GARDEN STATE NISSAN, INC. and 1567 ROUTE 23 HOLDINGS LLC,

Plaintiffs/Appellants,

v.

1567 SOUTH REALTY LIMITED LIABILITY COMPANY,

Defendant/Respondent/Cross-Appellant,

1567 SOUTH REALTY LIMITED LIABILITY COMPANY,

Third-Party Plaintiff,

YURIY MIRGORODSKIY and RICHARD OSIASHVILI,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3784-23

Civil Action

On Appeal from a Final Judgment,
Superior Court of New Jersey,
Morris County, Chancery Division

Sat Below:
Hon. Frank J. DeAngelis, P.J.Ch.

Date Submitted:
December 13, 2024

BRIEF OF PLAINTIFFS-APPELLANTS GARDEN STATE NISSAN, INC. AND 1567 ROUTE 23 HOLDINGS LLC

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PRELIMINARY STATEMENT

To settle a lawsuit to enforce a commercial tenant's option to purchase, where the landlord disagreed with the appraiser, the parties agreed to have a specifically-named neutral appraiser establish the "dispositive" purchase price. The parties identified the appraiser by name and made clear the appraiser would set the "dispositive" purchase price to guarantee against additional litigation. When the appraiser returned with the dispositive purchase price, the landlord would not honor it. Thus, this litigation to enforce the settlement agreement, including a request to the court below to memorialize the terms of the settlement agreement in a judgment based on the dispositive purchase price set by the neutral appraiser.

Despite the landlord's expert conceding the neutral appraiser complied with all applicable standards in the appraisal industry, and despite the neutral appraiser and the landlord's expert testifying that appraisals are subjective, the trial court entered judgment with the judge's belief of what should be the purchase price. The judgment did not adopt the remainder of the settlement agreement, including various credits due at closing, despite those issues not having been contested in the pleadings. The judgment should be reversed and there should be a remand for entry of judgment that adopts the settlement agreement and which confirms the dispositive purchase price, as the parties agreed would occur when they settled the first lawsuit.

PROCEDURAL HISTORY[1]

On January 11, 2022, Plaintiff Garden State Nissan, Inc. ("GS Nissan") filed a Complaint for declaratory relief against Defendant 1567 South Realty Limited Liability Company ("Property Owner/South Realty"). Pa1-12. GS Nissan sought to compel Property Owner/South Realty to sell property to GS Nissan pursuant to an option agreement in a commercial lease. Pa1-12.

On July 6, 2022, GS Nissan entered into a Settlement Agreement with Property Owner/South Realty, Pa13-19, and a Real Estate Sale Agreement with GS Nissan's property holding company, 1567 Route 23 Holdings LLC ("Route 23 Holdings"). Pa20-34. The parties agreed to have an appraiser "determine the dispositive purchase price" for Route 23 Holdings to purchase the property. Pa15 (¶1(a)); Pa20 (¶3(a)). In turn, on July 12, 2022, GS Nissan dismissed its Complaint. Pa35.

On August 9, 2022, GS Nissan and Route 23 Holdings filed a Complaint against Property Owner/South Realty to enforce the Settlement Agreement and the

[1] Transcripts are as follows:

1T = March 4, 2024 trial transcript
2T = March 5, 2024 trial transcript
3T = March 6, 2024 trial transcript
4T = March 13, 2024 trial transcript
5T = April 8, 2024 trial transcript
6T = April 9, 2024 trial transcript
7T = March 31, 2023 motion
8T = October 25, 2023 motion
9T = November 17, 2023 motion

Real Estate Sale Agreement. Pa36-45. The Complaint sought specific performance (Count One) and asserted breach of contract (Counts Two and Three). Pa36-45. On September 15, 2022, Property Owner/South Realty filed an Answer and Counterclaim, seeking declaratory relief (Count One), specific performance (Count Two), breach of contract (also Count Two), breach of the covenant of good faith and fair dealing (Count Three), conspiracy (Count Four), fraud (Count Five), promissory estoppel (Count Six), and a RICO violation (Count Seven). Pa46-79.

On January 23, 2023, Property Owner/South Realty filed a First Amended Answer and Counterclaim, with a Third-Party Complaint against members of Route 23 Holdings, i.e., Yuriy Mirgorodskiy ("Yuriy") and Richard Osiashvili ("Richard"). Pa80-144. On April 28, GS Nissan, Route 23 Holdings, and Richard filed an Answer. Pa145-168. On May 8, Yuriy filed an Answer and a Crossclaim for contribution/indemnification. Pa169-212.

Trial took place before the Hon. Frank J. DeAngelis, P.J.Ch. on March 4-6, 13, April 8-9, 2024. 1T-6T. On April 9, the court entered a directed verdict dismissing from Property Owner/South Realty's First Amended Answer/Counter-claim/Third-Party Complaint: Count Two (breach of contract); Count Four (conspiracy); and Count Seven (RICO). 6T112-1 to -2. On April 29, Property Owner/South Realty moved to clarify and/or for reconsideration of dismissal of Count Two, Pa213-214, which the court denied on May 30. Pa215-226.

On June 18, 2024, the court issued its Order and Decision. Pa227-263. The court granted GS Nissan and Route 23 Holdings specific performance, but substituted the purchase price set by the parties' appraiser with the court's higher purchase price. Pa262-263. The court set a closing date, too. Pa263. On July 3, GS Nissan moved to deposit, pending appeal, the disputed amount of the purchase price into a fund of court. Pa264-265. On July 26, the court stayed its June 18 Order pending the motion. Pa266.

On August 2, GS Nissan and Route 23 Holdings filed a notice of appeal, Pa267-270, as amended on August 19 to modify the caption and a party designation. Pa271-276. On August 7, Property Owner/South Realty filed a notice of cross-appeal. Pa277-281. Also on August 7, the court below denied the motion to deposit the disputed money into a fund of court. Pa283-294.

On August 12, GS Nissan moved to enforce the June 18 Order, including having the court confirm GS Nissan's entitlement to a closing credit that is not referenced in the Order. Pa295-296. Though filed as a motion to enforce, the Court interpreted it as a motion for reconsideration and/or modification, and on August 30, denied the motion. Pa297-305. With any breach of honoring the closing credit a breach that would arise only at the closing, and if not honored at closing, it was premature when the Court issued its decision and not waived by GS Nissan.

STATEMENT OF FACTS

On June 15, 2020, 1567 South Realty Limited Liability Company ("Property Owner/South Realty") entered into a triple-net lease with Yuriy Mirgorodskiy ("Yuriy," despite trial transcripts referring to him as "Yuriv") to rent property housing a Nissan car dealership. Pa306-340; 2T94-4 to -6. For the lease, Seth Dobbs, Esq.'s law firm represented the Property Owner/South Realty, with Kevin DiPiano signing for the company, and Joseph F. Gentile, Esq. represented Yuriy. Pa334.

Yuriy and Richard Osiashvili ("Richard") are partners in Garden State Nissan, Inc. ("GS Nissan"). 2T90-11 to -18; 3T64-1 to -19; 3T81-6 to -8. Mr. Dobbs represented Yuriy for the GS Nissan shareholder agreement with Richard. 3T66-3 to -14. Mr. Dobbs, per Richard, "was our attorney, and when I mean our, Yuriy and my attorney, as corporate counsel regarding [GS] Nissan[.]" 3T81-2 to -8. For GS Nissan, Yuriy and Richard purchased the rights to operate a Nissan dealership, 3T67-2 to -3, and to purchase the leased property, 3T67-6 to -11, which is the purchase giving rise to the litigation.

On June 24, 2020, Yuriy assigned the lease to GS Nissan. Pa341; 1T114-17 to 115-7. The lease includes a purchase option. Pa329 (¶22). Yuriy and Richard formed 1567 Route 23 Holdings, LLC ("Route 23 Holdings") to be the holding company for the property upon exercising the purchase option. 2T90-11 to -18.

Under the lease option, the purchase price "shall be the appraised value" based on each side's appraisal, less credits applied at closing. Pa329 (¶22). If the appraisals are more than ten percent apart, the appraisers "shall . . . appoint a third appraiser[.]" Pa329 (¶22). The third appraisal "shall constitute the purchase price," though it must be within the high-low established by the first two appraisals. Pa329 (¶22). The intent was to make the third appraisal "the final conclusive number to establish the purchase price." 3T89-21 to -23.

Nicole DiBello, Esq., of Stevens & Lee, has practiced automotive law for decades, 1T18-8 to -22, and represents sellers and buyers of automobile dealerships. 1T19-9 to -21. In late 2020, early 2021, Richard retained Ms. DiBello for the purchase. 1T19-22 to 20-19. At the time, Richard believed both attorneys DiBello and Dobbs were his attorneys, 3T90-2 to -8, but Mr. Dobbs then acted as the seller's attorney when the parties exchanged appraisals. 1T22-16 to -24.

GS Nissan's appraisal was $4,300,000.00. 3T91-15 to -17; 1T24-1 to -4. Property Owner/South Realty's appraisal was $7,900,000.00. 2T43-15 to -16; 3T92-7 to -8; 1T24-8 to -9. Since seller's appraisal was more than ten percent higher, the parties selected a final appraiser, 3T92-18 to -23; 1T24-17 to -21, to set a final purchase price. 3T92- 23 to 93-5. The third appraisal was $4,575,000.00. 3T93-18 to -21.

The parties would use the third appraisal, "Because that's what was agreed, that was what was discussed, and that was what was supposed to happen," 3T94-1 to -2, per Richard. For the closing, Richard understood both attorney Dobbs and DiBello were his lawyers. 3T94-14 to 18. "Mr. Dobbs is – was our attorney . . . .Myself and Yuriy's attorney, well, [GS] Nissan's attorney . . . .I had, you know, other dealership acquisitions and Seth [Dobbs] was our attorney . . . .I trusted Seth [Dobbs]." 3T95-6 to -13. Per Richard, Mr. Dobbs, as GS Nissan's lawyer, would assist their property purchase "because [Mr. Dobbs] knew the landlord Kevin [DiPiano], he knew me, he knew Yuriy[.]" 3T95-16 to -22. "Seth [Dobbs] told me, oh, [Mr. DiPiano is] taking his time [with the closing], it's not on his front burner, he has bigger fish to fry, he's buying other dealerships, and its' not really on his front burner right now." 3T96-5 to -9.

After delays in Mr. DiPiano agreeing to the purchase price, "Seth [Dobbs] arranged a meeting with [Richard], Yuriy, and Kevin DiPiano[.]" 3T97-18 to -20; see also 6T19-14 to -17 (Mr. DiPiano recalled the meeting). "Seth [Dobbs] thought it would be a good idea to kind of gently have everybody sit down at the table and see if we could resolve it." 3T98-6 to -8. "And Seth [Dobbs] was just kind of keeping both of us, both parties at bay, and trying to kind of mediating – he was the mediator" – Mr. Dobbs was only lawyer at the meeting. 3T99-11 to -15.

Ms. DiBello learned of the meeting afterwards from Richard. 3T123-1 to -6. Per Richard, "I can absolutely recall that [Ms. DiBello] was upset at Seth [Dobbs] and she was upset at me . . . .[S]he was angry with me." 3T123-7 to -19; see also 4T8-14 to -17 (in July 2021, as for Mr. Dobbs, Richard testified, "I know he was my attorney").[2]

Per Ms. DiBello, "We of course kept our position that that – [the third appraiser's] number was the purchase price, because that's what the lease said. It became clear at some point that there would not be an agreement to sell at that number, so suit was filed to force the purchase." 1T30-19 to -24. On or about January 11, 2022, Ms. DiBello, for GS Nissan, filed suit, "to force the landlord to sell [] the property at the value appraised by the third appraiser." 1T44-22 to 45-1; 1T99-8 to -9.

Ms. DiBello, for GS Nissan, and Mr. Dobbs, for the seller, "discussed resolving the matter by entering into a Purchase and Sale Agreement where we would be more specific, as specific as possible, with respect to a fourth and final appraisal." 1T32-24 to 33-2. As for all of Ms. DiBello's testimony, the court found Ms. DiBello. Pa236.

[2] Mr. Dobbs may have had Yuriy sign a conflict waiver when he decided to represent the seller, but Richard did not recall a waiver nor did he understand the conflict waiver concept, or the validity of a conflict waiver. 4T9-7 to -21.

Per Ms. DiBello, "After a lot of back and forth" between counsel, 1T33-4; 1T41-1 to -4, the parties settled and GS Nissan dismissed its lawsuit. 1T31-16 to -21; 1T99-20 to -24. "[T]here was less back and forth on the purchase price than some of the closing credits." 1T42-2 to -3. "At the end of the day, we went back and forth on drafts of the Purchase and Sale Agreement. Everything was agreed to." 1T42-5 to -8. To settle, Richard recalled, "Seth [Dobbs] reached out to me and said hey, how do we resolve this, or something to that tune." 3T103-5 to -10. Richard still believed Mr. Dobbs represented, "Both of us," 3T103-11 to -13, i.e., buyer and seller.

Richard understood Mr. Dobbs to be his lawyer, "Because I paid him a hefty amount of money every month and he bills for everything. He bills me every time he takes me to dinner. He was my attorney." 3T103-14 to -18. For preparation of the settlement agreement, Mr. Dobbs represented the seller and Ms. DiBello represented the buyer. 3T104-14 to -20. Yet, Mr. Dobbs assisted Richard with the agreement, i.e., "I would speak to Seth [Dobbs] on a regular basis, he was my attorney in other things. So he, when he – when the negotiations started, I did speak to Seth while this thing [(settlement)] was being constructed." 3T105-20 to 106-2. Per Richard,

> What [Mr. Dobbs] wanted was a fourth appraisal – what [seller] Kevin [DiPiano] wanted was a fourth appraisal, and the verbatim, exact terminology was he -- because I told Seth like what if he [(DiPiano)] just refuses to agree, like what if he just does what he did on the last agreement, how do we -- how do we stop that? And he [(Dobbs)] said, "This is a live or die by the sword agreement," verbatim, word for word.

> That nobody can get out of it, and it's very clear, very direct and that's it. There's nothing else.
>
> [3T106-5 to -13.]

On July 6, 2022, GS Nissan and Property Owner/South Realty finalized a Confidential Settlement Agreement. Pa342-348. Its terms were "jointly drafted" by counsel. 1T46-2 to -4. The agreement was not intended to otherwise modify, amend, or act as a novation of the lease, 1T112-23 to 113-4, which would apply thru closing. 1T113-5 to -7.

The purpose of the agreement was "to settle the lawsuit or anything that could have come up in the lawsuit that's pending," 1T42-21 to -23, per Ms. DiBello. It was to include "some claims that [Mr. Dobbs] made during the settlement negotiations," including "there's an e-mail between Mr. Dobbs and I regarding some alleged lease violations, something to do with zoning, rents, things like that." 1T45-5 to -14. Per the Whereas Clause, after referencing the then-pending lawsuit, "[T]he Parties have agreed to settle any and all of the respective claims asserted by each and all those claims which could have been asserted, whether known or unknown with respect to the sale of the subject [property], by the execution of this Confidential Settlement Agreement[.]" Pa13-14.[3]

[3] A typo in the agreement references a "motor vehicle," but all understood it to be the "property" being sold. 1T112-17 to -19; 5T108-1 to -14.

