

In light of all of the above, not only is there no genuine issue of material fact in dispute, but there is no factual evidence of any kind or legal basis to overturn the trial Court’s August 2, 2022 Order of Summary Judgment in favor of the Close Now Defendants.

V. The trial Court properly entered Summary Judgment in favor of Defendants Anthony Barber and Close Now, LLC, as to Count Five (Conspiracy) of Plaintiffs' Fourth Amended Complaint

In connection with Plaintiffs' "Count Five – Conspiracy" alleged cause of action, Plaintiffs have failed to present any evidence of any wrongdoing, *i.e.* unlawful actions, or conspiracy engaged in by Defendants Anthony Barber and/or Close Now, LLC. To the contrary, Plaintiffs' generic allegation of conspiracy is unsupported by any evidence, let alone credible and/or competent evidence. In connection with this Count as well as the other Counts involving Defendants Anthony Barber and Close Now, Plaintiffs are left with only their own bare and unsupported allegations, which are insufficient to defeat a motion for summary judgment. *See* New Jersey Court Rule 4:46-2(c); *see also Brill v. Guardian Life Insurance Company of America*, 142 N.J. 520 (1995). Significantly, Plaintiff Hassan specifically testified that he was unaware of any facts that support Plaintiffs' allegations that Mr. Barber or Close Now intended to deceive Plaintiffs and/or that Mr. Barber or Close Now conspired with Marc Theophile or with any of the other defendants to deceive Plaintiffs. *See* Pa6199, at pages 237 – 238. Plaintiffs have failed to produce any competent and/or credible evidence to the contrary.

"In New Jersey, a civil conspiracy requires a 'a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties

to inflict a wrong against or injury upon another, and an overt act that results in damage." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177, (2005) (quoting Morgan v. Union County Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364, (App.Div.1993), certif. denied, 135 N.J. 468, 640 A.2d 850 (1994)). As reflected above and as reflected in the trial Court's Order, Plaintiffs have failed to present any evidence of wrongdoing on the part of Defendants Anthony Barber and Close Now. Similarly, Plaintiffs' have failed to produce any evidence of any "unlawful act" engaged in by Defendants Anthony Barber and/or Close Now in connection with Plaintiffs' action. Further, Plaintiffs have failed and are unable to present any evidence of Defendants Anthony Barber and/or Close Now acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, in order to inflict a wrong against or injury upon Plaintiffs. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177, (2005).

Inasmuch as Plaintiffs have failed to produce any competent evidence of any kind of any conspiracy engaged in by Defendants Anthony Barber and/or Close Now, LLC, the summary judgment in favor of Defendants Anthony Barber and Close Now, LLC, as to Count Five – Conspiracy of Plaintiffs Fourth Amended Complaint is clearly appropriate as there are no genuine issues of material fact in dispute and the law is on the side of Defendants Anthony Barber and Close Now.

Further, Plaintiffs appeal is insufficient to disturb the trial court's grant of summary judgment.

VI. The trial Court properly entered Summary Judgment in favor of Defendants Anthony Barber and Close Now, LLC, as to Count Eight (Negligent Misrepresentation) of Plaintiffs' Fourth Amended Complaint.

Consistent with all of the above, Plaintiffs have failed to produce any credible evidence of any kind that supports Plaintiffs' allegations that Defendants Anthony Barber and/or Close Now engaged in any form of negligent misrepresentation. To the contrary, Plaintiff Hassan testified that he was unaware of Mr. Barber and/or Close Now ever making any misrepresentations in regard to the commercial loan transactions that are the subject of Plaintiffs' Complaint. *See* Pa6199, pages 238 – 239. Similarly, Plaintiffs' proposed expert report also fails to identify any negligence, including "negligent misrepresentation, engaged in by Defendants Anthony Barber and/or Close Now. *See* Pa262. Plaintiffs have failed to produce any competent and/or credible evidence to the contrary.

A negligent misrepresentation constitutes "[a]n incorrect statement, negligently made and justifiably relied on, [and] may be the basis for recovery of damages for economic loss . . . sustained as a consequence of that reliance." *H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 334 (1983). Negligent misrepresentations are

quite closely related to equitable and legal fraud, wherein equitable fraud requires "(1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party." *First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125, 136-37 (2003) (quoting *Liebling v. Garden State Indem.*, 337 N.J. Super. 447, 453 (App. Div.), certif. denied, 169 N.J. 606 (2001)). The elements of legal fraud include "a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment." *Jewish Ctr. of Sussex County v. Whale*, 86 N.J. 619, 624 (1981).

Besides being closely related to equitable and legal fraud, some courts have determined that negligent misrepresentations are actually intentional wrongs because of an intent of a party that another party rely on the misrepresentation. See e.g. *Safeco Ins. Co. of Am. v. Andrews*, 915 F.2d 500, 502 (9th Cir. 1990) (insured's misrepresentations in connection with the sale of property were not occurrences under the policy); *Allstate Ins. Co. v. Chaney*, [804 F. Supp. 1219](#), 1221-22 (N.D. Cal. 1992) (under California law; *Am. States Ins. Co. v. Canyon Creek*, [786 F. Supp. 821](#), 825 (N.D. Cal. 1991) (negligent misrepresentations made in conjunction with the sale of property "falls within the rubric of fraud.))

Plaintiffs' Negligent Misrepresentation Count, however, fails in the first instance because neither Defendant Anthony Barber nor Close Now, LLC, made any

representation(s) and/or misrepresentation(s) in this matter, and Plaintiffs have failed to produce any competent and/or credible evidence to the contrary.

In light of the above, the trial Court properly granted summary judgment in favor of Defendants Anthony Barber and Close Now, LLC, as to Plaintiffs' Count Eight – Negligent Misrepresentation due to the absence of any genuine issue of material fact in dispute together with the facts and law being on the side of the Close Now Defendants.

VII. Plaintiff's Appeal in regard to the Negligence Count(s) against Defendants Anthony Barber and Close Now is moot and must be Denied as the Negligence Counts were dismissed with prejudice by virtue of a Stipulation of Dismissal entered into between the parties.

On June 9, 2022, a Stipulation of Dismissal with Prejudice was entered into between the parties, which dismissed Plaintiffs' negligence counts (Counts VI and VII) as against Defendant Anthony Barber and Close Now, LLC. *See* DBCNa1. As a result, Plaintiffs' attempt to continue to prosecute its negligence counts as against Defendants Anthony Barber and Close Now, LLC is moot.

VIII. Plaintiffs have failed to provide any factual or legal basis, as well as any genuine issue of material fact in order to impose individual liability against Defendant Anthony Barber and/or to disturb the Trial Court's Order of Summary Judgment.

In addition to the fact that there exists absolutely no factual evidence of any kind supporting personal liability as to Defendant Anthony Barber, and that

consistent with the contents Trial Court's Order, which plainly reflects the absence of any genuine issue of material fact relative to personal liability of Defendant Anthony Barber, whom has had absolutely no involvement in this matter of any kind other than being identified as a member and broker/agent of Close Now, as well as Plaintiffs' failure to produce any credible evidence of any kind that would support a theory of liability against Defendants Anthony Barber, Defendant Anthony Barber has no personal liability in light of the provisions contained in New Jersey's Revised Limited Liability Company Act.

At all times relevant hereto, Close Now, LLC is/was a New Jersey Limited Liability Company and is/was engaged in the business of commercial mortgage brokering. *See* Pa241. At times relevant hereto, Anthony Barber is/was and has been a member and broker/agent of Close Now, LLC. *Id.* Other than being simply identified in commercial loan related documents as a broker/agent of Close Now, Anthony Barber has had absolutely no involvement of any kind in this matter. *See also* Pa6199.

N.J.S.A. 42:2C-30 of the Revised Limited Liability Company Act makes clear that "the debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts, obligations, or other liabilities of the company" and "do not become the debts, obligations, or other

liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager.” *See* N.J.S.A. 42:2C-30.

Here, notwithstanding there is absolutely no credible evidence of any kind that Defendants Anthony Barber nor Close Now, LLC, engaged in any wrongdoing of any kind, including but not limited to fraud, deceit, negligence, misrepresentation, tortious interference, conspiracy, etc., nor is there any genuine issue of material facts in regard to same, it is clear that even assuming that there existed credible evidence in support of Plaintiffs’ allegations relative to Close Now, Defendant Anthony Barber is protected from any liability consistent with the provisions contained in N.J.S.A. 42:2C-30. Thus, N.J.S.A 42:2C-30 insulates Anthony Barber from any liability, although none, of Close Now, LLC.

Consequently, in light of all of the above, summary judgment in favor of Defendant Anthony Barber is appropriate, necessary, and required as to each and every Count contained in Plaintiffs’ Fourth Amended Complaint, and consistent with the trial court’s August 2, 2022 Order of Summary Judgment.

Conclusion

Based upon all of the above, Plaintiffs’ Appeal of the Trial Court’s August 2, 2022 Order granting summary judgment to Defendants Anthony Barber and Close Now, LLC, must be denied inasmuch as Plaintiffs have failed to produce any

credible evidence in support of any of their causes action as against Defendants Anthony Barber and Close Now, LLC, and have failed to establish any genuine issue of material fact in dispute in regard to their factually and legally unsupported claims against Defendants Anthony Barber and Close Now, LLC, and the law is on the side of Defendants Anthony Barber and Close Now, LLC.

Respectfully Submitted,

/s/ Jeffrey S. Quinn

JEFFREY S. QUINN

JSQ/ch

Encl.

cc. All counsel of record via eCourts filing

Superior Court of New Jersey

Appellate Division

Docket No. A-002759-22T4

IRFAN HASSAN and LITTLE	:	CIVIL ACTION
MASON PROPERTIES, LLC,	:	
	:	ON APPEAL FROM THE
<i>Plaintiffs-Appellants,</i>	:	FINAL JUDGMENT OF
	:	THE SUPERIOR COURT
vs.	:	OF NEW JERSEY,
	:	CHANCERY DIVISION,
	:	UNION COUNTY
MARC-ROLAND THEOPHILE;	:	
EIGHT COPELAND ROAD	:	
GROUP, LLC; JEST HOLDINGS,	:	DOCKET NO.: UNN-C-0005-20
LLC; REVOLVING MORTGAGE	:	
INVESTMENT TRUST 2017-	:	Sat Below:
BRQ1, by U.S. Bank National	:	
Association, as Trustee; U.S. BANK	:	HON. ROBERT J. MEGA, P.J.CH.
NATIONAL ASSOCIATION	:	
	:	
<i>(For Continuation of Caption</i>	:	
<i>See Next Page)</i>	:	

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT CHICAGO TITLE INSURANCE COMPANY

On the Brief:

CHELSEA P. JASNOFF, ESQ.
Attorney ID# 113672014
ANTHONY TWARDOWSKI, ESQ.
(Admitted Pro Hac Vice)

ZARWIN, BAUM, DeVITO, KAPLAN,
SCHAER & TODDY, P.C.
Attorneys for Defendant-Respondent
Chicago Title Insurance Company
30 Montgomery Street, Suite 960
Jersey City, New Jersey 07302
(201) 432-7840
cjasnoff@zarwin.com

Date Submitted: November 27, 2024



COUNSEL PRESS

(800) 4-APPEAL • (334070)

as Trustee for Velocity Commercial	:
Capital Loan Trust 2018 a/k/a U.S.	:
Bank National Association as	:
Trustee for Velocity Commercial	:
Capital Loan Trust 2018-1; U.S.	:
BANK NATIONAL	:
ASSOCIATION as Trustee for	:
Velocity Commercial Capital Loan	:
Trust 2018-2; WILMINGTON	:
SAVINGS FUND SOCIETY, FSB	:
d/b/a Christiana Trust, as Certificate	:
Trustee for NRP Mortgage Trust 1;	:
LH-NP STRAT DELAWARE	:
OWNER TRUST; U.S. BANK,	:
N.A., as Indenture Trustee for VCC	:
2022 MC-1 Trust and Velocity	:
Commercial Capital, LLC; EDDY	:
JEAN JACQUES; 1ST RATE	:
TITLE AND SETTLEMENT	:
SERVICES, LLC; EDWARD	:
MCCLOUD; CLOSE NOW, LLC	:
and ANTHONY BARBER,	:
	:
<i>Defendants-Respondents.</i>	:

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. PRELIMINARY STATEMENT	1
II. PROCEDURAL HISTORY AND STATEMENT OF FACTS	4
A. Plaintiffs' Claims	4
B. Chicago Title's Summary Judgment Motion	6
C. The Trial	8
IV. LEGAL ARGUMENT	8
A. Standard of Review	9
B. If Certain Rulings of the Trial Court are Upheld, No Liability Can Be Imposed Against Chicago Title as a Matter of Law and Plaintiffs' Appeal as to Chicago Title Should Be Denied	10
C. The Trial Court Correctly Found Chicago Title Owed No Duty to Plaintiffs	13
D. The Trial Court Correctly Found Chicago Title Is Not Liable for the Alleged Wrongdoing of 1st Rate Based on an Agency Theory	21
1. 1st Rate's Agency Was for the Sole Purpose of Issuing Title Insurance Commitments, Policies, Endorsements and Other Title Assurances and Expressly Excluded Closings	22
2. The Scope of 1st Rate's Agency Does Not Include Issues that 1st Rate Knew About or Reasonably Could Have Discovered Through the Exercise of Reasonable Diligence	26
IV. CONCLUSION	27

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<u>27-35 Jackson Ave., LLC v. Samsung Fire & Marine Ins. Co., Ltd.,</u> 469 N.J. Super. 200 (App. Div. 2021)	9
<u>539 Absecon Blvd., L.L.C. v. Shan Enters. Ltd. P’ship,</u> 406 N.J. Super. 242 (App. Div. 2009)	9
<u>Alfano v. Schaud,</u> 429 N.J. Super. 469 (App. Div. 2013)	10
<u>Ballingall v. Ballingall,</u> No. A-2494-21, 2023 N.J. Super. Unpub. LEXIS 831 (N.J. Super. App. Div. May 30, 2023)	11, 12
<u>Brill v. Guardian Life Ins. Co. of Am.,</u> 142 N.J. 520 (1995).....	10
<u>Cidalina O. Carvalho v. Toll Bros. & Developers,</u> 143 N.J. 565 (1996).....	20
<u>Cocco v. Hamilton,</u> 2010 N.J. Super. Unpub. LEXIS 1047, 2010 WL 2011003 (App. Div. 2010)	18, 19
<u>Davis v. Brickman Landscaping, Ltd.,</u> 219 N.J. 395 (2014).....	10
<u>Fantis Foods v. N. River Ins. Co.,</u> 332 N.J. Super. 250 (App. Div. 2000)	9
<u>Hayes v. Delamotte,</u> 231 N.J. 373 (2018).....	11
<u>Hudson v. Fay,</u> (N.J. Ch. 1939).....	22-23
<u>Metropolitan Life Ins. Co. v. Coddington,</u> (N.J. Ch. 1942).....	22
<u>N.J. Dep’t of Env’t Prot. v. Alloway Twp.,</u> 438 N.J. Super. 501 (App. Div. 2015)	9, 21

<u>Onukogu v. N.J. State Judiciary Essex Vicinage,</u> No. A-3536-20, 2023 N.J. Super. Unpub. LEXIS 654 (N.J. Super. App. Div. May 1, 2023).....	11, 12-13
<u>Smith v. Boyd,</u> 272 N.J. Super. 186 (Law Div. 1993).....	16, 17
<u>State v. Shangzhen Huang,</u> 461 N.J. Super. 119 (App. Div. 2018)	9, 21
<u>Templo Fuente De Vida Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh,</u> 224 N.J. 189, (2016).....	9
<u>Thurber v. Thurber,</u> 2017 N.J. Super. Unpub. LEXIS 106 (App. Div. 2017).....	17, 18
<u>Walker Rogge, Inc. v. Chelsea Title & Guaranty Co.,</u> 116 N.J. 517 (1989).....	18

Statutes & Other Authorities:

Barlow Burke, <i>Definitions</i> , Law of Title Ins. § 5.01 (2021 ed.)	13
Barlow Burke, <i>Title insurance defined</i> , Law of Title Ins. § 2.01 (2021 ed.)...	13
J. Bushnell Nielsen, Agents & Approved Attorneys, Title and Escrow Claims Guide § 17.1 (2020 ed.).....	23
J. Bushnell Nielsen, Escrow and other functions outside scope of agency, Title and Escrow Claims Guide § 17.2 (2020 ed.)	23
J. Bushnell Nielsen, <i>Third party beneficiary claims</i> , Title and Escrow Claims Guide § 7.7 (2020 ed.).....	14
Joyce Palomar, <i>Who is insured—Claims of uninsured third parties</i> , 1 Title Ins. Law § 4:29 (2020 ed.)	14
Joyce Palomar, <i>Who is insured—Who is insured under Loan policies</i> , 1 Title Ins. Law § 4:8 (2020 ed.)	14
N.J.S.A. 17:46B-1(i).....	24
NJLTIRB Rate Manual, § 1.10	24
Pressler & Verniero, <u>N.J. Court Rules</u> , cmt. 4 on <u>R. 2:6-2</u> (2015).....	9
R. 1:36-3	12, 18

I. PRELIMINARY STATEMENT

In this case, Plaintiffs/Appellants, Ifran Hassan (“**Hassan**”) and Little Mason Properties, LLC (“**LMP**”) (collectively, “**Plaintiffs**”), claim they are the victims of real property theft. Plaintiffs claim Hassan was the sole owner of LMP and that Defendants, Marc Theophile (“**Theophile**”) and Eight Copeland Road Group (“**ECRG**”), fraudulently transferred properties owned by LMP to ECRG and then encumbered the properties with mortgages. Defendant, 1st Rate Title and Settlement Services, LLC (“**1st Rate**”), issued lenders’ policies of title insurance and handled the closings of the mortgage transactions. Defendant/Respondent, Chicago Title Insurance Company (“**Chicago Title**”) insured the mortgages by underwriting lenders’ policies of title insurance in favor of the mortgagees.

In addition to seeking to hold Theophile and ECRG – the parties who are alleged to have committed the theft – liable for the alleged real property theft, Plaintiffs also sought to hold numerous other, much more attenuated parties liable, including Chicago Title. Relevant for purposes of this Appeal, Plaintiffs asserted that 1st Rate and Edward McCloud (collectively at times the “**1st Rate Defendants**”), failed to stop the allegedly unauthorized property transfers and mortgages. Plaintiffs attempted to hold Chicago Title liable for these alleged failures because 1st Rate was a title policy issuing agent for Chicago Title.

Following extensive discovery, Chicago Title moved for summary judgment on all of Plaintiffs' claims against it. Importantly, Plaintiffs did not dispute the material facts on which that motion was premised; specifically, Plaintiffs did not dispute that Plaintiffs did not ask Chicago Title or 1st Rate to issue a single policy of title insurance in their favor, that Plaintiffs never ordered a search or a commitment from Chicago Title or 1st Rate and that neither Chicago Title nor 1st Rate supplied Plaintiffs with a search or a commitment. On the contrary, Plaintiffs admitted that the subject title insurance policies were issued only for the benefit of the lenders and that Plaintiffs never dealt with Chicago Title or 1st Rate in any capacity with respect to the subject transactions. Based on those undisputed facts, the trial court granted summary judgment in favor of Chicago Title on all Plaintiffs' claims against Chicago Title, including its negligence claim. For the reasons set forth herein, this Court should affirm the trial court's Order granting summary judgment in favor of Chicago Title.

First, after an eleven (11) day bench trial, the trial court found that the subject property transfers and mortgages were authorized. If this Court upholds these findings, there is no need for this Court to consider Plaintiffs' appeal of the grant of summary judgment in favor of Chicago Title because if the property transfers and mortgages were authorized, Plaintiffs have no right to relief, much less against Chicago Title. In addition, if this Court upholds the trial court's

finding on summary judgment that the 1st Rate Defendants complied with the applicable standard of care, Chicago Title cannot be held liable for negligence because the negligence claim against Chicago Title is premised on the 1st Rate Defendants' alleged negligence.

Second, to impose liability on Chicago Title when it never agreed to underwrite any title insurance policies in favor of Plaintiffs, never performed a search for Plaintiffs, never issued a title commitment for Plaintiffs, and never even communicated with Plaintiffs, would expand the duties owed by a title insurer beyond what any other New Jersey court has done, and would drastically alter the allocation of risk in the title insurance industry as it has existed for decades.

Third, the terms of a written Issuing Agency Contract clarify that the scope of 1st Rate's agency excluded closings and issues that 1st Rate either knew about, or reasonably could have discovered through the exercise of reasonable diligence. The conduct about which Plaintiffs complained is outside the scope of the Issuing Agency Contract and cannot be the basis for imposing liability on Chicago Title.

For these reasons, which are discussed in full detail below, this Court should affirm the trial court's Order granting summary judgment in favor of Chicago Title on Plaintiffs' claims against it.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

A. Plaintiffs' Claims.

Plaintiffs claim they are the victims of real property theft. Plaintiffs claim Hassan was the sole member of LMP and that Theophile and ECRG fraudulently transferred properties owned by LMP to ECRG and then encumbered the properties with mortgages. (Pa0014-21). In total, Plaintiffs claim 18 real estate properties (the “**Subject Properties**”) were fraudulently transferred from LMP to ECRG. (Pa0017). Theophile is alleged to have created and used a fraudulent operating agreement for LMP, including forging Hassan’s signature to facilitate these transfers. (Pa0019-21). After obtaining title to the Subject Properties, ECRG encumbered the Subject Properties with 21 mortgages (the “**Mortgages**”) issued in favor of Velocity Commercial Capital, LLC (“**Velocity**”) and Jest Holdings, LLC (“**Jest**”). (Pa0021-22, ¶¶ 57, 66-67). The closings were handled by 1st Rate. (Pa243-252, Response to Interrogatory No. 2).

Chicago Title insured the Mortgages by underwriting loan policies of title insurance in favor of Velocity and Jest (the “**Title Policies**”). (Pa0016, ¶¶ 18; Pa0024, ¶77). The relationship between 1st Rate and Chicago Title is set forth and governed by an Issuing Agency Contract dated August 18, 2011. (Pa0441;

¹ The factual background and procedural history of this matter are intertwined and thus presented together.

Pa5390-91, p. 126:17-129:10).

It is undisputed that Plaintiffs had no dealings with Chicago Title or 1st Rate and Plaintiffs do not dispute that: (1) they did not ask Chicago Title to issue a single policy of title insurance in their favor; (2) they never ordered a title search or a commitment from Chicago Title; (3) Chicago Title never supplied Plaintiffs with a title search or a commitment; (4) the Title Policies were issued only in favor of Velocity and Jest; (5) Plaintiffs never dealt with Chicago Title in any capacity with respect to the subject transactions; (6) Hassan had no dealings with 1st Rate before the subject transactions closed; (7) Hassan has never spoken with McCloud; (8) Hassan never employed 1st Rate's services; (9) neither 1st Rate nor McCloud performed any services for Hassan or his companies; and (10) Hassan was not the 1st Rate Defendants' client. (Chicago Title Statement of Undisputed Facts Nos. 5-11 and responses thereto, Pa7420; Pa7589).

Acknowledging Chicago Title's limited role in the subject transactions, Plaintiffs sought to hold Chicago Title liable based on the actions of 1st Rate and McCloud, because 1st Rate was a title policy issuing agent for Chicago Title. (Pa0013). Plaintiffs asserted the following claims against Chicago Title: Count I (quiet title), Count III (fraud), Count IV (tortious interference), Count V

(conspiracy), Count VI (negligence) and Count VIII (negligent misrepresentation). (Pa0022-29).

B. Chicago Title's Summary Judgment Motion.

On May 6, 2022, Chicago Title filed a motion for summary judgment as to each cause of action asserted against Chicago Title. (Pa7418). Chicago Title argued on summary judgment that Chicago Title did not owe a duty to Plaintiffs regarding the subject transactions. Chicago Title also argued that the agency relationship between Chicago Title and 1st Rate was contractually limited in scope, did not include the alleged misconduct of 1st Rate and McCloud on which Plaintiffs based their claims, and specifically excluded closings. (Pa257).

Chicago Title also argued that although Hassan and Theophile disputed whether the transfers of the Subject Properties from LMP to ECRG and the Mortgages were authorized, those factual disputes were immaterial to the motion for summary judgment filed by and granted in favor of Chicago Title. Thus, Chicago Title argued that, even if the trial court were to assume for purposes of Chicago Title's summary judgment motion that Plaintiffs did not authorize the transfers of the Subject Properties and/or the Mortgages, given Chicago Title's limited role in the subject transactions, and the limited scope of its agency relationship with 1st Rate, as a matter of law, Plaintiffs could not maintain a cause of action against Chicago Title.

By Order dated August 2, 2022, the Honorable Robert J. Mega, P.J. Ch. granted summary judgment in favor of Chicago Title and against Plaintiffs as to each cause of action asserted against Chicago Title. (Pa0471).² In granting summary judgment in favor of Chicago Title, the trial court found as follows:

The Court finds that a title insurer cannot be held liable to a non-insured based on an agency theory. If there was an issue with the title examinations, those are the issues of the insured under the policy, they are not Plaintiffs' concern. Defendant Chicago Title Insurance Company did not perform a title search for Plaintiffs. Defendant Chicago Title Insurance Company never communicated with Plaintiffs. The Court finds that there is no sufficient evidence to support Plaintiffs' claims against Defendant Chicago Title Insurance Company.

(Pa0491).

The trial court also granted summary judgment in favor of 1st Rate and McCloud and, in doing so, found that 1st Rate and McCloud did not owe a duty to Plaintiffs and that 1st Rate and McCloud complied with the applicable standard of care. (Pa0492).

² Judge Mega's August 2, 2022 collectively addressed the separate summary judgment motions filed by various other parties as well, including Plaintiffs as to their Quiet Title claim against all defendants (which was denied), the 1st Rate Defendants as to all counts against them (which was granted), the mortgage lender defendants as to certain counts against them (which was granted) and the mortgage broker as to all counts against them (which was granted). (See Pa471-494).

C. The Trial.

Subsequent to Judge Mega's summary judgment decision on August 2, 2022, an eleven-day bench trial was held between January 5 and February 22, 2023 on the counts remaining against Theophile, ECRG, the mortgage lenders and the notary whose certification, seal and signature of a notary appeared on one of the documents that Plaintiffs claim was forged. (See 1T through 11T; Pa495-549). In its Order and decision entered on March 31, 2023, the Court entered judgment against Plaintiffs on all remaining counts. (Pa495-549). The Court found, among other things, that the transfers of the Subject Properties and the Mortgages were authorized. (See Pa524-525).