The agreement includes a provision to establish the "dispositive purchase price" based on an appraisal by an agreed-upon, final fourth appraiser:

> [Property Owner/South Realty] and [GS Nissan] have retained Dan Mistichelli, MAI of Pyramid Associates to perform a 4th appraisal (the "Appraisal") to determine the dispositive purchase price for the Premises. The Appraisal shall (i) be based upon an automotive use, and shall be the average of two appraisal methods, to wit: the Sales Comparison Approach using the sale of neighboring automobile dealerships since January 1, 2018, and the Capitalization of Income Approach, and (ii) include a size description of the Premises of 3.96+/- acres and a gross building area of 17,910 square feet. Furthermore, the appraiser shall be provided with the Lease and the P[urchase] S[ale] A[agreement] (as defined below).
>
> [Pa15 (¶1(a)) (emphasis added).]

"[B]oth sides were rolling the dice" and "whatever [Mr. Mistichelli of] Pyramid Associates came back with as the appraised value would be the final purchase price," 1T47-21 to -24, per Ms. DiBello. Instead of a clause for mediation or arbitration, they chose language to make sure "he's going to determine the dispositive purchase price." 1T95-10 to 97-4. Even if his valuation is mistaken, the parties drafted the agreement to prevent future litigation, because it provides no ability of either to object. 1T131-6 to -10. In fact, they included a provision that identifies the parties' rights for issues arising out of the settlement agreement, and it

limits legal proceedings to only asserting a breach of the agreement or litigation to "enforce a term or condition" of the agreement. Pa17 (¶9).[4]

The agreement carried forward rent credits from the lease and included a real estate credit a/k/a site control credit so the seller would not have to remove a Site Control Agreement, as had been required in the lease, and as discussed in more detail infra. Pa15 (¶1(c), (d)). Site control credits were identifiable as a set amount, $1,583,333.65, but rent credit required a calculation at closing. Pa15 (¶1(c), (d)). Prior to the agreement, the lease required the tenant to not be in default to be eligible for the rent credit. Pa330; see also 1T87-8 to -24. No such provision was included in the settlement agreement.

As for the origin of the rent credit, per Mr. DiPiano, it was an inducement to expedite closing. 6T6-7 to -13. He negotiated with Yuriy a $17,973.54 rent credit if closing occurred within one hundred twenty days of Mr. DiPiano obtaining subdivision approval from the township. 6T6-7 to -13.

As Ms. DiBello explained, "So there was a rent credit that was set forth in the lease of $17,973.54 per month, from the date the lease was signed, for 120 days is

[4] Mr. Dobbs did not testify; thus, no rebuttal about contractual intent of the lawyers who prepared the agreement. While Mr. DiPiano testified, the court found portions of his testimony not credible. Pa251-252. According to Mr. DiPiano, he claimed he expected the purchase price would be based on "like-kind properties in the area that were being used for automotive, and also the income approach based on the rent." 5T107-8 to 15.

what the lease said. The lease also said that closing was to occur in 120 days," which did not occur; thus, "[O]ur position was as long as we do what we're supposed to do, that $17,973.54 will continue through the closing date. The closing date in the Purchase and Sale Agreement was termed time of the essence for 30 days." 1T48-22 to 49-15. "[T]he seller's position was okay, that's fine, but if for some reason your client is unable to meet this time of the essence closing date, then we're not going to continue to give a credit, we're going to cap that credit on what it would have been on that 30th day." 1T49-17 to -22. The 120-day closing period was used to account for a delay for a subdivision of the property. 1T127-23 to 128-1.

The site control credit represented an encumbrance on the property. Specifically, Mr. DiPiano entered into a Site Control Agreement with Nissan North America that, for ten years, required a buyer/owner of the property to operate a Nissan dealership on the property. 3T71-9 to -24. Richard, as a purchaser, would be required to pay Nissan if Richard failed to honor the Site Control Agreement. 3T71-20 to -24. Richard would be liable to pay Nissan $2,000,000, 3T72-3 to -12, which the parties negotiated to be a prorated site control credit, 3T73-8 to -18, in the settlement agreement for $1,583,333.65, "[i]n consideration for Purchaser's receipt of a credit from [landlord] at the Closing" in that amount. Pa344 (¶1(c)). Thus, for the site control credit, Richard entered into the settlement agreement and became liable for the Site Control Agreement with Nissan. 3T73-20 to 74-4.

Section 9 of the agreement provides for fees and costs if notice of breach is given, accompanied by a five-day cure period. Pa346 (¶9). It states:

> In any Enforcement Action [(defined as an action "upon a breach of this Agreement or to otherwise enforce a term or condition of this Agreement")], the prevailing Party shall be entitled to recover from the non-prevailing Party all reasonable attorney's fees, costs and any other expenses the prevailing Party incurred as a result [of] such Enforcement Action, in addition to any other relief to which the prevailing Party may be entitled or such court deems appropriate.
>
> [Pa346 (¶9).]

On or about July 6, 2022, as part of the settlement, Route 23 Holdings and Property Owner/South Realty also entered into a Real Estate Purchase and Sale Agreement ("PSA"). Pa349-363; see also 3T107-14 to -16 (it was signed at the same time). For the PSA, Ms. DiBello is listed as the buyer's lawyer while Mr. Dobbs is listed as the seller's lawyer. 3T107-17 to -21. This, too, was a "joint effort" by counsel. 1T51-21 to -24. As noted below, the PSA and lawsuit settlement agreement mirror each other.

The PSA states, "[Property Owner/South Realty] agrees to sell and [Route 23 Holdings] agrees to buy the Property subject to and in accordance with the terms of this Agreement. In the event of a conflict between the Lease and this Agreement, this Agreement shall control." Pa349 (¶1). Section 8 identifies the real estate credits a/k/a site control and the rent credits, titled, "Adjustments and Credits at Closing,"

and confirms the parties "agree to adjust the following expenses as of the Closing Date," with the site control credits and rent credits included. Pa351-352 (¶8(c), (d)). Section 7 includes a time-of-the-essence clause, with a closing thirty days from the "Effective Date," Pa351 (¶7), which meant thirty days "[f]rom the date that we signed the contract." 3T108-10 to -12.

The breach/default clause, Section 13, states in pertinent part:

> If either Party breaches this Agreement or defaults hereunder, the non-defaulting Party shall notify in writing the Party alleged to be in default. The Party alleged to have defaulted shall then have ten (10) business days after receipt of the notice to correct the default . . . .If the default is not cured within the time provided, then the non-defaulting Party may proceed to seek the remedies available to it - i.e., specific performance[.]
>
> [Pa355 (¶13(a)); and Pa346 (¶9) (five-day cure period).]

The integration clause, Section 19, states in pertinent part:

> This Agreement . . . constitutes the entire agreement among the Parties hereto pertaining to the transaction contemplated herein, and supersedes all prior agreements, understandings, negotiations, and discussions, whether oral or written, of the Parties.
>
> [Pa358 (¶19(d)).]

For the purchase price, the PSA states, "[Property Owner/South Realty] and [Route 23 Holdings] have, on the date hereof, retained Dan Mistichelli, MAI of Pyramid Associates to perform an appraisal (the 'Appraisal') to determine the

purchase price of the Property (the 'Purchase Price')." Pa349 (¶3). Section 3 includes, from the settlement agreement, the requirement for the final appraisal:

> The Appraisal shall (i) be based upon an automotive use, and shall be the average of two appraisal methods, to wit: the Sales Comparison Approach using the sale of neighboring automobile dealerships since January 1, 2018, and the Capitalization of Income Approach, and (ii) include a size description of the Land of 3.96+/- acres and a gross building area of 17,910 square feet . . . .The Purchase Price (as adjusted pursuant to this Agreement) shall be payable by [Route 23 Holdings] at Closing[.]
>
> [Pa349 (¶3); see also Pa352 (¶9(b) ("At Closing, [Route 23 Holdings] shall pay [Property Owner/South Realty] the Purchase Price as set forth in Section 3[.])]

Mr. Mistichelli has been a commercial real estate appraiser since 1989. 1T153-19 to -22. He focuses on "mortgage appraisals for mortgage financing involving all types of commercial properties." 1T153-25 to 154-7. The court found Mr. Mistichelli to be a credible witness. Pa239.

Mr. Mistichelli understood his role as being the "impartial appraiser . . . [with] no skin in the game on either end." 3T34-2 to -4. "The purpose of the appraisal was to effectively settle the dispute between two prior appraisals," 3T43-12 to -13, per Mr. Mistichelli. He issued a report, 1T57-1 to -16, that appraised the property at $4,605,000.00, 1T171-20, 1T58-16 to -17, after averaging the two approaches, infra.

For the appraisal, he performed a site inspection, 1T160-15 to -23, which provides a "better understanding of the property in terms of its physical components,

functional components, locational characteristics, condition, [and] quality[.]" 1T161-4 to -10. He inspected the property, 2T68-13 to -15, and walked the premises. 1T162-24 to -25. He examined the condition of the building, 2T67-2 to -4, including its roof. 2T67-5 to -6; 1T162-22 to -23. He measured the building, 1T162-15 to -18, examined the office space, 1T162-21 to -22, and the HVAC system. 1T162-22 to -23. He had for his appraisal the floor plan and a site survey. 1T163-21. He obtained a size description of the land, including the acreage and building's square footage. 1T165-20 to -25.

He identified for his appraisal the acreage as 3.959 acres and the building as being 17,910 square feet. 2T71-13 to 17; see Pa349-350 (¶3) (the agreement requires an appraisal based on "3.96+/- acres and a gross building area of 17,910 square feet"). Per the parties' agreement, his appraisal used the sales comparison approach and the income capitalization approach. 1T171-21 to 172-1.

For the sales comparison approach, he "started with a relatively defined area for a property of this manner." 1T172-13 to -14. He expanded the market area to account for insufficient sales data within the market area. 1T172-17 to -22. He examined seven properties for comparison, 1T173-19 to -21, though in his industry "[t]here's no hard and fast rule" for how many properties an appraiser should examine. 1T173-22 to -24. His normal practice is to compare "typically like four, five, or more" properties. 1T174-4 to -6.

"[I]n order to find sufficient sales for any property when you're appraising it, you have to start with a defined area, and . . . my defined area was Morris County," 2T132-10 to -13, which is the property location. "I expanded my market area on a geographic basis to Morris County, and then beyond that." 2T132-15 to -17. "I had to go beyond the immediate adjacent properties to the subject to find comparable sale data." 2T134-13 to -15.

His comparisons were based on five Morris County properties, one in Warren, and one in Passaic. 1T174-18 to -22. Morris' comparisons were "certainly" neighboring properties, Warren was neighboring, and he considered "all" appropriate "from a locational perspective." 2T14-17 to -23. He sought to select what he considered "the best comparable data available." 3T46-17 to -19.

He "did not see a necessity to go beyond the area that I went," 3T47-1 to -2, and "for appraisal practice, irrespective of what -- even if the property is in a defined neighborhood, if there are no comparable data, there are no comparable sales within that neighborhood, you're forced to expand your geographic area." 1T167-16 to -19. Defendant did not introduce any standard for appraisers that defines "neighboring properties" any differently than employed by Mr. Mistichelli.

Mr. Mistichelli relied on deeds and tax records to assess prices. 1T175-4 to -10. He also factored traffic count, its effect on prices, and performed an adjustment

analysis accordingly. 2T8-18 to 9-4. He engaged in an additional adjustment process based on his knowledge and experience, 2T11-15 to -20, and,

> In this case I considered in addition to differences in location; differences in the age and condition of each property in relation to the subject; differences in quality and appeal in relation to the subject; differences in building size in relation to the subject; differences in land to building ratio in relationship to the subject; and differences in parking ratio in relationship to the subject.
>
> [2T10-24 to 11-6.]

Importantly, Mr. Mistichelli noted, in his field, "There is a level of subjectivity to it." 2T12-15 to -18. Subjectivity is a recognized occurrence within the appraisal industry, 2T13-2 to -7, as later confirmed with testimony from the Property Owner/South Realty's appraiser, infra. Mr. Mistichelli also candidly acknowledged he had a few inaccuracies in his report, 3T42-21 to -23, such as typos, 3T55-25 to 56-11, though nothing that changed his ultimate conclusion. Similarly, one of the properties he reviewed for comparison was a mixed-use property, but he explained why it was a distinction without a difference. 3T21-15 to 22-8. Also, two of the leases he reviewed for comparison were, in Mr. Dobbs' opinion, not proper comparables. 3T39-10 to -18; see ibid. (when Mr. Mistichelli informed Mr. DiPiano's counsel at trial that Mr. Mistichelli disagreed with Mr. Dobbs' opinion, counsel responded, "Whether or not [Mr. Dobbs is] correct or not is another story[.]").

Mr. Mistichelli also considered the parties' lease, 1T169-17 to -24, which stipulates a base rent, 1T170-7 to -9, and he knew there would be "additional monies [(the credits)] that the landlord will receive from the tenant that are to be applied to the purchase prices in the event that a sale is consummated between the parties." 1T170-4 to -13. "[T]he tenant's base rent was $52,260. Of this amount $17,973.54 will be applied as a credit against the purchase price . . . .[S]o roughly $35,000 was the base rent." 1T170-20 to -25. He deducted the $17,973.54 to arrive at "effective net monthly rent of $22.97 per square foot." 1T171-1 to -7; see also 1T179-17 to -22 (in response to questioning by the court, he confirmed base rent was $52,260 with a credit at closing of $17,973.54/month).

As for the source of the $52,260 rent included in the lease, Mr. DiPiano, of South Realty, testified he picked that number based on selecting an amount that covered the mortgage he had on the property. 5T103-1 to -8. The mortgage included three lots: the dealership, an unimproved lot, and a tire business. 5T96-12 to -17; 5T99-23 to 100-5; see also 5T100-6 to -9 (they needed to first subdivide the property to take part of the tire business and add it to the property for the Nissan dealership). The rent number arose out of an amount Mr. DiPiano wanted so he could cover all his expenses until Yuriy purchased the property. 5T103-1 to -8. It was also based on his desire to avoid negative cash flow pending the closing, 3T75-22 to 76-1; thus, not based on any prevailing market rate.

While the court questioned Mr. Mistichelli about the decision to deduct the rent amount Mr. DiPiano included in the lease, Mr. Mistichelli did not believe accounting for a rent adjustment affected his analysis under the sales approach. 2T74-15 to 75-2. Nor did he believe $52,260 monthly rent was the proper, fair market rent for this property. 3T48-10 to -15.

In response to questioning by the Court, Mr. Mistichelli performed a calculation for the Court based on the rent amount included in the lease, instead of discounting rent as Mr. Mistichelli did, which resulted in rent of approximately $35/sq ft, "But we don't need to concern ourselves with the price per square foot, we can just work off the aggregate numbers," he noted. 2T75-17 to 76-19. By performing a calculation with non-discounted rent, per the Court's request, with the other adjustments, the net operating income came to $7,153,420, 2T76-20 to 78-1, but, again, this is only if one first adopts as fair market rent the number Mr. DiPiano inserted in the lease. 3T48-10 to -15.

Mr. Mistichelli did not believe one should analyze the property the way the Court requested, and contrarily instead testified, "[I]t would have been inappropriate in my opinion to analyze the property from that perspective." 2T75-14 to -16. This is why, while he looked at the lease, for an appraisal he performed a market analysis. 3T48-16 to -21. He used rental comparables to arrive at a market rent. 3T49-22 to 50-1.

Mr. Mistichelli's income capitalization approach consisted of an analysis of the property from its income producing perspective. 2T21-19 to -21; see also 1T171-21 to 172-1. (per the settlement agreement, he used the sales comparison approach and the income capitalization approach). He compared properties different than used for his sales comparison approach and focused on dealerships being leased. 2T23-4 to -13. Here, too, some subjective analysis occurs because, for example, a percentage needs to be affixed for vacancy and credit loss. 2T33-9 to -17. Subjective analysis is required because, unlike other businesses, there is no published material of vacancy rates for automobile dealerships. 2T33-14 to -22. Upon arriving at his appraisal under the income capitalization approach, it was then a mathematical calculation of taking that number, adding it to the sales comparison number, and dividing the two. 2T38-14 to -17.

On July 18, 2022, Mr. Mistichelli emailed the report to Ms. DiBello and Mr. Dobbs. Pa368-369. His appraisal came to $4,655,000, infra. Incidentally, the township performed an appraisal for the 2022 tax year that came to $4,322,100. 3T54-3 to -9. With the final appraisal, Richard understood, per the settlement, "That was it . . . .Whatever that number came, that was it." 3T110-10 to -15. While the report performed an analysis under sales comparison approach and income capitalization approach, the two numbers were not then averaged together in the report, infra.

Upon receipt of the appraisal, Ms. DiBello began preparing the closing papers, including having the purchase price given to the title company to assess the policy amount, inserting the price into the bulk sales notice, etc. 1T59-1 to -8. Also on July 18th, Ms. DiBello's paralegal forwarded to Mr. Dobbs closing-related correspondence (title objection letter) and requested a July 27th closing. Pa376-388.

GS Nissan had all its funding and financing in place to proceed with a July 27th closing, per Ms. DiBello. 1T68-3 to -5; 1T75-25 to 76-1. Richard confirmed he had the money available for the closing. 2T109-24 to 110-1; see also 3T111-22 (in addition to cash, he had a mortgage commitment). Richard also had available a loan pursuant to an agreement with a loan provider, which Mr. Dobbs actually drafted for him. 4T14-1 to -20.

On July 19th, Mr. Dobbs contacted Mr. Mistichelli, and told Mr. Mistichelli he believed "there is a mistake" in the appraisal amount of $4,655,000.00. Pa367. Mr. Dobbs challenged the calculation methodology and advocated for changes to the appraisal. Pa367. Mr. Dobbs asked Mr. Mistichelli to "recalculate the Fair Market Value without incorporating the rent credit that the Buyer is already receiving at closing." Pa367.

Ms. DiBello informed Mr. Dobbs that his request to change the methodology is "contrary to the parties agreement" and incorrect, and Mr. Mistichelli's "analysis is consistent with 3 of the 4 appraisals performed to date." Pa372. Mr. Dobbs

responded, in part, the appraisal is "based around the rent credit, which is being provided to the Buyer at closing[.]" Pa372. Thus, the parties' intent, per Mr. Dobbs, was to have the appraiser perform an analysis without implicating credits at closing. Pa372.

Mr. Mistichelli explained to Mr. Dobbs why Mr. Dobbs' opinion about the appraisal was wrong. Pa366. Mr. Mistichelli wrote, among other things, "The income approach was presented merely to demonstrate that the value conclusion via the sales approach is reasonable," Pa366 and for his appraisal he "did both," i.e., sales comparison approach and income capitalization approach. 3T31-4 to -13. "[B]oth methodologies are in [report], fully presented." 3T32-6 to -9.

Ms. DiBello similarly expressed that Mr. Dobbs' belief about the calculation was incorrect. Pa364; Pa366. Mr. Dobbs repeated his opinion and cited the basis for his belief being his personal experience. Pa365-366. Ms. DiBello further informed Mr. Dobbs, "The parties agreed on the appraiser, the manner in which the appraisal should be conducted, and the documents with which the appraiser should be provided." Pa364.

Also on July 19th, the paralegal informed Mr. Dobbs, "As you know, the purchase price has been set at $4,655,000. Purchaser will be prepared to close on Wednesday, July 27. Please confirm you are available." Pa389. On July 20th, she followed up with Mr. Dobbs. Pa390.

On July 21st, the title company confirmed the July 27th closing and requested closing documents. Pa391. On July 25th, Ms. DiBello followed up, too, and asked Mr. Dobbs to confirm Mr. DiPiano will be prepared to close on the 27th. Pa393.[5]

On July 26th, Mr. Dobbs responded, "There is no closing tomorrow or August 5th because the Appraisal was not completed in accordance with the Settlement Agreement or the specific instructions provided to the appraiser[.]" Pa394. Mr. Dobbs asserted the appraisal did not average the two appraisal methods, as anticipated in the PSA. Pa394. He also challenged Mr. Mistichelli's data. Pa394-395. "Until the appraisal is revised to be in line with the settlement agreement, there will be no closing," he wrote. Pa395.

Mr. DiBello testified, while Mr. Mistichelli did the proper valuation (both the sales comparison approach and capitalization of income approach), he did not average the two numbers. 1T64-22 to 65-4. On July 27th, Ms. DiBello wrote to Mr. Mistichelli:

> Seller's counsel has made several objections to your appraisal. My client and I do not agree with any of Mr. Dobbs' recent objections (or, for that matter, his right to make such objections), except for one – Mr. Dobbs is correct when he says that the resulting values of the two methods used should have been averaged to arrive at the ultimate appraised value (contract language copied below). Since this requirement is an express term of the parties' agreement, I agree that your appraisal should be

[5] While Ms. DiBello sought a July 27th closing, the outer most date to meet the contractual deadline was August 5th. 1T75-22 to -24.

> amended to reflect a value of $4,605,000 – the average of $4,555,000 and $4,655,000. Please amend and reissue ASAP, as closing must occur on August 5th, at the latest.
>
> [Pa396.]

An hour or two later, Mr. Mistichelli averaged the two numbers for the report, Pa397-398, thus satisfying the appraisal the parties requested of him. 1T73-5 to -8. By averaging the numbers, the appraisal amount actually lowered to be more favorable to the purchaser and less favorable to Mr. Dobbs' client. 1T143-10 to -21; see also Pa401-481 (final report).

Also on July 27, Ms. DiBello sent Mr. Dobbs a notice of default for anticipatory breach, i.e., stating the closing would not occur on or before August 5th, contrary to the time-of-the-essence clause. Pa482-483. Ms. DiBello offered a five-day cure period to enable a closing on August 5th. Pa482-483. Ms. DiBello's notice incidentally also satisfied a separate provision of the parties' agreement that referenced a ten-day cure period. 1T151-4 to -16. On August 4, a new lawyer for Mr. DiPiano sent Ms. DiBello a notice of default that repeated Mr. Dobbs' opinion and claimed GS Nissan defaulted by failing to obtain "a specific and accurate appraisal." Pa484-486; contra Pa349 (both parties retained Mr. Mistichelli).

On August 9, 2022, GS Nissan and Route 23 Holdings filed a Complaint to enforce the Settlement Agreement and PSA. Pa36-45. On August 31, Mr. DiPiano's new lawyer sent another notice of default. 1T110-19 to 111-5. This time, the notice

alleged as default that GS Nissan identified the settlement agreement in its Complaint despite the agreement saying its terms were confidential. 1T111-1 to -5. At trial, Mr. DiPiano testified he did not think disclosure of 'confidential' terms was a problem, despite his counsel's letter, 5T109-14 to -19, though after an overnight break at trial he testified it was a problem. 6T36-1 to 37-1.

Theodore J. Lamicella, Jr. is a real estate appraiser with Associated Appraisal Group, 4T42-3 to -22, retained by South Realty, 4T44-21 to -22, to analyze Mr. Mistichelli's report. 4T45-12 to -19. He testified as an expert in appraisals, 4T46-14 to -15; 4T48-20 to 49-2, though he was evasive on his role and what opinion he was even offering to support Mr. DiPiano's challenge to Mr. Mistichelli's appraisal. See Pa246 ("Certainly, the testimony regarding whether Lamicella's report was an appraisal review was unclear and rambling.")

Though testifying to critique Mr. Mistichelli's appraisal, Mr. Lamicella was clear: "I am in no way implying [Mr. Mistichelli] violated any of [the] standards" applicable to appraisers. 5T27-5 to -8. "We have a reasonable man standard for appraisers. We gather the data, analyze it, interpret it, and opine a value. Reasonable people – reasonable people can disagree while still complying with all the rules." 5T28-9 to -12. In his field, things are subjective. 5T16-3 to -8.

"[A]lthough both of our values are divergent, I didn't imply or state I thought he violated any professional practice standards or rules. I just was pointing out why

I thought the analysis was flawed and that those flaws led us in different directions." 5T28-14 to -19. As for the "flawed" analysis, Mr. Lamicella did not identify any industry standards he relied on. 4T47-18 to 48-13.

> I utilized different sales, I utilized different rentals, I relied on the income approach. All my rentals are of new car dealers. And on the sales approach, all of the comparable sales I utilized in my view were most comparable to the subject property, and were more in line with the criteria set forth in the definition of market value.
>
> [5T16-16 to -22.]
>
> I thought the things that I thought were flawed were some of the comparables he selected. I thought the analysis on the subject of the lease was inaccurate or flawed. I thought adjustments in capitalization rate and development, I found a number of things that were inconsistent or unsupported to be utilized in an appraisal of this subject property type.
>
> [4T50-14 to -21.]

For the income capitalization approach, he thought rent should have been the $52,260 per month Mr. DiPiano used to cover his expenses, 4T53-12 to -15, compared to Mr. Mistichelli's belief that $35,000 is the better number. 4T53-16 to -21; 5T6-9 to -18. Mr. Lamicella felt since, per the lease, "your rent was the rent," this is the rental value he would use for the appraisal. 5T6-9 to -14. He felt "the most comparable property is the subject property," 5T6-19 to -25, without it being clear how a parties' manipulation of the rental amount affects fair market value, i.e., Mr. DiPiano picking a rental amount to cover expenses amassed by Mr. DiPiano on the

property. Mr. Lamicella felt the property yielded $32 per square foot, by adopting Mr. DiPiano's rental amount. 4T60-14 to -17. According to Mr. Lamicella, Mr. Mistichelli's decision to deduct an amount equal to the rental credit, 4T53-22 to -25, "could have skewed [Mr. Mistichelli's] judgment analysis, et cetera," 4T54-23 to -25, though he had no proof it was, in fact, skewed. 5T81-18 to -23.

Mr. Lamicella also disagreed with the leases Mr. Mistichelli compared with the parties' lease, 4T61-23 to -25, 4T63-13 to -14, and interpreted two leases differently, thus affecting the dollar amount Mr. Lamicella affixed to what he considered the rental amount. 4T62-18 to -21; 4T64-13 to -16. Also,

> Well, the capitalization rate selection I thought was flawed, weak, unsupported. The conclusion of an equity yield rate I thought was unsupported. And the band of investment, . . . if there's no support or those two things are flawed, when you get your ultimate conclusion of that rate, it's going to be unsupported and/or flawed. And I thought in this case it was both.
>
> [4T65-14 to -25.]

"For [Mr. Mistichelli's] band of investment, . . . he talks about talking to lenders and brokers and amortization schedules, but there's no -- nothing included, no support for any of the conclusions. A 25 year amortization he utilizes, again, with no support." 4T66-14 to -19. "Then for the equity portion, the equity component, he talks about considering what the treasury yields are and then some kind of return

based on that . . . .[T]here is much better data which I utilize," though Mr. Lamicella did not identify it in his testimony. 4T67-2 to -17.

For the sales comparison approach, "I think that there was some components of his analysis, some of his adjustments, either unsupported or maybe not merited." 4T68-6 to -7. He took issue with two properties considered by Mr. Mistichelli because one of the sales was not listed with a broker, which he thinks "could have" yielded a higher price for the sale. 4T68-18 to 69-12; see also 4T69-19 to 70-4. He did not address why he would reject a sale made without a broker while adopting the rental value made by Mr. DiPiano. See generally 6T37-2 to -7 (Mr. DiPiano is not a licensed or certified real estate appraiser); see also Pa252 (despite testimony by Mr. DiPiano about other properties to compare to his property, the court found, "DiPiano did not have the qualifications to provide an opinion[.]").

Based on his opinion of properties for comparable sales analysis, and adjustments he chose to make to market value, "I concluded a – the value per square foot of $425 or $7,610,000." 4T77-3 to -7. However, even as comparables are concerned, he conceded this too is subjective, 5T58-11 to -15, and while he testified he disagreed with comparables used by Mr. Mistichelli, "I certainly also was not saying just because I don't believe they're as comparable, it doesn't mean it's in violation to use them." 5T64-8 to -18. "[W]hen I was saying improper, I wasn't implying improper in violation of any USPAP [(Uniform Standards of Professional

Appraisal Practice)] rules[,]" 5T65-17 to 24, as again whether an appraiser uses as comparables used car dealership versus new car dealerships, for example, is a subjective analysis an appraiser chooses to employ. 5T65-17 to 66-6.

Based on his analysis and adjustments under the income capitalization approach (appraised at $8,420,000), 4T60-23 to 61-1, and sales comparison approach (appraised at $7,610,000), 4T77-6 to -7, and averaging them, he opined an appraisal amount of $8,015,000. Pa488; 4T77-8 to -12. By way of comparison, prior to GS Nissan filing the first lawsuit, GS Nissan's appraisal was $4,300,000.00, 3T91-15 to -17; 1T24-1 to -4, Mr. DiPiano's appraisal was $7,900,000.00, 2T43-15 to -16; 3T92-7 to -8; 1T24-8 to -9, and the parties' neutral third appraisal was $4,575,000.00. 3T93-18 to -21. Per the settlement agreement, Mr. Mistichelli then set the "dispositive purchase price" at $4,605,000. Pa403.

In sum, while Mr. Lamicella would have performed the appraisal differently,

> I don't think Mr. Mistichelli -- although both of our values are divergent, I didn't imply or state I thought he violated any professional practice standards or rules. I just was pointing out why I thought the analysis was flawed and that those flaws led us in different directions.
>
> [5T28-14 to -19.]

"I didn't state and didn't mean to imply that any – there was any violation of USPAP or any other rules set by the New Jersey Appraisal Board," 5T29-2 to -4, and he found no deviation by Mr. Mistichelli of any applicable appraisal standard. 5T29-5

to -7; see also 5T67-11 to -14 (he could cite no violation or deviation from any standard); 5T67-15 to 21 (same); see also Pa245 (the court made a finding, "Lamicella conceded that he was not claiming that Mistichelli was using properties that were not comparable but that Lamicella believed the properties he used to be most comparable to the Premises").

Through trial, and pending closing, GS Nissan paid rent ($52,260) with the rent credit ($17,973.54), 3T112-6 to -13, 3T124-2 to -4, and awaited closing for the site control credit. 3T112-16 to -22. The latter to be a closing credit of $1,583,000, 3T113-23 to 114-10, per the settlement agreement. 3T138-25 to 139-6.

On June 18, 2024, the court issued an Order and Decision. Pa227-263. The court granted GS Nissan/Route 23 Holdings specific performance. Pa227-228. The court set a forty-five-day closing, but lowered the purchased price to $5,904,210. Pa228; contra 3T91-15 to -17; 1T24-1 to -4 (GS Nissan's pre-suit appraisal was $4,300,000); 2T43-15 to -16; 3T92-7 to -8; 1T24-8 to -9 (Mr. DiPiano's pre-suit appraisal was $7,900,000); 3T93-18 to -21 (the neutral pre-suit appraisal was $4,575,000); Pa403 (Mr. Mistichelli was $4,605,000); 4T77-8 to -12 (Mr. Lamicella was $8,015,000).