IV. LEGAL ARGUMENT

In appealing the trial court's grant of summary judgment in favor of Chicago Title on their negligence claim, Plaintiffs argue that the trial court erred by: (a) not finding that Chicago Title owed a duty of care to Plaintiffs; and (b) not finding Chicago Title liable for 1st Rate's alleged wrongdoing under an agency theory.³ As confirmed below, both of these arguments should be

³ In their Appeal Brief, Plaintiffs appear to appeal the trial court's grant of summary judgment in favor of Chicago Title only as to Count VI (negligence). Plaintiffs do not address any of the other causes of action that were asserted against Chicago Title and dismissed on summary judgment. (See Pb71-90). As a result, Chicago Title only addresses herein Plaintiffs' negligence claim against Chicago Title. "An issue that is not briefed is deemed waived upon appeal."

rejected. However, as an initial matter, if this Court upholds certain rulings of the trial court, there is no basis for imposing liability against Chicago Title and the Court need not consider Plaintiffs' arguments regarding the grant of summary judgment in favor of Chicago Title.

A. Standard of Review

When reviewing the grant of summary judgment, the Appellate Division applies the same standard as the trial court in determining whether summary judgment is appropriate. 27-35 Jackson Ave., LLC v. Samsung Fire & Marine Ins. Co., Ltd., 469 N.J. Super. 200, 205 (App. Div. 2021) (internal citations omitted). “That standard *mandates* that summary judgment be granted ‘if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.’” Id. (quoting Templo Fuente De Vida Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)) (emphasis added).

See N.J. Dep’t of Env’t Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) (citing Fantis Foods v. N. River Ins. Co., 332 N.J. Super. 250, 266-67 (App.Div.2000); Pressler & Verniero, N.J. Court Rules, cmt. 4 on R. 2:6-2 (2015)); see also State v. Shangzhen Huang, 461 N.J. Super. 119, 125 (App. Div. 2018) (citing to 539 Absecon Blvd., L.L.C. v. Shan Enters. Ltd. P’ship, 406 N.J. Super. 242, 272 n.10 (App. Div. 2009) for the proposition that “claims that have not been briefed are abandoned on appeal”).

“The ‘essence of the inquiry’ is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” Alfano v. Schaud, 429 N.J. Super. 469, 474 (App. Div. 2013) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” Id. (internal quotation marks and citation omitted).

B. If Certain Rulings of the Trial Court are Upheld, No Liability Can Be Imposed Against Chicago Title as a Matter of Law and Plaintiffs’ Appeal as to Chicago Title Should Be Denied.

To succeed on a claim for negligence, a plaintiff bears the burden of proving each of the following elements: “(1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages.” Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (internal quotations and citation omitted). Plaintiffs’ negligence claim against Chicago Title is premised on the notion that 1st Rate, Chicago Title’s agent, owed a duty to Plaintiffs to have stopped the allegedly unauthorized transfers of the Subject Properties and the Mortgages, and that 1st Rate breached that duty.

Following the eleven-day bench trial, however, the trial court found that Theophile was acting “with Hassan’s knowledge and approval . . . when transferring title to the subject properties from [LMP] to [ECRG], and when

entering into the contested loan agreements,” and that “Hassan knew and otherwise authorized the transfer of title for the subject properties from [LMP] to [ECRG] . . .” (Pa524-525, 536; Pb29-64). Although the trial court’s decision to grant summary judgment in favor of Chicago Title on Plaintiffs’ negligence claim preceded these factual findings by the trial court, this Court should affirm the trial court’s Order based on these factual findings, because there can be no “breach” as a matter of law where there was no unauthorized transaction which negligently was not stopped. See Ballingall v. Ballingall, No. A-2494-21, 2023 N.J. Super. Unpub. LEXIS 831, at *13 n.6 (N.J. Super. App. Div. May 30, 2023) (noting that ““appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion,”” and affirming denial of plaintiffs’ summary judgment motion for reasons different than the motion court) (quoting Hayes v. Delamotte, 231 N.J. 373, 387 (2018)); Onukogu v. N.J. State Judiciary Essex Vicinage, No. A-3536-20, 2023 N.J. Super. Unpub. LEXIS 654, at *23 (N.J. Super. App. Div. May 1, 2023) (relying on Hayes for the proposition that, on de novo review of summary judgment record on appeal, Appellate Division was “not bound by the court’s reasoning and may employ reasoning different from the motion court as

the basis for an affirmance of the court's orders.'")⁴ As to why this Court should affirm the trial court's findings of knowledge, approval, authority and validity on appeal, Chicago Title incorporates herein the arguments set forth in the Lender Defendants'⁵ and Theophile's and ECRG's respective Briefs in Opposition to this appeal.

Furthermore, the trial court found on summary judgment that the 1st Rate Defendants complied with the applicable standard of care. (Pa0492). While Plaintiffs are appealing this finding, if this Court upholds it, there can be no negligence claim against Chicago Title, as a matter of law, as that claim is premised on 1st Rate having breached a duty to stop the transfers of the Subject Properties and the Mortgages. (Pa0027); see Ballingall, 2023 N.J. Super. Unpub. LEXIS 831, at *13 n.6; Onukogu v. N.J. State Judiciary Essex Vicinage,

⁴ Pursuant to R. 1:36-3 a copy of the Ballingall and Onukogu opinions are located at CTDa95-CTDa99 and CTDa109-CTDa122.

⁵ The term "Lender Defendants" includes the current mortgage holders who are foreclosing on the Subject Properties: Defendants JEST Holdings, LLC; Revolving Mortgage Investment Trust 2017-BRQ1, by U.S. Bank National Association, as Trustee; U.S. Bank National Association as Trustee for Velocity Commercial Capital Loan Trust 2018; U.S. Bank National Association as Trustee for Velocity Commercial Capital Loan Trust 2018-2; Wilmington Savings Fund Society, FSB d/b/a Christiana Trust, Not in Its Individual Capacity, but Solely in Its Capacity as Certificate Trustee for NRP Mortgage Trust 1; Napier Park LH-NP-Strat Delaware Owner Trust and LH-NP-Strat Delaware Owner Trust.

2023 N.J. Super. Unpub. LEXIS 654, at *23. Chicago Title maintains that this Court should uphold this finding based on the arguments set forth in the 1st Rate Defendants' Brief in Opposition to this appeal and incorporates those arguments herein.

Even if this Court were to reverse the trial court's findings in either regard, it can, and should, still affirm the trial court's decision to grant summary judgment in Chicago Title's favor for the reasons set forth below.

C. The Trial Court Correctly Found Chicago Title Owed No Duty to Plaintiffs.

The general rule, as confirmed in numerous authoritative treatises, is that a title insurer does not owe duties outside the title insurance policy. For example:

- Barlow Burke, *Title insurance defined*, Law of Title Ins. § 2.01 (2021 ed.) ("Owners, lessees, and lenders each have a separate interest in a title, insurable in its own right. As a general rule, an owner-mortgagor gains no rights as an insured when his or her mortgagee takes out a title insurance policy. The jurisprudence is clear that title insurance issued only to a mortgagee confers no benefits upon the mortgagor. Only the mortgagee could sue to recover benefits."). (CTDa2⁶).
- Barlow Burke, *Definitions*, Law of Title Ins. § 5.01 (2021 ed.) ("only the parties named in the policy as holding the interests specified are insured. . . . In general, the duty of a title insurance company runs only to its insured, not to third parties who are not party to the contract. A person not falling within the definition of

⁶ CTDa_ refers to Chicago Title's Appendix.

an ‘insured’ may not reasonably rely on a policy or its provisions.”). (CTDa22).

- Joyce Palomar, *Who is insured—Who is insured under Loan policies*, 1 Title Ins. Law § 4:8 (2020 ed.) (“As discussed more fully in § 4:29, courts generally also reject purchasers/mortgagors’ claims of coverage under title insurance policies which name their mortgagees as the insured. This has been the case even where the mortgagor paid the premium and was required to provide the policy as a condition to receiving the loan.”). (CTDa60).
- Joyce Palomar, *Who is insured—Claims of uninsured third parties*, 1 Title Ins. Law § 4:29 (2020 ed.) (“In an action on the title insurance contract, a court is likely to find that the mortgagor has no rights directly or as a third-party beneficiary under its mortgagee’s loan policy, even though the mortgagor was required to pay the premium for the loan policy as a condition to receiving the loan.”). (CTDa63).
- J. Bushnell Nielsen, *Third party beneficiary claims*, Title and Escrow Claims Guide § 7.7 (2020 ed.) (“[A] seller is not an insured or third party beneficiary of the policy, and the insurer does not owe a duty to the seller.”) (CTDa71).

This is not to say, however, that a title insurer’s liability is always limited to claims arising under contract. Indeed, while Plaintiffs suggest that Chicago Title so argued, and the trial court so held, neither is true. Chicago Title acknowledged in its summary judgment motion that, while the general rule is that title insurers only owe duties to the named insured, in certain circumstances, title insurers could potentially be liable for negligence *if* the title insurer assumed non-contractual duties. Plaintiffs’ claim against Chicago Title failed because Plaintiffs failed to present evidence of a single obligation assumed by

Chicago Title outside the Title Policies that would warrant deviating from the general rule, and the trial court agreed. The trial court did not hold that title insurers can never be held liable for negligence. (Pa0491).

The trial court's finding that Chicago Title did not assume a duty in favor of Plaintiffs is supported by the undisputed facts and the law. The undisputed evidence before the trial court confirmed: (1) Plaintiffs did not ask Chicago Title to issue a single policy of title insurance in their favor; (2) Plaintiffs never ordered a title search or a commitment from Chicago Title; (3) Chicago Title never supplied Plaintiffs with a title search or a commitment; (4) the Title Policies were issued only in favor of Velocity and Jest; (5) Plaintiffs never dealt with Chicago Title in any capacity with respect to the subject transactions; (6) Hassan had no dealings with 1st Rate before the subject transactions closed; (7) Hassan never spoke with McCloud; (8) Hassan never employed 1st Rate's services; (9) neither 1st Rate nor McCloud performed any services for Hassan or his companies; and (10) Hassan was not the 1st Rate Defendants' client. (Chicago Title Statement of Undisputed Facts Nos. 5-11 and responses thereto, Pa7420; Pa7589-7590).

Further, and notably, Plaintiffs' own proposed expert, Joseph Grabas ("**Grabas**"), admittedly did not render an opinion that Chicago Title assumed any duties outside the Title Policies. (Pa6861, p. 127:19-25). Based on these

undisputed facts, if this Court were to impose a duty on Chicago Title to parties as attenuated as Plaintiffs, the Court would improperly open the floodgates to a host of meritless lawsuits that would inundate the title insurance industry. This no doubt is why no New Jersey court has gone to such lengths.

Smith v. Boyd, 272 N.J. Super. 186 (Law Div. 1993) is squarely on point and supports the trial court's conclusion that Chicago Title does not owe a duty to Plaintiffs and therefore cannot be held liable for negligence as a matter of law. In Smith, a title report prepared by a title insurer for the benefit of a foreclosing lender failed to reference a mortgage. The plaintiff was the successful bidder at the foreclosure sale and filed suit against the title insurer, among others, claiming the title report was negligently prepared. After noting that the plaintiff's negligence claim depended upon both the existence of a duty and the breach of that duty, the court found that the title insurer owed no duty to the plaintiff:

Plaintiff's claim of negligence depends upon both the existence of a duty and the breach of that duty. I find that no common law duty existed from [title insurer] to plaintiff (and therefore do not even get to the issue of breach of any duty). . . . [Title insurer's] having made a title report does not create a common law duty to plaintiff. That report was for the benefit of the foreclosing plaintiff; to ascertain the proper parties defendant and to give the appropriate information to the sheriff for the advertisement and the announcements at sale.

Id. at 196. The court went on to note that the plaintiff was neither a direct nor third-party beneficiary of the title report and stated:

To find for plaintiff would be tantamount to elevating him to the status of an insured, at no effort or expense to him. I am convinced that this would have been beyond the reasonable contemplation of the contracting parties and therefore affords no basis upon which to rest a judgment for plaintiff. (Emphasis added.)

Id. at 197-98 (emphasis added).

The title examinations here (while not performed by Chicago Title) were similarly performed for the benefit of Velocity and Jest, not Plaintiffs. There is absolutely no evidence of Chicago Title assuming any duties outside of the Title Policies which would warrant imposing a duty on Chicago Title. Accordingly, just as the court in Smith correctly found there was no duty owed to the plaintiff, the trial court below correctly found Chicago Title owed no duty to Plaintiffs, noting that “[i]f there was an issue with the title examinations, those are the issues of the insured under the policy, they are not Plaintiffs’ concern.” (Pa0491).

Thurber v. Thurber, 2017 N.J. Super. Unpub. LEXIS 106 (App. Div. 2017) is also directly on point and supports the trial court’s granting summary

judgment in Chicago Title's favor.⁷ In Thurber, a husband transferred property that was solely in his wife's name to himself by a fraudulent deed. Husband then encumbered the property with a series of mortgages. Wife filed suit and named the title insurer of one of the mortgage transactions as a defendant. Summary judgment was granted in favor of the title insurer and affirmed on appeal, with the Appellate Division finding the title insurer owed no duty to Wife and that Wife could not recover against the title insurer "using theories of agency or apparent authority." Id. at 18-19. Similarly here, because Plaintiffs are not insureds under the Title Policies, and there is no evidence of Chicago Title having assumed any duties outside of the Title Policies, Chicago Title owes no duty to Plaintiffs as a matter of law.

Plaintiffs cite to Cocco v. Hamilton, 2010 N.J. Super. Unpub. LEXIS 1047, 2010 WL 2011003 (App.Div. 2010) to suggest that title insurers may be found negligent. Plaintiffs, however, miss the point, as Chicago Title did not argue title insurers may *never* be found negligent. Indeed, as discussed above, Chicago Title acknowledged on summary judgment and acknowledges again on appeal that Walker Rogge, Inc. v. Chelsea Title & Guaranty Co., 116 N.J. 517, 541 (1989) confirms that a title insurer can be liable in negligence to an insured

⁷ Pursuant to R. 1:36-3 a copy of the Cocco opinion is located at CTDa100-CTDa108.

when the title insurer assumes duties outside the title policy. Here, Plaintiffs admittedly are not insureds and they failed to identify any duties Chicago Title assumed outside the Title Policies. (Chicago Title Statement of Undisputed Facts No. 7 and response thereto, Pa7421; Pa7590). Plaintiffs' own proposed expert admittedly did not render an opinion that Chicago Title assumed any duties outside the Title Policies. (Pa6861, p. 127:19-25).

Moreover, the court in Cocco did not impose negligence liability on a title insurer. The Appellate Division simply reversed summary judgment because there was a factual dispute regarding the representations made directly to the insured at a closing regarding the significance of a lis pendens and the status of pending litigation. Here, it is undisputed that the Title Policies were issued for the benefit of Velocity and Jest, not Plaintiffs, and that neither Chicago Title nor 1st Rate made any pre-closing representations to Plaintiffs. (Chicago Title Statement of Undisputed Facts Nos. 5-11 and responses thereto, Pa7420; Pa7589). Since Chicago Title's involvement in the subject transactions was limited to underwriting title policies for the benefit of Velocity and Jest, the trial court properly refused to elevate Plaintiffs to the status of an insured and properly found that Chicago Title owed no duty to Plaintiffs.

While Plaintiffs argue this Court should impose a duty on Chicago Title based on factors courts consider in imposing duties (Pb77-87), those factors only

reinforce that imposing a duty on Chicago Title in this case would be improper as a matter of law under the undisputed facts of this case. As to foreseeability of the alleged harm, Plaintiffs do not dispute that: (1) they did not ask Chicago Title to issue a single policy of title insurance in their favor; (2) they never ordered a title search or a commitment from Chicago Title; (3) Chicago Title never supplied Plaintiffs with a title search or a commitment; (4) the Title Policies were issued only in favor of Velocity and Jest; (5) Plaintiffs never dealt with Chicago Title in any capacity with respect to the subject transactions; (6) Hassan had no dealings with 1st Rate before the subject transactions closed; (7) Hassan never spoke with McCloud; (8) Hassan never employed 1st Rate's services; (9) neither 1st Rate nor McCloud performed any services for Hassan or his companies; and (10) Hassan was not the 1st Rate Defendants' client. (Chicago Title Statement of Undisputed Facts Nos. 5-11 and responses thereto, Pa7420; Pa7589-7590). Under such facts and circumstances, Chicago Title could not have foreseen that its issuance of Title Policies in favor of Velocity and Jest would result in harm to Plaintiffs, with whom Chicago Title never dealt.

Furthermore, the law will not impose a duty even where the harm *is* foreseeable if considerations of fairness and public policy do not support imposing such a duty. See Cidalina O. Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572 (1996). As discussed above, if this Court were to deviate from

the general rule and impose a duty on Chicago Title to parties as attenuated as Plaintiffs under the undisputed facts of this case, the Court would improperly open the floodgates to a host of meritless lawsuits that would turn the title insurance industry on its head, and significantly increase the cost of title insurance.

D. The Trial Court Correctly Found Chicago Title Is Not Liable for the Alleged Wrongdoing of 1st Rate Based on an Agency Theory.

The trial court correctly refused to find Chicago Title liable for 1st Rate's alleged misconduct based on an agency theory. First, the trial court found that 1st Rate owed no duty to Plaintiffs. (Pa0492). However, even if the trial court had found that 1st Rate owed a duty to Plaintiffs and breached that duty, there is no basis for imposing negligence liability against Chicago Title because 1st Rate's alleged misconduct was outside the scope of its relationship with Chicago Title.⁸

⁸ Plaintiffs do not argue on appeal that the trial court should have found Chicago Title liable under an "apparent authority" theory, presumably because apparent authority must be based upon conduct of the principal (here, Chicago Title), and Plaintiffs admittedly did not rely on any representations made by Chicago Title. (See Chicago Title Statement of Undisputed Facts No. 8, Pa7421; Pa7590). As such, this issue is deemed waived on appeal and thus Chicago Title will not address it. See Alloway Twp., 438 N.J. Super. at 505 n.2; Shangzhen Huang, 461 N.J. Super. at 125.

The scope of 1st Rate's agency is set forth in the Issuing Agency Contract between Chicago Title and 1st Rate and is not unlimited. Pursuant to the terms of the Issuing Agency Contract, 1st Rate's agency was for the sole purpose of issuing title insurance commitments, policies, endorsements and other title assurances, and further expressly excluded closings and issues that 1st Rate either knew about, or reasonably could have discovered through the exercise of reasonable diligence. (Pa0441-444, §§1, 4.J. and 7.B). These limitations prevent Plaintiffs' recovery against Chicago Title, and the trial court therefore correctly granted summary judgment in favor of Chicago Title.

To be clear, Chicago Title did not argue below and is not arguing here that it is never responsible for the acts committed by 1st Rate. However, where, as here, the alleged misconduct occurred at a closing and was the type of conduct that 1st Rate knew about, or reasonably could have discovered through the exercise of reasonable diligence, 1st Rate's conduct falls outside the scope of the Issuing Agency Contract.

1. 1st Rate's Agency Was for the Sole Purpose of Issuing Title Insurance Commitments, Policies, Endorsements and Other Title Assurances and Expressly Excluded Closings.

Principals and agents may limit the scope of the agency between them. Metropolitan Life Ins. Co. v. Coddington, (N.J. Ch. 1942) (a principal has the right to limit the powers and authority of its own agents); Hudson v. Fay, (N.J.

Ch. 1939) (an agent has no authority to bind a principal outside the terms limited by the agency agreement).

Here, the Issuing Agency Contract expressly limited the agency to the “sole purpose of issuing title insurance commitments, policies, endorsements and other title assurances” while also expressly stating: “***Agent [1st Rate] is not an agent of Principal [Chicago Title] for purposes of conducting a Closing,*** and Agent agrees that it will not hold itself out to the public in such a manner as to suggest that it is the agent of the Principal for Closings.” (Pa0441-443, §§1 and 4.J) (emphasis added). These limitations on the scope of a title policy issuing agent’s authority are confirmed in J. Bushnell Nielsen’s Title and Escrow Claims Guide, which provides:

- J. Bushnell Nielsen, Agents & Approved Attorneys, Title and Escrow Claims Guide § 17.1 (2020 ed.) (“A title agent’s actual authority is determined by the agency contract. The relationship between agent and insurer is contractual. It is almost always defined by a written agreement. The contract establishes that the agent may act for the insurer in soliciting and issuing insurance policies. The contract invariably states that any escrow, attorney-client or other duties assumed are not within the scope of the agency.). (CTDa78).
- J. Bushnell Nielsen, Escrow and other functions outside scope of agency, Title and Escrow Claims Guide § 17.2 (2020 ed.) (“Modern title agency contracts explicitly state that escrow or closing duties assumed by the agent are outside of the scope of the agency. A title agent has no authority to enter into an escrow agreement “as agent of” its underwriter. The insurer is not bound by an agency relationship that does not exist and that is proclaimed only by the alleged agent. The title agent’s handling of the closing, without

more, does not make the insurer liable for the agent's acts as closer."). (CTDa84).

The limited scope of a title agent's authority is further confirmed by the New Jersey Land Title Insurance Rating Bureau Rate Manual, which provides:

"Title Insurance Agent" shall mean a person or entity as defined in N.J.S.A. 17:46B-1(i) who or which holds a valid license from the State of New Jersey and is a party to a written contract with an Insurer which authorizes the Title Insurance Agent to prepare and issue title insurance commitments, policies and endorsements on its behalf. Nothing contained in this Manual shall be construed to extend the authority or scope of agency of a Title Insurance Agent beyond that which is set forth in its contract with an Insurer.

See NJLTIRB Rate Manual, §1.10 (definition of "Title Insurance Agent"). (CTDa93-CTDa94)

The transfers of the Subject Properties and the Mortgages about which Plaintiffs complain are acts that occurred during closings. Indeed, had the transactions not closed, Plaintiffs would not be claiming any losses. As discussed further below, none of the claimed losses are attributable to any of the title examinations performed by 1st Rate in order to issue the Title Policies to Velocity and Jest. The only reason Plaintiffs claim to have suffered any losses is because 1st Rate did not stop the closings. As a result, the subject transactions fall outside the express terms of the Issuing Agency Contract.

The Court should reject Plaintiffs' contention that their alleged losses flow from the title examinations performed by 1st Rate in the course of evaluating whether to issue the title insurance policies to Velocity and Jest. The title examinations performed by 1st Rate have nothing to do with Plaintiffs' claimed losses. The title examinations were performed to allow lenders' policies of title insurance to be issued in favor of Velocity and Jest. Unrelated to the title examinations or the Title Policies, Plaintiffs' claimed losses are tethered to the transfer of the subject properties to ECRG and the subsequent mortgages thereon.

Here, even if there had been an issue with 1st Rate's examinations in assessing whether to issue title insurance (*e.g.*, a missed gap in title or a missed easement), those are the insureds' concerns under the Title Policies, not Plaintiffs' concerns. Plaintiffs' concerns are solely attributable to the failure to stop the transfers of the Subject Properties and the Mortgages. These are issues not within the limited scope of 1st Rate's agency but are closing issues which the Issuing Agency Contract expressly excludes from the scope of the agency. Accordingly, summary judgment was properly granted in favor of Chicago Title.

2. The Scope of 1st Rate's Agency Does Not Include Issues that 1st Rate Knew About or Reasonably Could Have Discovered Through the Exercise of Reasonable Diligence.

As set forth in the Issuing Agency Contract, the scope of 1st Rate's agency relationship with Chicago Title does not include issues that 1st Rate either knew about, or reasonably could have discovered through the exercise of reasonable diligence. (Pa444, §7.B). Grabas – Plaintiffs' own expert – opined that had 1st Rate exercised the proper standard of care it would have discovered that the subject transactions were disputed and stopped the closings. (Pa6894, p. 130:12-131:7). Grabas opined that the issues with which he finds fault are issues that 1st Rate either knew about, or reasonably could have discovered through the exercise of reasonable diligence. (Pa6893, p. 128:15-129:1, 129:6-131:7; Pa444, §7.B). Notably, Grabas did not opine that the 1st Rate Defendants were acting as Chicago Title's agent when performing the conduct on which Plaintiffs base their claims. (See Pa6893, p. 127:8-18). Accordingly, the trial court correctly refused to find that 1st Rate was acting as Chicago Title's agent when it engaged in the alleged conduct with which Plaintiffs find fault and therefore cannot be held liable under an agency theory as a matter of law.

IV. CONCLUSION

For the foregoing reasons, Chicago Title respectfully requests that the Court deny Plaintiffs' appeal as to Chicago Title and affirm the trial court's grant of summary judgment in favor of Chicago Title.

**ZARWIN, BAUM, DeVITO, KAPLAN
SCHAER & TODDY, P.C.**

By: /s/ Chelsea P. Jasnoff
Chelsea P. Jasnoff, Esquire
Attorneys for Defendant
Chicago Title Insurance Company

Dated: December 2, 2024

IRFAN HASSAN AND LITTLE MASON
PROPERTIES, LLC

Plaintiffs,

v.

MARC-ROLAND THEOPHILE; EIGHT,
COPELAND ROAD GROUP, LLC; JEST
HOLDINGS, LLC; REVOLVING
MORTGAGE INVESTMENT TRUST
2017-BRQ1, BY U.S. BANK NATIONAL
ASSOCIATION, AS TRUSTEE; U.S.
BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR VELOCITY
COMMERCIAL CAPITAL LOAN TRUST
2018 A/K/A U.S. BANK NATIONAL
ASSOCIATION AS TRUSTEE FOR
VELOCITY COMMERCIAL CAPITAL
LOAN TRUST 2018-1; U.S. BANK
NATIONAL ASSOCIATION AS TRUSTEE
FOR VELOCITY COMMERCIAL
CAPITAL LOAN TRUST 2018-2;
WILMINGTON SAVINGS FUND
SOCIETY, FSB D/B/A CHRISTIANA
TRUST, AS CERTIFICATE TRUSTEE FOR
NRP MORTGAGE TRUST 1; LH-NP
STRAT DELAWARE OWNER TRUST;
U.S. BANK, N.A., AS INDENTURE
TRUSTEE FOR VCC 2022 MC-1 TRUST
AND VELOCITY COMMERCIAL
CAPITAL, LLC; EDDY JEAN JACQUES;
1ST RATE TITLE AND SETTLEMENT
SERVICES, LLC; EDWARD MCCLOUD;
CLOSE NOW, LLC; AND ANTHONY
BARBER,

Defendants.

APPELLATE DIVISION,
DOCKET NO. A-002759-22T4

ON APPEAL FROM ORDERS IN THE
SUPERIOR COURT OF NEW JERSEY,
CHANCERY DIVISION, UNION
COUNTY DOCKET NO. UNN-C-0005-20

SAT BELOW:
HON. ROBERT J. MEGA, P.J.CH.