The court dismissed GS Nissan/Route 23 Holdings' claim for breach of contract and dismissed the claims of Defendant/Third-Party Plaintiff. Pa228.

According to the court below, if a right to specific performance is established, the court then decides, in its discretion, that enforcement is equitable. Pa259.

"The Court notes that there is no basis to reject the Mistichelli appraisal based on some misconduct by Mistichelli or based on Mistichelli violating a standard of care in reaching his conclusions in the appraisal." Pa262. Yet,

> [T]he Court disagrees with Mistichelli's use of a modified base rent when calculating the value of the Premises under the income capitalization method. It is clear to the Court that the base rent was $52,260, and that by using the rental credit applicable when Plaintiff exercised the purchase option under the lease[, he] improperly reduced the appraised value.
>
> [Pa262.]

"As there is no evidence that the Mistichelli appraisal was otherwise improper, the court recalculates Mistichelli's income capitalization appraisal value based on the base rent." Pa262.

> Mistichelli testified that if he used the $52,260 base rent in his income approach, then his income approach valuation would have been $7,153,420. He maintained that the change in the amount of rent used would not have an impact on his $4,655,000 valuation. Pursuant to the Settlement Agreement and PSA, the dispositive purchase price is $5,904,210, the average of the valuation as calculated by the income.
>
> [Pa262.]

The court held Plaintiff does not get the closing credit because because a closing did not occur by June 2020, per the lease. Pa262; but see Pa342, Pa349 (the

settlement agreement and PSA both post-date the June 2020 deadline in the pre-settlement lease).

For the breach of contract claim,

> The evidence presented at trial clearly demonstrates that the parties entered into the Settlement Agreement and the PSA with the intent to set forth the method for arriving at the purchase price for the Premises. The parties agreed that "the dispositive purchase price" for the Premises would be set by the appraisal completed by Mistichelli.
>
> [Pa252.]

Defendant challenged the appraisal setting the dispositive purchase price through Mr. Lamicella who "maintained that Mistichelli could have used better comparable properties" and who believed Mr. Mistichelli "used the incorrect rental amount for the Premises because he deducted the purchase credit negotiated by the parties." Pa253. Though clear Mr. Mistichelli did not deviate from "any professional standards," Mr. Lamicella's testimony espoused his belief Mr. Mistichelli "could have used other comparable properties," while testifying "appraisals are subjective and each appraiser may use comparable properties that another appraiser does not use, but that does not mean that the appraisal is incorrect[.]" Pa253.[6]

[6] While Defendant insinuated wrongdoing from an alleged ex parte communication between counsel and the appraiser, the court found emails first sent to only the appraiser were "within a short period of time" send to Mr. Dobbs. Pa253. There was no evidence of "any effort" to influence the appraisal. Pa252.

Per the court below, the parties' agreement did not address what would happen if there was a dispute about Mr. Mistichelli's appraisal, Pa254, and Defendant's refusal to close was not a breach of contract. Pa254. The court thus dismissed Plaintiff's breach of contract claim. Pa254. The court dismissed Defendant's breach of lease claim, based on late rent payments, due to insufficient evidence of an actionable breach. Pa254. Similarly, the breach of lease based on repairs being performed without consent, consisted of only repairs that under the lease did not require consent. Pa254. Defendant failed to present evidence repairs were structural in nature, and non-structural repairs did not require consent. Pa254.

The court dismissed Defendant's breach of lease, premised upon a lis pendens being filed by Route 23 Holdings, because that entity did not sign the lease and, regardless, "there was nothing impermissible with [its] filing[." Pa254-255. The court also found the lis pendens filing was caused by Defendant's refusal to close pursuant to the parties' agreement. Pa255. Defendant also failed to establish damages. Pa255. The court similarly dismissed Defendant's remaining claims of breach, premised upon pre-settlement issues, because Defendant released any such breaches upon entering into the settlement agreement. Pa255. Defendant failed to establish support for the claim, anyway. Pa255.

As for any breach of the covenant of good faith and fair dealing, the court "[did] not find that either party acted inappropriately or in bad faith by taking their

respective positions." Pa257. Thus, the court dismissed this, too. Pa257. The court dismissed Defendant's promissory estoppel claim, which sought to enforce an alleged oral agreement prior to the settlement agreement due to insufficient evidence any such agreement occurred. Pa257. It made no difference, however, because Defendant failed to establish reasonable reliance, and entered into a settlement agreement inconsistent with any alleged oral agreement. Pa257-258. The court dismissed Defendant's claim for fraud as well, which Defendant based on the claim Mr. Mirgorodskiy did not disclose, when negotiating the purchase, that he was under investigation. Pa258. The court held Defendant failed to establish a duty to disclose anything that was not disclosed. Pa258-259.

Despite the settlement agreement and defense counsel stating at the onset of trial the court is not to establish the purchase price, 1T6-11 to -13, the judge set a "dispositive purchase price of $5,905,210," Pa263, instead of Mr. Mistichelli's dispositive purchase price of $4,605,000. Reverting to the judge's limited role and it not being to establish the purchase price, 1T6-11 to -13, defense counsel also informed the court at the onset of trial its witnesses for the appraisal issue, "It's not for [the court] to determine the actual purchase price per se, but it's for [the court] to consider whether or not Mr. Mistichelli's report doesn't conform to the agreement and is otherwise flawed." 1T6-13-25.

LEGAL ARGUMENT

POINT I

THE COURT BELOW ERRED WHEN IT CHANGED THE PARTIES' EXPRESSED CONTRACTUAL INTENT TO HAVE THEIR CHOSEN PROPERTY APPRAISER – NOT A JUDGE - DETERMINE THE "DISPOSITIVE" PURCHASE PRICE FOR THE PROPERTY SALE (Da227-228).

The parties' intent, as expressed by the words they adopt for their contract, controls regardless of a desire afterwards to add language and notwithstanding an individual judge's belief the parties' chosen 'expert' should have considered different factors. This is especially true here where, as part of a settlement agreement in pending litigation, the parties selected a specific appraiser to provide what the contract labels the "dispositive" purchase price for the property sale.

The parties left no room in their contract for debate- they chose by name the person who would provide the dispositive purchase price for the property. While the judge below believed the appraiser should have considered one of several factors differently, it was not for the judge to insert this belief. The evidence prevented the judge from inserting his belief, because even Defendant's expert testified about the subjective nature of property appraisals.

It was within the appraiser's discretion to assign a different rental value than inserted in the lease years earlier by the property owner. Nobody challenged the

background and experience of the appraiser and, to the contrary, Defendant's expert testified the appraiser performed his role consistent with all applicable appraisal standards. It makes no difference that the judge or Defendant's expert would have appraised the property higher because the parties did not choose the judge or Defendant's expert to make that determination.

Due to the subjective nature of appraisals, even an error in judgment was contemplated by vesting sole discretion with the appraiser to opine on the "dispositive purchase price" of the property. Even if we accept the parties' chosen appraiser undervalued fair rental value, or misjudged something else for that matter, under well-settled principles of contract interpretations, this was the calculated risk the parties undertook upon entering into the settlement agreement. Further, based on the court's finding, "[T]here is no basis to reject the Mistichelli appraisal based on some misconduct by Mistichelli or based on Mistichelli violating a standard of care in reaching his conclusions in his appraisal," Da262, there is no basis for the court below to substitute its judgment for that of Mr. Mistichelli. Stated differently, the record lacks sufficient, credible evidence to support the judge's action.

Contract interpretation and construction is a matter of law subject to de novo review. Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998); Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995). No

deference is given to the interpretation below, as this Court "look[s] at the contract with fresh eyes." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011).

A settlement agreement is a contract like any other contract, Nolan v. Lee Ho, 120 N.J. 465, 472 (1990), which courts should strive to enforce. See generally, Jannarone v. W. T. Co., 65 N.J. Super. 472, 476 (App. Div. 1961) ("The settlement of litigation ranks high in our public policy"). The parties' intent is the bedrock of contractual interpretation. Perhaps no factor is more important to interpreting a contract than the parties' intent. It takes priority over written portions of a contract that erroneously express something other than the parties' intent. Ultimate Computer Svcs., Inc. v. Biltmore Realty Co., Inc., 183 N.J. Super. 144, 149 (App. Div. 1982).

"A party that uses unambiguous terms in a contract cannot be relieved from the language simply because it had a secret, unexpressed intent that the language should have an interpretation contrary to the words' plain meaning." Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191 (App. Div. 2002). Here, the parties employed wording to express their clear intent for finality of all foreseeable litigation, as expressed with the word "dispositive" upon selecting Mr. Mistichelli as the appraiser and as the sole person "to determine the dispositive purchase price for the Premises."

A court should not draw an inference regarding contractual intent when the language employed is as definite and unambiguous as the language the parties used here. "Dispositive" means "bringing about a final determination." Wachovia Bank,

N.A. v. Deutsche Bank Tr. Co. Americas, 397 F.Supp.2d 698, 701-02 (W.D.N.C. 2005) (citation omitted). Courts "choose to read 'dispositive' for what it means: to settle or finish the dispute." Canon Latin Am., Inc. v. Lantech (CR), S.A., 508 F.3d 597, 601 n.8 (11th Cir. 2007). To be dispositive means to be the "deciding factor" and "bringing about a final determination." Mississippi Vet. Home Purchase Bd. v. State Farm Fire & Cas. Co., 492 F.Supp.2d 579, 589 (S.D.Miss. 2007); see also Boskoff v. Yano, 217 F. Supp. 2d 1077, 1084 (D.Haw. 2001) (dispositive is that which "bring[s] about a final determination") (citation omitted); Mitsubishi Polyester Film, Inc. v. U.S., 321 F.Supp.3d 1298, 1308 (Ct. Int'l Trade 2018) (dispositive means "'controlling' of the scope inquiry in the sense that they definitively answer the scope question") (citation omitted); Sango Int'l, L.P. v. U.S., 484 F.3d 1371, 1379 (Fed. Cir. 2007) ("Dispositive" means "[h]aving the quality or function of directing, controlling, or disposing of something") (citation omitted).

The judge here inserted a non-existent term into the settlement agreement and Real Estate Sale Agreement by adding a requirement that the appraiser use the rental value inserted in the lease by Mr. DiPiano years earlier when the parties entered into their lease. The judge also erred by adding a provision that a closing occur by June 2020 for credits to apply. The latter is not possible, as the parties did not enter into the settlement agreement/sale agreement until July 2022, and neither document includes such a contingency.

It would make no sense to include credits in a settlement agreement, in July 2022, if any right to credits expired in 2020. It is also contrary to the express terms of the settlement agreement. The settlement agreement explains how the pre-settlement lease required seller's Site Control Agreement with Nissan North America be removed as an encumbrance prior to closing. Pa344. Seller was paid $2,000,000 for the agreement with Nissan North America. Pa344. "In consideration" for purchasing property with an encumbrance, the settlement agreement provides that Richard will receive a $1,583,333.65 credit at closing. Pa344. The judge cannot remove this provision and, as noted, the judge relied on the wrong document because this issue, in the 2020 lease, was addressed in the 2022 settlement agreement.

The court "can only enforce the contracts which the parties themselves have made," Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960) (citation omitted), and cannot "make a better contract for [the] parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the other." James v. Fed. Ins. Co., 5 N.J. 21, 24 (1950) (citation omitted). The court cannot under the guise of interpretation change the agreement that made Mr. Mistichelli the final decision-maker. Kieffer, 205 N.J. at 223 (2011) (citation omitted).

Even if one were to query the parties' intent, notwithstanding employing the word "dispositive," Ms. DiBello, as counsel who authored the agreement, testified about contractual intent: "[B]oth sides were rolling the dice" and "whatever [Mr.

Mistichelli] came back with as the appraised value would be the final purchase price." 1T47-21 to -24. Even if his valuation is mistaken, they employed language to prevent future litigation, i.e., no ability of either to object. 1T131-6 to -10. Mr. Dobbs, as opposing counsel who co-authored the agreement did not refute Ms. DiBello's testimony about contractual intent.

Richard, as a party signing the agreement, testified about contractual intent: upon entering into the agreement, "That was it . . . .Whatever that number came, that was it." 3T110-10 to -15. Mr. DiPiano did not refute Richard's testimony. When given the opportunity to try to change what he agreed to, Mr. DiPiano instead said the language meant, "That a -- the purchase price would be determined doing an appraisal the correct way using the income approach and nearby recent sales." 6T57-13 to -19. The words "nearby recent sales" do not appear in the fully integrated agreement and, as noted, the appraisal was consistent with accepted standards.

Mr. DiPiano then shifted to say he does not "exactly understand" what "dispositive" means, though he the admitted it was explained to him by Mr. Dobbs. 6T57-20 to 58-8. "It is the general rule that where a party affixes his signature to a written instrument, . . . a conclusive presumption arises that he read, understood and assented to its terms and he will not be heard to complain that he did not comprehend the effect of his act in signing." Peter W. Kero, Inc. v. Terminal Const. Corp., 6 N.J.

361, 368 (1951). Here, too, absent a claim (and then finding) of ambiguity, the court's role was limited to enforcing the agreement as-is.

Another basis for reversal is the failure of the court below to follow this Court's decision in Cap City Products Co. v. Louriero, 332 N.J. Super. 499 (App. Div. 2000). "The decisional law of the Appellate Division is not only binding on our trial courts, but is an expression of the law of our State unless the New Jersey Supreme Court says otherwise." Gormley v. Wood-El, 218 N.J. 72, 114 (2014).

In Cap City, as here two contracting parties seeking a valuation of property (stock) inserted in their agreement, if they did not agree on the value, they would "mutually select a third party to value the stock and to arbitrate a binding settlement." Id. at 501. Here the parties employed equally clear language of their intent: a person to "determine the dispositive purchase price." Like here, one party disagreed with the valuation. Ibid. Like here, the court below believed an error occurred. Ibid.

This Court reversed, "We are satisfied that, whether . . . [the] determination be termed an arbitration award or the product of a settlement, the trial court erred by setting aside the determination because of an alleged 'error as to law.'" Id. at 502. This Court addressed the issue of whether labeling the determination a product of arbitration or an appraisal affects the outcome. Id. at 507-508. This Court found any distinction "unpersuasive" because the principle of Tretina Printing, Inc. v. Fitzpatrick & Assoc., Inc., 135 N.J. 349 (1994) "applies regardless of the

characterization used to describe the [arbitration's/appraiser's] function." Id. at 507. Tretina, in turn, "lays out a broad, strong policy" of strictly limiting the ability of a judge to interfere with the appraisal. Id. at 508.

"Further, the binding nature of the parties' agreement here rests also on a firmly settled, strong principle of New Jersey law apart from the Tretina doctrine. Our courts have said, time and again, that settlements are favored and will be enforced whenever voluntarily agreed to by the parties." Ibid. (citations omitted). "[W]hatever label may be applied to the agreement . . ., it is clear [the parties] agreed to be bound by the valuation performed [by their chosen arbitrator/appraiser]." Ibid.

> [While the objector] suggests [this Court] interpolate into that statement an implied contingency that the valuation by the "third party" will represent a "binding settlement" only if it is consistent with some later determination as to governing New Jersey law[,] [f]or the same reasons articulated in Tretina, [this Court] reject[s] that argument.
>
> [Id. at 509.]

Even more persuasive than the agreement in Cap City, Richard, his lawyer, Mr. DiPiano, and his lawyer, employed the word "dispositive." For the foregoing reasons, the decision of the court below to adopt a purchase price different than that of the parties' chosen appraiser should be reversed.

Similarly, the court erred in not including language in its decision that adopted the entirety of the settlement agreement. Richard assumed liability under Mr. DiPiano's Site Control Agreement with Nissan in exchange for a $1,583,333.65 site

control credit. Richard also paid rent through trial pursuant to a settlement agreement that provides for a $17,973.54 monthly rent credit at closing. With the case filed as one seeking specific performance of the settlement agreement and a declaratory judgment on the issue disputed at trial - the "dispositive purchase price" - prior to credits then being applied at closing, the decision below should have compelled a closing "pursuant to the settlement agreement, at a purchase price of $4,605,000.00, and inclusive of the remaining terms, including the site control and rent credits required at closing."

POINT II

THE COURT BELOW ERRED WHEN IT FAILED TO AWARD GARDEN STATE NISSAN FEES AS A PREVAILING PARTY FOR: (1) SECURING A PURCHASE; AND (2) SECURING THE PURCHASE AT A PRICE WELL BELOW WHAT KEVIN DIPIANO SOUGHT (Pa227-228).

The settlement agreement for the first lawsuit filed by GS Nissan included a provision to enable GS Nissan to recoup fees incurred, if again required to engage in litigation to enforce an agreement made by Mr. DiPiano. Rather than award fees pursuant to the "prevailing party" provision of the settlement agreement, the court made no fee award.

"Generally, a contract which permits an aggrieved party to recover fixed or 'reasonable' attorneys' fees as part of any damages is enforceable unless some larger public policy mandates a contrary result." Center Grove Associates v. Hoerr, 146 N.J. Super. 472, 474 (App. Div. 1977).

The settlement agreement provides,

> In any Enforcement Action [(defined as an action "upon a breach of this Agreement or to otherwise enforce a term or condition of this Agreement")], the prevailing Party shall be entitled to recover from the non-prevailing Party all reasonable attorney's fees, costs and any other expenses the prevailing Party incurred as a result [of] such Enforcement Action, in addition to any other relief to which the prevailing Party may be entitled or such court deems appropriate.

Here again the parties, through counsel, used unchallengeable language: the prevailing party "shall" be entitled to fees. The word "shall" means it is mandatory. State in the Interest of M.P., 479 N.J. Super. 492, 498 (App. Div. 2024). "[T]he phrase 'prevailing party' is a legal term of art that refers to a 'party in whose favor a judgment is rendered.'" Mason v. City of Hoboken, 196 N.J. 51, 72 (2008) (citation omitted)).

One need not obtain all relief sought, and is a prevailing party by simply securing a resolution that "affect[s] the defendant's behavior towards the prevailing plaintiff.'" Smith v. Hudson Cnty. Reg., 422 N.J. Super. 387, 394 (App. Div. 2011) (alteration in original; citation omitted)); see also N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 571 (1999) (a party is a prevailing party upon "the settling of some dispute that affected the behavior of the [party asked to pay attorneys' fees] towards the [party seeking attorneys' fees]") (alterations in original) (citation omitted). "'[T]he magnitude of the relief obtained is irrelevant'; an award of nominal damages is sufficient to constitute a party as prevailing." Village Supermarket, Inc., 328 N.J. Super. 410, 421 (App. Div. 2000).

GS Nissan accomplished what Mr. DiPiano tried to avoid since before the first lawsuit, which is a compelled sale of the property. His Answer seeks to avoid a sale and his Counterclaim similarly sought, among other things, declaratory judgment "that there is no longer an obligation to sell the Subject Property" and "nullification"

of the PSA. Pa252-253. Mr. DiPiano fought the sale to end. Not only did the court rule in GS Nissan's favor, but the court ordered a sale at an amount far closer to what GS Nissan sought than what Mr. DiPiano ever offered. Compare the court's purchase price of $5,905.210, which is challenged here as being impermissibly high, with Mr. DiPiano's pre-suit amount of $7,900,000.00 and his attempt at trial to secure a sale price of $8,015,000.

GS Nissan secured the primary relief sought, i.e., a sale, at an amount far below what Mr. DiPiano tried to compel GS Nissan to pay. The court-ordered amount, even as inflated, is considerably closer to the appraisal amount Mr. DiPiano agreed to accept as part of the settlement of the first lawsuit, $4,605,000.00, than the over-$8,000,000.00 he presented at trial.

It is the forced sale that makes GS Nissan the prevailing party independent of the amount of the sale:

> According to [Plaintiff], he "defeated" [Defendant] on 90% of his fraud and breach of fiduciary duty claims because [Defendant] only received 10% of his claimed damages. Such reasoning ignores the inescapable fact that while [Defendant] may not have prevailed to the full extent he felt entitled, he nevertheless prevailed. It is the determination of culpability, not the amount of damages, that determines who is the prevailing party. See Highland Constr. Co. v. Stevenson, 636 P.2d 1034, 1038 (Utah 1981) ("a party in whose favor an affirmative judgment is rendered, whether or not the judgment is for less than initially sought in the complaint, is the 'prevailing party'"). While a reduction in the amount claimed by a plaintiff may seem a moral and financial victory for a

> defendant, it does not make the defendant the "prevailing party" in terms of attorney fees.
>
> [Brown v. Richards, 840 P.2d 143, 155 (Utah Ct. App. 1992) (a persuasive decision due to its reasoning, even if not binding on this Court).

The court below observed Mr. DiPiano "refused to accept the sale price determined by Mistichelli on numerous grounds, including that the appraisal failed to comply with appraisal standards, failed to use the proper rent paid by Plaintiff, and that Plaintiff's counsel inappropriately interfered with the appraisal process by having ex parte communications with Mistichelli," all the reasons were debunked or shown to be immaterial at trial. Pa252-253. Per Mr. DiPiano's expert, Mr. Mistichelli did not fail to comply with any recognized standards. As for the rent, Mr. Mistichelli was not required to use "rent paid by Plaintiff" for his appraisal and there was no testimony the rent assessed by Mr. Mistichelli was not "proper rent" under any industry-accepted standard. As for the so-called ex parte communications, the court found there was no real ex parte communication and, had there been, it did not affect the appraisal. The court labeled the latter claim as being "without merit." Pa253.

GS Nissan, as the "prevailing party" that successfully compelled as sale, and a favorable price, even as improperly inflated by the court, is entitled to fees.

CONCLUSION

For the foregoing reasons, we respectfully request the decision below be reversed in part for a remand for:

(1) Entry of judgment that enforces the settlement agreement in its entirety including a purchase price of $4,605,000.00 and the agreed upon site control credit and rent credits at closing being due to Garden State Nissan/Route 23 Holdings; and

(2) Entry of judgment following consideration of an application for fees and costs pursuant to the prevailing-party provision of the settlement agreement.

Respectfully submitted,

/s/ Jeff Mandel

Jeffrey S. Mandel

Dated: December 13, 2024

GARDEN STATE NISSAN, INC. and 1567 ROUTE 23 HOLDINGS LLC, **Plaintiffs/Appellants** **v.** **1567 SOUTH REALTY LIMITED LIABILITY COMPANY,** **Defendant/Third-Party Plaintiff/Respondent/Cross-Appellant**	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **APPEAL DOCKET NO: A-3784-23** **CIVIL ACTION** **ON APPEAL FROM A FINAL JUDGMENT, SUPERIOR COURT OF NEW JERSEY, MORRIS COUNTY, CHANCERY DIVISION** **SAT BELOW: HON. FRANK J. DEANGELIS, P.J.CH.** **DATE SUBMITTED: June 10, 2025**
1567 SOUTH REALTY LIMITED LIABILITY COMPANY, **Defendant/Third-Party Plaintiff/Respondent/Cross-Appellant** **v.** **YURIY MIRGORODSKIY and RICHARD OSIASHVILI,** **Third-Party Defendants**	

DEFENDANT/THIRD-PARTY PLAINTIFF/RESPONDENT/CROSS-APPELLANT, 1567 SOUTH REALTY LIMITED LIABILITY COMPANY'S BRIEF

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PRELIMINARY STATEMENT

Plaintiffs/Cross-Respondents, Garden State Nissan, Inc. and 1527 Route 23 Holdings ("Plaintiffs") seek a reversal of the Trial Court's June 18, 2024 Order to Enter Judgment After Trial ("Trial Order") which granted specific performance and required Plaintiffs to purchase Respondent/Cross Appellant, 1567 South Realty Limited Liability Company ("Defendant")'s property ("Property") pursuant to a Confidential Settlement Agreement ("Settlement Agreement") and Real Estate Sale and Purchase Agreement ("REPA") at a purchase price of $5,904,210 with no closing credits. Plaintiffs ask this Court to compel Defendant to sell them the Property at a lower price with credits even though the Property was transferred. But Defendant already sold the Property to Plaintiffs at the Trial Court's determined purchase price over six months ago, and a new deed naming Plaintiffs as owners has been recorded.

Despite Plaintiffs' bald claims, the Trial Court did not "substitute its judgment" for that of the appraiser when deciding the purchase price. The Trial Court simply corrected the appraiser's misinterpretation of the plain and ordinary language in the Lease and REPA. It was up to the Trial Court—not the appraiser—to interpret and apply the contracts. Further, the Trial Court's determination that Plaintiffs were not entitled to a rent credit was supported by the REPA: Plaintiffs were only entitled to the credit if the closing occurred

within thirty (30) days, and the Trial Court correctly found that the closing did not occur within that time. The Trial Court properly exercised its equitable powers and grant specific performance compelling the sale with an abatement of the purchase price without credits.

To the extent that Plaintiffs ask this Court to award them a credit for assuming the Site Control Agreement ("Site Control Credit"), that request is improper. Plaintiffs never indicated that they were seeking a Site Control Credit in their Notice of Appeal and never properly raised the request during trial. After trial, Plaintiffs filed a motion to modify the Trial Order to include an award for a Site Control Credit, which the Trial Court denied. Plaintiffs never appealed that Order. Plaintiffs never sought to amend their Notice of Appeal to include that Order. Because the issue was never properly raised, the Trial Court never had a fair chance to consider it. The Site Control Credit request was waived. Plaintiffs are not entitled to the Site Control Credit since the conditions set forth by the Trial Court for the transfer were equitable.

Further, Plaintiffs never properly raised their request for attorney's fees at trial or thereafter. Nor was this issue included in their Notice of Appeal. Plaintiffs did not prevail at trial. They took the position throughout the litigation (and in their merits brief) that the appraiser's flawed report could not be corrected. Plaintiff was not the prevailing party.

The Court should also enter a reversal or remand on points raised in Defendant's cross appeal since any error only harmed Defendant. The Trial Court should have also held that the appraiser failed to follow the REPA's requirement since he failed to use "neighboring properties from January 1, 2018 to the present" as comparable sales, and he failed to consider only properties with "automotive use".

COUNTER STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. The background of the Subject Property.

Prior to the recent sale, Defendant was the fee simple owner of certain real property located at 1567 Route 23, Butler, NJ 07045 ("Property"). (Pa. 91 ¶ 4).[2] The Property consisted of a new car dealership, namely a Nissan dealership, which sold and serviced new and used automobiles. (Pa. 92 ¶ 6).

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[1] The "Statement of Facts" and "Procedural History" sections of Defendant's brief are represented together for the Court's convenience and to avoid repetition.

[2] "Pa" = Appellants/Cross-Respondent ("Plaintiffs")'s Appendix
"Ra" = Respondent/Cross-Appellant ("Defendant")'s Appendix.
"1T" = March 4, 2024 trial transcript
"2T" = March 5, 2024 trial transcript
"3T" = March 6, 2024 trial transcript
"4T" = March 13, 2024 trial transcript
"5T" = April 8, 2024 trial transcript
"6T" = April 9, 2024 trial transcript
"7T" = March 31, 2023 motion
"8T" = October 25, 2023 motion
"9T" = November 17, 2023 motion.

B. The parties negotiate the Lease (and eventual sale) of the Property.

In or around early or mid-2020, Yuriy Mirgorodskiy ("Mirgorodskiy") who was a member of Plaintiffs, approached Kevin DiPiano ("DiPiano"), Respondent's member, seeking to expand his business into the new car business. They asked for DiPiano's assistance and suggested that DiPiano lease them the Property. (Pa. 92 ¶ 7). Mirgorodskiy and Richard Osiashvili ("Osiashvili"), knew that Respondent had a mortgage on the Property which reflected a Property value of well over $8,000,000.00. (Pa. 92 ¶ 8).

Mirgorodskiy proposed that DiPiano help him and Osiashvili get into the new car dealership business by including an option to purchase the Property in the Lease. (Pa. 92 ¶ 8-10). DiPiano told Mirgorodskiy and Osiashvili that, to sell the Property, he would need a sale price of around $8,500,000.00. (Pa. 92-93 ¶ 11-12). Mirgorodskiy and Osiashvili acknowledged that the Property was worth around $8,500,000.00. (Pa. 93 ¶ 13).

Mirgorodskiy and Osiashvili further agreed that they would buy the Property for about $8,500,000.00, but wanted to get an appraisal for a more exact number which would be between $8,000,000.00 and $9,000,000.00. (Pa. 117 ¶ 60). They indicated that they would agree to any price within that range because they were not concerned with the sale price of the Property because they

wanted to purchase the business. (Ibid.) They were very concerned with convincing DiPiano to assist them in getting into the new car industry.

To further induce DiPiano, Mirgorodskiy promised DiPiano that they would use the Property to operate a lawful dealership. (Pa. 93 ¶ 18). At that time, DiPiano had no idea that Mirgorodskiy were the subject of a New Jersey Division of Consumer Affairs Investigation, several customer complaints and civil lawsuits alleging that Mirgorodskiy had defrauded customers at other dealerships. (Pa. 94-113 ¶ 22- 35). Had DiPiano known that information, he would have never entered into the Lease. (Pa. 137 ¶ 191).

C. The Lease and Plaintiffs' breaches of the Lease.

On June 15, 2020, Defendant entered a five-year lease with Mirgorodskiy which was assigned to Garden State Nissan, Inc. ("Lease"). (Pa. 306).

The base rent was Six Hundred Twenty-Seven Thousand One Hundred Twenty Dollars and 00/100 ($627,120.00), payable in equal consecutive monthly installments of Fifty-Two Thousand Two Hundred Sixty Dollars and 00/100 ($52,260.00). (Pa. 307 ¶ 2).

1567 South Realty learned of numerous breaches of the Lease on behalf of the Garden State Parties. For example, Paragraph 5 of the Lease indicated that Plaintiffs were not to "create or permit to be created or to remain, and will promptly discharge at its sole cost and expense, any liens caused to be levied

against the Premises by [Garden State Nissan, Inc.], including mechanics' or construction liens, ***encumbrances or other charges*** upon the Premises[.]" (Pa. 312 ¶ 5). Also, Paragraph 16 contained a subordination clause which prohibited the tenant (or its successors or assigns) from taking any action which interfered with Defendant's mortgage on the Property. (Pa. 326 ¶ 16). Contrary to those provisions, Plaintiffs filed a lis pendens while the Lease was still active, which caused Defendant to be unable to refinance its mortgage, forcing the mortgage into default. (Ra. 652-53).