CIVIL ACTION

BRIEF OF LENDER RESPONDENTS IN OPPOSITION TO APPEAL

RIKER DANZIG LLP

Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962-1981
(973) 538-0800

Co-Counsel for Lender Respondents,
Jest Holdings, LLC; Revolving Mortgage
Investment Trust 2017-BRQ1, By U.S. Bank
National Association, as Trustee; U.S. Bank
National Association as Trustee For Velocity
Commercial Capital Loan Trust 2018 a/k/a U.S.
Bank National Association as Trustee For Velocity
Commercial Capital Loan Trust 2018-1; U.S. Bank
National Association as Trustee For Velocity
Commercial Capital Loan Trust 2018-2;
Wilmington Savings Fund Society, FSB d/b/a
Christiana Trust, as Certificate Trustee For NRP
Mortgage Trust 1; LH-NP-Strat Delaware Owner
Trust; U.S. Bank, N.A., as Indenture Trustee For
VCC 2022MC-1 Trust and Velocity Commercial
Capital, LLC

Of Counsel and on the Brief:

Michael R. O'Donnell, Esq. (NJ Bar No. 030491988)
Bethany A. Abele, Esq. (NJ Bar No. 031752006)

On the Brief:

Kori L. Pruett, Esq. (NJ Bar No. 416602022)

Submitted: December 2, 2024

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY.....	3
STATEMENT OF FACTS	4
I. HASSAN’S FINANCIAL WOES AND NEED FOR THEOPHILE’S ASSISTANCE	4
II. THE PARTNERSHIP BETWEEN THEOPHILE AND HASSAN	7
A. Hassan and Theophile Worked Together as Partners and Friends in Pursuit of their Plan.....	7
B. Before the Closings of the Loans, Hassan was Aware Theophile Registered LMP in New Jersey with Theophile listed as its Agent....	10
C. Hassan Continued to Work with Theophile Knowing that Theophile Represented himself to Third Parties as Authorized to Act for LMP and as the Owner of the Properties.....	13
D. Hassan Authorized Theophile to Negotiate on Behalf of Plaintiffs ...	16
E. Hassan Gave Theophile Everything He Needed to Close the Loans..	17
F. Hassan Received Information Regarding the Loans.....	18
III. THE ECRG LOANS AND MORTGAGES.....	20
IV. HASSAN’S “EPIPHANY” AND DISAVOWAL OF THEOPHILE	22
LEGAL ARGUMENT.....	22
I. STANDARD OF REVIEW.....	22
A. Trial Decision.....	22
B. Summary Judgment.....	24
II. THE TRIAL COURT PROPERLY FOUND FOR THE LENDERS	24
A. The Appeal is Moot as to Eleven Loans/Mortgages	24

B.	The Trial Court’s Decision is Supported by Competent, Relevant and Reasonably Credible Evidence set forth in the Record.....	25
C.	The Trial Court’s Credibility Determinations should be Upheld as They are Supported by Adequate, Substantial and Credible Evidence and the Trial Court’s Own Observations of the Witnesses	30
D.	The Trial Court Properly Held that the Lenders were Permitted to Treat Theophile as a Hostile Witness.....	36
E.	The Trial Court Properly Held that Theophile Had Actual Authority to Act on Behalf of LMP	39
F.	The Trial Court Properly Held that Theophile Had Apparent Authority to Act on Behalf of LMP	40
III.	THE LENDERS’ MORTGAGES ARE VALID UNDER EQUITABLE MAXIMS: RATIFICATION, UNCLEAN HANDS, ESTOPPEL	42
IV.	SUMMARY JUDGMENT FOR THE LENDERS WAS PROPER	45
A.	Plaintiffs’ Position That They Can Recover Monetary Damages on an Ejectment Action Against a Party that Never Possessed the Property Ignores the Plain Meaning of N.J.S.A. 2A:35-2	45
B.	The Trial Court Correctly Determined that the Lenders are Entitled to Partial Summary Judgment on Equitable Subrogation	48
CONCLUSION		50

**TABLE OF JUDGMENTS, ORDERS, AND RULINGS APPEALED WITH
CITATIONS TO PLAINTIFFS' APPENDIX**

JUDGMENTS/ORDER	ORDER	DECISION
Judgment of Honorable Robert J. Mega, Superior Court, Union County, dated March 31, 2023, Dismissing Plaintiffs' Claims	Pa495	Pa535
Order of Honorable Robert J. Mega, Superior Court, Union County, dated August 2, 2022, granting Summary Judgment in Favor of Anthony Barber and Close Now, LLC	Pa471	Pa490
Order of Honorable Robert J. Mega, Superior Court, Union County, dated August 2, 2022, granting Summary Judgment in Favor of Chicago Title Insurance Company	Pa471	Pa491
Order of Honorable Robert J. Mega, Superior Court, Union County, dated August 2, 2022, granting Summary Judgment in Favor of JEST Holdings, LLC	Pa471	Pa491
Order of Honorable Robert J. Mega, Superior Court, Union County, dated August 2, 2022, granting Summary Judgment in Favor of Edward McCloud and 1st Rate Title and Settlement Services, LLC	Pa471	Pa492
Order of Honorable Robert J. Mega, Superior Court, Union County, dated August 2, 2022, granting Summary Judgment in Favor of the Lender Defendants	Pa471	Pa493

TABLE OF AUTHORITIES

Cases	Page(s)
<u>Aboutay v. Savarino,</u> 2006 N.J. Super. Unpub. LEXIS 2290 (App. Div. Aug. 1, 2006)	36
<u>Accounteks.Net, Inc. v. CKR Law, LLP,</u> 475 N.J. Super. 493 (App. Div. 2023)	32
<u>AMB Prop., LP v. Penn Am. Ins. Co.,</u> 418 N.J. Super. 441 (App. Div. 2011)	40
<u>Capparelli v. Lopatin,</u> 459 N.J. Super. 584 (App. Div. 2019)	36
<u>Cesare v. Cesare,</u> 154 N.J. 394 (1998)	23
<u>Chrisomalis v. Chrisomalis,</u> 260 N.J. Super. 50 (App. Div. 1992)	43
<u>Clients’ Sec. Fund of the Bar v. Allstate Ins. Co.,</u> 219 N.J. Super. 325 (App. Div. 1987)	44
<u>Connecticut Car Rental, Inc. v. Prime One Capital Co.,</u> 247 F. Supp. 2d 158 (D. Conn. 2003)	42
<u>Cumberland Farms, Inc. v. N.J. Dep’t of Env’t Prot.,</u> 447 N.J. Super. 423 (App. Div. 2016)	25, 30
<u>Dencer v. Erb,</u> 142 N.J. Eq. 422 (Ch. 1948)	44
<u>Eaglebank v. BR Pro. Sports Grp., Inc.,</u> 649 F. App’x 209 (3d Cir. 2016)	42
<u>Edward D. Lord, Inc. v. Mun. Utils. Auth.,</u> 128 N.J. Super. 43 (Law Div. 1974)	45
<u>First Union Nat’l Bank v. Nelkin,</u> 354 N.J. Super. 557 (App. Div. 2002)	44
<u>Glob. Am. Ins. Managers v. Perera Co.,</u> 137 N.J. Super. 377 (Ch. Div. 1975)	44

<u>Globe Motor Car Co. v. First Fid. Bank, N.A.,</u> 273 N.J. Super. 388 (Law Div. 1993)	44
<u>Goodwin Motor Corp. v. Mercedes-Benz of North America, Inc.,</u> 172 N.J. Super. 263 (App. Div. 1980)	43
<u>Gripenburg v. Twp. of Ocean,</u> 220 N.J. 239 (2015)	32
<u>Hayes v. Delamotte,</u> 231 N.J. 373 (2018)	23
<u>Homeopathic Mut. Life Ins. Co. v. Marshall,</u> 32 N.J. Eq. 103 (Ch. 1880)	49
<u>In re Tr. Created By Agreement Dated Dec.20,</u> 194 N.J. 276 (2008)	25, 27, 39
<u>Inv. Bank v. Torres,</u> 243 N.J. 25 (2020)	24
<u>Invs. Sav. Bank v. Keybank, N.A.,</u> 424 N.J. Super. 439 (App. Div. 2012)	48, 50
<u>Isko v. Planning Bd.,</u> 51 N.J. 162 (1968)	23
<u>Jennings v. Reed,</u> 381 N.J. Super. 217 (App. Div. 2005)	40
<u>Kuhn v. Tumminelli,</u> 366 N.J. Super. 431 (App. Div. 2004)	41
<u>Marder v. Realty Const. Co.,</u> 84 N.J. Super. 313 (App. Div. 1964)	47
<u>Mem'l Props., LLC v. Zurich Am. Ins. Co.,</u> 210 N.J. 512 (2012)	24
<u>Meshinsky v. Nichols Yacht Sales, Inc.,</u> 110 N.J. 464 (1988)	31
<u>N.J. Div. of Child Prot. & Permanency v. T.D.,</u> 454 N.J. Super. 353 (App. Div. 2018)	31

<u>N.Y. Mortg. Tr. 2005-3 Mortg.-Backed Notes, U.S. Bank Nat. Ass’n as Tr. v. Deely,</u> 466 N.J. Super. 387 (App. Div. 2021)	48
<u>N.Y. Susquehanna & W. Ry. Corp. v. State Dep’t of Treasury, Div. of Taxation,</u> 6 N.J. Tax 575 (1984)	24
<u>Newark Branch, N.A.A.C.P. v. Twp. of W. Orange,</u> 786 F. Supp. 408 (D.N.J. 1992)	41
<u>Reibman v. Myers,</u> 451 N.J. Super. 32 (App. Div. 2017)	48, 49
<u>Seidman v. Clifton Sav. Bank, S.L.A.,</u> 205 N.J. 150 (2011)	23, 25
<u>Serial Bldg., Loan & Sav. Inst. v. Ehrhardt,</u> 95 N.J. Eq. 607 (Ch. 1924)	49
<u>State v. Ernst,</u> 32 N.J. 567 (1960)	31
<u>State v. Locurto,</u> 157 N.J. 463 (1999)	30, 31, 36
<u>State v. Rajnai,</u> 132 N.J. Super. 530 (App. Div. 1975)	36
<u>Thermo Contracting Corp. v. Bank of New Jersey,</u> 69 N.J. 352 (1976)	42
<u>U.S. Bank Nat. Ass’n v. Hylton,</u> 403 N.J. Super. 630 (Ch. Div. 2008)	48
<u>Zuendt v. A. Eisenstein, Inc.,</u> 139 N.J. Eq. 476 (Ch.), <u>decree aff’d</u> , 140 N.J. Eq. 472 (1947)	41
Statutes	
N.J.S.A. 2A:35-1, et seq.	45, 46, 47
Rules	
N.J.R.E. 611	36, 37

PRELIMINARY STATEMENT

“Oh what a tangled web we weave, when first we practice to deceive.” Sir Walter Scott, Marmion: A Tale of Flodden Field (1808). Over the course of an eleven-day bench trial, the Trial Court untangled the web that was spun as a result of the partnership between Irfan Hassan (“Hassan”) and Marc-Roland Theophile (“Theophile”). The Trial Court recognized that Hassan’s financial distress led the men to develop a master plan in which Theophile would refinance properties owned by Little Mason Properties, LLC (“LMP” and with Hassan as “Plaintiffs”), with Plaintiffs’ debts being paid from the loan proceeds. Integral to their plans was that Theophile’s company, Eight Copeland Road Group, LLC (“ECRG”) would be the borrower, he would serve as the guarantor, and the properties as the collateral. To execute this plan, Theophile, on behalf of LMP, transferred 18 properties (the “Properties”) to ECRG between March and July 2018 and ECRG obtained loans (the “Loans”) that paid off hundreds of thousands of dollars of liens encumbering the Properties, including judgments against both Hassan individually and LMP. The Loans were secured by mortgages (the “Mortgages”) on the Properties, which are now held by U.S. Bank National Association as Trustee for Velocity Commercial Capital Loan Trust 2018 a/k/a U.S. Bank National Association as Trustee for Velocity Commercial Capital Loan Trust 2018-1; U.S. Bank National Association as Trustee for Velocity Commercial Capital Loan Trust 2018-2; LH-NP-Strat

Delaware Owner Trust (“LH-NP”); Velocity Commercial Capital LLC; U.S. Bank, N.A., as Indenture Trustee for VCC 2022MC-1 Trust; and JEST Holdings, LLC (the “Lenders”).

Plaintiffs continue to feign ignorance to the scheme they helped concoct and now seek to invalidate the Trial Court’s decision upholding the Mortgages. It is this feigned ignorance that led the Trial Court to find Hassan not credible. Indeed, despite being Ivy-League educated and running a real estate business, Hassan testified that he did not know what the terms “refi” or “cash-out” meant after reviewing his own communications wherein he used the exact same words. He conveniently lost all recollection of certain communications when he believed they did not support his story, while miraculously being able to recall communications from the same period if he deemed them helpful. Hassan’s testimony was directly contradicted by not only documents, but multiple other witnesses at trial. The evidence showed that Plaintiffs were aware that Theophile had an operating agreement that named himself as the 99% owner of LMP and that he filed a Certificate of Registration with the State of New Jersey identifying himself as LMP’s registered agent. Yet, Hassan continued to work with Theophile after he “learned” that Theophile was holding himself out to others as having authority to act on behalf of LMP and as the owner of the Properties.

In that vein, any time information or documents were needed by the title agent closing the Loans or by others, Hassan provided these things to Theophile, as well

as giving Theophile blank checks and his credit card. He even paid down one of Theophile's credit cards so that Theophile could get a better rate for the loans. There can be no question that Theophile and Hassan were working as partners and that Plaintiffs put Theophile in a position to act as their agent. That is why the Trial Court correctly found that Theophile had actual and apparent authority to act on behalf of LMP and upheld the Mortgages. It is also why this Court should affirm that decision.

PROCEDURAL HISTORY

Plaintiffs initiated this action seeking, inter alia, to quiet title to the Properties. In May 2022, the Lenders moved for partial summary judgment on Count Two of the Fourth Amended Complaint (ejectment) and on their equitable subrogation Counterclaim. (Pa65). The Trial Court granted the Lenders' motions and denied Plaintiffs' summary judgment motion. (Pa471-94). Though Plaintiffs appeal the granting of the Lenders' motions for partial summary judgment, there is no need to revisit the same as the Lenders' Mortgages were properly upheld by the Trial Court. If the trial decision is reversed (and it should not be), the summary judgment decisions in favor of the Lenders should nonetheless be affirmed.

Between January 5 and February 22, 2023, the Honorable Robert J. Mega, P.J.Ch. presided over a bench trial for the remaining claims, which included a total of eight days of examination and cross-examination of Hassan and Theophile and the testimony of loan broker Brad Spingarn, title agent Edward McCloud, Hassan's

attorney Richard Azikiwe, notary Eddy Jean Jacques and Hassan's realtor Roman Drukarov. The Trial Court also heard audio messages between Hassan and Theophile, which were recorded contemporaneously with the events at issue. This was in addition to the admission of over 350 exhibits, including, inter alia, text messages between Hassan and Theophile. The Trial Court correctly permitted the Lenders to treat Theophile as a hostile witness as the Lenders had outstanding claims against Theophile and ECRG. At the conclusion of trial, Judge Mega issued a 51-page opinion which provided an extensive analysis of witness credibility, including a thorough review of the testimony of Hassan and Theophile. (Pa495-549). The Court found in favor of the Lenders and upheld the Mortgages.¹ The majority of the Properties have now gone through foreclosures and eleven properties have been purchased by third parties and/or redeemed.

STATEMENT OF FACTS

I. HASSAN'S FINANCIAL WOES AND NEED FOR THEOPHILE'S ASSISTANCE

After graduating from the New Jersey Institute of Technology, Hassan worked for the United States Department of Defense as a software engineer. (See 1T 76:11-

¹ To the extent necessary, defined term "the Lenders" includes predecessors-in-interest and current Mortgage-holders.

24; Pa17 at ¶24).² Around 2008, he took on more of a management role in his family real estate business and, by 2010, was making the majority of the decisions regarding that business. (See 1T 78:19-81:5, 81:20-82:12). In 2013, he formed LMP in Delaware and “took steps to transfer his ownership of rental properties to LMP.” (See 1T 85:6-15; Pa17-18 at ¶¶26-27). In 2016, Hassan left his employment to run the real estate business full time. (Pa17 at ¶25). In total, Plaintiffs have purchased over forty properties in New Jersey. (1T 92:4-7).

By 2017, Plaintiffs were in financial distress. At least twenty-eight of Plaintiffs’ properties had tax liens sold on them, with some having unpaid taxes dating back to 2013. (See Pa4017-50; Pa4124; 4T 130:25-135:17). Plaintiffs lost at least six properties to tax foreclosures. (See Pa4017-52; Pa4124-27). There were also judgments from the New Jersey Department of Environmental Protection (“DEP”) and PSE&G, among others, encumbering Plaintiffs’ properties. (See Pa4058-75; 9T 147:11-149:2). Indeed, the DEP lien, which impacted most of the properties owned by Plaintiffs, would have to be paid in full in order to be removed. (9T 137:10-138:9, 148:19-149:2). While “struggling with the cash flow” during this time, Hassan also faced issues due to his poor credit. (See Pa3834 at 46:12-22; 8T 146:4-7 (broker testifying that Hassan’s credit situation disqualified him from optimal loan

² His undergraduate degree is in computer science with an applied mathematics minor. He has a Masters in computer science from NJIT and a Masters in electrical and systems engineering from University of Pennsylvania. (See 1T 74:19-76:13).

products/terms); 9T 115:18-21 (Hassan’s real estate counsel testifying that Hassan would have had some problems obtaining financing in light of his credit situation)). Due to his poor credit, Hassan did not qualify for the maximum loan to value rates, as testified to by Brad Spingarn (“Springarn”) of Close Now, the broker for the Loans. (See 8T 140:15-17 (“Q. And Mr. Hassan, due to derogatory credit, could only get 60 percent of value, correct? A. Correct.”)). Indeed, Conditional Loan Approvals Hassan obtained referenced his “derogatory credit history.” (See Pa702).

It was during this period of financial woes that Hassan met Theophile. Shortly thereafter, without asking Theophile for a business card, CV or a single reference, Hassan began doing business with Theophile and developed a close relationship with Theophile, including things such as giving Theophile his credit card and blank checks, LMP’s bank statements, and personal information for himself and that of his family, such as social security numbers. (See, e.g., 4T 6:17-22; Pa1387; Pa1947; Pa3842 at 63:5-12; Pa1811-1813; 5T 80:10-82:21; 2T 75:12-76:24 (Hassan lending Theophile \$5,000 to reduce his credit card debt)). All of which are things that a person would do with a business partner and close friend, not a random acquaintance.

Shortly after Spingarn informed Hassan that his credit would cause an issue with refinancing, both Hassan and Theophile told Spingarn they would be working together to obtain the loans. (See 8T 113:5-19 (“Q. . . . And after Marc Theophile contacted you about getting the loans done, did you have any further contact with

Mr. Hassan? A. Yes. Q. And what contact was that? A. Phone Call. . . . Q. . . . what was the contents of that phone call? A. Discussing the new scenario that they were working together. And, you know, that we're looking at totally . . . different scenarios because they're now working together . . ."); see also 8T 113:20-120:6; 9T 108:1-7). With Theophile's involvement, the men would be able to obtain more favorable loans than Hassan could. (See 8T 140:15-17).

II. THE PARTNERSHIP BETWEEN THEOPHILE AND HASSAN

A. Hassan and Theophile Worked Together as Partners and Friends in Pursuit of their Plan

The evidence at trial, including Hassan's own messages, showed that Hassan and Theophile were working together as partners and friends:

Theophile: Dude, we'll make millions together. But you have to get out of this mess by cleaning it little by little. It didn't happened [sic] in one day, it will not be resolved in one day. Little by little baby steps. Patience will be required. I resolve the problem.

Hassan: We do it together brother.

(Pa1821 (emphases added); see Pa1830). Theophile testified that he and Hassan both understood that the partnership required Theophile to get loans secured by the properties owned by Hassan/LMP and that Theophile's company, ECRG, would be the borrower and Theophile the guarantor. (See 5T 67:24-68:19 ("Q. . . . And I just wanted to confirm, during those initial communications right after you met, you were discussing getting loans that would be secured by properties either owned by Mr.

Hassan or by his entity, Little Mason Properties. Is that Correct? A. Yes. Q. And did you discuss with Mr. Hassan that the borrower on these loans would be your entity, Eight Copeland Road Group, LLC? A. Yes. . . . Q. With these loans that would be procured by Eight Copeland Road Group, LLC, who would be the guarantor on those loans, sir? A. Marc Theophile. Myself, yes.”). Likewise, Hassan confirmed that this was the plan. (See 1T 174:7-175:3; 3T 31:22-32:2).

Moreover, Hassan and Theophile had the following exchange in March of 2018, wherein Theophile stated that after the closings, he planned to transfer the properties “back to” a limited liability company owned by Hassan:

3/17/18, 10:52 AM - Marc Loans: Dude you have to stay with me on all of these properties. They are headaches

3/17/18, 10:56 AM - Irfan: **Don’t worry bro I be with you. U do paperwork I do maintenance**

3/17/18, 11:00 AM - Marc Loans: I am hoping u don’t bounce! I don’t need properties. I have been there done that. Don’t need headaches

3/17/18, 11:01 AM - Marc Loans: **I think after closing I would just sign them back over to a new llc you own**

3/17/18, 11:03 AM - Irfan: **Whatever u like.** I be here bro my most money is in gas stations I can’t bounce. U r crazy to think this.

3/17/18, 11:03 AM - Marc Loans: We are just using these properties as strategy to get shit clean up so we can get loans to focus on mining. I don’t need to manage

3/17/18, 11:04 AM - Marc Loans: **Best to deed everything back to you**

3/17/18, 11:05 AM - Irfan: I want to get into big game ...mining and agriculture ... **you will be my partner brother.** I handle field work and

acquisition and you handle finances and office work.

(Pa1829-1830 (emphases added)). Thus, any allegation by Hassan that he did not know that the Properties would be transferred out of Plaintiffs' names in connection with the transactions is simply not credible. (See also Pa2105).

The evidence set forth at trial demonstrated that the men were working together, and that Hassan knew closings on the Properties were imminent. Indeed, this is reflected in the messages exchanged between Hassan and Theophile:

([audio being played) 'MR. THEOPHILE: Congratulations. **We are cleared for the building. They are just waiting on the title to come back, so they can start doing the numbers on the HUD.** So the guy is trying to get us, like, more money. Like 75 percent of the appraised value. So let's wait and see.' (Exhibit J-95 stopped playing) . . .

([audio] being played) 'MR. HASSAN: **Man - - bro - - my man. That's good news, man,** That good news, We could use some good news. I'm still on the road, so today I'm going to send you the list of the other stations with the one we talked about today. I'm going to send it to you. All right? So let me know. **You have my account information** (indiscernible) will send me forms and the final numbers. All right? **Okay. Brother, congratulations to you, man. Real hard work. Thank you. Thank you.**' (Exhibit J-96 stopped playing).

(7T 136:19-137:18 (emphases added); see also Pa1653-54; Pa4101-02; Pa1389 (stating, among other things, "The loan is clear to close with one stip." regarding the Maple Ave. property at issue); Pa1880 (wherein Theophile says "Dude we are trying to close 70th St and Crest this Thursday. Please go take the pics" and Hassan responded "Ok."); Pa1785 (Hassan telling Theophile to "Close building asap bro" and Theophile responding "Clean up the mess bro little by little" to which Hassan

responded “Yes after closing I be working on it” and Theophile responded “I meant cleaning up the title on Maple”); Pa1801 (Theophile advising Hassan that “Maple is in final underwriting”); Pa1988 (Hassan instructing Theophile “Close this loan soon bro. I spent lot of money and time.”); Pa1680; 6T 66:3-21; 5T 208:24-211:11).³

In addition to extensive messages between them, Hassan and Theophile also discussed their partnership and plan on telephone calls. Theophile consistently testified that the majority of their conversations occurred via calls. (See, e.g., 5T 37:2-3 (“we spent like 90 percent on the phone talking. We would speak for hours.”); 5T 44:1-4; 6T 203:21-204:4). Hassan also testified that phone calls were necessary when there was a “need to explain things.” (See 1T 153:16-19; 6T 135:1-11).

B. Before the Closings of the Loans, Hassan was Aware Theophile Registered LMP in New Jersey with Theophile listed as its Agent

On June 28, 2017, Hassan emailed a Microsoft Word version of an operating agreement for LMP, a Delaware LLC, to Theophile. (See Pa2265-86). The next day, Theophile registered LMP in the State of New Jersey, identifying himself as LMP’s registered agent, among other things. (See Pa1333-71). Although feigning ignorance of this at trial, Hassan was impeached by his prior testimony to the Honorable Joseph

³ Although at one time Hassan told Theophile not to close without him, this fact only supports the Lenders’ point that Hassan had provided Theophile with everything he needed to close on the Properties, as recognized by the Trial Court when questioning Hassan, and contradicts Hassan’s story that he and Theophile were only in preliminary discussions. (See Pa1880; 2T 28:17-29:18; see also 2T 31:2-22).

P. Perfilio, J.S.C. in a related action:

Q. So, you were aware that Mr. Theophile registered your Delaware LLC in New Jersey; is that right?

A. There was conversation; yes. Under my LLC registered under my name in State of New Jersey; yes.

Q. Did you pay for that registration?

A. I think he used the same credit card, the one I gave for the lender. He used the same credit card to make the payment. I believe.

(Pa3842 at 64:9-17; 5T 97:17-98:1 (“Q. On June 28th, 2017, Mr. Hassan sent you, Mr. Theophile, a Word version of his document, his operating agreement for . . . [LMP]. Is that correct? A. Yes. Q. And the next day, on June 29th, 2017, you registered . . . [LMP] with the State of New Jersey, correct? A. With his consent, yes. And then he gave me this credit card to pay for it.”)). Not only was Theophile listed as the registered agent of LMP on this Certificate of Registration, but under “Signatures” on the Certificate of Registration for LMP, Theophile’s company ECRG was listed as “Authorized Representative” followed by Theophile’s name as “General Partner.” (See Pa1336). Hassan is not mentioned anywhere. (Id.).

The same day Theophile registered LMP in New Jersey, he sent Hassan an email with a link to documents⁴ that included: (i) an executed, notarized operating

⁴ Plaintiffs’ suspicions regarding the link set forth in Pa1333 are of no moment. First, the subject line is indicative of the documents contained in the link. Second, Plaintiffs did not obtain an expert to review the link in support of their baseless contention that it is fraudulent. Finally, Theophile testified that the link contained the LMP documents and Plaintiffs have failed to provide any testimony to the contrary – only Hassan’s failure to recall. (See 2T 152:12-153:10; 9T 31:17-34:13).

agreement for LMP naming Theophile as 99% owner of LMP, with Hassan as 1% owner; (ii) proof that LMP had been registered with the State of New Jersey on June 29, 2017; (iii) the Certificate of Registration confirming Theophile as LMP's registered agent and the registered office and business address of LMP as 8 Copeland Road, Denville, New Jersey (ECRG's address), and that the "Signatures" for LMP were Theophile's entity ECRG (as "Authorized Representative") and Theophile (as "General Partner"); and (iv) the Short Form Standing Form confirming Theophile was the registered agent and ECRG's address was LMP's registered office. (See Pa1333-71). Theophile also testified that Hassan was aware of the same as the men were on the phone when Theophile did the registration. (See 5T 99:16-20).

By July of 2017, at the latest, Hassan knew Theophile had registered LMP in New Jersey and that, inter alia, the publicly-filed registration documents named Theophile as LMP's registered agent. (See Pa1372). Nonetheless, he did not ask Theophile to remove his name from the public records regarding LMP, nor did Hassan take any action to do so himself until after the Loans closed. (See 5T 137:13-138:1 ("Q. Mr. Theophile, at any time before the loans at issue closed, did Mr. Hassan ask you to revoke or amend the documents that you had filed with the State of New Jersey, registering Little Mason Properties? A. No. . . Q. It was not prior to the loans and mortgages at issue of closing, correct? A. Correct); Pa4109; 2T 167:17-168:20, 160:18-161:6)). Instead, Hassan continued to work with Theophile.

C. Hassan Continued to Work with Theophile Knowing that Theophile Represented himself to Third Parties as Authorized to Act for LMP and as the Owner of the Properties

Plaintiffs harp on a July 21, 2017 email in which Hassan recognizes that Theophile registered LMP in the State with himself listed as LMP's registered agent and asks Theophile to acknowledge that Hassan was the sole owner of LMP, which Theophile did. Despite statements in this email accusing Theophile of acting without his consent, Hassan did not distance himself from this man he had only recently met who was allegedly acting without his consent, but, instead continued to work with Theophile in pursuit of their plan. (See, e.g., 5T 167:12-16 ("Q. And after this July 21, 2017, email exchange, did you and Mr. Hassan remain friends? A. Yes. Buddies, yes. A. And you remained business partners as well? A. Yes.")). In connection with that same July 21, 2017 email chain, Hassan emailed Theophile setting forth the plan for their joint venture. (Pa2199-200). Moreover, Hassan did not seek to amend the publicly-filed documents presenting to the world that Theophile had a role in LMP. In sum, their post July 2017 course of conduct illustrated that Theophile was indeed authorized to act for Plaintiffs. (See 5T 165:19-167:14; 2T 167:17-168:20).

In the July 21, 2017 email chain, Hassan acknowledged that Theophile would get "cash out" loans using Plaintiffs' properties and laid out a four-part plan to Theophile. (See Pa2200; Pa2199 ("Please move one step at a time...lets do one loan at a time. I m thinking we should do as follow. First your clear your credit. Second

We do building loan so we can get good 800K in hand. Third we use building funding to fund big package and pay 51K for loan for 40 properties. Fourth, we do development approvals for all 7 projects and sent you today using funding we get from 40 residential package. and after that we will be golden once we get approvals for Parsippany alone.”)(ellipses, errors in original)). In February of 2018, Theophile drafted a contract for sale for a property owned by LMP identifying LMP as the seller “with an address of 8 Copeland Road, Denville, NJ” – in other words, listing LMP’s address as ECRG’s address – the address Theophile had listed for LMP on the Certificate of Registration he filed. (Pa1757; T5 135:5-137:23). As Theophile sent this contract of sale to Hassan in February 2018, Hassan was clearly aware that Theophile was drafting documents on LMP’s behalf and representing to others that LMP’s address was ECRG’s address, but, again, continued working with Theophile in pursuit of their plan to obtain loans secured by the Properties. (Ibid.).

Theophile also repeatedly sent Hassan correspondence in which Theophile represented to various third parties that he was authorized to act for LMP and/or identifying himself or ECRG as the owner of the Properties. Likewise, he repeatedly sent Hassan emails with loan information, including term sheets and proposals from lenders for a refinance, specifically identifying ECRG as the borrower and that the

Properties would be used as collateral for the loans.⁵ For example:

- In June 2017, Theophile sent Hassan an email, which contained a copy of a letter that Theophile sent to Silver Hill Funding, LLC on behalf of ECRG and LMP in which Theophile stated that: “I prefer to transfer the deed over to Eight Copeland Group LLC [sic] due to the simple fact that this LLC is established and a New Jersey Registered LLC compared to Little Mason Properties LLC that is Delaware registered company[.]” (See Pa2105).
- In June 2017, Theophile forwarded to Hassan a Letter of Intent for a loan to “Eight Copeland Road, LLC” to be secured by one of the Properties, with Eight Copeland Road as the borrower and Theophile as the guarantor. (See Pa612).
- On July 10, 2017, Theophile sent Hassan a loan proposal to ECRG regarding a refinance of the properties. (See Pa618-30; see also 1T 93:24-25). The letter, addressed to Theophile/Eight Copeland Road LLC, referenced “blanket first mortgage financing secured by **your** portfolio of forty-three (43) properties” – with Properties owned by Plaintiffs included on the list. (See Pa619 (emphasis added)). The letter also stated that the purpose of the loan was to “Refinance existing debt/equity” regarding those 43 properties. (Pa619).
- On December 28, 2017, Theophile sent Hassan an email attaching a new loan term sheet naming “Entity owned 100% by Marc R. Theophile” as borrower and some of the Properties as the secured properties. (See Pa2137-42). Again, the letter was directed to Theophile/ECRG and referenced “your” portfolio of properties being used as collateral for the loans and that the purpose of the loan was to “Refinance existing debt/equity” regarding the properties. (Id.).
- Throughout April and May 2018, Theophile constantly texted

⁵A letter of intent that listed LMP as the borrower nonetheless had a signature line for Theophile to “accept[] and agree[]” regarding the loan. Theophile was also listed as the guarantor. Theophile forwarded this letter to Hassan. (See Pa4053-57).

Hassan regarding pay-off statements, discharges of mortgages, and appraisals for the Properties. (See Pa1866-81; Pa1947-50; Pa1953-56; and Pa1958-59).

(See also Pa2119-26 (email to Hassan attaching term sheet with ECRG named as the borrower; Pa2149-98, Pa2202 (emails to Hassan listing refinancing proposals); Pa1870-71 (text message to Hassan listing conditional loan approval for ECRG)). In that context, in January 2018 (before any of the closings), Theophile forwarded a message to Hassan in which Theophile advised a third party:

I am the new owner of the property sine [sic] 2015, and there is no ongoing legal matter going on with **my property**. . . . I am expecting from you be [sic] noon the next day to have all legal documents releasing this lien against **my property**. . . .

(Pa1724-27 (emphases added)). Thus, Hassan was aware that Theophile was representing to third parties that he/ECRG owned the Properties and had the ability to mortgage the same. Nonetheless, Hassan did not take any action to advise third parties otherwise. (See 2T 160:18-161:6, 167:17-168:20).

D. Hassan Authorized Theophile to Negotiate on Behalf of Plaintiffs

The evidence at trial further showed that Hassan knew Theophile was negotiating the payoff of his liens and judgments and that the loan proceeds would be used for same. (See, e.g., 3T 59:20-24; Pa2260-64 (regarding negotiations with Hillside tax collector); Pa1724-25; Pa1821-25; Pa1745-49; Pa1941(Hassan telling Theophile “I call or u call tomorrow to get oayoff [sic]” (emphasis added)); Pa1823-1825 (messages regarding Theophile’s negotiations with a creditor and Theophile

advising Hassan that he is making “huge progress” regarding same, to which Hassan responded “Good bro”); Pa4083; Pa3930 (regarding Theophile’s negotiations with PSE&G Plaintiffs’ behalf)). Indeed, Hassan assisted Theophile with this endeavor, including, for instance, by providing information needed regarding the various liens to be paid off. (See ibid; Pa1949 (when Hassan instructed Theophile to obtain a discharge of a lien and provided Theophile with his date of birth and social security number); 6T 23:16-24 (“Q. Mr. Theophile, did Mr. Hassan authorize you to negotiate with lienholders on the property and other creditors of Mr. Hassan and/or Little Mason? A. Of course. Yes. . . . Q. And he was aware that you were doing that? A. Yes.”); Pa1949; Pa1724-25)). Significantly, Hassan – who now claims he never authorized Theophile to act on his behalf – even instructed Theophile to falsely tell a lienholder that he (Theophile) was Hassan’s attorney. (Pa1949).

E. Hassan Gave Theophile Everything He Needed to Close the Loans

Time after time, Hassan provided Theophile whatever he asked for to get the loans they sought. Among other things, Hassan:

- paid \$41,000 for appraisals of the Properties in connection with obtaining the loans (Pa18 at ¶¶34);
- provided his credit card to Theophile for loan applications and “a number of blank checks” (Pa19 ¶37; Pa18 at ¶36);
- provided Theophile with bank statements in connection with seeking the loans (see, e.g., Pa1862; Pa1780; Pa1811-13);
- authorized Theophile to negotiate payoff amounts with creditors who had liens on the Properties (see, e.g., Pa4083; Pa4096);

- provided Theophile with lease and tenant information on the Properties (see Pa1771-72; Pa1934; Pa1963; Pa1974-81; Pa1940-46; Pa4086); and
- scheduled for appraisers to access the Properties at Theophile's request (Pa4087; Pa1771-73; Pa1815 (Theophile telling Hassan "Be on the alert for appraisal on Maple tomorrow. Sooner we get him in the building, sooner we'll close"))).

F. Hassan Received Information Regarding the Loans

In their brief, Plaintiffs repeatedly allege that there is "no record" of Hassan receiving any information whatsoever as to the Loans ultimately issued by the Lenders. (Pb39, 40, 16). The record illustrates otherwise. In that vein, on February 13, 2018, Theophile sent Hassan a title commitment from 1st Rate Title & Settlement Services, LLC ("1st Rate") – the title agent that closed the transactions at issue – regarding the Mortgage on 1576-80 Maple Avenue, Hillside, NJ (the "Hillside Loan"). (See Pa1774; Pa3399). Not only does the cover letter reference ECRG as the mortgagor for a transaction regarding this property, but a review of the title commitment also reveals that Jest Holdings LLC ("Jest") was the lender to receive title insurance for a \$650,000 loan. (Pa3399; Pa3411). The Hillside Loan – one of the Loans being challenged by Plaintiffs – in fact closed in March of 2018, in the amount of \$650,000, with Jest as the lender and ECRG as the mortgagor. (Pa2741-47).

Plaintiffs now boldly state that "[a]s was the case with the Hillside Loan, Theophile never told Hassan anything about the Velocity Loans" (Pb16), but again,

the evidence directly contradicts this statement. As one example, many of the appraisals of the Properties listed Theophile as the borrower and, for most of the Loans at issue, also listed the Loan number of the Loan that closed. (See Pa854-78; see also Pa2856; Pa2859; Pa2862; Pa2868; Pa2871; Pa2874; Pa1441; Pa2880; Pa2841; Pa2847; Pa2877; Pa4122). In March 2018, Theophile also sent Hassan several appraisal confirmations, which explicitly referenced the Loan numbers of the Loans at issue in the subject of the email for various properties. (See Pa2774-2807; Pa2810-Pa13; see also Pa4102; 6T 32:5-36:3). Even more compelling, on April 12, 2018, before most of the closings on the Loans, Theophile sent Hassan an email with evidence of property insurance for several of the Properties, with ECRG listed as the insured and “Velocity Commercial Capital, LLC its successors and/or assigns ATIMA” listed as having an “additional interest.” (See Pa4112-20). Hassan did not question the same or ask Theophile why ECRG was receiving property insurance on Properties he believed LMP owned, or why Velocity Commercial Capital, LLC (“Velocity”) would have an “additional interest” as to same.

Moreover, at the same time Hassan received numerous documents listing the loan numbers for the Loans at issue, he also received a text message from Theophile that stated, in part, “it will be easy and quick **given the fact that all your loans are already in Velocity’s system and approved.**” (See Pa1857 (emphasis added); 3T 48:24-51:13; Pa4122-23; 3T 93:9-101:7)). Velocity was the lender on 17 of the 18

Loans that, as with the Hillside Loan, Hassan now claims to know nothing about.

Theophile also sent Hassan a portion of a title commitment for 70 Crest, Hassan's home, as well as a tax search run by 1st Rate on the Property. (See Pa1403-06; 5T 155:3-9 (Theophile testifying that letter listing his portfolio of properties included 70 Crest, Hassan's home)). Hassan did not inquire as to why Theophile would have a title commitment on his home. (See 6T 41:23-44:9 ("Q. When you sent this e-mail on April 13, 2018 to Mr. Hassan, did he ask you why you had a portion of a title commitment on 70 Crest Drive? A. Never. Q. Did he ask you about 1st Rate's involvement on 70 Crest Drive and their issuance of a title commitment on 70 Crest Drive? A. Never."); see also 4T 112:23-113:13)). Nor did he reach out to inquire as to communications involving Close Now. (See 3T 23:1-24:3). Instead, he assisted Theophile "to clear up any title issues that might preclude [the Properties'] use as collateral." (Pb8).

III. THE ECRG LOANS AND MORTGAGES

Between March 2018 and July 2018, LMP and Theophile began finalizing the transactions whereby Theophile would transfer properties from LMP to ECRG, obtain loans secured by mortgages on the Properties, and use these loans to pay off liens and judgments against Plaintiffs. Jest issued the Hillside Loan, with the remaining 17 Loans issued by Velocity (and subsequently assigned) (See Pa22 ¶¶66, 68). The Properties served as collateral for the Mortgages securing the Loans and

ECRG was the borrower/mortgagor in each of the transactions – just as Hassan and Theophile had planned.

The Loans were all closed by 1st Rate. Like Spingarn, 1st Rate’s principal Edward McCloud (with 1st Rate as “McCloud”) testified at trial that he understood Hassan and Theophile to be working together. (See 11T 40:2-18 (“Q. So you had no firsthand knowledge of the dealings between Mr. Hassan and Mr. Theophile, correct? A. My interpretation was that they were working together from the start. It was never a secret for Mr. Theophile that Hassan was his partner. They were - - from my title commitments we were requiring payoffs for judgments and stuff like that, which everything was - - as far as what I was concerned, Hassan was always in the background, you know, getting the payoffs and stuff like that.”); id. at 91:14-25).⁶

McCloud took steps required to ensure that ECRG held title to the Properties by reviewing corporate documents, reviewing corporate searches issued by the State of New Jersey, reviewing deeds and ensuring compliance with the title commitments issued in connection with the transactions. (See 11T 85:2-87:2; id. at 98:11-21). McCloud testified that he had no reason to question the accuracy of the corporate documents as he had also independently confirmed information regarding LMP with the State. (See 11T 94:6-95:18; id. at 98:11-21). As to ECRG, McCloud also had

⁶ Hassan’s real estate agent Roman Drukarov also testified that Hassan mentioned the involvement of a partner during their conversations. (See 10T 38:3-7).

documents authorizing Theophile to sign the Loan documents on ECRG's behalf. (See Pa1333-71; 11T 86:19-23). The Loan closings occurred from March 2018 through July 2018 and \$3.4 million was lent with at least \$691,567.09 of the Loan proceeds used to pay off various liens encumbering the Properties, such as judgment and tax liens, and other tax, water, and sewer charges regarding the Properties.

IV. HASSAN'S "EPIPHANY" AND DISAVOWAL OF THEOPHILE

According to Hassan, he allegedly discovered that the Properties had been transferred to ECRG in early July 2018. (See Pa2005-2008). Specifically, he claims that he learned of the transfer when realtor Roman Drukarov informed him that one of the Properties (1576 Maple) was in ECRG's name. (See 2T 15:13-22 ("[Drukarov] told me it's under Eight Copeland Road group, LLC.")). Drukarov, however, testified that he told Hassan the property was not in his name, but never mentioned ECRG. Indeed, text messages between Hassan and Drukarov confirm it was Hassan who told Drukarov that ECRG owned the property. (See 10T 35:23-36:1; Pa4282-94).

LEGAL ARGUMENT

I. STANDARD OF REVIEW

A. Trial Decision

"Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review: 'we do not disturb the

factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]” Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169, 182 (2011)(alternation in original) (citations omitted)(reviewing “Chancery Court’s comprehensive letter opinions rendering its decision at the conclusion of a hotly contested trial and . . . conclud[ing] that ‘there is substantial evidence in support of the trial judge’s findings and conclusions’”). “Deference is especially appropriate ‘when the evidence is largely testimonial and involves questions of credibility.’” Cesare v. Cesare, 154 N.J. 394, 412 (1998)(citation omitted). Where, as here, the “trial court hears the case, sees and observes the witnesses, [and] hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses.” Id. (citations and internal quotations omitted)(alternation in original). In sum, “[t]he appellate court should ‘exercise its original fact finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter.’” Id. (citations omitted). Further, even if this Court disagrees with the trial court’s reasoning, it should affirm the dismissal on alternative grounds. Hayes v. Delamotte, 231 N.J. 373, 387 (2018)(“A trial court judgment that reaches the proper conclusion must be affirmed even if it is based on the wrong reasoning.”)(citing Isko v. Planning Bd., 51 N.J. 162, 175 (1968)).

B. Summary Judgment

A court sitting in review of a trial court's grant of summary judgment must "employ the same standard [of review] that governs the trial court" and "must view the evidence in the light most favorable to the non-moving party and analyze whether the moving party was entitled to judgment as a matter of law." Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012) (citation omitted). "When summary judgment is premised on a legal conclusion, we review that decision de novo, giving 'no special deference to the legal determinations of the trial cot.'" Inv. Bank v. Torres, 243 N.J. 25, 47 (2020) (citations omitted).

II. THE TRIAL COURT PROPERLY FOUND FOR THE LENDERS

A. The Appeal is Moot as to Eleven Loans/Mortgages

As an initial matter, the Lenders have now been paid in full on their loans secured by the following properties: 555 Jefferson Avenue; 840 Martin Street; 904 Third Avenue; 1062 William Street; 918 Anna Street; 52 Lincoln Street; 34 William Street; 306 Court Street; 84 Heckel Street; 35 Oak Street; and 913 Bond Street. Accordingly, Plaintiffs' claims regarding the Trial Decision and Summary Judgment Order are moot as to the aforementioned properties except for Plaintiffs' ejectment claims. See N.Y. Susquehanna & W. Ry. Corp. v. State Dep't of Treasury, Div. of Taxation, 6 N.J. Tax 575, 582 (1984) ("An issue is 'moot' when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy.") (citations omitted). Finally, as to LH-NP, its mortgages were

redeemed and it was not named in Plaintiffs' ejectment claim.⁷ Thus, the appeal is moot as to LH-NP in its entirety.

B. The Trial Court's Decision is Supported by Competent, Relevant and Reasonably Credible Evidence set forth in the Record

"The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility." Cumberland Farms, Inc. v. N.J. Dep't of Env't Prot., 447 N.J. Super. 423, 437 (App. Div. 2016) (citations omitted). This Court must determine whether the Trial Court made factual findings and legal conclusions that were "manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]" Seidman, 205 N.J. at 169; see also In re Tr. Created By Agreement Dated Dec.20, 1961, 194 N.J. 276, 287 (2008)(holding that "notwithstanding his reliance on some testimony that should not have been admitted, there was substantial credible evidence in the record as a whole to support the judge's conclusion"). Specifically, to reverse, there must be a "basis to characterize . . . [the trial court's] decision as 'so wholly insupportable as to result in a denial of justice.'" In re Tr., 194 N.J. at 287 (citation omitted).

Ignoring that standard, Plaintiffs make sweeping and unsupported claims

⁷ Count Two (ejectment) is not asserted against LH-NP. (See Pa2324).

regarding the Trial Court’s review without citing evidence in support of their claims. (Compare Pa3834 at 46:12-22 (Hassan’s testimony to Judge Perfilio that he was “struggling with the cash flow”) with Pb38 (stating without citing to evidence that “[t]he actual evidence firmly establishes that Hassan was perfectly capable of continuing to operate his business as he saw fit.”); see also Pb42 (stating without citing to evidence that Hassan’s “testimony is supported by all the competent, relevant and reasonably credible evidence.”)). Indeed, Plaintiffs claim that “[t]here is no record of any communication to Hassan by any other party or person regarding the Theophile Loan transactions prior to Hassan’s discovery of the fraud.” (Pb39). However, the evidence at trial demonstrated that Hassan received multiple communications with the exact loan numbers of the Loans at issue prior to his alleged “discovery” of the transactions and was directly told by Theophile that “all your loans are already in Velocity’s system and approved.” (See Pa854-78; Pa2856; Pa2859; Pa2862; Pa2868; Pa2871; Pa2874; Pa1441; Pa2880; Pa2841; Pa2847; Pa2877; Pa4122; Pa2774-2807; Pa2810-13; Pa4102; Pa1403; 6T 41:23-44:9; Pa1857).

Hassan’s decision to not inquire about the Loans after receiving the aforementioned documents from Theophile (a person he gave personal information to, including his credit card and social security number) does not negate the fact that he did receive the information. It most definitely does not rebut the Trial Court’s

decision, based on a review of the totality of the evidence, that Theophile had the authority to enter into the Loans/Mortgages. Indeed, Hassan did nothing to change that perception, even after he was made aware that Theophile listed ECRG as the owner of LMP. (See 3T 23:1-24:3 (“Q. And you were familiar with Brad Springarn at Close Now. You could have called him and ask him, ‘Brad - - A. I could have done many things. . . Q. And you didn’t call Close Now or anyone else to ask about the details on any of the loans that Mr. Theophile told you were getting clear to close. A. When you say ‘anyone else,’ what do you mean in this context? A. Any third party. A. I did not call any third party.”); 3T 12:4-18, 103:11-104:7)).

Simply put, Plaintiffs cannot come close to demonstrating how the Trial Court’s decision is “so wholly insupportable as to result in a denial of justice.” In re Tr., 194 N.J. at 287 (citations and internal quotations omitted). It is not enough to simply say that something is unsupported. Though Plaintiffs argue that Theophile’s testimony regarding phone conversations concerning the Loans is too coincidental to be believed (Pb42), Hassan himself corroborated Theophile’s testimony when he testified that he spoke on the phone with Theophile when there was a “need to explain things.” (1T 153:16-19; see 6T 135:1-11 (audio recording wherein Hassan tells Theophile “give me a call and we can go over it. . . . So I can tell you verbally”)). In that vein, Plaintiffs’ allegation that Theophile’s testimony is the sole evidence demonstrating Hassan and Theophile were acting as partners regarding the

transactions is without merit as demonstrated by, inter alia, the testimony of Spingarn, McCloud, and Drukarov. (See 8T 119:1-120:6 (Spingarn) (“Q. Do you specifically remember having conversation with Mr. Hassan about working with Mr. Theophile? A. Yes.”); id. at 124:20-23 (“Q. And then after you had that call with Mr. Theophile, you confirmed with Mr. Hassan that he was working with Mr. Theophile, correct? A. Correct.”); id. at 126:5-127:23 (Spingarn confirming his deposition testimony that he believed Hassan and Theophile were partners, and that Hassan was aware of the transactions at issue); id. at 132:15-133:13 (Spingarn confirming his deposition testimony that Hassan told him he was working with Theophile); 11T 40:2-18 (McCloud)(“My interpretation was that they were working together from the start. It was never a secret for Mr. Theophile that Hassan was his partner. They were – from my title commitments we were requiring payoffs for judgments and stuff like that, which everything was – as far as what I was concerned, Hassan was always in the background, you know, getting the payoffs and stuff like that.”); id. at 92:1-4 (“Q. Was it your understanding, sir, that Mr. Hassan knew that his liens would be paid off in connection with these loans? A. Absolutely. They were partners.”); id. at 92:5-93:3; 108:14-16 (“From all the – everything that I saw, you know, led me to the professional opinion myself that they were partners”); id. at 100:16-101:14; 107:10-108:16; 10T 38:3-7 (Drukarov) (“Q. Did Mr. Hassan ever tell you that he – he had a partner? A. There was mention of a partner in – in our

conversations. . . .’)). While Plaintiffs argue that Hassan’s testimony rather than Theophile’s testimony should be determinative, the Trial Court simply did not find Hassan credible as set forth infra, which is supported by the testimony of the various third parties contradicting Hassan’s narrative.

The evidence at trial also showed that Plaintiffs knew Theophile had an operating agreement⁸ that named himself as the 99% owner of LMP, and that Plaintiffs knew that Theophile filed a Certificate of Registration for LMP with the State of New Jersey identifying himself as LMP’s registered agent, with the registered office and main business address of LMP listed as ECRG’s address. (See Pa1336; Pa1372). Hassan was not referenced anywhere on this publicly-filed Certificate of Registration. (See Pa1336). Plaintiffs knew about the aforementioned Certificate of Registration and its reference to Theophile before any of the Loans/Mortgages closed. (See Pa1372). Yet, they took no action to remove or amend the documents that had been filed and instead chose to allow the public records to continue to identify Theophile and ECRG as agents/representatives of LMP. Even more compelling, Hassan continued to work with Theophile after he claims he

⁸ While Plaintiffs assert that the date of the Operating Agreement is determinative, such argument fails. Theophile and Hassan also discussed whether to backdate or “season” documents to effectuate their plan. (Pa1879-80; 6T 151:13-24; 2T 240:17-241:11; 6T 131:11-132:11). Indeed, Hassan himself backdated and improperly executed multiple mortgages on other properties in his family’s real estate portfolio. (2T 103:10-114:9).

“discovered” that these documents had been filed by Theophile and after receiving numerous documents clearly showing that Theophile was holding himself out to third parties as having authority to act on behalf of LMP and to enter into transactions regarding the Properties. (See Pa2199; Pa1724-27; Pa1372; Pa2105). This alone supports the Trial Court’s finding that Theophile and Hassan were working as partners and that Theophile had actual and apparent authority to conduct the transaction at issue. Indeed, the evidence supports that Theophile’s testimony – that he was acting with Hassan’s knowledge and consent throughout their continued partnership – is certainly more plausible than Hassan’s narrative that he continued to work with Theophile for another year after purportedly learning that Theophile was taking actions without his consent. Thus, the Trial Court’s decision is supported by “adequate, substantial [and] credible evidence” and its thorough, well-reasoned decision should be affirmed.⁹ Cumberland Farms, Inc., 447 N.J. Super. at 437.

C. The Trial Court’s Credibility Determinations should be Upheld as They are Supported by Adequate, Substantial and Credible Evidence and the Trial Court’s Own Observations of the Witnesses

It is well established that the trier of fact is in the best position to provide the careful scrutiny and evaluation that both circumstantial and direct evidence require.

⁹ The Lenders have no opinion as Hassan’s argument that the Trial Court should have entered a money judgment in his favor against Theophile, except to note that Plaintiffs did not request the same at trial and that if a money judgment is entered, the Mortgages should nonetheless be upheld and would have priority over any such judgment in favor of Hassan.

Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988)(citations omitted) (“Trial court findings are ordinarily not disturbed unless ‘they are so wholly unsupportable as to result in a denial of justice,’ and are upheld wherever they are ‘supported by adequate, substantial and credible evidence.’”). That is why appellate courts grant deference to trial courts on witness credibility. See State v. Locurto, 157 N.J. 463, 465, 474 (1999) (finding that “[a]ppellate courts should defer to trial courts’ credibility findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record”); N.J. Div. of Child Prot. & Permanency v. T.D., 454 N.J. Super. 353, 384 (App. Div. 2018) (noting that deference to trial court on witness credibility is a long settled standard on appellate review).