Paragraph 4(b) of the Lease required Plaintiffs "at its sole cost and expense, [to] comply in all material respects with all laws, orders, ordinances and regulations of federal, state, county and municipal authorities (i.e., environmental, health, safety, fire, zoning and building) and with any direction made pursuant to law of any public officer or officers. (Pa. 310 ¶ 4(b)). Nevertheless, Plaintiffs violated numerous municipal ordinances resulting in a case against DiPiano. (Ra. 631-35 ¶ 28, 31). Plaintiffs further violated the lease by making significant changes to the Property without approval. (Ra. 2078 ¶ 30).

Also, even though Plaintiffs represented that they were going to use the Property to operate in a lawful manner, they improperly used the Property to

mislead, overcharge and defraud consumers. (Ra. 2071-2073 ¶'s 1-8; Pa. 309-310 ¶ 4 (requiring Plaintiffs' to use the Property in a "lawful manner")).

D. The Option to Purchase in the Lease.

Paragraph 22 of the Lease included the option to purchase. It stated that "[p]rovided LESSEE is not in default of any obligation hereunder, LESSEE is afforded the option of purchasing the Premises on the following terms and conditions." (Pa. 329, ¶ 22(c)). It further stated that, to determine the purchase price of the Property, the parties were to obtain appraisals and that the purchase price would be the average of the appraisals if they were within 10% of each other. (Ibid.) If the appraisals were not within 10%, then a 3rd appraisal would be obtained. (Ibid.). Garden State assigned its right to purchase the Property to 1527 Route 23 Holding, LLC ("Holdings"), which exercised the option. (Pa. 349). After the assignment, Holdings was under the same obligation as Garden State to refrain from engaging in any conduct which violated the Lease. (Pa. 317-318, ¶ 10(c), (d)).

E. The First Lawsuit Regarding the Purchase Price of the Property.

In accordance with the option, Defendant and Plaintiffs hired their own appraisers. Defendant's appraiser valued the Property at nearly $7,900,000, whereas Plaintiffs' appraiser valued the Property at $4,300,0000. (Pa. 342). Because the appraisals were outside of 10%, a third-party appraiser was

retained. However, that appraisal used a flawed method which resulted in steep discount and purchase price which did not reflect the Property's value. (Ibid.).

Holdings obtained financing from Nissan Motor Acceptance Company in the amount of $6,320,000. (4T22:14-25). Given the formula Nissan used to approval the financing, Holdings never would have obtained financing for over 6 million dollars unless there was a fourth appraisal (conducted by Nissan) valued the Property at over than $7,900,000. (Ra. 1440; Ra. 1455; 4T24:15-20). Plaintiffs refused to produce that fourth appraisal during discovery. (Ibid.).

Defendant became deeply concerned that the appraisers were using subjective and flawed appraisal methods to artificially reduce the price. (See Pa. 118-119 ¶'s 68-72). Plaintiffs filed a lawsuit ("first lawsuit") seeking to compel Defendant to sell the Property at a discount. (Pa. 1). However, they eventually entered into a new agreement. (Pa. 342; Pa. 349). The parties noted in the new agreement was "with respect to the sale of the subject motor vehicle" Property and that the Lease would remain in full effect. (Pa. 342; Pa. 349).

F. The Parties Enter Into the Settlement and REPA

Plaintiffs discontinued the first lawsuit and entered into the Confidential Settlement Agreement ("Settlement Agreement") and Real Estate Purchase and Sale Agreement ("REPA") which contained a formula for calculating the purchase price for the Property. (Pa. 342; Pa. 349).

In the REPA and Settlement Agreement, the parties agreed that they would appoint an appraiser, Dan Mistichelli ("Mistichelli"), and that he would follow the requirements in the Settlement Agreement. Also, ***neither party could be in breach of the Lease, REPA, or Settlement Agreements.*** Mistichelli was required to ***correctly follow the carefully negotiated appraisal method set forth in Paragraph 3(a) of the REPA***. (Pa. 344, ¶ 1(a); Pa.349-350, ¶ 3(a)). The parties agreed that there would be no arbitration provision in the REPA or Settlement Agreements, Plaintiffs' transactional attorney removed the arbitration provision and the parties agreed that Mistichelli was not intended to be an arbitrator. (1T97:15).

Under the appraisal method in the REPA, Mistichelli's appraisal was to:

> (i) be based upon an automotive use, and shall be the average of two appraisal methods, to wit: the Sales Comparison Approach using the sale of neighboring automobile dealerships since January 1, 2018, and the Capitalization of Income Approach, (ii) include a size description of the Land of 3.96 +/- acres and a gross building area of 17,910 square feet. Furthermore, the appraiser shall be provided with the Lease and this Agreement. The cost of the Appraisal has been or shall be paid by the Seller. The Purchase Price (as adjusted pursuant to this Agreement) shall be payable by Purchaser at Closing by wire transfer of immediately available federal funds to a bank account designated by a Seller in writing prior to the Closing.
>
> [Pa. 349-350, ¶ 3(a)) (emphases added).]

Paragraph 13(b)(ii) of the REPA ***limited Plaintiffs' damages*** in the event of an alleged default by the Seller (i.e. Defendant), requiring Plaintiffs to ***choose***

between either specific performance or liquidated damages: "(b)(ii) If Seller fails to cure a default after notice, Purchaser ***may either*** pursue a claim for specific performance ***or*** terminate this Agreement." (Pa. 356). Plaintiffs ***were not*** allowed to seek damages and specific performance. (Ibid.).

G. Mistichelli Fails to Follow the Appraisal Method in the REPA and Calculates an Artificially Discounted Price.

Prior to finalization of the appraisal report, Plaintiffs' transactional attorney had *ex parte* communications with Mistichelli regarding his appraisal method. (Pa. 124 ¶ 112). Thereafter, Mistichelli delivered an appraisal which completely disregarded the appraisal formula that he was obligated to follow pursuant to Paragraph 3(a) of the REPA. (Ra. 121- 124 ¶'s 86-112).

Defendant's transactional attorney, Seth Dobbs[3], notified Mistichelli and Plaintiffs' transactional attorney, Nicole Dibello, via email that Mistichelli's appraisal methodology was flawed and that his appraisal needed to be corrected to conform with the formula. (Pa 231-232). For example, to calculate the Property's purchase price under the Capitalization Approach, Mistichelli was supposed to consider the base rent in the Lease to determine whether the Lease's rent amount was in line with market rent. (Pa. 349-350; Pa. 235; Pa. 238; Pa.

[3] Plaintiffs try to insinuate that there was confusion regarding who Dobbs represented. That is simply untrue. Dobbs was retained to represent Defendant, and that Plaintiffs retained Nicole DiBello, Esq. (See e.g., Pa 229-230.)

262). Rather than taking the $52,260.00 rent in the Lease, Mistichelli improperly calculated the rent by subtracting the $52,260.00 rent amount by the inapplicable, contingent and temporary $17,973.54 closing credit which undervalued the Property by millions. (Pa. 261-262).

Mistichelli admitted there were inaccuracies in his report. (3T42:21-23). Mistichelli failed to follow the formula in the REPA. For example, Paragraph 3(a) of the REPA required Mistichelli to use "neighboring properties" as comps in his Comparative Sales Approach, but he used properties over 30 miles away. (Pa. 237; Pa. 349-350). In fact, Mistichelli could not even provide a clear definition of the term "neighboring properties." (1T166:7-167:19). Instead of using "neighboring properties," Mistichelli totally disregarded the REPA and looked for comparable sales beyond the Morris County area—some ranging as far as thirty miles away. (2T16:17-23; 2T88:7-17; 2T132:10-21). He also used sales in Warren and Passaic Counties. (2T16:17-23; 2T 46:9-8).

Paragraph 3(a) also required that Mistichelli search for comparable sales which were sold "from January 1, 2018 to the present," which he failed to do. (Pa. 349-350). Further, Mistichelli's appraisal was supposed be based upon an "automotive use" of the Property. (Ibid.). However, he used "mixed use" properties (i.e. properties which are not solely used as a car dealership) and used properties as comparable rentals in his Capitalization of Income Approach. (See

e.g., 2T 16:15-17:1; 3T 21:9 to 24:2). As a result, his appraisal did not reflect the Property's value. (Pa. 237-38).

Defendant tried to work with Plaintiffs to have Mistichelli correct his appraisal to conform with the REPA and Settlement Agreement. (Pa. 233-234; Ra. 507-540). Defendant's counsel sent emails and letters outlining the deficiencies and requesting correction. (Pa 394-400). However, Plaintiffs refused to make any corrections and took the position that even if the report is flawed, no party could seek to correct it. However, when a minor issue arose that would help Plaintiffs, they only agreed to change the report to lower the price. However, Plaintiffs continued to take the position that any corrections that resulted in a higher price could not be considered. (Ra. 517-519; Ra. 238). There was also another appraisal performed by Cushman & Wakefield which indicated that the Property was worth at least 8 million dollars. (Ra. 544).

H. The Underlying Lawsuit.

On August 9, 2022, Plaintiffs filed the Verified Complaint seeking following relief: (1) Specific Performance, (2) Breach of Contract, (3) Breach of Settlement Agreement (Pa. 42-3). Rather than terminating the REPA, Plaintiffs pursued specific performance and sought an Order "decreeing specific performance directing that [Defendant] convey to Route 123 Holdings, in performance of the [REPA], by good and sufficient deed, the Subject Property,

and that [Defendant] perform all other actions and duties necessary to fulfill its obligations under the" REPA." (Pa. 43). Recognizing that the REPA included an election of remedies provision, Plaintiffs noted in the breach of contract count that they were seeking "compensatory damages" ***only "in the event that the Court does not order specific performance of the contract."*** (Pa. 43 (emphasis added)).

Defendant filed a Verified Answer, Counterclaims and Third-Party Complaint asserting the following claims: (1) Declaratory Relief; (2) Breach of Contract and Specific Performance; (3) Breach of the Covenant of Good Faith and Fair Dealing; (4) Civil Conspiracy; (5) Fraud; (6) RICO and (7) Promissory Estoppel. (Pa. 80- 144).

Plaintiffs sought to proceed summarily, arguing that Mistichelli's flawed purchase price for the Property was "dispositive." The Trial Court and denied their motion. (Ra. 1). Plaintiffs sought reconsideration to proceed summarily, which was denied. (Ra. 32). Plaintiffs also moved to dismiss Defendant's amended counterclaims which was denied with the exception of RICO. (Ra. 49).

After Plaintiffs filed an improper *lis pendens*, Defendant filed a motion to allow Defendant to refinance its mortgage. (Ra. 78). In that motion, Defendant pointed out that Plaintiffs' Lis Pendens constituted a breach of the Lease. (Ra. 1749). The Trial Court entered an order directing the parties to meet and confer.

(Ra. 78). Despite that directive, Plaintiffs refuse to alter the Lis Pendens or allow Defendant to refinance. (Ra. 1767).

Defendant served subpoenas for documents and testimony upon Milton Goode and DOWC Administrative Services, as they were entities who have been aggrieved by Plaintiffs practices. (Ra. 1968-71). Defendant also served interrogatory requests and document demands. The testimony and documents sought were relevant to proving Defendant's fraud and breach of lease claims. (Ra. 1881-82 ¶6-10; Ra. 2008). Plaintiffs filed a motion to quash and refused to provide Defendant with discovery relating to its breach of the Lease and fraud counterclaims. (See e.g, Ra. 1882- 94).

Defendant filed a Motion to Compel to provide fulsome responses, depositions, and to enforce the subpoenas. (Ra. 1876). In two orders, the Trial Court partially granted and partially denied the Motions to Quash and Discovery. It limited Defendant's discovery requests (including the subpoenas, interrogatories and document demands) so that Defendant could obtain only documents and information from after the execution of the Settlement Agreement and REPA. (Ra. 82; Ra. 86). In effect, the Trial Court's Order barred Defendant from obtaining evidence relating to Defendant's fraud claims and breach of Lease claims. (See ibid.)

On March 1, 2024, without any additional briefing or arguments, the Trial Court *sua sponte* reconsidered its April 3, 2023 order and dismissed Defendant's fraud claims. (Ra. 2110). The Trial Court indicated that it "in light of information discovered throughout the discovery period and the litigation," it believed that Defendant's fraud claims could be disposed of on a motion to dismiss. (Ra. 2113). The Trial Court held that Defendants failed to show that Plaintiffs breached the lease by acting fraudulent with customers, despite the fact that Defendant pleaded that it was fraudulently induced into entering into the Lease and that it would never have entered into the agreement had it known that Plaintiffs would use the Property to defraud customers. (Ra. 2114-15; Pa. 135 ¶ 183). The Trial Court determined that the customer complaints "would not provide a basis to find that there was a breach of the [L]ease." (Ra. 2114-15).

I. The Trial and Entry of the Trial Order.

The Trial Court set a trial date for March 4, 2024, and entered a pre-trial order holding that "any issue not raised or addressed in the trial brief will be deemed abandoned and waived." (Ra. 2108 ¶ 10). Plaintiffs submitted their pre-trial brief but made no reference to a demand for a closing credit related to the Site Control Agreement.

The parties participated in a six-day non-jury trial in front of the Honorable Frank J. DeAngelis, J.S.C. (Pa. 227-28). Plaintiffs never raised their request for a Site Control Credit as part of their specific performance request.

At trial, Mistichelli stated that he calculated the base rent by using the Lease Agreement and the REPA, which stated the rent to be applied. (1T 170:4-20). He admitted to improperly applying closing credits up front and calculating an incorrect base rent of "roughly $35,000" after the $52,260 monthly rent was decreased by the $17,973.54 the inapplicable, contingent and temporary closing credit. (1T170:20-25; 1T171:9-10). Mistichelli conceded that the monthly rental price actually paid by Plaintiffs was not reduced by $17,973, but rather, they paid the full $52,260 per month, and that the credit was supposed to be given at closing only if certain preconditions were satisfied (which they were not). (1T179:7-180:2).

Mistichelli admitted that there were several inaccuracies in his report. (3T42:21-23; Pa238). For instance, Mistichelli ignored the requirement in the REPA that he use "neighboring properties" for comparable sales and that his appraisal be based on "automotive use". In fact, Mistichelli could not provide a clear definition of the term "neighboring properties". (1T166:7-167:19). Instead of looking for comparable sales which neighbored the Property (or were even close to the Property), he unilaterally decided to expand his search and looked

for sales outside of the Morris County area—some ranging as far as thirty miles away. (2T16:17-23; 2T88:7-17; 2T 132:10-21).

Even though the REPA required Mistichelli's appraisal to be based upon an "automotive use" (i.e. he was to conduct an appraisal with primary consideration of the Property's value if used to operate a new car dealership), Mistichellil ignored that requirement and selected used car dealerships and mixed-use properties. (2T16:15-17:1; 3T21:9-24:2).

Theodore Lamicella ("Lamicella") testified as the expert appraiser for Defendant. (4T42:1-10; 4T44:12-14). He reviewed the Misitchelli's report and determined that "the analysis on the subject of the lease was inaccurate or flawed" based on a reasonable degree of certainty in his field of expertise. (4T50:2-25). Lamicella stated that Mistichelli's calculation of a $35,000 per month rent amount was inappropriate because that was not the rent listed in the Lease, and the credit used to artificially decrease the rent amount was contingent, temporary and inapplicable. (4T53:12-54:14; 4T54:23-25).