Thus, even in instances where higher courts would have come to a different conclusion than the trial court, factfinders still must be given heightened deference on witness credibility. Locurto, 157 N.J. at 471 (noting reviewing court must defer to trial court’s determination of witness credibility when its findings could have been reasonably reached on evidence presented regardless of whether reviewing court would have reached a different conclusion). The trial court’s first-hand exposure to witness testimony reserves it the right to reject any or all testimony. State v. Ernst, 32 N.J. 567, 583-84 (1960)(“a trial judge in his discretion may give the charge in any situation in which he reasonably believes a jury may find a basis for its

application.”); Accounteks.Net, Inc. v. CKR Law, LLP, 475 N.J. Super. 493, 503 (App. Div. 2023)(citations omitted)(“Deference is particularly appropriate when the court’s findings depend on credibility evaluations made after a full opportunity to observe witnesses testify and the court’s ‘feel of the case.’”); Gripenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015)(“In [an] appeal from a non-jury trial, we give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions.”).

Here, after observing over four days of Hassan’s testimony, including his evasive nature and outlandish assertions, the Trial Court determined that Hassan was not credible and that his testimony was not supported by the reliable testimony offered by other witnesses. The Trial Court held the following:

[Hassan’s] bias was apparent and observable, most notably when he was continuously reluctant to answer both simple and probing questions asked by the Defendants. This bias was also apparent when Hassan was repeatedly unable to recall facts about which he had just testified while being examined by his own attorney. Hassan also continuously tried to provide evasive answers to simple questions about the contents of documents being directly shown to him. As to the extent to which Hassan’s testimony is contradicted by other evidence, the Court finds that a large portion of Hassan’s testimony is contradicted by both his own testimony and the testimony of other credible witnesses.

(Pa511). Unable to address the Trial Court’s assessment here, Plaintiffs instead simply attack the testimony of the other trial witnesses, including Theophile, whom the Trial Court deemed credible. See Gripenburg, 220 N.J. at 254.

Any review of Hassan's testimony more than confirms the Trial Court's assessment of him. Throughout his testimony, he was "conveniently" unable to read certain portions of exhibits while at the same time being able to read other words on the same exhibit that he deemed helpful to him. For example, as observed by the Trial Court, Hassan testified that he was unable to read the words "Velocity Commercial" (a lender that issued 17 of the disputed Loans) on documents he had prior to closing even though the words were only partially obstructed. (See 3T 81:1-84-7; Pa4113). Further, when Hassan deemed that an exhibit was "helpful" for his case he would recall receiving and/or reading the same, however, if he believed that an email was not "helpful," he would not recall receiving and/or reading the same. (Compare 2T 149:22-24 (discussing exhibit J-102 (Pa2104) ("A. I don't recall seeing this email, this letter. I don't recall opening it and reading it. I don't recall that.") with 1T 158:21-159:5 ("A. Yes, I did. And - - yeah, my name is there, right? Yes, I did receive this e-mail. Yeah.")).

His testimony was riddled with inconsistencies and conflicting narratives. Hassan, who operates his family's real estate business, is Ivy League educated and holds three advanced degrees, also claimed that he did not know what the terms "refi" and "cash-out" meant even though he used repeatedly used those exact same terms in communications with Theophile. (See 3T 147:7-148:9 ("A. I don't know the exact meaning of those words. I was sending an email while I was angry and I

was using the words as they come to my mind”); id. at 54:18-21 (“Q. You used the word “refinanced.” Right? A. In a loose language term, text message. I’m not writing a contract or agreement. I’m sending a WhatsApp message but maybe I’m driving.”); 2T 188:9-189:4; 4T 160:1-161:1 (Hassan testifying he cannot read a title commitment despite managing his family’s real estate business)). Similarly, when questioned as to why he gave Theophile his credit card information for a loan application Hassan stated: “Maybe I was busy, maybe I was driving, I don’t remember, but I just gave my credit card to him.” (1T 159:24-160:19). Moreover, Hassan, trying to justify his failure to recall emails that he deemed harmful to his case, testified that he regularly ignored emails when working for the government, which is nonsensical at best. (3T 145:11-15 (“Q. When you worked for the government, did you ignore emails and attachments that did not go into your spam folder and that you saw and related to your work? A. I ignored many of them; yes.”); see also 4T 135:12-17 (Hassan acknowledging tax sale certificates on his properties were accruing 18% interest but expressing concern for 9% interest rate on loan); Pa511 (“Hassan repeatedly asserted that allowing the tax liens to remain unpaid was a voluntary business decision. This testimony was inconsistent with the fact that at least six of Hassan’s properties were lost in tax foreclosure in the years prior to the events in question.”)).

Further, while Hassan testified that Theophile is a “nobody,” he gave that

“nobody” access to his credit card, his social security number, and personal information regarding his parents, among other things. (See 1T 172:2-6 (“A. He is . . . nobody.”); Pa1387; Pa1947; Pa3842 at 63:5-12; 1T 159:24-160:19. He also readily provided LMP’s bank statements to Theophile. (See Pa1811-1813).

Indeed, on more than occasion, Hassan’s testimony was contradicted by witnesses at trial – including Plaintiffs’ own witnesses. For example, Hassan testified that his attorney Richard Azikiwe advised him that a certain purported financing arrangement between Hassan and Theophile was possible, which was directly contradicted by Azikiwe’s testimony. (See 9T 118:3-119:4 (“Q. I want to direct you . . . to some testimony that Mr. Hassan gave in this case about the advice that you gave him. A. Okay. . . Q. The testimony from Mr. Hasssan on that date was: (Reading) . . . ‘A. That’s what he told me, and I told Richard Azikiwe, Hey, he’s proposing something like that. And we go through - - Q. And you’re telling us Richard Azikiwe told you that was acceptable? A. I did not say that . . . he said it was acceptable. He said it’s possible.’ (End of Reading) Q. You never told Mr. Hassan that it was possible? A. No.”) (second internal quotations omitted); 9T 112:11-21). Moreover, Hassan repeatedly claimed that he learned of the transfer to ECRG when Roman Drukarov informed him that one of the properties was in the name of ECRG. (See 2T 15:13-22; Pa4547-48). However, text messages exchanged between Drukarov and Hassan clearly show that Hassan nonchalantly advised

Drukarov that ECRG held title to the property, as confirmed by Drukarov's trial testimony as well. (See Pa4282-946; 10T 35:23-37:21).

In sum, the Trial Court's credibility determinations should be upheld as Plaintiffs have failed to demonstrate how they were not reasonably reached based on the evidence presented and deference should be given to the Trial Court, who was able to observe the testimony firsthand. See Locurto, 157 N.J. at 465, 471.

D. The Trial Court Properly Held that the Lenders were Permitted to Treat Theophile as a Hostile Witness

The New Jersey Rules of Evidence permit leading questions subject to the discretion of the Trial Court when a party is adverse:

(c) Leading Questions. — Leading questions should not be used on direct examination except as necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls an adverse party or a witness identified with an adverse party, or when a witness demonstrates hostility or unresponsiveness, interrogation may be by leading questions, subject to the discretion of the court.

N.J.R.E. 611(c) (emphasis added); Aboutay v. Savarino, 2006 N.J. Super. Unpub. LEXIS 2290, at *14 (App. Div. Aug. 1, 2006) ("Our present evidence rules thus expressly allow a party who calls an adverse party as a witness, . . . to pose leading questions to that adverse party, even absent a particularized showing that the witness is 'hostile' or 'unresponsive.'"); State v. Rajnai, 132 N.J. Super. 530, 541 (App. Div. 1975) ("[B]road latitude may be allowed in examining a hostile witness, especially a party called by his adversary in a civil action"); Capparelli v. Lopatin, 459 N.J.

Super. 584, 609-10 (App. Div. 2019) (“‘[C]ontrol[ling] and manag[ing] the introduction of testimony’ is within the discretion of the Trial Court, and ‘[its] decision . . . [is] conclusive unless clearly erroneous as a matter of law.’”).

The Lenders had active claims against Theophile and ECRG when Theophile testified at trial. Indeed, the Lenders, during their closing argument, still requested relief against Theophile if the Mortgages were not upheld. (See 11T 161:2-6 (“If for some reason the Court doesn’t uphold the mortgages, the Court should, nonetheless, find in . . . the lenders’ favor here on our crossclaims against Mr. Theophile”). Thus, it was more than within the Trial Court’s discretion to permit leading questions. Indeed, the plain language of the Rule suggests that simply being adverse is enough to permit leading questions. See Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 8 on N.J.R.E. 611(c) (2024)(reasoning that “suggesti[on] that it was improper, prior to the enactment of this rule, to label a witness as ‘hostile’ merely because he is the adverse party in the case . . . does not seem to survive the rule’s explicit authorization of leading questions when an adverse party is called”). Thus, under a plain reading of N.J.R.E. 611(c), the Lenders were adverse to Theophile, and the Lenders were allowed to ask leading questions.

Moreover, that Theophile’s credible testimony was favorable to the Lenders does not change the fact that the Lenders were adverse to Theophile. Further, Plaintiffs had every opportunity to question and interrogate Theophile’s claims

during their 4-day examination of Theophile and, by their own account, Plaintiffs “genuinely challenged the disparity between [Theophile’s] story and the evidence[.]” (Pb66). Indeed, Theophile could have responded to the questioning any way he saw fit. In that vein, when ruling on an objection to leading questions (after previously declaring that both Plaintiffs and the Lenders could treat Theophile as a hostile witness), the Trial Court stated, in front of Theophile, that:

The witness clearly has the ability to answer the question in a manner where he would so see fit. Or if it’s an incorrect question can say it’s an incorrect, or if they don’t understand the question, they could say so. So because that person’s been declared hostile, I’m giving both counsel the leeway that they’ve asked for.

(5T 32:7-13). In fact, later that day, Theophile took the opportunity to correct the Trial Court when the Court was questioning him about his testimony. (Id. at 111:8-11). If he was comfortable correcting the Trial Court’s interpretation of testimony, certainly he would be comfortable correcting an adversary’s interpretation.

Moreover, the Trial Court’s analysis of Theophile’s testimony was not a rubber stamp. (See Pa517 (“the Court did not find Theophile’s assertion that Eddie Jean Jacques just took it upon himself to backdate the notarization of the operating agreement (which itself was already backdated by Theophile) to be particularly credible.”)). Indeed, the Trial Court carefully grappled with the testimony and determined that Theophile’s testimony “was mostly credible and corroborated by subsequent witness testimony as well as admitted evidence.” (Id.). That the Trial

Court viewed Theophile's testimony as predominantly credible is not a testament to the Lenders' leading questions. Rather, it is a testament to the fact that the evidence set forth in the record below supports Theophile's testimony and that his testimony assisted the Trial Court with understanding the issues, unlike the evasive and unhelpful testimony offered by Hassan. (Compare Pa517 ("The Court recognizes that Theophile frequently went beyond the scope of the question or was somewhat off-topic. However, this appears to have been done in an attempt to provide even more information or context than was strictly requested rather than trying to avoid a question or admission.") with Pa512-13 ("Hassan's testimony is unreliable primarily due to his selective attempts to claim ignorance as to both communications he appeared to be involved in as well as events going on around him without reasonable explication.")).

Finally, even if this Court determines that the Lenders should not have been permitted to ask Theophile leading questions, that alone does not alter the Trial Court's findings of fact and legal conclusions as the overwhelming weight of the evidence set forth in the record supports the Trial Court's findings. See In re Tr., 194 N.J. at 287.

E. The Trial Court Properly Held that Theophile Had Actual Authority to Act on Behalf of LMP

Actual authority exists "when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with

the principal's manifestations to the agent, that the principal wishes the agent so to act.'" See AMB Prop., LP v. Penn Am. Ins. Co., 418 N.J. Super. 441, 454 (App. Div. 2011) (emphasis added) (citation omitted); Jennings v. Reed, 381 N.J. Super. 217, 231 (App. Div. 2005) (an agent's actual authority may "be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account.") (emphasis added). Here, the Trial Court correctly determined that Theophile reasonably believed that he had the authority to act on behalf of Plaintiffs. Indeed, Plaintiffs were aware of Theophile's actions, Hassan represented to Theophile that they were partners, and he authorized Theophile to take actions on behalf of Plaintiffs, among other things. (See Pa1341-60; supra at pp. 10-20).

F. The Trial Court Properly Held that Theophile Had Apparent Authority to Act on Behalf of LMP

Even if Theophile did not have actual authority to act on behalf of Plaintiffs, which the Lenders contend he did have, he undoubtedly, as held by the Trial Court, had apparent authority in connection with the transactions at issue. "Apparent authority arises 'when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.'" AMB Prop., 418 N.J. Super. at 454 (citation omitted). Apparent authority exists where: (1) the appearance of authority was created by the alleged principal's conduct; (2) the third party relied on this appearance; and (3) said

reliance was reasonable under the circumstances. Id.; see also Zuendt v. A. Eisenstein, Inc., 139 N.J. Eq. 476, 480 (Ch.), decree aff'd, 140 N.J. Eq. 472 (1947) (holding third party's reliance on attorney's apparent authority to act for principal was reasonable); Newark Branch, N.A.A.C.P. v. Twp. of W. Orange, 786 F. Supp. 408, 424 (D.N.J. 1992) (holding that a “principal is bound by the acts of his agent within the apparent authority which he knowingly permits an agent to assume or which he holds the agent out as possessing”) (citation omitted).

Here, there can be no dispute that the Operating Agreement, New Jersey Certificate of Registration, Short-Form Standing and Filing Certification for LMP provided by Theophile in connection with the transactions at issue named Theophile as a representative of LMP, creating the appearance of authority. (See Pa1333-71). Indeed, McCloud testified that he reviewed documents that he pulled from the State and relied on the “whole picture” when determining that Theophile had the authority to act on behalf of LMP. (11T 86:19-23, 34:9-35:7, 98:11-21, 109:20-110:5). As a result, third parties relied on the publicly-filed documents showing that Theophile had the authority to act on behalf of LMP and to transfer and mortgage the Properties. See Kuhn v. Tumminelli, 366 N.J. Super. 431, 445 (App. Div. 2004) (“As one of the owners of the LLC and its general manager, Tumminelli had apparent authority to endorse business checks and was placed in this position by the LLC and Kuhn. It was not unreasonable for Quick Cash to rely on Tumminelli's

apparent authority.”); Eaglebank v. BR Pro. Sports Grp., Inc., 649 F. App’x 209, 213 (3d Cir. 2016) (“Stokes, by virtue of his position as the executive vice president and chief financial officer of VIP, was an agent cloaked with the authority to enter into contracts and obtain financing on behalf of VIP, the principal”); Connecticut Car Rental, Inc. v. Prime One Capital Co., 247 F. Supp. 2d 158, 167 (D. Conn. 2003) (finding apparent authority existed when “Prime One’s official filings with the states of Washington and Florida specified that Prime One was a member-managed limited liability company. Since T & W was the member which held the majority ownership interest in Prime One, Bank of America reasonably believed that T & W and its employees were authorized to execute the Connecticut Car Rental lease assignments”). Accordingly, the Trial Court properly determined that “[i]n this instance, the evidence strongly indicates that Hassan was aware that Theophile was continuously pursuing loans on behalf of Little Mason Properties and pursuing those loans as the purported owner of the 18 properties at issue in this case.” (Pa544).

III. THE LENDERS’ MORTGAGES ARE VALID UNDER EQUITABLE MAXIMS: RATIFICATION, UNCLEAN HANDS, ESTOPPEL

Even if this Court does not find that Theophile had actual or apparent authority to act, the Mortgages should be upheld pursuant to the doctrine of ratification. “Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account.” Thermo Contracting Corp. v. Bank of New Jersey, 69 N.J. 352, 361 (1976)(quotation omitted)(applying

ratification where party failed to object to supposed bad acts and continued doing business with the alleged bad actor). Here, even if Plaintiffs can prevail on their claim that the operating agreement is fraudulent, they nonetheless ratified the operating agreement listing Theophile as the 99% owner of LMP, the LMP filings with the State of New Jersey and, in particular, Theophile's authority to act on LMP's behalf by refusing to amend the public records identifying Theophile's authority and, instead, continuing to allow Theophile to act on their behalf even after knowing that the public records identified him as LMP's agent, that he possessed an operating agreement naming him 99% owned of LMP, and that he was holding himself out to others as being authorized to act on behalf of LMP. Indeed, despite having evidence that ECRG was being identified as the owner of the Properties, Hassan did not terminate his relationship with Theophile or advise any third parties that LMP, not ECRG, was the owner of the Properties. (See supra pp. 10-20).

Further, the evidence presented regarding Hassan's actions and inactions in connection with seeking loans to be secured by the Properties supports application of the doctrine of unclean hands. See Goodwin Motor Corp. v. Mercedes-Benz of North America, Inc., 172 N.J. Super. 263, 271 (App. Div. 1980) ("a court of equity will deny its remedies to a suitor who has been guilty of bad faith, fraud or unconscionable acts in the transaction which forms the basis of the lawsuit."); Chrisomalis v. Chrisomalis, 260 N.J. Super. 50, 53-54 (App. Div. 1992) ("A suitor

in equity must come into court with clean hands and . . . must keep them clean after his entry and throughout the proceedings.”)(citations omitted). Among other things, Hassan worked with Theophile in making various misrepresentations to lenders, including falsifying leases. (See 3T 141:18-143:8; 6T 93:5-94:16; 1T 174:16-175:13; 8T 137:6-25, 138:10-25; Pa 1866-67; 4T 121:3-21).

Finally, even if this Court does not find that Theophile had actual or apparent authority to act, Plaintiffs unquestionably had the opportunity to prevent Theophile from transferring the Properties and obtaining the Loans but repeatedly failed to do so. New Jersey courts consistently hold that “as between two innocent parties[,] equity will visit the loss upon the one by whose act the injury first could have been avoided.” Glob. Am. Ins. Managers v. Perera Co., 137 N.J. Super. 377, 388 (Ch. Div. 1975), aff’d, 144 N.J. Super. 24 (App. Div. 1976). Indeed, when two innocent parties are harmed by fraud, the “the loss should be borne by the one whose act enabled the wrongdoer to commit the fraud.” Globe Motor Car Co. v. First Fid. Bank, N.A., 273 N.J. Super. 388, 397 (Law Div. 1993); Clients’ Sec. Fund of the Bar v. Allstate Ins. Co., 219 N.J. Super. 325, 330 (App. Div. 1987)(same); Dencer v. Erb, 142 N.J. Eq. 422, 429 (Ch. 1948)(“Equity does not rescue the heedless and neglectful to the consequential injury and loss of those who have acted innocently, diligently, and in good faith.”); First Union Nat’l Bank v. Nelkin, 354 N.J. Super. 557, 568 (App. Div. 2002)(“Estoppel is designed to ensure that the loss is born by

the party who ‘made the injury possible or could have prevented it.’”) (citation omitted).

Here, the Lenders had no knowledge of Plaintiffs’ claims until the lawsuits challenging the transfers and mortgages. Plaintiffs have known since at a minimum July 2017 that Theophile was holding himself out as authorized to act for LMP and named himself and ECRG as the agent/representative of LMP in public records with the State of New Jersey. Because Plaintiffs had the opportunity to limit Theophile’s ability to act on behalf of LMP (if he was not so authorized), and failed to do so, they cannot now point the finger at the Lenders. See, e.g., Edward D. Lord, Inc. v. Mun. Utils. Auth., 128 N.J. Super. 43, 47 (Law Div. 1974), aff’d, 133 N.J. Super 503. Indeed, Plaintiffs’ situation is a consequence of their own making. To the extent a fraud was committed, Plaintiffs cannot simply leave an innocent party such as the Lenders paying for their own business partner’s wrongdoings after they mistakenly put their trust in him. As between the parties, there can be no question that Plaintiffs had the opportunity to prevent any alleged loss yet failed to do so.

IV. SUMMARY JUDGMENT FOR THE LENDERS WAS PROPER

A. Plaintiffs’ Position That They Can Recover Monetary Damages on an Ejectment Action Against a Party that Never Possessed the Property Ignores the Plain Meaning of N.J.S.A. 2A:35-2

Plaintiffs’ second cause of action was for ejectment under N.J.S.A. 2A:35-1, et seq. (Pa23). Plaintiffs sought two forms of relief on this cause of action. They

sought judgment against the Lenders (except LH-NP): (1) declaring that [LMP] is the owner in fee simple of all rights, titles, and interests in and to the Subject Properties and that Defendants have no right, title, estate, or interest in or lien on the described Subject Properties; and (2) Finding all Defendants jointly and severally liable to Plaintiffs for damages, costs and attorney's fees. Id. The Lenders moved for summary judgment as to monetary damages under N.J.S.A. 2A:35-2. (Pa7592).

The Trial Court correctly dismissed the claim for monetary damages on summary judgment. (Pa471). This is because the Lenders did not have possession by virtue of having filed foreclosure actions. (Pa491). As the Trial Court correctly found, "N.J.S.A. § 2A:35-2 is about those in physical possession of property. N.J.S.A. § 2A:35-2 requires that a defendant have been in possession of property as a prerequisite to recovery." (Id.). This is consistent with the plain meaning of N.J.S.A. 2A:35-2 which says a "plaintiff shall be entitled to recover from the defendant any and all incidental damages, including mesne profits, and the full value of the **use and occupation** of the premises for the time ... during which the defendant was in possession thereof." (emphasis added). Filing a foreclosure action does not amount to "use and occupation" of a property under the plain meaning of the statute.

Plaintiffs ignore the plain meaning of N.J.S.A. 2A:35-2 in arguing that the "trial court was incorrect as a matter of law when it held that the reference to

possession in the ejectment statute establishes that a defendant may only be held liable under the statute if it is in physical possession of the property in question.” (Pb93). Plaintiff cites Marder v. Realty Const. Co., 84 N.J. Super. 313, 321 (App. Div. 1964) for the proposition that for purposes of N.J.S.A. 2A:35-2, a “defendant’s assertion of a possessory right” can be deemed possession. (Pb94). But in Marder, the defendant did not merely file an action asserting a right to the property. Rather, the defendant parked automobiles on the plaintiff’s property, placed ash and refuse cans on the property, shoveled snow on the property, and landscaped the property so that it would appear to have been a part of the defendant’s property. Marder, 84 N.J. Super. at 317. In neither Marder nor any other case cited by Plaintiffs did a court rule that the assertion of a right to ownership of a property through filing a foreclosure action amounts to “use and occupancy” of a property for purposes of N.J.S.A. 2A:35-2.

Finally, even if this Court found that the Trial Court was incorrect in concluding that as a matter of law, damages under N.J.S.A. 2A:35-2 were only available against a defendant who physically occupied a property, it would be irrelevant as the Trial Court correctly found that the properties did not belong to Plaintiffs, who consented to their transfer. As such, the Lenders were never in possession of Plaintiffs’ alleged property even if filing a foreclosure action could amount to possession. As such, dismissal of the Plaintiffs’ claim against the Lenders

under N.J.S.A. 2A:35-2 should be affirmed.

B. The Trial Court Correctly Determined that the Lenders are Entitled to Partial Summary Judgment on Equitable Subrogation

As an initial matter, if the Trial Decision is upheld, this Court need not consider the Appellants' claim as to the summary judgment decision on equitable subrogation grounds as the Lenders are not seeking both the equitable subrogation amount and the amount due under the Mortgages upheld by the Trial Court. If for some reason the Trial Court decision is reversed (and it should not be), the summary judgment decision in favor of the Lenders should nonetheless be upheld.

Under the well-established and "highly favored" doctrine of equitable subrogation, a mortgagee is permitted to stand in the shoes of a prior creditor where the mortgagee's funds were used to pay off a prior creditor's lien. See, e.g., U.S. Bank Nat. Ass'n v. Hylton, 403 N.J. Super. 630, 637 (Ch. Div. 2008) (citation omitted); Invs. Sav. Bank v. Keybank, N.A., 424 N.J. Super. 439, 477 (App. Div. 2012); N.Y. Mortg. Tr. 2005-3 Mortg.-Backed Notes, U.S. Bank Nat. Ass'n as Tr. v. Deely, 466 N.J. Super. 387, 399 (App. Div. 2021). "The goal of equitable subrogation is to prevent unjust enrichment." Reibman v. Myers, 451 N.J. Super. 32, 47 (App. Div. 2017)(applying equitable subrogation against a fee simple owner and explaining that "[e]quitable subrogation, a common law concept, seeks 'to compel the ultimate discharge of an obligation by the one who ought to pay it'").

Plaintiffs attempt to limit the scope of this well-established doctrine by relying

upon Investors Savings Bank, 424 N.J. Super. at 447, claiming that “the doctrine as typically applied is simply a recognition that, as an equitable matter, a lender refinancing a first-lien mortgage without knowledge of intervening encumbrances is awarded priority over the holders of those encumbrances, notwithstanding that its mortgage arose later in time.” (Pb100). Although the Investors Court noted that the “prototypical situation in which a court will apply the doctrine of equitable subrogation is where a mortgage with priority over other liens on a property is refinanced by a new mortgage used to pay off the outstanding balance on the old mortgage”, nowhere in the Court’s decision does it suggest that this is the only scenario in which the doctrine of equitable subrogation may apply. Id. at 444.

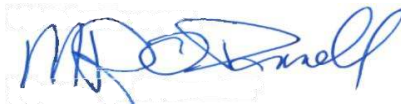
The doctrine also applies in situations where, as here, a party challenges the validity of a mortgage that paid off a prior lien, including where fraud or forgery has been alleged. See Reibman, 451 N.J. Super. 32 (affirming summary judgment applying equitable subrogation where wife alleged husband forged her name to transfer property to himself and then mortgaged property without her knowledge); Serial Bldg., Loan & Sav. Inst. v. Ehrhardt, 95 N.J. Eq. 607 (Ch. 1924)(equitable subrogation allowed mortgagee to stand in shoes of prior lender where husband forged wife’s signature on mortgage); Homeopathic Mut. Life Ins. Co. v. Marshall, 32 N.J. Eq. 103 (Ch. 1880). Regardless of whether/when Plaintiffs’ title is restored, it does not change the fact that the proceeds of the Loans paid off hundreds of

thousands of liens for which Plaintiffs were responsible. As set forth in the closing documents, it is undisputed that the Loans directly paid off countless liens against Plaintiffs and the Properties totaling at least \$691,567.09. (See Pa4614-4964). Indeed, Hassan was aware that he was responsible for paying the liens. (See Pa4410 at 58:5-59:12; Pa4414 at 65:20-66:2; Pa4432-4435). Thus, at a minimum, the Lenders would be entitled to liens on the Properties in the amount of their loan proceeds that were used to satisfy the prior liens and other charges, plus interest.¹⁰ See U.S. Bank, N.A., 403 N.J. Super. at 637; Invs. Sav. Bank, 424 N.J. Super. at 444.

CONCLUSION

For the reasons stated, the Lenders respectfully request that the Court deny Plaintiffs' appeal as to the Lenders and affirm the Trial Court's March 31, 2023 Final Judgment and the Trial Court's August 2, 2022 Order.

Respectfully submitted,
RIKER DANZIG LLP
Co-Counsel for Lender Respondents,

By: 

Michael R. O'Donnell (No. 030491988)

Date: December 2, 2024

¹⁰ Indeed, Plaintiffs would certainly be unjustly enriched if allowed to benefit from payments made with the Loan proceeds without repaying the Lenders or allowing the Lenders to step into the shoes of the prior lienholders whose liens were paid off.

PINCUS LAW GROUP, PLLC

By: /s/ Michael Clark

MICHAEL CLARK
*Co-counsel for Defendant
LH-NP-STRAT Delaware Owner Trust*

SOLOMON RUBIN

By: /s/ Solomon Rubin
SOLOMON RUBIN
*Co-Counsel for Defendant
JEST Holdings, LLC*

STERN & EISENBERG

By: /s/ Salvatore Carollo
SALVATORE CAROLLO
*Co-counsel for Defendants U.S. Bank National
Association as Trustee for Velocity Commercial
Capital Loan Trust 2018 a/k/a U.S. Bank National
Association as Trustee for Velocity Commercial
Capital Loan Trust 2018-1; U.S. Bank National
Association as Trustee for Velocity Commercial
Capital Loan Trust 2018-2 ;Velocity Commercial
Capital, LLC; and U.S. Bank, N.A., as Indenture
Trustee for VCC 2022MC-1 Trust*

4854-1744-9209, v. 5

IRFAN HASSAN AND LITTLE MASON
PROPERTIES, LLC,

Plaintiffs/Appellants,

vs.

MARC-ROLAND THEOPHILE; EIGHT
COPELAND ROAD GROUP, LLC; JEST
HOLDINGS, LLC; REVOLVING
MORTGAGE INVESTMENT TRUST 2017-
BRQI, BY U.S. NATIONAL BANK
ASSOCIATION AS TRUST FOR
VELOCITY COMMERCIAL CAPITAL
LOAN TRUST 2018-1; U.S. BANK
NATIONAL ASSOCIATION AS TRUSTY
FOR VELOCITY COMMERCIAL LOAN
TRUST 2018-2; WILMINGTON SAVINGS
FUND SOCIETY, FSB D/B/A
CHRISTIANA TRUST, AS CERTIFICATE
TRUSTEE FOR NRP MORTGAGE TRUST
1; LH-NP STRAT DELAWARE OWNER
TRUST; U.S. BANK N.A., AS INDENTURE
TRUSTEE FOR VCC 2022 MC-1 TRUST
AND VELOCITY COMMERCIAL
CAPITAL, LLC; EDDY JEAN JACQUES;
1ST RATE TITLE AND SETTLEMENT
SERVICES, LLC; EDWARD MCCLOUD;
CLOSE NOW, LLC; AND ANTHONY
BARBER,

Defendants/Respondents.

SUPERIOR COURT OF NEW
JERSEY

APPELLATE DIVISION

Docket No.: A-002759-22T4

Submission Date: December 2, 2024

On Appeal from a Final Order of
the Superior Court Chancery
Division, General Equity Part,
Union County dated August 2, 2022

Trial Docket No.: UNN-C-0005-20

Sat Below:
Hon. Robert J. Mega, P.J.Ch.

**DEFENDANTS/RESPONDENTS 1ST RATE TITLE AND SETTLEMENT
SERVICES, LLC AND EDWARD MCCLOUD'S BRIEF**

CALCAGNI & KANEFSKY LLP
One Newark Center
1085 Raymond Boulevard, 14th Floor
Newark, New Jersey 07102
Tel.: (862) 233-8130
Fax: (862) 902-5458
Email: lpaxton@ck-litigation.com
*Attorneys for Respondents 1st Rate
Title and Settlement Services, LLC
and Edward McCloud*

Of Counsel:

Lauren M. Paxton (Attorney ID: 001642010)

On the Brief:

Lauren M. Paxton

Richard Spatola (Attorney ID: 357262021)

TABLE OF CONTENTS

TABLE OF JUDGMENTS AND ORDERS BEING APPEALED.....	iii
TABLE OF AUTHORITIES	iv
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY.....	3
STATEMENT OF FACTS.....	4
LEGAL ARGUMENT.....	7
I. APPLICABLE STANDARDS OF REVIEW.....	7
II. SUMMARY JUDGMENT IN FAVOR OF THE 1ST RATE DEFENDANTS ON PLAINTIFF’S NEGLIGENCE CLAIM WAS PROPER (COUNT SIX).....	8
A. The Trial Court Correctly Found That Title Insurers and Their Agents Do Not Owe a Duty to a Non-Insured.	9
III. SUMMARY JUDGMENT IN FAVOR OF THE 1ST RATE DEFENDANTS ON PLAINTIFF’S NEGLIGENT MISREPRESENTATION CLAIM WAS PROPER (COUNT 8).....	16
IV. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE 1ST RATE DEFENDANTS ON PLAINTIFFS’ “INTENTIONAL TORT COUNTS” (COUNTS 3, 4, AND 5).....	18
A. Summary Judgment in Favor of the 1st Rate Defendants was Warranted Regarding Plaintiffs’ Fraud Claim (Count 3).....	19
B. Summary Judgment in Favor of the 1st Rate Defendants was Warranted Regarding Plaintiffs’ Tortious Interference Claim (Count 4).	23

C. Summary Judgment in Favor of the 1st Rate Defendants was
Warranted Regarding Plaintiffs’ Civil Conspiracy Claim (Count
5).25

V. McCLOUD CANNOT BE HELD PERSONALLY LIABILITY26

CONCLUSION30

TABLE OF JUDGMENTS AND ORDERS BEING APPEALED

JUDGMENTS/ORDER	ORDER	DECISION
Order for Summary Judgment in Favor of Edward McCloud and 1st Rate Title and Settlement Services, LLC	Pa471	Pa492

TABLE OF AUTHORITIES

Cases

<u>Alfano v. Schaud,</u> 429 N.J. Super. 469 (App. Div. 2013)	8, 26
<u>Alloway v. Bradlees, Inc.,</u> 157 N.J. 221 (1999)	15
<u>Anthony v. Chicago Title Ins. Co.,</u> 2007 WL 1144802 (S.D. Ohio Apr. 16, 2007)	12
<u>Banco Popular N. Am. v. Gandi,</u> 184 N.J. 161 (2005)	19, 26
<u>Best Bergen Homes, Inc. v. Nunez,</u> 2015 WL 9957834 (N.J. App. Div. Feb. 4, 2016)	24
<u>Brill v. Guardian Life Ins. Co. of Am.,</u> 142 N.J. 520 (1995)	7, 22
<u>Bryant v. City of Atlantic City,</u> 309 N.J. Super. 596 (App. Div. 1998)	7
<u>Carvalho v. Toll Bros. & Developers,</u> 143 N.J. 565 (1996)	15
<u>Cocco v. Hamilton,</u> 2010 WL 2011003 (N.J. App. Div. May 17, 2010)	14
<u>Davis v. Devereux Found.,</u> 209 N.J. 269 (2012)	15
<u>Davis v. Fein Such Kahn & Shephard PC,</u> 2020 WL 3481782 (D.N.J. June 25, 2020)	25
<u>DiMaria Constr., Inc. v. Interarch,</u> 351 N.J. Super. 558 (App. Div. 2001)	24

<u>The Ephraim and Hilda Fey Family Limited Partnership v. Commonwealth Land Title Ins. Co.,</u> 2012 WL 662519 (Cal. App. 2 Dist. Feb. 28, 2012)	12
<u>Erdheim v. Maggio,</u> 2009 WL 2136150 (N.J. App. Div. July 20, 2009).....	20
<u>Fidelity Union Bank v. United Plastics Corp.,</u> 218 N.J. Super. 381 (App. Div. 1987).....	28
<u>Frederick v. Smith,</u> 416 N.J. Super. 594 (App. Div. 2010).....	15
<u>Gennari v. Weichert Co. Realtors,</u> 148 N.J. 582 (1997).....	19
<u>Gormely v. Wood-El,</u> 218 N.J. 72 (2014).....	3
<u>Green v. Morgan Properties,</u> 215 N.J. 431 (2013).....	17
<u>Home Buyers Warranty v. Roblyn Dev. Corp.,</u> 2006 WL 2190742 (N.J. App. Div. Aug. 4, 2006).....	27
<u>Isko v. Planning Bd. of Livingston Twp.,</u> 51 N.J. 162 (1968).....	7
<u>Karpontinis v. Multi-Solns., Inc.,</u> 2013 WL 1150722 (N.J. App. Div. Mar. 21, 2013).....	12
<u>Kaufman v. i-Stat Corp.,</u> 165 N.J. 94 (2000).....	17
<u>Lamorte Burns & Co. v. Walters,</u> 167 N.J. 285 (2001).....	24
<u>Luczejko v. City of Hoboken,</u> 207 N.J. 191 (2011).....	11

<u>Princeton Neurological Surgery, P.C. v. Horizon Blue Cross Blue Shield of N.J.,</u> 2024 WL 178220, (N.J. App. Div. Jan. 17, 2024).....	16
<u>Richard A. Pulaski Constr. Co. v. Air Fram Hangers, Inc.,</u> 195 N.J. 457 (2008).....	29
<u>Saltiel v. GSI Consultants, Inc.,</u> 170 N.J. 297 (2002).....	29
<u>Sandler v. New Jersey Realty Title Ins. Co.,</u> 36 N.J. 471 (1962).....	10
<u>Sean Wood L.L.C. v. Hegarty Grp.,</u> 422 N.J. Super. 500 (App. Div. 2011)	28
<u>Smith v. Boyd,</u> 272 N.J. Super 186 (Law Div. 1993).....	13
<u>State Capital Title & Abstract Co. v. Pappas Business Servs.,</u> 646 F. Supp.2d 668 (D.N.J. 2009).....	29
<u>State Dept. of Env’t. Prot. v. Ventron Corp.,</u> 94 N.J. 473 (1983).....	28
<u>Templo Fuente De Vida Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh,</u> 224 N.J. 189 (2016).....	7
<u>Thurber v. Thurber,</u> 2017 WL 164480 (N.J. App. Div. Jan 17, 2017).....	13
<u>Tung v. Briant Park Homes, Inc.,</u> 287 N.J. Super. 232 (App. Div. 1996)	28
<u>Walker Rogge, Inc. v. Chelsea Title & Guar. Co.,</u> 116 N.J. 517 (1989).....	9, 10, 11, 18
<u>Wang v. Allstate Ins. Co.,</u> 125 N.J. 2 (1991)	9

Watson v. Sunrise Senior Living Servs., Inc.,
2013 WL 103966 (D.N.J. Jan. 8, 2013)..... 29

Weinberg v. Dinger,
106 N.J. 469 (1987)..... 8

Rules

Rule. 4:46-2(c)7

Other Legal Authorities

Barlow Burke, Law of Title Ins. § 201 (2021).....10, 20

J. Bushnell Nielsen, Title Escrow Claims Guide § 7.7 (2020)..... 12

PRELIMINARY STATEMENT

This case is, and should have remained, a dispute between two former business partners, Plaintiff Irfan Hassan (“Hassan”) and Marc-Roland Thoephile (“Thoephile”) over transactions involving eighteen real estate properties (the “Subject Properties”). The dispute centers around Plaintiffs’ claim that Hassan was the sole member of Little Mason Properties (“LMP”) and that Thoephile and Eight Copeland Road Group LLC (“ECRG”) fraudulently transferred the Subject Properties from LMP to ECRG and then encumbered the properties with mortgages.

Notwithstanding the lack of any relationship or interaction, Plaintiffs expanded this action beyond its outer limits by suing every “deep pocket” that had any connection to the transactions involving the Subject Properties. This included 1st Rate Title and Settlement Services, LLC (“1st Rate”), who served as title and settlement agent for its lender clients (*i.e.*, not the Plaintiffs), and Edward McCloud (“McCloud”), who is the sole owner of 1st Rate (collectively, the “1st Rate Defendants”). It is undisputed that Plaintiffs never met, spoke with, or had any dealings with the 1st Rate Defendants prior to these transactions.

After discovery concluded, the 1st Rate Defendants successfully moved for summary judgment on all six counts that were brought against them. Like the trial court’s decision on summary judgment, this appeal can be decided without considering the underlying factual dispute between Hassan and Thoephile over

whether title to the Subject Properties were fraudulently transferred (which, after a bench trial, the court ultimately found to have not occurred). As it relates to the 1st Rate Defendants, every material fact necessary for this appeal was not disputed by Plaintiffs in their response to the 1st Rate Defendants' statement of material facts.

While Plaintiffs maintain that the trial court committed error in granting summary judgment in favor of the 1st Rate Defendants on every claim, the trial court's rulings were proper. Because the 1st Rate Defendants did not owe a duty of care to Plaintiffs, there was no legal basis for their negligence-based claims. Furthermore, Plaintiffs' negligent misrepresentation claim could have been dismissed for the additional reason that the record contains no evidence of reliance.

As for the remaining claims—fraud, tortious interference, and civil conspiracy—Plaintiffs purposefully conflate these claims under a single “intentional tort” heading and then attempt to manufacture a single factual dispute over whether the 1st Rate Defendants knew of Theophile's fraud. The obvious problem with this is that knowledge of a fraud is not relevant for purposes of proving tortious interference and civil conspiracy, and knowledge that a misrepresentation of fact is false is but one of the many elements needed to prove a fraud. And, in any event, Plaintiffs do not point to any record evidence supporting their contention that the 1st Rate Defendants knew that Theophile was committing fraud. When each claim is scrutinized in isolation, it becomes clear that there is no evidentiary support for the

essential elements of: (1) misrepresentation and reliance to show a fraud; (2) intentional interference of a protectable interest to show tortious interference; and (3) an agreement to undertake any unlawful actions to show a civil conspiracy.

PROCEDURAL HISTORY

A detailed recitation of the procedural history of this case from initiation through summary judgment can be found in the trial court's August 2, 2022, Order. (Pa473-77). The operative pleading at the time of summary judgment, Plaintiffs' Fourth Amended Complaint (hereafter, the "Complaint"), alleged the following claims against the 1st Rate Defendants: Quiet Title (Count One); Fraud (Count Three); Tortious Interference (Count Four); Civil Conspiracy (Count Five); Negligence (Count Six); and Negligent Misrepresentation (Count Eight). (Pa22-29). On May 6, 2022, the 1st Rate Defendants moved for summary judgment on all six of the counts brought against them.¹ (Pa474; Pa482-83; Pa6120-21).² On August 2, 2022, the trial Court granted the 1st Rate Defendants' motion for summary judgment. (Pa471-72). The trial court issued a Final Judgment on March 31,

¹ Plaintiffs did not appeal the trial court's granting of summary judgment on their quiet title claim against the 1st Rate Defendants. See Pb. at 25-26; see also Gormely v. Wood-El, 218 N.J. 72, 95 n.8 (2014) (when an issue is not briefed, it is deemed waived).

² Due to a typographical error, the 1st Rate Defendants' initial notice of motion filed on May 6, 2022, was captioned as a motion for partial summary judgment, which was corrected by subsequent filing on May 9, 2022. (Pa6120-21).

2023, resolving the remaining claims against the remaining defendants. (Pa495-97). This appeal followed.

STATEMENT OF FACTS³

In 2009, McCloud opened up his own limited liability company, 1st Rate, to which he is the sole owner. (Pa6135, SOF ¶ 31; Pa7248, RSOF ¶ 31). 1st Rate's services are retained with the placement of a title order, usually via e-mail. (Pa6135, SOF ¶ 32; Pa7248, RSOF ¶ 32). A title officer at 1st Rate inputs all the relevant information such as the borrowing entity, the loan amount, the lender, the property address, and where the title commitment is to be sent. (Id.). A title search is then ordered through a third-party searcher, and tax, judgment, and corporate searches are also ordered. (Id.). The search results are reviewed by the title officer and then a title commitment is put together and sent to the lender. (Id.).

Hassan and Theophile were friends and business partners prior to the transactions involving the Subject Properties. (Pa6132, SOF ¶ 13; Pa7246, RSOF ¶ 13). When LMP was formed as a Delaware limited liability company in December 2013, Hassan never filled out the operating agreement provided to

³ As the Court will see from the citations to the 1st Rate Defendants' Statement of Material Facts ("SOF") and Plaintiffs' Response to the 1st Rate Defendants' Statement of Material Facts ("RSOF"), all the facts contained in this counterstatement are not disputed.

him, which would have identified LMP's owners and managers. (Pa6132, SOF ¶¶ 11-12; Pa7246, RSOF ¶¶ 11-12). In 2017, Theophile filed a New Jersey registration for LMP that had Theophile as the registered agent, which was known by Hassan. (Pa6131, SOF ¶ 6; Pa7246, RSOF ¶ 6). As is generally the case, an operating agreement was not filed with the State of New Jersey. (Pa6136, SOF ¶ 39; Pa7248, RSOF ¶ 39).

In connection with its role as title and settlement agent, Theophile provided 1st Rate an Operating Agreement for LMP—which was notarized and contained a signature for Hassan—to establish his authority to act on behalf of LMP. (Pa6132, SOF ¶ 14; Pa7246, RSOF ¶ 14; Pa611). The LMP Operating Agreement stated that Theophile was the 99% owner of LMP. (Pa6132, SOF ¶ 15; Pa7247, RSOF ¶ 15). Theophile also provided the 1st Rate Defendants with additional documents supporting his authority over LMP, including extensive email communications and a New Jersey Certification of Registration for LMP showing Theophile as the authorized representative. (Pa6134, SOF ¶ 22; Pa7247, RSOF ¶ 22).

The Subject Properties were transferred from LMP to ECRG by deeds that were signed by Theophile. (Pa6135, SOF ¶ 29; Pa7247-48, RSOF ¶ 29). Theophile represented to McCloud that the transfers were necessary to secure the loans from the lender. (Pa6137, SOF ¶ 41; Pa7248, RSOF ¶ 41). For all of

the transactions involving the Subject Properties, the lenders were sent the title commitments and were named as the insured on the title policies. (Pa6135, SOF ¶ 33; Pa7248, RSOF ¶ 33). After the title commitments were sent to the lenders, 1st Rate had numerous communications with Theophile, which included Theophile providing him with updates, information, and documents needed to clear title conditions and comply with title commitments in order to close the loan transactions. (Pa6135-36, SOF ¶ 34; Pa7248, RSOF ¶ 34). Theophile represented to 1st Rate that he was working in connection with, and in partnership with, Hassan to clear the Subject Properties of liens, judgments, and claims. (Pa6136, SOF ¶ 35; Pa7248, RSOF ¶ 35).

Prior to the closings of the transactions involving the Subject Properties, Hassan never met, spoke with, or had any dealings with 1st Rate or McCloud, including never hiring 1st Rate to do work for him or his entities. (Pa6131, SOF ¶¶ 9-10; Pa7246, RSOF ¶¶ 9-10). 1st Rate was also not aware, prior to the closings, of any allegation that Theophile did not have authority to act on behalf of LMP. (Pa6136-37, SOF ¶ 40; Pa7248, RSOF ¶ 40). Hassan testified that “Theophile is directly responsible for causing [Hassan] and [Hassan’s] companies to lose title to these 18 properties which are the subject to this lawsuit” and Theophile testified that “1st Rate didn’t do anything wrong.” (Pa6131-32, SOF ¶¶ 16, 18; Pa7247, RSOF ¶¶ 16, 18). Prior to bringing suit,

Hassan drafted a document and provided it to the authorities that stated that Theophile “defrauded” 1st Rate. (Pa6134, SOF ¶¶ 25-27; Pa7247, RSOF ¶¶ 25-27).

LEGAL ARGUMENT

I. APPLICABLE STANDARDS OF REVIEW

This Court reviews “the trial court’s grant of summary judgment de novo under the same standard as the trial court.” Templo Fuente De Vida Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). “[T]he judgment of a lower court can be affirmed even if on grounds different than those relied upon below.” Bryant v. City of Atlantic City, 309 N.J. Super. 596, 629 (App. Div. 1998); see also Isko v. Planning Bd. of Livingston Twp., 51 N.J. 162, 175 (1968) (appellate court may affirm a judgment on different grounds than those identified below).

Summary judgment must be granted when the record shows “that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” Rule 4:46-2(c). The “essence of the inquiry” is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 533 (1995) (internal quotation marks and citation omitted). “At the

summary judgment state, facts must be viewed in the light most favorable to the nonmoving party only if there is a ‘genuine’ dispute as to those facts.” Alfano v. Schaud, 429 N.J. Super. 469, 474 (App. Div. 2013), cert. denied, 214 N.J. 119 (2013). Indeed, the party opposing summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts” and “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issues for trial.” Id. at 474-75 (internal quotation marks and citation omitted). Thus, “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of material fact.” Id. at 475 (internal quotation marks and citation omitted) (emphasis in original).

II. SUMMARY JUDGMENT IN FAVOR OF THE 1ST RATE DEFENDANTS ON PLAINTIFF’S NEGLIGENCE CLAIM WAS PROPER (COUNT SIX)

A claim of negligence requires a showing of: “(1) [a] duty of care, (2) breach of [that] duty, (3) proximate cause, and (4) actual damages.” Weinberg v. Dinger, 106 N.J. 469, 484 (1987). In granting summary judgment in favor of the 1st Rate Defendants, the trial court concluded that “a title agent cannot be liable to a non-insured.” (Pa492). In other words, the trial judge found that the 1st Rate Defendants did not owe a duty to the Plaintiffs. There is

no dispute that the question of whether a duty exists is a matter of law that is properly decided on summary judgment. See Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991). Plaintiffs, however, contend that the trial court got it wrong and maintain that they can sue a title agent for damages under a theory of negligence. There is simply no support for this position. Instead, the law is clear that the responsibilities of title insurers and title agents are contractual, their obligations are to the insured, and they can only be sued outside of contract if an independent duty was voluntarily assumed. Any contrary finding would not only be without any legal basis, but it would also contradict settled principles of title insurance law in New Jersey, and across the United States.

A. The Trial Court Correctly Found That Title Insurers and Their Agents Do Not Owe a Duty to a Non-Insured.

The Supreme Court of New Jersey has unequivocally stated that “[i]n this state, the rule has been that a title company’s liability is limited to the policy and that company is not liable in tort for negligence in searching records.” Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 116 N.J. 517, 535 (1989). This rule is premised on the fact that the duty of a title company “does not depend on negligence, but on the agreement between the parties.” Id. Indeed, “[a] title insurance policy is a contract of indemnity under which the insurer for a valuable consideration agrees to indemnify the insured in a specified amount against loss through defects of title to, or liens or encumbrances upon realty in

which the insured has an interest.” Sandler v. New Jersey Realty Title Ins. Co., 36 N.J. 471, 478-79 (1962). Because “the relationship between [a title] company and the insured is essentially contractual,” and a title company “is providing not services, but a policy of insurance,” the “policy appropriately limits the rights and duties of the parties.” Walker Rogge, 116 N.J. at 540. Thus, “if the title company fails to conduct a reasonable title examination . . . then it runs the risk of liability under the policy.” Id.; see also Barlow Burke, Law of Title Ins. § 201 (2021)⁴ (“Even when the title insurer concedes that it was negligent in its title search, resulting in the nondisclosure of a defect in title that an insured claims was material to the transaction, the indemnity is unaffected—because, again, the insurer’s negligence is irrelevant to its duty to indemnify.”) (Pa7163).

The only recognized exception that could open the door to a negligence action against a title insurer is “if the act complained of was the direct result of duties voluntarily assumed by the insurer in addition to the mere contract to insure title.” Walker Rogge, 116 N.J. at 541 (internal quotation marks and citation omitted). Moreover, “[i]n situations where the principal owes no duty or less than the normal duty of care to the person harmed, the agent likewise has either no duty or a diminished duty to that third party even for actions that

⁴ Plaintiffs’ own expert identified the treatise Law of Title Insurance as authoritative. (Pa6140, SOF ¶ 55; Pa7249, RSOF ¶ 55).

otherwise would constitute a tort.” Luchejko v. City of Hoboken, 207 N.J. 191, 212 (2011) (internal quotation marks and citation omitted).

Plaintiffs concede that they are not a party to any applicable insurance contract (Pa6135, SOF ¶ 33; Pa7248, RSOF ¶ 33), and do not contend that the 1st Rate Defendants voluntarily assumed a duty on their behalf. Instead, they claim that they have the right to bring a negligence claim against the 1st Rate Defendants based on how they “performed the title examination necessary to issue title insurance.” (Pb at 72). An entity conducting a title search “for its own benefit” and “in conjunction with its obligation to issue the title commitment and policy,” however, was what the Walker Rogge court found to not create negligence-based liability. 116 N.J. at 536.

Plaintiffs attempt to brush aside New Jersey Supreme Court precedent by claiming that it only applies to negligence claims brought by an insured would lead to an absurd result of title insurers, and by extension their agents, having more exposure to a third party than the insured who retained its services. Tellingly, Plaintiff’s expert, touted as “among the most experienced and credentialed experts in title assurance in New Jersey” (Pb at 72), did not subscribe to such a position and made clear that his opinions did not extend to whom the 1st Rate Defendants owed a duty. (Pa6137-38, SOF ¶¶ 44, 46, 48; Pa7249, RSOF ¶¶ 44, 46, 48). The reason is simple; the law does not support a

duty being owed to anyone besides the insured. See J. Bushnell Nielsen, Title Escrow Claims Guide § 7.7 (2020)⁵ (“The true owner of property has no standing to sue the title insurer that issued a policy to the grantee, when the insured deed or mortgage was forged or the product of fraud.”) (Pa7145); Id. (“[A] seller is not an insured or third-party beneficiary of the policy, and the insurer does not owe a duty to the seller.”) (Pa7143); Karpontinis v. Multi-Solns., Inc., 2013 WL 1150722, at *4 (N.J. App. Div. Mar. 21, 2013) (“[T]here is no authority that permits a seller or non-party to a real estate transaction, such as [plaintiff], to recover against a buyer’s title insurer”) (1RDa003); The Ephraim and Hilda Fey Family Ltd. P’ship v. Commonwealth Land Title Ins. Co., 2012 WL 662519, at *1, *4-5 (Cal. App. 2 Dist. Feb. 28, 2012) (title insurer did not owe a duty to the real general partner when a “falsely and fraudulently prepared” limited partnership agreement was used to fraudulently transfer property because “[a] party who does not purchase title insurance may not rely on the title insurer to protect his or her interests or to disclose all detrimental information contained in the recorded files”) (internal quotation marks and citation omitted) (Pa7182, Pa7185); Anthony v. Chicago Title Ins. Co., 2007 WL 1144802, at *1-2 (S.D. Ohio Apr. 16, 2007) (record owner claiming her signature on deed was forged

⁵ Plaintiffs’ own expert identified the treatise Title Escrow Claims Guide as authoritative. (Pa6140, SOF ¶ 54; Pa7249, RSOF ¶ 54).

had no standing to sue the insurer that issued a policy to the grantee because it “does not owe even a basic duty of protection to Plaintiff”) (Pa7188-89).