In order to comply with the REPA, Mistichelli should have used comparable sales as close to the Property as possible. (4T55:16-21). Lamicella testified that new dealerships are more valuable than used dealerships. (4T56:13-57:13). Lamicella also opined that Mistichelli's appraisal adjustments were flawed based on his geographical range comparison. (4T70:13-73:25). For

those reasons, Lamicella maintained that the appraisal was flawed and did not accurately reflect the Property's value. (5T70:10-11).

Osiashvilli also testified. Defendant's Counsel sought to impeach Osiashvilli's credibility. (4T33:1-34:5). However, the Trial Court prohibited that line of questioning. (Ibid.)

DiPiano testified that he and Mirgordoskiy discussed acquiring the Property for approximately $8 million. (5T 98:1799:3). He explained that Mirgordoskiy did not disclose any consumer issues or investigations from the New Jersey Attorney General Division of Consumer Affairs or the NJMVC. (5T 99:9-18). If Mirgordoskiy had disclosed such information, DiPiano would not want to get involved in a leasehold with Mirgordoskiy. (5T 99:9-18). Regarding the option to purchase, DiPiano affirmed that the credit provided for in the lease was intended to be an incentive to close quickly. (5T 104:5-15). DiPiano explained that an expeditious closing is important in his business. (5T 104:17105:1).

DiPiano testified that Mistichelli was retained to do the appraisal pursuant to the REPA. (6T 8:2-8). DiPiano confirmed that neither of the parties were supposed to communicate with him to keep the appraisal fair. (6T 8:5-13). DiPiano explained that several of the properties used by Mistichelli in his appraisal were not comparable to the Property. (6T 10:1-16; 6T 17:1119:1).

Plaintiffs moved for a direct verdict with respect to the counterclaims. (6T 78:9-11; 6T 79:16-82:10; 6T87:16-97:12; 6T97:16-99:6, 6T100:180103:5). The Trial Court denied Plaintiffs' motion as to declaratory relief, breach of the implied covenant of good faith and fair dealing, fraud, and promissory estoppel. (6T83:18-84:15; 6T100:10-14; 6T111:3-16; 6T110:8-111:5). The Trial Court granted the motion for a directed verdict with respect to breach of contract (6T96:2-12).

Defendant moved for reconsideration/clarification regarding the Trial Court's Order granting directed verdict. (Ra. 2117). The Trial Court entered denied Defendant's motion for reconsideration, holding that Plaintiffs filing of the *lis pendens* did not violate the Lease (despite the language of the subordination clause and language preventing Plaintiffs from taking action to encumber the Property). (Pa. 225-226).

The Trial Court rendered its Order to Enter Judgment after Trial ("Trial Order"). (Ibid.). In that Order, the Trial Court dismissed Plaintiffs' claim for breach of contract. (Pa. 252-254). In doing so, it made a factual determination that Defendant had a good faith basis to object to Mistichelli's appraisal report based on his flawed appraisal method, and therefore, Defendant's refusal to close on the Property did not rise to the level of a breach. (Pa. 254). The Trial Court also dismissed Defendant's counterclaims.

With respect to the Specific Performance, the Trial Court reviewed the Lease and REPA Agreements and determined that Mistichelli erred when he misinterpreted those documents and used the inapplicable $17,973.54 closing credit in the REPA—which was to only apply in the event that the parties closed on the Property within 30 days—to artificially reduce the rent amount. (Pa. 259-262). It found that the Lease clearly stated that the "base rent was $52,260, and that by using the rent credit, Misitichelli improperly reduced the appraisal value" under the Capitalization Approach. (Pa. 262).

The Trial Court found that had Misitichelli used the correct base rent (i.e. $52,260), his price under the Capitalization Approach would have been $7,153,420. (Pa. 262). Mistichelli's further testified that he believed that his Comparable Sales Approach appraisal (i.e. $4,655,000) was unaffected by the failure to include the correct base rent but that figure was not based upon "neighboring properties." (Pa. 262).

Using Misitchelli's own calculations, the Trial Court took the Capitalization of Income Approach appraisal amount that Mistichelli testified that he would have reached had he used the correct base rent (i.e. $7,153,420) and averaged that number by Mistichelli's Comparable Sales Approach to reach a purchase price of $5,904,210. (Ibid.) The Trial Court held that neither party was entitled to a credit. (Ibid.).

The Trial Court entered an order granting the request for specific performance and "***ORDERED that Plaintiffs shall have forty-five days to complete the purchase of the Premises for $5,904,210[.]"*** (Pa. 228 (emphasis added)). Plaintiffs did not make any application for attorney's fees after trial.

Plaintiffs filed a Notice of Appeal of the Order to Enter Judgment after Trial, which was subsequently amended. (Pa. 267-70; Pa. 271-76). In their NOA and CIS, Plaintiffs only raise arguments "seeking to enforce the settlement" and relating to the Trial Court's calculation of the purchase price and specific performance award. They did not seek a reversal or remand of the Trial Order for a monetary award. (Ibid.). Defendant filed a cross appeal and CIS. (Pa. 277).

J. The Motion to "deposit the dispute purchase price into a court fund."

Plaintiffs filed a "Notice of Motion to Deposit Monies Into Court To Effectuate the Closing Of Title As Set Forth in Trial Order While Preserving Plaintiffs Rights on Appeal." (Pa. 264). On August 7, 2024, the Trial Court entered a decision and order ***denying Plaintiffs' motion in its entirety.*** (Pa. 283-94). In so doing, the Trial Court held that Plaintiffs' motion—which had many names including a motion for a "partial stay"—was an improper motion to modify the Trial Order. The Trial Court held that Plaintiffs had "filed a notice of appeal and thus, the Court no longer has jurisdiction to hear" Plaintiffs' motion. (Pa. 288-94). The Trial Court went on to note that, even if it did have

jurisdiction, Plaintiffs "did not provide sufficient evidence to demonstrate irreparable harm" for a stay. (Pa. 293). Nor did Plaintiffs demonstrate a likelihood of success on the merits of their appeal.

Plaintiffs never filed a Notice of Appeal of the Trial Court's Order, or sought to amend their current Notice of Appeal to include this order.

K. The Short Notice of Motion to Enforce the Trial Order.

On August 12, 2024, Plaintiffs filed yet another procedurally deficient post-judgment motion "to enforce"[4] the Trial Order. (Pa. 297-305).

On August 30, 2024, the Trial Court entered a Decision and Order ***denying*** Plaintiffs' "motion to enforce" and its request for additional credits in its entirety. (Decision). (Pa. 297). In so holding, it ruled that it lacked jurisdiction. (Pa. 304-305). Further, the Trial Court held that Plaintiffs never included their demand for a Site Control Credit before or after trial, and therefore, their request after a judgment was already entered was improper.

Plaintiffs' did not appeal the Trial Court's August 30, 2024 Order.

L. Defendant Sold the Property, and Title was Transferred to Plaintiffs.

While this appeal was pending, the sale moved forward. On September 17, 2024, Defendant delivered the deed to Property to Holdings.

[4] In reality, Plaintiffs' motion sought to modify the Trial Order.

STANDARD OF REVIEW

The scope of this Court's review of an order or judgment entered after a non-jury trial is limited. See e.g., Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011); see also Balducci v. Cige, 240 N.J. 574, 594-95 (2020) (same). "[I]n reviewing the factual findings and conclusions of a trial judge, [the Appellate Division is] obliged to accord deference to the trial court's credibility determination[s] and the judge's 'feel of the case' based upon his or her opportunity to see and hear the witnesses." N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J. Super. 81, 88 (App. Div. 2006) (quoting Cesare v. Cesare, 154 N.J. 394, 411–13 (1998)), certif. denied, 190 N.J. 257 (2007). "Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence," and "should not be disturbed unless . . . they are so wholly insupportable as to result in a [manifest] denial of justice." Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483–84 (1974).

"When deciding a purely legal issue, [this Court's] review is de novo." Kaye v. Rosefielde, 223 N.J. 218, 229 (2015) (quoting Fair Share Hous. Ctr., Inc. v. N.J. State League of Municipalities, 207 N.J. 489, 493 n.1 (2011)).

LEGAL ARGUMENT

POINT I: PLAINTIFFS' APPEAL SHOULD BE DISMISSED. (PA. 259-263).

A. The Trial Court properly held that Mistichelli misinterpreted the REPA, and calculated an incorrect purchase price. (Pa. 259- 263).

The Trial Court did not "substitute its judgment" for that of the appraiser—the Trial Court made a legal determination that Mistichelli misinterpreted the REPA and Lease Agreements. (App. Br. p. 37-50). See e.g., Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001). Mistichelli improperly calculated the rent by subtracting the $52,260.00 rent stated in the Lease by the inapplicable, contingent and temporary $17,973.54 closing credit in the REPA—which caused him to artificially reduce his Capitalization of Income Approach Appraisal and under value the Property. (Pa. 262; 1T 179:7180:2; 4T 53:1254:14; 4T 54:23-25).

Using Mistichelli's calculations, the Trial Court corrected Mistichelli's Capitalization Approach appraisal to include the rental amount in the contracts. The Trial Court had the authority to apply plain language of the agreements, see Matter of Est. of Jones, 477 N.J. Super. 203, (App. Div. 2023) (when interpreting a contract, the court must apply the plain language of the agreement), aff'd as modified, 259 N.J. 584(2025), and to interpret the meaning of those documents. See e.g., Liberty Bell Cap. II, L.P. v. Warren Hosp., No.

3:13-CV-4241-BRM-TJB, 2017 WL 4330359 (D.N.J. Sept. 29, 2017) (where the agreement "is clear and unambiguous, the Court may interpret [and apply] the contract as a matter of law"), aff'd, 748 F. App'x 463 (3d Cir. 2018); see also Wedgewood Gardens Condo. Ass'n, Inc. v. Wedgewood Gardens Devs., Inc., No. A-0699-23, 2025 WL 400761 (App. Div. Feb. 5, 2025) ("The interpretation of the [contractual] terms is to be 'decided by the court").

This Court's holding in Leach v. Princeton Surgiplex, LLC, No. A-6120-11T1, 2013 WL 2436045 at * 1-2 (App. Div. June 6, 2013) is instructive. In that case, this Court reversed the Trial Court's summary judgment award in favor of defendant which compelled the sale of plaintiff's ownership interest pursuant to the fair market value reached by the appraiser appointed in the operating agreement. See id. at *2-3. This Court held that the Trial Court was not precluded from evaluating whether the appraiser's method conformed with the contracts:

> we discern from plaintiff's arguments that he contends it would frustrate the purpose of the buy-out provisions to assume those provisions preclude any inquiry into the appraiser's methods, the information considered by the appraiser, the calculations made, or the conclusions drawn by the appraiser, even though the agreement does not contain any provisions for questioning of the appraisal. We agree. The operating agreement expressly designates the appraiser (or its substitute) and directs a determination of Surgiplex's fair market value. ***It cannot be seriously argued that the appraiser is entitled to determine fair market value by spinning a wheel or flipping a coin, or that the appraiser may consider less than all relevant evidence, or that no party could question a mathematical***

> ***error in the appraiser's calculations***. Implied in the operating agreement must be an understanding that the appraiser will utilize accepted professional norms and that a party to the operating agreement reserves the right to challenge the appraisal's results upon the appraiser's failure to conform to accepted standards.
>
> [Id. at * 2.]

The facts in this case are even stronger than Leach. The Court reasoned in Leach that a trial court can consider a party's challenge to a mathematical error in the appraiser's calculation even if the contract is silent on the issue. Ibid. Here, the REPA was not silent on the issue—it included an express contractual requirement that Mistichelli conduct a Capitalization Approach appraisal which was based upon the Lease and REPA and which conformed with an appraisal formula carefully negotiated by the parties. (Pa. 349-50 ¶ 3(a)). The Trial Court had the authority to apply the correct rent as stated in the Lease when Mistichelli failed to properly apply the Capitalization Approach and conform with the agreed-upon formula. (See e.g., Pa. 262; 1T 179:71 to 80:2).

Plaintiffs' argument that the Trial Court "added a non-existent term" to the contract documents by requiring Mistichelli use the rent amount stated in the Lease is nonsensical. (Opp. Br. p. 40). Paragraph 3(a) of the REPA expressly required that Misitichelli be provided with a copy of the Lease to be used in his appraisal calculations. In Plaintiffs' world, the REPA required that Mistichelli be provided with a copy of the Lease, only so he could completely disregard its

terms in his appraisal. (Pa. 349-50). Further, Paragraph 8(c)(i) of the REPA stated that the rent credit was "an adjustment at Closing." (Pa. 351, ¶ 8). It was not an adjustment to the Lease, and Misitchelli's belief that the credit reduced the entire rent for the five-year tenancy was not supported by a fair reading of the contracts.

Likewise, Plaintiffs cite to inapposite case law and trial testimony to absurdly argue that the "dispositive purchase price" language in the Settlement Agreement required the Trial Court to accept Mistichelli's flawed calculations no matter what. (App. Br. pg. 39, citing Wachovia Bank, N.A. v. Deutsche Bank Tr. Co. Americas, 397 F. Supp. 2d 698 (W.D.N.C. 2005) (inapposite case from the Western District of North Carolina cited in Plaintiffs' moving brief. The federal court considered the term "dispositive" to determine the types of cases which can be heard by magistrates. The case had nothing to do with the enforcement of an appraisal or settlement agreement); (App. Br. pg. 39, citing Mississippi Veterans Home Purchase Bd. v. State Farm Fire & Cas. Co., 492 F. Supp. 2d 579 (S.D. Miss. 2007) (inapposite case from the Southern District of Mississippi cited by Plaintiffs which considered the term "dispositive" to determine whether federal regulation resolved plaintiff's claim based on its interpretation of an insurance policy. The case had nothing to do with enforcement of an appraisal or settlement agreement); see also Sango Int'l, L.P.

v. United States, 484 F.3d 1371 (Fed. Cir. 2007) (inapposite federal district court case cited by Plaintiffs which had nothing to do with enforcing an appraisal agreement or settlement agreement); see also App. Br. pg. 38, 40-41 (Plaintiffs cherry pick irrelevant trial testimony from Ms. DiBello and Mr. Osiashvili's transcripts regarding the meaning of the term "dispositive." Regardless of what Ms. DiBello or Mr. Osiasvili's understanding of the term, it does not change that the parties included a formula for Mistichelli to follow, which he failed to do. Further, DiBello testified that the rent amount was $52,250 per month and the Trial Court held that Osiasvili's testimony regarding the rent credit was not credible).

In sum, Plaintiffs are impermissibly trying to use the "dispositive purchase price" reference to override the language in the REPA requiring Misitchelli to consider the Lease and apply the carefully negotiated appraisal formula. Their interpretation should be disregarded. See e.g., Cumberland Cnty. Imp. Auth. v. GSP Recycling Co., Inc., 358 N.J. Super. 484, 497 (App. Div. 2003) ("Additionally, the contract 'should not be interpreted to render one of its terms meaningless.'").

Further, Plaintiffs' reliance on this Court's decision in Cap City Prods. Co. v. Louriero, 332 N.J. Super. 499 (App. Div. 2000) is misplaced, as the parties did not appoint Mistichelli to act as an arbitrator. See also Tretina

Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 352 (1994) (inapposite case cited in Plaintiffs' brief where the Court applied a heightened standard of review to vacate an arbitration award). Here, the parties did not appoint Mistichelli as an arbitrator, and therefore, the Trial Court was entitled to consider whether his appraisal conformed with the parties' agreement.