While Plaintiffs primarily rely on Smith v. Boyd, 272 N.J. Super 186 (Law Div. 1993), this trial level opinion with no precedential value actually supports the position that a title insurer/title agent does not owe a duty to a non-insured. In Smith, a “negligently prepared” title report, contractually prepared for the benefit of a foreclosing lender, failed to reference a mortgage, and the successful bidder at a foreclosure sale brought suit against the preparer of the title report. 272 N.J. Super at 188-89. Regarding plaintiff’s negligence claim against the title report preparer, the court found as a matter of law that “having made a title report does not create a common law duty to plaintiff” because the report was not made for him, and that it would be “unfair and unjust” to grant a third party with more rights than those available to the contracting party. Id. at 196-97. Like the preparer of the title report in Smith, the 1st Rate Defendants did not conduct any work on behalf of Plaintiffs, thus making it “unfair and unjust” to elevate Plaintiffs to a position that would exceed that of the insured lenders.

The other two unpublished cases cited by Plaintiffs likewise support the lack of any duty owed to them by the 1st Rate Defendants. See Thurber v. Thurber, 2017 WL 164480, at *7 (N.J. App. Div. Jan 17, 2017) (“Individuals who are not ‘named insureds’ under the policy cannot recover. There is no

authority presented allowing a seller or non-party to the real estate transaction to recover against a buyer's title insurer.") (internal citation omitted) (1RD010); Cocco v. Hamilton, 2010 WL 2011003, at *12 (N.J. App. Div. May 17, 2010) (reversing summary judgment and remanding where "[a] reasonable jury could conclude" that the "assurances" made by a title insurance representative "was such a duty voluntarily assumed" that could subject the title insurance company to a negligence claim) (internal quotation marks and brackets omitted) (1RD020). These cases collectively establish that non-contractual third parties can only bring a negligence claim against title insurers/title agents for independent duties voluntarily assumed, which did not happen here. The undisputed facts show that Plaintiffs are not the insured, never communicated with the 1st Rate Defendants, and never engaged the 1st Rate Defendants to perform any services.

Acting as if applicable law did not already foreclose the imposition of a duty under the present circumstances, Plaintiffs resort to "standard negligence principles" to try and manufacture a duty of care owed to them by the 1st Rate Defendants. (Pb at 77-87). The imposition of a legal duty requires that a defendant not only have the "ability to foresee injury to a potential plaintiff" but that considerations of fairness and public policy also warrant the creation of such a duty. Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 573 (1996)

(internal quotation marks, brackets, and citation omitted). Those considerations include “the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.” Alloway v. Bradlees, Inc., 157 N.J. 221, 230 (1999) (internal quotation marks and citation omitted); see also Davis v. Devereux Found., 209 N.J. 269, 296 (2012) (“nature of the attendant risk” means “whether the risk is foreseeable, whether it can be readily defined, and whether it is fair to place the burden of preventing the harm upon the defendant”). These principles do not support a duty of care here.

It was not foreseeable that Plaintiffs would be injured as a result of title in the Subject Properties being transferred from LMP to ECRG when 1st Rate performed title examinations solely in conjunction with its obligation to issue title commitments and policies for the lenders after receiving an operating agreement showing that Theophile was the 99% owner of LMP and a New Jersey Certification of Registration showing that Theophile was the registered agent. Moreover, Plaintiffs and the 1st Rate Defendants did not have *any* relationship, and courts have not imposed a duty on this basis alone. See, e.g., Frederick v. Smith, 416 N.J. Super. 594, 601 (App. Div. 2010) (affirming dismissal of negligence claim since “the absence of any relationship between plaintiffs and [defendant] precludes the imposition of a duty”).

Public policy also disfavors extending a title agent's duties to other parties to real estate transactions because doing so would stretch exposure beyond the point of reason and would completely upend the economic structure of real estate transactions. Indeed, if every person or entity who is affected by a transfer of real property could sue a title insurer/title agent and argue that they should have done more to investigate every conceivable party or prior transaction, then the scope of the title agent's obligations as well as their potential liabilities would be undefined and boundless. Thus, even under so called standard negligence principles put forth by Plaintiffs, the 1st Rate Defendants do not owe a duty of care to Plaintiffs.

III. SUMMARY JUDGMENT IN FAVOR OF THE 1ST RATE DEFENDANTS ON PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM WAS PROPER (COUNT 8)

Lumping their negligence and negligent misrepresentation claims together, Plaintiffs' appeal only addresses whether the 1st Rate Defendants owed a duty to Plaintiffs and whether there was a breach of that duty. (Pb at 71-89). While "[a] party asserting a negligent misrepresentation claim must show the defendant had a duty of care," Princeton Neurological Surgery, P.C. v. Horizon Blue Cross Blue Shield of N.J., 2024 WL 178220, at *7 (N.J. App. Div. Jan. 17, 2024) (1RD026), and the trial court found the lack of a duty dispositive in granting summary judgment and dismissing Plaintiffs' negligence claims,

there are additional bases to support summary judgment.

The elements for negligent misrepresentation are “an incorrect statement, negligently made and justifiably relied upon, and economic loss or injury sustained as a consequence of that reliance.” Green v. Morgan Properties, 215 N.J. 431, 457 (2013) (internal quotation marks, ellipses, brackets, and citation omitted). Here, Plaintiffs do not point to any evidence showing that they received, considered, and relied upon any statements from the 1st Rate Defendants. See Kaufman v. i-Stat Corp., 165 N.J. 94, 109 (2000) (“The actual receipt and consideration of any misstatement remains central to the case of any plaintiff” bringing a negligent misrepresentation claim). Plaintiffs fail to do so because it is not possible; the undisputed record shows that Plaintiffs did not speak with the 1st Rate Defendants before the transactions involving the Subject Properties closed (Pa6131, SOF ¶¶ 9-10; Pa7246, RSOF ¶¶ 9-10), and Plaintiffs only found out about Theophile’s purported fraud after the transactions closed. (See, e.g., Pa7422, Chicago Title SOF ¶ 11; Pa7590 Pls.’ RSOF ¶ 11). Without any evidence showing that Plaintiff received and relied on a purported misrepresentation causing injury, summary judgment dismissing Plaintiffs’ negligent misrepresentation claim was appropriate for reasons beyond the lack of duty.

IV. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE 1ST RATE DEFENDANTS ON PLAINTIFFS' "INTENTIONAL TORT COUNTS" (COUNTS 3, 4, AND 5)

Given that “[t]he prevailing view remains not to impose liability in tort on a title company,” Walker Rogge, 116 N.J. at 538, and that view has not changed since Walker Rogge was decided by the Supreme Court of New Jersey, there is no legal basis for Plaintiffs’ claims of fraud, tortious interference, and civil conspiracy against the 1st Rate Defendants. If this Court considers these claims, however, it will be satisfied that the summary judgment record is devoid of any genuine and material questions of fact that would otherwise preclude summary judgment with respect to these claims.

Recognizing their lack of merit, Plaintiffs improperly group their fraud, tortious interference, and civil conspiracy claims together as the “Intentional Tort Counts,” and argue that they hinge solely on whether the 1st Rate Defendants “knew that Theophile was committing fraud and/or acted in concert with him.” (Pb at 103). This could not be further from the truth. Fraud, tortious interference, and conspiracy are unique claims, consisting of different essential elements that must be supported with evidence. As discussed below, Plaintiffs do not come forward with any evidence—much less disputed evidence—to satisfy these claims.

A. Summary Judgment in Favor of the 1st Rate Defendants was Warranted Regarding Plaintiffs' Fraud Claim (Count 3).

“To establish common-law fraud, a plaintiff must prove: ‘(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.’” Banco Popular N. Am. v. Gandi, 184 N.J. 161, 172-73 (2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)). While Plaintiffs focus entirely on knowledge in their appeal, (see Pb at 103-05), they do not point to any evidence establishing that (i) a material misrepresentation was made by the 1st Rate Defendants to Plaintiffs, and (ii) Plaintiffs relied on any alleged misrepresentation by the 1st Rate Defendants. The trial court’s decision to grant summary judgment in favor of the 1st Rate Defendants was based on this lack of evidence. (See Pa492) (“Intentional torts require steps that the evidence against these Defendants does not support” and “nor can there be any reliance by Plaintiff Irfan Hassan on statements made by these Defendants”).

A review of the record confirms why summary judgment was properly granted in favor of the 1st Rate Defendants as it relates to Plaintiffs’ fraud claim. First, there is no evidence in the record that shows or even suggests that Hassan received or reviewed the title commitments and/or policies that contained the alleged falsities concerning title for the Subject Properties. And even had

Hassan received such documents (which is a fact not in the record), a title policy is not a representation of fact but rather simply an undertaking by the insurer to make payment in the event facts concerning title turn out to be inaccurate or untrue. See Barlow Burke, Law of Title Ins. § 201 (2021) (“An indemnity has no representational aspect. Thus, no title policy is a guarantee of good title. It is not a representation that the title is in any sort of condition, good or bad, or that it is free from any type of defect or encumbrance. . . . The policy of title insurance, however, does not constitute a representation that the contingency insured against will not occur. Accordingly, when such contingency occurs, no action for negligence or negligent misrepresentation will lie against the insurer based upon the policy of title insurance alone.”) (Pa7162). Second, Plaintiffs admit that Hasan never hired 1st Rate to do work for him or his entities and never met, spoke with, or had any dealings with 1st Rate or McCloud. (Pa6131, SOF ¶¶ 9-10; Pa7246, RSOF ¶¶ 9-10). Third, Hassan did not know about the transfers of the Subject Properties and the mortgages until after all the closings occurred. (See, e.g., Pa7422, Chicago Title SOF ¶ 11; Pa7590 Pls.’ RSOF ¶ 11). Because Plaintiffs never communicated with the 1st Rate Defendants and the documents containing the purported falsities were never communicated to Plaintiffs, there is simply no evidentiary support for the essential elements of misrepresentation and reliance. See Erdheim v. Maggio, 2009 WL 2136150, at

*6 (N.J. App. Div. July 20, 2009) (finding “summary judgment was appropriate” where “plaintiff presented no evidence that he actually and reasonably relied on defendant’s statements”) (1RDa032). Summary Judgment must therefore be affirmed in the 1st Rate Defendants’ favor on Plaintiffs’ fraud claim.

Even if this Court felt compelled to address the knowledge element, Plaintiffs fail to point to any evidence that creates a genuine issue of material fact over whether 1st Rate knew of Theophile’s fraudulent claim to authority over Little Mason. The trial court agreed when it found that “Plaintiffs have not presented sufficient evidence that [the 1st Rate Defendants] knew there was a problem with Marc-Roland Theophile’s authority to act.” (Pa492). McCloud testified that he did not have any doubts whether Theophile had the authority to act on behalf of LMP. (See, e.g., Pa5395-96, Jan. 4, 2022, McCloud Dep. 148:19-149:8). And Plaintiffs conspicuously omit any reference to a document that Hassan drafted for the authorities, after learning about Theophile’s purported fraud, that contradicts their position in this lawsuit that 1st Rate knew about the fraud. (Pa6134, SOF ¶¶ 25-27; Pa7247, RSOF ¶¶ 25-27). In this document, Hassan states that 1st Rate “broke off communication when it became evident Marc [Theophile] defrauded them.” (Id.). Thus, by his own admission, Hassan acknowledges that the 1st Rate Defendants were also victims of Theophile’s fraud, which consequently means that the 1st Rate Defendants and

McCloud did not have any knowledge of the fraud.

In the face of this evidence, Plaintiffs make general representations, unsupported by the evidence, that is irrelevant and immaterial to the 1st Rate Defendants' knowledge. For example, Plaintiffs claim that 1st Rate "earned substantial fees" (without citation) and that "\$55,000 in additional funds are unaccounted for in 1st Rate's recordkeeping" (with a general citation to over twenty closing ledgers that do not show this). Neither statement, even accepting it as fact, have anything to do with the 1st Rate Defendants' knowledge of Theophile's purported fraud. See, e.g., Brill, 142 N.J. at 529 ("[W]here the party opposing summary judgment points only to disputed issues of fact that are of an insubstantial nature, the proper disposition is summary judgment.") (internal quotation marks and citation omitted). Similarly, Plaintiffs' self-serving and citationless contention that "Theophile's fraud was evident on the face of documents" (Pb at 103) and "documents 1st Rate was required to review . . . contained indications that Theophile's claim to title was unsound" (with a general citation to a 25-page expert report) (Pb at 104) do not provide any evidence of the 1st Rate Defendants' knowledge of Theophile's purported fraud and Plaintiff cites no legal authority that states otherwise.

Apparently recognizing the lack of evidentiary support, Plaintiffs also turn to disingenuous assertions and utter speculation. Citing to an August 20, 2021, Order (see Pa1), Plaintiffs make the outrageous contention that “1st Rate resisted discovery, failing to timely produce responsive documents repeatedly, resulting in delays in discovery, and almost certainly in the absence of evidence that should be before the Court.” (Pb at 104). This Order, however, merely granted Plaintiffs’ motion to compel discovery from the 1st Rate Defendants after a common discovery dispute. For Plaintiffs to accuse the 1st Rate Defendants of withholding information based on a single discovery dispute and an unsupported claim of documents being produced “when it served 1st Rate’s purposes to do so,” is utterly ridiculous. If Plaintiffs truly believed that any discovery misconduct occurred, they could have sought relief with the trial court. Tellingly, they did not. And such an unfounded accusation on appeal does not create an issue of fact, and it does not provide a basis to reverse the granting of summary judgment here.

B. Summary Judgment in Favor of the 1st Rate Defendants was Warranted Regarding Plaintiffs’ Tortious Interference Claim (Count 4).

Plaintiffs do not point to any specific evidence or make any legal argument for why summary judgment on their tortious interference claim was improper. Instead, Plaintiffs repeat the argument that there is evidence that the 1st Rate

Defendants knew that Theophile was committing a fraud. (See Pb at 105-07). But knowledge of Theophile's purported fraud, which is itself unsupported with evidence, is irrelevant to establishing a tortious interference claim. See DiMaria Constr., Inc. v. Interarch, 351 N.J. Super. 558, 567 (App. Div. 2001) (the elements to a tortious interference claim are "(1) a protected interest; (2) malice—that is, the defendant's intentional interference without justification; (3) a reasonable likelihood that the interference caused the loss of the prospective gain; and (4) resulting damages.").

Here, Plaintiffs did not come forward with any evidence showing that the 1st Rate Defendants intentionally interfered with contracts between LMP and third parties or any other business opportunity. See Lamorte Burns & Co. v. Walters, 167 N.J. 285, 306-07 (2001) (malice is harm "inflicted intentionally and without justification or excuse," must be "transgressive of generally accepted standards of common morality or of law," such as "conduct that is fraudulent, dishonest, or illegal"); Best Bergen Homes, Inc. v. Nunez, 2015 WL 9957834, at *4 (N.J. App. Div. Feb. 4, 2016) (affirming trial court's order granting summary judgment and dismissing broker's tortious interference claim because broker failed to establish buyers acted with malicious intent in interfering with listing agreement) (1RDa036). In fact, the record is devoid of evidence showing that the 1st Rate Defendants even knew of the contracts with

which Plaintiffs claim they intentionally interfered. Because Plaintiffs provide no basis to overturn the trial court's holding that "[i]ntentional torts require steps that the evidence against these Defendants does not support" (See Pa492), summary judgment must be affirmed as it relates to Plaintiffs' tortious interference count.

C. Summary Judgment in Favor of the 1st Rate Defendants was Warranted Regarding Plaintiffs' Civil Conspiracy Claim (Count 5).

Once again, Plaintiffs attempt to show that the trial court erred in granting summary judgment on its civil conspiracy claim by arguing that there is evidence to support the contention that "1st Rate knew that Theophile's claim to authority over Little Mason was fraudulent."⁶ (Pb at 103). But like tortious interference, knowledge of a fraud is not a necessary element to prove a civil conspiracy. Instead, a civil conspiracy requires proof of "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an

⁶ Should this court conclude that Thopehile had authority to act on behalf of Little Mason, then there cannot be a civil conspiracy. Such a claim is only actionable if there is an independent wrong. See, e.g., Davis v. Fein Such Kahn & Shephard PC, 2020 WL 3481782, at *9 (D.N.J. June 25, 2020) (dismissing conspiracy claims where substantive claims based on the predicate acts were also dismissed) (1RDa051).

overt act that results in damage.” Banco Popular N. Am., 184 N.J. at 177 (internal quotation marks and citations omitted).

The record does not contain any evidence of an agreement between the 1st Rate Defendants and Theophile (or any other party) to undertake any unlawful actions whatsoever. In fact, the evidence conclusively shows that there was no agreement at all. For example, prior to bringing this lawsuit, Hassan admitted, in a document that he prepared, that Theophile “defrauded” 1st Rate. (Pa6134, SOF ¶¶ 25-27; Pa7247, RSOF ¶¶ 25-27). Furthermore, Hassan admitted during his deposition that he did not “have any knowledge or facts of any other defendants besides Velocity getting together and creating a conspiracy” and that his belief that a “conspiracy” existed was limited to a single document, the operating agreement. (Pa6132-33, SOF ¶ 17; Pa7247, RSOF ¶ 17). Where, as here, there is no credible evidence to support essential elements of a claim, then summary judgment is proper. See, e.g., Alfano, 429 N.J. Super. at 474-75 (“Where the record taken as a whole could not lead a rational trier of fact to finding for the nonmoving party, there is no ‘genuine issue for trial’”) (citation omitted).

V. McCLOUD CANNOT BE HELD PERSONALLY LIABILITY

The trial court did not need to reach the specific issue of whether McCloud could be held personally liable because it ultimately found that none of

Plaintiffs' claims were factually and legally supported. Even assuming that a claim against 1st Rate could survive summary judgment, there would still be no basis to hold McCloud personally liable.

Plaintiffs maintain on appeal, without any factual or legal support, that McCloud "took individual responsibility for the conduct of the title examinations on the Theophile Loans when he signed the title commitments as the responsible licensed insurance producer." (Pb at 105). This contention is unsupported because it is not backed by the record or the law. As a matter of fact, the title commitments show that Chicago Title Insurance Company is the signatory to the commitment (signed by Chicago Title's president), and McCloud's signature on the commitment's schedule comes under "Chicago Title Insurance Company" and is on behalf of 1st Rate, as an authorized agent of Chicago Title. (See, e.g., Pa3359-3367). Furthermore, merely signing the commitments does not legally expose McCloud to liability. See, e.g., Home Buyers Warranty v. Roblyn Dev. Corp., 2006 WL 2190742, at *4 (N.J. App. Div. Aug. 4, 2006) ("Considering that a corporation cannot act alone and requires the physical assistance of natural persons, the mere fact that an individual executed a contract for the purpose of binding a corporation does not also render that individual liable. Instead, in circumstances such as those presented, the signatory should be viewed only as an agent for the corporation.")

(1RDa040); Fidelity Union Bank v. United Plastics Corp., 218 N.J. Super. 381, 388 (App. Div. 1987) (no individual liability where individual signature “was intended to be made in a corporate capacity”).

Next, Plaintiffs claim that the doctrine of piercing the corporate veil is applicable to hold McCloud personally liable because there is “sufficient evidence” to subject 1st Rate to liability under the “Intentional Tort Counts,” which “involve allegations of fraud.” (Pb at 106). Merely alleging fraud against a corporation, however, does not provide a basis for veil piercing. Instead, the purpose of the limited and extraordinary equitable doctrine of piercing the corporate veil “is to prevent an independent corporation from being used to defeat the ends of justice, to perpetuate fraud, to accomplish a crime, or otherwise to evade the law.” State Dept. of Env’t. Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983) (internal citation omitted); see also Sean Wood L.L.C. v. Hegarty Grp., 422 N.J. Super. 500, 517 (App. Div. 2011) (“An individual may be liable for corporate obligations if he was using the corporation as his alter ego and abusing the corporate form in order to advance his personal interests.”). Moreover, the party seeking to pierce the corporate veil “bears the burden of proving that the court should disregard the corporate entity.” Tung v. Briant Park Homes, Inc., 287 N.J. Super. 232, 240 (App. Div. 1996). Here, the record is devoid of any evidence that McCloud created and used 1st Rate for the

purpose of committing fraud against Plaintiffs or that 1st Rate otherwise failed to observe corporate formalities. Without any such evidence, veil piercing is inapplicable. See Richard A. Pulaski Constr. Co. v. Air Fram Hangers, Inc., 195 N.J. 457, 473 (2008) (no individual liability where entity was neither “a fraud or a sham, or that it had failed to observe the requisite corporate formalities”); State Capital Title & Abstract Co. v. Pappas Business Servs., LLC, 646 F. Supp.2d 668, 679 (D.N.J. 2009) (“[E]ven in instances where one individual shareholder or director dominates the corporate entity, liability generally is imposed only where the dominant party has abused the privilege of incorporation by using the corporate form to perpetuate a fraud or injustice, or otherwise circumvent the law.”) (internal quotation marks, brackets, and citation omitted).

Finally, Plaintiffs assert that the participation theory of individual liability provides them with an avenue to sue McCloud in his individual capacity. (Pb at 106). But New Jersey courts have limited the application of this theory to intentional torts, the majority of which “have involved fraud and conversion.” Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 304 (2002) (collecting cases); Watson v. Sunrise Senior Living Servs., Inc., 2013 WL 103966, at *17 (D.N.J. Jan. 8, 2013) (“[P]lainiff does not claim that an intentional tort occurred here, which is generally the context in which courts impose liability on corporate

officers under the participation theory.”) (Pa7240). As previously discussed, there is no evidence supporting any of Plaintiffs’ intentional torts, including fraud, thus making the participation theory inapplicable.

CONCLUSION

For the foregoing reasons, the 1st Rate Defendants request that this Court deny Plaintiffs’ appeal in its entirety and affirm the trial court’s order granting summary judgment in favor of the 1st Rate Defendants.

Respectfully submitted,

CALCAGNI & KANEFSKY LLP

By: /s/ Lauren M. Paxton
Lauren M. Paxton, Esq.
One Newark Center
1085 Raymond Blvd., 14th Floor
Newark, New Jersey 07102
Tel. (862) 397-1796
Fax (862) 902-5458
lpaxton@ck-litigation.com
*Attorneys for Respondents 1st Rate
Title and Settlement Services, LLC,
and Edward McCloud*

Dated: December 2, 2024

IRFAN HASSAN AND LITTLE MASON	:	APPELLATE DIVISION
PROPERTIES, LLC,	:	DOCKET NO.: A-002759-22T4
	:	
Plaintiffs/Appellants	:	ON APPEAL FROM ORDERS
	:	IN THE SUPERIOR COURT OF
vs.	:	NEW JERSEY, CHANCERY
	:	DIVISION, UNION COUNTY
MARC-ROLAND THEOPHILE;	:	
ET ALS.;	:	COUNTY DOCKET NO.
	:	UNN-C-0005-20
	:	
	:	SAT BELOW:
	:	HON. ROBERT J. MEGA,
	:	P.J.Ch.
	:	
	:	CIVIL ACTION

**PLAINTIFFS/APPELLANTS, IRFAN HASSAN AND
LITTLE MASON PROPERTIES, LLC’S REPLY BRIEF**

RICHARD T. WELCH, ESQ. (Attorney ID #032972006)
RONALD L. DAVISON, ESQ. (Attorney ID #266481971)
STARR, GERN, DAVISON & RUBIN, P.C.
105 Eisenhower Parkway, Suite 401
Roseland, NJ 07068
Tel.: (973) 403-9200 / Fax: (973) 226-0031
Email: rwelch@starrgern.com / rdavison@starrgern.com
*Attorneys for Appellants, Irfan Hassan
and Little Mason Properties, LLC*

On The Brief:

Richard T. Welch, Esq.
Ronald L. Davison, Esq.

Submitted: December 16, 2024

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT.....	1
LEGAL ARGUMENT.....	3
POINT I: PLAINTIFFS’ RESPONSE TO THE OPPOSITION SUBMITTED BY THE LENDER DEFENDANTS	3
A. The Trial Court’s Holding That Hassan Transferred Ownership of And Authority Over Little Mason’s Properties to Theophile is Overwhelmingly Contradicted by The Weight of The Evidence.....	3
B. There is no evidence of any partnership or any other agreement by which Hassan transferred ownership of or authority over Little Mason’s properties to Theophile....	6
C. The evidence establishes that Hassan had no knowledge of Theophile’s fraud.	9
D. The Trial Court’s Subjective Findings as to Credibility Are Contrary to the Weight of the Evidence.....	13
E. Theophile’s testimony is further made unreliable by the judge’s decision to permit the Lenders to examine him using leading questions, which permitted them to present their case in chief by prompting guided responses from him during his testimony.	17
F. The weight of the evidence does not support a finding that Theophile had apparent authority to execute deeds on behalf of Little Mason.	18

G.	The Trial Court’s Holding on Plaintiffs’ Ejectment Count Against Theophile and the Lenders Was the Result of Legal Error	18
H.	This appeal is not moot as to any of the Subject Properties.....	19
I.	Equity does not support stripping Hassan of his rights to the Subject Properties.	21
POINT II	PLAINTIFFS’ RESPONSE TO THE OPPOSITION SUBMITTED BY THE TITLE DEFENDANTS	21
A.	There is no rule limiting liability for damages caused to a non-contracting party by negligence on the part of title insurers or their agents.....	21
B.	Chicago Title is liable for the negligence of its agent, 1st Rate	24
C.	Edward McCloud is personally liable his and 1st Rate’s negligence.....	25
POINT III	PLAINTIFFS’ RESPONSE TO THE OPPOSITION SUBMITTED BY DEFENDANTS CLOSE NOW, LLC AND ANTHONY BARBER (the “Close Now Defendants”)	25
CONCLUSION		25

TABLE OF AUTHORITIES

Cases

<u>Smith v. Boyd,</u> 272 N.J. Super. 186 (Law Div. 1993).....	22
<u>Walker Rogge, Inc. v. Chelsea Title & Guar. Co., Inc.,</u> 116 N.J. 517 (1989)	21

Statutes

<u>N.J.S.A. § 25:1-11(a)</u>	20
<u>N.J.S.A. § 2A:50-30</u>	20
<u>N.J.S.A. § 46:26A-12</u>	20

PRELIMINARY STATEMENT

In their opposition to Plaintiff's appeal in this matter, the Lender Respondents (the "Lenders") rely on the last resort of the party whose case cannot survive a plain look at the evidence – they use scary, demonizing language about deceit, schemes and plots. They quote Sir Walter Scott, known for his flowery tales of high, chivalric drama, to suggest that this case is about untangling a web of deceit, rather than simply acknowledging the plain and abundant evidence that creates a straightforward record of exactly what happened. What happened was that Marc Theophile committed clear fraud, which benefited himself alone, to the great detriment of every other party involved, including the Plaintiffs and all other defendants. The better reference is to Mark Twain, who openly mocked Scott's florid drama. To paraphrase Twain, the lies peddled by Theophile and adopted by the Lenders for their own purposes, have gotten all the way around the world, while the simple truth here is still getting its boots on. Fortunately, the proof is in the evidence, not in Defendants' spin.

Having been given the opportunity to present to this court any actual evidence that suggests that Plaintiffs' somehow participated in the fraud by which they were robbed of millions of dollars, the Defendants have failed to do so. They can identify no evidence that Plaintiffs ever had any agreement by

which they transferred to Theophile the authority to sign deeds by which he took ownership of their property. They point to tax liens, which Plaintiffs had dealt with regularly over the entire course of operating their business, and ask the Court to infer that those liens caused such panic that Plaintiffs ceded half of their assets to Theophile. In doing so, they ignore the simple, unchallenged facts that those and other obligations were dwarfed by the assets available to Plaintiffs. To argue that Plaintiffs were aware of Theophile's fraudulent transactions, they point to a convoluted method by which Hassan might have been able to identify lenders Theophile was working with and ignore the evidence that unequivocally demonstrates that nothing regarding the actual transactions Theophile was entering into was ever communicated to Hassan.

Given their opportunity to offer to the Court evidence that supports their nonsensical tale of collusion by Plaintiffs in their own fleeing, that is the sum of what Defendants can offer. They ignore a record that overwhelmingly, explicitly and repeatedly demonstrates that Plaintiffs did not authorize the fraudulent transactions and never would have done so. Their intent is to distract from that record with dramatic, incredible tales spun from wisps of suggestion. Fortunately, the record indisputably demonstrates that the fraudulent transactions happened for the simple reason that Marc Theophile committed fraud by falsely claiming that he was the owner of Plaintiffs' properties.

LEGAL ARGUMENT

POINT I: PLAINTIFFS' RESPONSE TO THE OPPOSITION SUBMITTED BY THE LENDER DEFENDANTS

A. The Trial Court's Holding That Hassan Transferred Ownership of And Authority Over Little Mason's Properties to Theophile is Overwhelmingly Contradicted by The Weight of The Evidence.

The Lenders assert that Hassan was in financial distress and needed Theophile's assistance. That is the explanation they offer for why Hassan would enter into some sort of arrangement with Theophile that would cost him either \$2.5 million on top of 30% of the value of his properties (according to Theophile), or 50% of the value of his business (pursuant to the agreement imposed by the Court). That claim is demonstrably false. The unchallenged evidence proves that Hassan's financial position was sound, and that even if he had urgently needed to raise cash, he had no need of Theophile's assistance to do so.

As an initial matter, the unchallenged objective evidence demonstrates that the value of Hassan's assets far exceeded his liabilities. In the case of the 18 properties that are the subject of this case, independent appraisals made at the time of the Subject Transactions establish a market value for the Subject Properties, after physical inspection, of \$5.1 million. The tax liens and other obligations against them at the time amounted to \$1.5 million. (Pb20-21)

Furthermore, the record is clear that Hassan could and did raise the cash necessary to satisfy liens against property he wanted to keep. It is a matter of both public record and evidence in this matter that while it was not uncommon for tax liens to be issued against some of Hassan's properties, he could and did pay off such liens throughout the course of operating his business, including during 2017 and 2018, the years in question. (Pb39-40)

The objective evidence also demonstrates that even if Hassan had needed to raise additional cash, he certainly did not need Theophile's assistance to do so. Independently of anything he was investigating with Theophile, but contemporaneously therewith, Hassan obtained offers of financing on his properties. Those offers were made with knowledge of the liens against the properties, which were not a substantial factor in a lending decision, because any such liens would be satisfied in the course of closing any loans, as was confirmed at the time by Brad Spingarn, the mortgage broker, and as to which he testified at trial. (Pb11-12)

Finally, Hassan was never convinced that raising cash by financing his properties was a good idea. He was convinced by Theophile to investigate such financing by the promise that Theophile could help him obtain terms that would make such financing ideal. As Theophile obtained offers from various lenders, though, it became clear that financing was not a good option because it would

be too expensive. (Pb11) Accordingly, Hassan rejected all offers of financing, including both those obtained by Theophile, and those he obtained independently of Theophile. He decided instead that he would simply sell his residential real estate portfolio, which had been his intention before he met Theophile. It was when he began the process of listing the portfolio with a real estate broker that he discovered that Theophile had fraudulently taken title to the Subject Properties by using a forged document that appeared to establish that he owned Hassan's LLC. (Pb19-20)

The only evidence in this record that Hassan was desperate for Theophile's help was Theophile's own unsupported claim to that effect. Theophile falsely testified that Hassan couldn't have gotten loans against the properties or sold the properties because of the outstanding liens against them. When he repeatedly made that assertion during his testimony at trial, Theophile knew full well that it was false. He knew that any outstanding liens would be satisfied at the closing of any financing, and in fact, he himself obtained loans against the properties while the liens were outstanding.

Accordingly, the evidence fully demonstrates that Hassan was more than capable of continuing to operate his business as he saw fit without any input whatsoever from Theophile, and that he had no need to enter into any

arrangement with Theophile, much less some arrangement pursuant to which Theophile would take half or more of the value of Hassan's assets.

B. There is no evidence of any partnership or any other agreement by which Hassan transferred ownership of or authority over Little Mason's properties to Theophile.

As Hassan has maintained throughout, and as he testified at trial, he liked Theophile, was interested in investigating financing as proposed by Theophile, and contemplated continuing to do business with Theophile in some capacity going forward. The evidence also shows, however, that Theophile was not able to obtain any financing proposals that Hassan found acceptable. He did agree to support Theophile in an effort by Theophile to finance a purchase of the properties from him, if Theophile could raise enough money. Eventually, though, when nothing happened, Hassan took steps to list his properties for sale.

The Lenders suggest that these actions are sufficient to evidence an agreement between the two of them by which Hassan transferred a substantial portion of his assets to Theophile. As discussed in detail in Plaintiff's Brief, the robust contemporary record of the dealings between Hassan establishes that Hassan never did, nor ever wanted or intended to enter into any transaction with Theophile that would give Theophile control of Hassan's assets. No evidence relied on by the Lenders in their response is capable of supporting a finding to the contrary.

The Lenders refer to communications between Hassan and Theophile in which they talk about potential future ventures. They point out that Hassan said he wanted to move into mining and agriculture, and that Theophile would be his “partner.” (Lenders’ Opposition Brief (“Lb”7-8) They also cite an instance in which Hassan called Theophile “brother.” (Id.) Use of such language among them no more establishes a contract or any other actual business agreement between the two men than it makes them brothers.

Nor does the fact that Hassan did not take action to remove Theophile as the registered agent of Little Mason when he learned of it. (Lb10-12) Hassan objected to Theophile’s listing of himself as Little Mason’s registered agent without having told Hassan. When Hassan discovered it, he told Theophile as much in explicit language, and reiterated that whatever they were doing together, Theophile had no authority whatsoever as to Little Mason or its assets. Hassan knew (correctly) that being Little Mason’s registered agent did not give Theophile any authority to act on behalf of Little Mason, though, so he did not believe there was any urgent reason to make a change. (Pb50-51)

They also refer to an exchange in which Theophile proposed to transfer title to the properties back to Hassan after Theophile had purchased them. (Lb8) Presumably, if he had done so, he would have demanded some agreement by which he would realize the value of the assets he had purchased, just as Hassan

would have done if they had entered into an agreement transferring assets to Theophile. None of these events ever transpired, though, and there was never any actual business agreement between Hassan and Theophile of any kind. What happened was that Theophile forged a document purporting to show he was the owner of Little Mason, fraudulently transferred title to the properties to himself, took out loans against them, and kept the money.

Finally, the Lenders point to solicitations for financing proposals and related communications with prospective lenders in which Theophile holds himself out as acting for Little Mason or otherwise able to secure financing on the properties. These prior communications neither establish any authority on Theophile's part, nor have any connection to the actual fraudulent transactions. They were made with Hassan's knowledge and with the expectation that if any proposed financing were acceptable, those transactions, as well as any necessary transactions between Hassan and Theophile to account for any joint venture, would all be properly agreed to and documented. Theophile's representations in those communications could not have served to establish his authority to act on behalf of Little Mason in an actual legal transaction, nor were they sufficient to have justified any third party's reliance on them to establish such authority (even if any of those third parties had been connected with the actual fraudulent loans). That insufficiency is starkly evidenced by the fact that in order to actually close

on the fraudulent transactions, Theophile was required to forge a formal LLC agreement to establish his purported ownership of Little Mason.

C. The evidence establishes that Hassan had no knowledge of Theophile's fraud.

Again, as discussed in detail in Plaintiff's brief, the evidence is clear that Hassan had no knowledge of the fraudulent transactions entered into by Theophile. In the voluminous and detailed record of communications between the two of them, including during the period in which the transactions were being closed and Theophile was pocketing millions of dollars in cash taken from Hassan's properties, there is not a single reference to any of the transactions. The communications throughout that period show Theophile continuing to obtain financing proposals, and Hassan continuing to support him, even as Hassan began to move toward publicly listing the properties for sale. There is no reference at all to the loan proposals obtained in advance of the transactions or any of their terms, no reference that any proposals had been accepted, no reference to any closings, and no reference to the fact that Theophile was receiving millions of dollars in loan proceeds.

The Lenders nonetheless claim that Hassan knew and approved of the fraudulent loans. They refer to communications in which Theophile suggests that his efforts to obtain financing are about to be consummated. In one instance,

Theophile claims that a loan on the Hillside property had been cleared, and that closing documents might be prepared soon. (Lb9) They include Hassan's response, in which he acknowledged the potential good news, and directed Theophile to send him all of the documentation regarding the transaction. (Id.)

In fact, that exchange refutes the Lenders' position. The potential loan referred to by Theophile was not one of the loans that was actually consummated. Also, Hassan's response clearly indicated that he needed to understand and approve of the potential transaction before it proceeded. That is in keeping with all prior proposals obtained by Theophile for Hassan's properties, in which Hassan had reviewed detailed proposals to determine whether they were acceptable (and in each case had determined that they were not).

In every prior instance, written proposals were received from the prospective lenders and forwarded to Hassan for his consideration. (Pb9-11) No such proposals or any other information regarding the actual fraudulent transactions were ever communicated to Hassan. That is true despite the fact that actual written proposals were, in fact, issued for each of the fraudulent loans entered into by Theophile, and that extensive communications took place between Theophile and the closing agent regarding all of the details of closing each of the transactions, which also were never sent to Hassan or referred to in any of the ongoing communications between Hassan and Theophile.

Nor did anything in the correspondence between Theophile and prior prospective lenders establish Theophile's authority to control Little Mason or its assets, as the Lenders suggest. (Lb13-15) In fact, none of the deals considered ever advanced to the point at which actual authority to execute documents became relevant. Most importantly, however, it doesn't matter what went down with those earlier transactions. The only question here is whether Theophile had authority to execute the documents in these transactions. In this case, the lenders agent, 1st Rate, made it clear that the only evidence he considered sufficient to establish Theophile's authority to act on behalf of Little Mason was the fraudulent document.

The Lenders also refer to communications between Hassan and Theophile that they assert did make specific reference to the fraudulent loan transactions entered into by Theophile. None of those communications do so. The Lenders point to a title commitment sent by text from Theophile to Hassan that identified the prospective lender as JEST, which did, eventually, fund the loan on the referenced property. (Lb18) There is no other communication regarding this potential loan, its terms, its closing, or any discussion of whether or not it was acceptable. The Lenders assert that if Hassan had matched up file numbers referenced in appraisal requests with the file number referenced weeks later in insurance verifications, he could have discerned that Velocity (which issued all

of the other fraudulent loans) was one of the lenders from whom Theophile was soliciting proposals. Even if Hassan might have done so, there was nothing in those communications that indicated that any actual transaction had been identified and its terms specified and agreed to, much less that there were closings that were taking place, and money being paid to Theophile. At most, this evidence might possibly be interpreted to suggest that Hassan knew that JEST and Velocity were among the lenders being approached by Theophile. That was in keeping with Hassan's understanding of what Theophile was doing. There is nothing in these carefully curated items of evidence to suggest that Hassan was ever aware that any such transactions were actually happening.

The Lenders hold out this sparse evidence, none of which carries substantial weight in any event, against the glaring totality of the detailed and extensive record of communications between the men that lacked any reference at all to the actual fraudulent loan transactions entered into by Theophile. Those communications include the myriad communications before the transactions that include none of the same information regarding terms and consideration of those terms that had characterized the communications regarding every prior financing proposal. They also include extensive, frequent communications during the entire period in which the closings took place, in which there is no acknowledgment whatsoever that the very business that has constituted their

entire association is in the midst of being consummated, and that millions of dollars are being distributed as a result.

This chasm of silence regarding the fraudulent transactions does not stand alone. It is reinforced by all of the other evidence in this case, which establishes: Hassan's clear intent not to grant Theophile any authority regarding his properties; his refusal to accept any of the prior financing proposals; the clear fraud committed by Theophile to obtain the financing; Hassan's intention to sell his properties because he does not know they have been stolen from him; his steps toward actually listing the properties for sale; his discovery of the fraud; his reaction to it; and his communications with Theophile thereafter. Neither the Lenders nor the opinion of the trial court identifies any evidence sufficient to overcome the clear record that establishes that Theophile simply defrauded the Lenders, and robbed Mr. Hassan.

**D. The Trial Court's Subjective Findings as to Credibility
Are Contrary to the Weight of the Evidence.**

As discussed above, and in Plaintiffs' Brief (Pb58-62), Hassan's testimony that he never did transfer any authority or ownership of his assets to Theophile is supported by all of the documentary and other objective evidence, and the circumstances established by the evidence do not provide the basis for any natural inference that he did so. Moreover, none of the particulars of Hassan's

testimony cited by the trial court or the Lenders are of any particular relevance to the material issues in this case. For example, whether Hassan could see from the witness stand, the word “Velocity” on a document projected on a screen across the room is of no particular import, nor is his claim that by the time that document was sent he was paying little attention to emails from Theophile regarding Theophile’s ongoing effort to obtain financing. He had no particular reason to be evasive as to this point, because even if he had noticed at the time that Velocity was one of the lenders being approached by Theophile, there remains no evidence that he was ever aware that financing agreements had been agreed to and entered into by Theophile.

The same holds true as to reliance on Hassan’s reference to “cash flow problems” in a prior hearing regarding one of the Subject Properties, held before a different judge. (Lb26) There is nothing in the context of that remark (which is included in the evidence in this matter) that indicates that Hassan was in overall financial distress, much less financial distress so that he would enter into some arrangement that required him to forfeit an enormous portion of his assets to gain relief. The undisputed, objective evidence establishes not that Hassan had vastly more assets than liabilities, but that if he had chosen to, he could have used those assets to satisfy all of his outstanding liabilities, either by taking out

financing on terms similar to those eventually obtained by Theophile, or by simply selling his residential assets.

Regarding the purportedly conflicting testimony between Hassan and his attorney, Richard Azikiwe, as the Lenders themselves acknowledged, Hassan did not claim that Azikiwe had told him that a particular financing arrangement suggested by Theophile was “acceptable”, but rather that it was “possible.” (Lb35) In fact, Azikiwe testified that what he told Hassan was that he (Azikiwe) had not seen such a transaction, and that if Hassan wanted to proceed he would need to make sure it was properly documented. (Pb7-8) This reflects generally the strength of the evidence relied upon by the Lenders’ to justify the trial court’s determination that no part of Hassan’s testimony was reliable (despite its uniform consistency with all of the other evidence before the court).

Neither the Court nor the Lenders provide evidence in the transcript that Hassan was “continuously reluctant to answer both simple and probing questions.” (Lb32) However, the sparse references relied upon by the trial court and the Lenders neither demonstrate a pattern of evasion or deceit, nor directly address any of the dispositive issues in this matter. The Lenders nonetheless suggest that Plaintiffs avoided addressing this issue in their brief to this Court, because Hassan’s testimony was so damaging. Far from avoiding a response to the assertion of Hassan’s overall unreliability as a witness, Plaintiffs not only

addressed that issue in their brief, and respectfully but affirmatively again refer this Court to Hassan's entire testimony and stand firmly on their position that there is nothing therein that supports that assertion.

Plaintiffs also refer this Court to the entirety of Theophile's testimony. Plaintiffs' position is that thorough review of the entirety of the respective testimonies of Hassan and Theophile cannot reasonably lead to any conclusion other than that Theophile was obviously and dramatically less credible than Hassan. Moreover, as noted previously, it is clear that on the single two most critical issues in this case – the question of whether any agreement was reached between Hassan and Theophile that established Theophile's authority to execute the deeds on behalf of Little Mason, and whether or not Hassan was aware of the fraudulent transactions as they occurred – the trial court itself did not find Theophile credible.

Theophile provided extensive and repeated testimony as to the specific nature and terms of the agreement he claimed was entered into between himself and Hassan, but when seeking to support its finding that Theophile did have such authority, the trial court ignored Theophile's testimony because it was patently unbelievable. Furthermore, the court made no reference to the discrepancy between the overwhelming record of documented communications between the two men that contained no reference to any of the subject transactions Nor did

the court refer to their thoroughly established practice of exchanging documents and detailed information via e-email and texts (on the one hand) and Theophile's testimony that it mere coincidence that all of his communications with Hassan regarding Theophile's fraudulent transactions took place over the telephone (on the other hand).

There is no doubt that a trial judge's subjective judgments as to credibility are properly included in the consideration of the evidence presented at trial, and rightfully deserve deference on review. However, where the overwhelming weight of the documentary and other objective evidence on the material issues leads to a clear conclusion, those subjective impressions should not stand as a basis for disregarding that evidence.

E. Theophile's testimony is further made unreliable by the judge's decision to permit the Lenders to examine him using leading questions, which permitted them to present their case in chief by prompting guided responses from him during his testimony.

On this point, Plaintiffs rely on the argument presented to this Court in their prior brief, save to reiterate that the trial court's apparent focus on the relative reliability of the testimony of the two primary parties makes the manner in which that testimony was elicited a matter of particular importance in reviewing the result.

F. The weight of the evidence does not support a finding that Theophile had apparent authority to execute deeds on behalf of Little Mason.

Plaintiffs rely on the arguments set forth above and in their prior brief to support their position that the evidence does not support a finding that Theophile had apparent authority to execute deeds on behalf of Little Mason, except to reiterate that Ed McCloud, the title agent, confirmed in his testimony that he had never met, spoken to or otherwise interacted with Hassan, and that absent the fraudulent document presented that appeared to establish Theophile's ownership of Little Mason, he did not have information sufficient to establish Theophile's authority to execute deeds on behalf of Little Mason. Accordingly, no action by Hassan provided McCloud with any basis on which to believe that Theophile possessed such authority.

G. The Trial Court's Holding on Plaintiffs' Ejectment Count Against Theophile and the Lenders Was the Result of Legal Error

On this point, Plaintiffs rely on their initial brief to this Court in response to the oppositions submitted by the Lenders and reiterate only that for the reasons set forth therein, application of the ejectment statute is not limited to instances in which the defendants are in physical possession of the property in question.

H. This appeal is not moot as to any of the Subject Properties.

To establish his authority to execute deeds on behalf of Little Mason, Theophile presented the title agent with a document Theophile knew to falsely establish his ninety-nine percent (99%) ownership of Little Mason, established at its formation (which took place years before he met Hassan). Despite this clear fraud – which would have been unnecessary had Hassan actually known of and approved of the fraudulent transactions – the trial court held that Theophile did actually have ownership of Little Mason, as well as executive authority to act on its behalf. That holding rested on an unwritten agreement inferred by the trial court by which Hassan ceded fifty percent (50%) ownership of Little Mason to Theophile pursuant to terms the trial court did not specify. No such agreement is reflected in the evidence, nor are any terms that might more fully explain it. Theophile testified that the two men had reached a vastly different agreement with specific terms, but the trial court evidently did not find that testimony credible and imposed an agreement of its own conception. The effect of the decision that Theophile was free to act independently of Hassan in disposing of Little Mason's properties was to validate the deeds by which Theophile transferred title to the Subject Properties to himself, and on the basis of which he granted mortgages to the Lenders.

Should this Court reverse the trial court's decision that the deeds were valid because Theophile actually had authority to execute them on behalf of Little Mason, those deeds would be *void ab initio*, and title would remain with Little Mason on the basis of the recorded deeds by which it took title. See, N.J.S.A. § 25:1-11(a) (providing that no transfer shall be effective unless it is reflected in a writing signed by the transferor). All subsequent purchasers are deemed to be on notice of Plaintiffs' claim to title by statute, because the claim is based on a prior recorded deed. See, N.J.S.A. § 46:26A-12 (providing that recording of a deed constitutes notice to all subsequent purchasers of the property as to the contents of that deed). Moreover, specific notice of this appeal was duly recorded as to each of the subject properties. Accordingly, later recorded claims are subject to Plaintiffs' duly recorded title. (Id.) Such prior recording is sufficient even to invalidate subsequent transfers by sheriff's deed. See, N.J.S.A. § 2A:50-30 (protecting foreclosure proceedings against claims that *were not recorded* prior to the initiation of those proceedings).

Accordingly, this appeal is not moot as to any of the Subject Properties. A decision in Plaintiffs' favor would affirm their rightful title to the properties, and leave subsequent purchasers, who were on notice of this action, to their own remedies against the purported sellers.

I. Equity does not support stripping Hassan of his rights to the Subject Properties.

Again, as discussed in Plaintiffs' Brief, Plaintiffs reasonably believed that given the publicly recorded records establishing their ownership of the Subject Properties, no transaction involving those properties could take place without their knowledge and approval. The only reason the fraudulent transactions occurred is because Theophile committed deliberate fraud in order to gain access to Plaintiffs' assets. Equity does not require that fraud to stand. Indeed, to permit that would be a glaring inequity.

**POINT II PLAINTIFFS' RESPONSE TO THE OPPOSITION
SUBMITTED BY THE TITLE DEFENDANTS**

A. There is no rule limiting liability for damages caused to a non-contracting party by negligence on the part of title insurers or their agents.

The Title Examiner defendants rely primarily on the holding in Walker Rogge, Inc. v. Chelsea Title & Guar. Co., Inc., 116 N.J. 517, 535 (1989). They argue that the rule established by that case is that a title insurance company or its agent cannot be held liable for damages to any party damaged by its negligence except for the party with whom it has contracted to provide insurance. (Opposition brief of Defendants Edward McCloud and 1st Rate Title ("1Rbr9-15"), Chicago Title Brief ("CTbr13-21") In fact, as discussed fully in Plaintiffs' brief, the rule established in the Walker case is that a title company's liability to

an insured party is generally limited to the terms of the insurance contract, and in most instances cannot arise from a parallel tort claim. The case does not address the question of liability to plaintiffs who are not party to an insurance policy, who seek to hold title companies liable pursuant to standard tort principles. See, e.g., Smith v. Boyd, 272 N.J. Super. 186 (Law Div. 1993).

As an initial matter, the Title Defendants offer no authority for the proposition that title companies are insulated from liability for damages caused by their negligence to non-insured parties. As for legal authority, they rely exclusively on Walker and on a number of cases that apply the actual rule of that case – i.e., that insured parties are limited to remedies under their contract – which does not apply here. (1Rbr9-15, CTbr13-21) They further cite a number of secondary sources, primarily derived from materials directed to title insurance professionals, but those, like the cases on which they rely, focus on the relationship between a title company and its insured, rather than on the question of third parties damaged by negligence on the part of the title company. (1Rbr12; CTbr13-14)

They take issue with Plaintiffs’ reliance on Smith v. Boyd, in which a trial court declined to apply a rule that damaged third parties had no recourse against a negligent title company, and instead assessed the defendant’s liability by applying negligence rules. (Smith, 272 N.J. Super. at 196-97.) Plaintiffs miss

the point when they argue that the judge did not find the defendant liable based on the facts of that case, which are materially different than the instant facts, as discussed in Plaintiff's brief. (1Rbr13; CTbr16) The significance of the Smith case is that the court recognized that there is no rule that immunizes title companies from being held liable for damages to third parties caused by their negligence.

The facts enumerated by the Title Defendants as supporting the court's grant of summary judgment in their favor are limited to facts that address the lack of contractual privity between them and Plaintiffs. (CTbr15) Again, this argument is premised on a non-existent rule that such privity is required, and the facts actually relevant to an assessment of their liability are the facts related to the foreseeability of the damages and the public policy considerations of imposing such liability, which facts are discussed in detail in Plaintiffs' Brief. To the degree that the Title Defendants respond as to these issues, they assert that it was not foreseeable that issuing title insurance to Theophile could result in harm to Plaintiffs'. That suggestion flies in the face of the entire public system of the protection of property rights that is based on a requirement that property records be publicly recorded and available for examination.

As discussed in detail in Plaintiffs' brief, it is a matter of policy that title examinations are an integral part of a public system for the protection of

property rights which affects far more parties than just those who are seeking to obtain title insurance in a given transaction. The critical role of such examinations to the larger system is evident by the fact that such examinations may be undertaken only by licensed professionals and must adhere to professionally established standards. It is self-evident that if a title examiner is negligent in assessing questions of title, more parties stand to be damaged by a resulting illegitimate transaction in property than only the party seeking insurance.

Finally, the Title Defendants point out that Plaintiffs' expert did not offer an opinion to the effect that they could be held liable to Plaintiffs for damages arising from their negligence. (1Rbr10 (n.4); CTbr15-16) Plaintiffs' expert was neither qualified nor retained to testify as an expert on this or any other legal question. He was eminently qualified to testify as to the standard of care applicable to the Title Examiners' work in this matter and as to whether they had met that standard. In a thoroughly documented and detailed report, he concluded that they had not, precluding any argument that there was no disputed issue of material fact on that question.

B. Chicago Title is liable for the negligence of its agent, 1st Rate

In response to the argument by the Chicago Title, Plaintiffs rely on the arguments presented to the Court in their initial brief, except to reiterate that there the relevant documents explicitly provide that in performing title examinations 1st Rate was acting in its capacity as the agent of Chicago Title.

C. Edward McCloud is personally liable his and 1st Rate's negligence.

In response to the arguments by 1st Rate on this point, Plaintiffs rely on the arguments presented to the Court in their initial brief.

**POINT III PLAINTIFFS' RESPONSE TO THE OPPOSITION
SUBMITTED BY DEFENDANTS CLOSE NOW, LLC
AND ANTHONY BARBER (the "Close Now Defendants")**

In response to the opposition submitted by the Close Now Defendants, Plaintiffs rely on the arguments presented to the Court in their initial brief, except to reiterate that there are clearly disputed questions of material fact that warrant reversal of the trial court's grant of summary judgment to these defendants.

CONCLUSION

In this Appeal, Plaintiffs rely entirely on the evidence of record in this matter. In light of that evidence, affirming the trial court's decision effectively imposing liability on Plaintiffs for their own, the Lenders', and the other defendants' losses would constitute a gross injustice. The evidence permits no

other conclusion but that all of those losses resulted directly from, and only from, the known intentional fraud of Marc Theophile, who has yet to be held accountable.

Accordingly, Plaintiffs respectfully request that this Court reverse the decision below and enter judgment affirming Plaintiffs' title to the Subject Properties, and upholding defendants' respective liability under the negligence and ejectment counts.

Respectfully submitted,
STARR, GERN, DAVISON & RUBIN
Attorneys for Appellants, Irfan Hassan
and Little Mason Properties, LLC

/s/ Richard T. Welch

Richard T. Welch, Esq.

/s/ Ronald L. Davison

Ronald L. Davison, Esq.

December 16, 2024