In Cap City Prod. Co., the defendant, a shareholder of a closely held corporation, entered into an agreement with plaintiff in which he agreed to sell all of his stock in the corporation. Ibid. The parties executed a contract which explicitly noted that, if they could not agree on the value of the stock, they would "mutually select a third party to value the stock and to arbitrate a binding settlement." Id. at 502. Critically, nothing in the agreement in that case set forth a procedure that the arbitrator was required to follow as part of his valuation process, or otherwise restricted the arbitrator. Id. at 502, 509. Because the agreement did not prohibit the arbitrator from applying a marketability discount, the Court rejected defendant's argument that the calculations were flawed and refused to disturb the arbitrator's business valuation. Id. at 9.

Unlike Cap City, here, the parties removed dispute resolution from the REPA and Settlement Agreements. (See e.g., Pa. 234 (Dibello admits that dispute resolution was removed from contract)). Defendant never waived its right to a trial. The parties did not appoint Mistichelli to act as an arbitrator. (1T

94:5-15 (Dibelllo testifies that the provision requiring arbitration of a dispute was removed from REPA)). Further, the contract documents set forth a carefully negotiated formula which Mistichelli was required to follow, and the Trial Court properly determined that his purchase price calculation did not adequately reflect a price which conformed with the parties' agreements. See e.g., Adler Engineers, Inc. v. Dranoff Properties, Inc., No. 14-0921 (RBK/AMD), 2016 WL 528160, at * (D.N.J. Feb. 9, 2016) (rejecting defendant's citation to Cap City and denying summary judgment on cross claims which sought to force the sale of property based on an appraisal price that was reached by third-party appraiser. There was an issue of fact regarding whether the appraiser followed the requirements set forth in the contract which may support a breach claim).

Plaintiffs' argument that the Trial Court also erred by failing to provide them with the rent and Site Control credits is similarly meritless. For starters, Paragraphs 7 and 8(c) of the REPA granted Plaintiffs an entitlement to $17, 973.54 credit ***if the Closing occurred within thirty (30) days*** after execution of the REPA. (Pa. 22-23). That requirement was not satisfied. Further, the Trial Court made a factual determination after trial that Defendant was not culpable for the delay of the Closing. Rather, Defendant had a good faith basis to object to Mistichelli's appraisal as there were flaws with his calculations. The Trial Court correctly found that Defendant did not breach the contract documents. See

Rova Farms, 65 N.J. at 483-84 (In an appeal of a non-jury trial involving breach of contract, the judge's determination of whether a party's conduct constituted a breach is a fact determination, which is "binding on appeal" and should "not be disturbed unless . . . [it is] so wholly insupportable as to result in a denial of justice."); see also Mango v. Pierce-Coombs, 370 N.J. Super. 239, 557 (App. Div. 2004) ("Whether conduct constitutes a breach of contract and, if it does, whether the breach is material are ordinarily jury questions."). With respect to the Site Control Agreement, Plaintiffs concoct a new interpretation of the Settlement Agreement and REPA for the first time on appeal and claim based on that interpretation they should have received a $1,583,333.65 credit based on their assumption of the Site Control Agreement. (Pl. br. p. 48). But, Plaintiffs never properly raised the Site Control issue at trial and Defendant never had a fair chance to cross examine Plaintiffs' witnesses regarding the issue. Plaintiffs arguments relating to the Site Control Agreement are not properly before this Court.

Further, Plaintiffs seek to mischaracterize Defendant's expert (Ted Lamicella)'s testimony to suggest that Mistichelli's purchase price determination was proper. Mr. Lamicella ***never*** agreed with Mistichelli's purchase price determination. Rather, he testified that Mistichelli's failure to use the Lease's base rent was improper. (4T 50:2-25; 4T 53:12 to 54:14; 4T 54:23-

25). To the extent that Plaintiffs rely on Lamicella's testimony to argue that Mistichelli's appraisal did not violate any appraisal ethics, that argument also misses the mark. The Trial Court adjusted Mistichelli's purchase price calculation was because he misinterpreted the REPA and Lease and included an improper credit—not because it violated appraisal ethics. The Trial Court had the authority to interpret the contracts. Accordingly, Plaintiffs' arguments that Mistichelli did not violate any industry standard is of no moment.

Also, the Trial Court properly exercised its equitable powers to adjust Mistichelli's flawed rent calculation to conform with the REPA and Lease. (Pa. 259- 263); Friendship Manor, Inc. v. Greiman, 224 N.J. Super 104, 113 (App. Div. 1990) (Specific performance is a discretionary remedy "resting on equitable principles and requiring the Court to appraise the respective conduct and the situation of the parties."); Graziano v. Grant, 326 N.J. 328, 342 (App. Div. 1999) ("[A] judge sitting in a court of equity has a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with principles of fairness, justice, and the law."); Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 599 (App. Div. 2005) (with respect to specific performance, the court must "do more than merely determine whether the contract is valid and enforceable; [it] must also 'appraise the respective conduct and situation of the parties'").

Here, the Trial Court had the authority to exercise its equitable powers to enter a specific performance award which adjusted Mistichelli's purchase price to include the correct rent amount. See Guaclides v. Kruse, 67 N.J. Super. 348, 360 (App. Div. 1961) ("specific performance with an abatement is a common remedy in equity"); Lydon v. PCAM Assocs., Inc., No. A-2914-14T1, 2015 WL 3948837 (App. Div. June 30, 2015) ("Specific performance with an abatement of price is an established remedy, one which may be particularly appropriate here because construction has already been completed."); see also Koppel v. Olaf Realty Corp., 56 N.J. Super. 109, 120 (Ch. Div. 1959) ("It has been repeatedly held in this State that there may be a specific performance of a contract involving the building and sale of a house, with an abatement of the purchase price for uncomplete or improper workmanship in the building by the builder."), aff'd. 62 N.J. Super. 103 (App. Div. 1960).

B. Plaintiffs' appeal is based upon harmless error. (Pa. 259-263).

Rule 2:10-2 provides that "[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result[.]" See also State v. Jackson, 243 N.J. 52, 73 (2020) (harmless error requires courts to determine whether the "error [was] 'sufficient to raise a reasonable doubt as to whether [it] led the [finder of fact] to a result it otherwise might not have reached.'" (alteration in original) (quoting

State v. Prall, 231 N.J. 567, 581 (2018))); Jersey Shore Beach & Boardwalk Co., Inc. v. Borough of Keansburg, No. A-0621-23, 2024 WL 5049239 (App. Div. Dec. 10, 2024) (holding that trial judge's mention of inapplicable statutes in his decision after a non-jury trial was harmless error as his it did not cause an unjust result).

Here, Plaintiffs spill much ink arguing that the Trial Order should be reversed because they believe the Trial Court failed to follow the parties' agreements. (App. Br. pgs. 37-50). However, that alleged error is harmless. For example, the Trial Court should have found that Paragraph 3(a) of the REPA required Mistichelli to use "neighboring properties" in his Comparative Sales Approach appraisal and his failure to do so was a breach of the REPA. (See Pa. 349-350; Pa. 252-263; 1T 166:5 167:19 (Misitchelli admits that he did not use properties adjacent to the Property at issue when conducting appraisal)). Likewise, the Trial Court also disregarded the requirement in Paragraph 3(a) that Mistichelli search for comparable sales which were sold "from January 1, 2018 to the present." (Pa. 252-263; 2T 130:1 to 24 (Mistichelli testifies that he did not look all the way back from 2018 for neighboring properties as required under the REPA). Further, the Trial Court disregarded the requirement that Mistichelli's appraisal be based upon an "automotive use" of the Property, and used comparable rentals in his Capitalization of Income Approach which did not

accurately reflect the value of the Property with primary consideration to its use as a new car dealership. (Pa. 252-263; 5T 62:22 to 63:6). In sum, Plaintiffs arguments should be dismissed pursuant to R. 2:10-2, as the error that is alleged is harmless.

C. Plaintiffs' argument relating to the Site Control credit was not properly raised below.

"It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal goes to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)).

Here, the Trial Court already held in another Order (which was not appealed by Plaintiffs) that Plaintiffs never properly requested a Site Control Credit as part of the Specific Performance Count, (Pa. 305 ("In any event, as the Court previously noted, the issue of Site Control Credit was not introduced at trial or in the parties' post-trial briefs and thus there is no basis for Plaintiffs' request for purchase price include any Site Control Credit").

Plaintiffs did not make any argument relating to a Site Control Credit in their summary judgment motions (or in their litany of motions for

reconsideration). There were only passing references to the Site Control Credit in the trial testimony. (Ibid.) Nor did they indicate in their Notice of Appeal of Case Information Statement that they were raising an argument relating to the Site Control Credit. (Pa. 267-276). In short, Plaintiffs request that a Site Control Credit be included as part of purchase price was not raised below, or on appeal and this Court should decline to consider it. In fact, the only time Plaintiffs referenced a Site Control Credit was in a post-judgment motion after the June 18, 2024 Trial Order was entered. (Pa. 305). The Trial Court denied Plaintiffs' request for a Site Control Credit (which Plaintiffs did not appeal).

Further, Plaintiffs sought specific performance and had the burden to articulate the exact performance they were seeking. Plaintiffs' failure to articulate their request for a Site Control Credit is a waiver. A plaintiff seeking specific performance is required to specify (in detail) the exact nature of the relief requested. See e.g., Kane v. Franklin Twp., No. A-3707-20, 2022 WL 2713199 (App. Div. July 13, 2022) (dismissing plaintiff's claim for specific performance because the nature of the equitable relief requested was not clear); Garces v. Sousa, No. A-3946-21, 2023 WL 7289226 (App. Div. Nov. 6, 2023) (declining to grant plaintiff's application for specific performance to enforce purchase option because relief was not clear).

Our courts will not grant "general requests" for specific performance which do not detail or fairly apprise the court or defendants of the relief being demanded. See e.g., Kane, 2022 WL 2713199 at *3; see Moore v. Galupo, 65 N.J. Eq. 194, 194 (Ch. 1903) (declining to grant specific performance for sale of property because the contract and requested relief were too vague); Alnor Construction Co. v. Herchet, 10 N.J. 246, 246 (1952) (the property description was so inadequate that the Court could not determine what land was to be conveyed); Malaker Corp. v. First Jersey Nat'l Bank, 163 N.J. Super. 463, 463 (App. Div. 1979) (denying plaintiffs' specific performance because several aspects of the request, such as the terms of the loan, rate of interest, repayment provision and duration, were unknown and were not clear), certif. den., 79 N.J. 488 (1979). In other words, any relief which has not been specifically requested by the plaintiff is deemed to be waived. See Naugle v. Baumann, 97 N.J. Eq. 118, 122 (Ch. 1925) (holding that purchaser waived his right to specific performance because he continued prosecuting his claim without raising the request); see also Kane, 2022 WL 2713199, at *3 (holding same).

Because Plaintiffs did not timely seek the Site Control credit, Defendant never had a fair opportunity to develop the record. Had Plaintiffs properly raised the Site Control Credit issue below, Defendant could have explored the issue at trial and asked questions relating to whether Plaintiffs' experts incorporated a

site control credit as part of their comparable sales analysis. If Plaintiffs experts failed to include this analysis as part of their comparable sales, then their comparisons would have been unfairly lowered. Moreover, there is nothing to suggest that Site Control Credits were not present on the properties used for comparison. Plaintiffs' request for a reversal regarding the Site Control Credit should be rejected as it was not properly raised below.

D. Plaintiffs' application for attorney's fees was not properly raised below and should be disregarded on appeal. (Not Raised Below).

Plaintiffs never made an application for attorney's fees pursuant to the REPA at any point after trial. The parties never had an opportunity to brief the "prevailing party" issue after the Trial Order was entered or to submit case law to the Trial Court regarding which party had "prevailed" after the proceedings.

As such, this Court should decline to consider the argument on appeal. See e.g., Cooper Med. Ctr. v. Johnson, 208 N.J. Super. 38, 39 (App. Div. 1986) (declining to consider plaintiff's argument that defendant was constitutionally mandated to provide payment because "[t]he trial judge was not asked to determine that issue since the point was not briefed there. Accordingly, we need not and will not consider it here."); Singh v. Sidana, No. A-1443-07T2, 2009 WL 4793808, at * 2 (App. Div. Dec. 15, 2009) (refusing to consider defendant's argument that plaintiff's debt collection efforts violated the Federal Fair Debt Collections act because the "argument was not briefed in the trial court."); see

also Am. Delta Techs., Inc. v. RK Elec. Info. Concepts, 276 N.J. Super. 283, 285 n.2 (App. Div. 1994) (declining to consider defendant's challenge to the prevailing party fee award because the issue was not included in their notice of appeal (citing Matter of Bloomingdale Convalescent Center, 233 N.J. Super. 46, 48 n.1 (App. Div. 1989)).

Plaintiffs never included their request for fees in their Notice of Appeal. (Pa. 267-271). As such, this Court should not consider the argument. See e.g., Haber, 2013 WL 6122596, at *1 (noting that arguments which were not included in the Plaintiffs' notice of appeal were not properly before the Court).

E. Plaintiffs did not "prevail" at trial, and therefore, they are not entitled to attorney's fees. (Not Raised Below).

"In general, New Jersey disfavors the shifting of attorneys' fees." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 373 (2009) (citing N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999)). However, "a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." Ibid. (quoting Packard–Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 440 (2001)). "When the fee-shifting is controlled by a contractual provision, the provision should be strictly construed in light of our general policy disfavoring the award of attorneys' fees." Ibid. (citations omitted).

To determine whether a party has "prevailed" for purposes of a contractual fee shifting provision, our courts apply a two-prong test. First, "the litigant seeking fees [must] establish that the 'lawsuit was causally related to securing the relief obtained; a fee award is [only] justified if [the party's] efforts are a 'necessary and important' factor in obtaining the relief.'" Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 445 (2001) (quoting Singer v. State, 95 N.J. 487, 494 (1984)). In other words, there must be a factual nexus between the pleading and the relief recovered. North Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999).

Second, the party seeking fees must prove that "the relief granted has some basis in law." Id. at 445 (internal quotations omitted). "The party seeking fees need not obtain all relief sought, but there must be a resolution of some dispute that affected the defendant's behavior towards the prevailing plaintiff." Ibid.

Here, Plaintiffs did not prevail on all their claims, nor did they procure all the relief they sought. First, Plaintiffs lawsuit was not casually related to the relief obtained at trial—the sale of the Property. Both Plaintiffs and Defendant sought specific performance for the sale of the Property. The only difference was that Defendant sought a specific performance sale order requiring Plaintiffs to comply with the appraisal formula in Paragraph 3(a) of the REPA (which it

received), while Plaintiffs took the position that Mistichelli's sales price was "dispositive" (which was not the case). (Pa. 42-43 (Plaintiffs' Complaint seeking specific performance; Pa. 129-130 (Defendants' Counterclaim seeking specific performance for sale of the Property pursuant to the terms outlined in Paragraph 3(a) of the REPA)). In other words, both parties sought a sale in their pleadings and Plaintiffs' actions did not "cause" the Trial Court to issue the Trial Order.

Second, Plaintiffs failed to obtain the specific performance relief they were seeking—an order compelling sale of the Property at Mistichelli's flawed purchase price of $4,605,000.00. Plaintiffs repeatedly took the position that Misitichelli's purchase price calculation was "dispositive" in at least two motions to proceed summarily, two motions for summary judgment and motions for reconsideration. (Ra. 1; Ra. 32; Ra. 49). They lost that argument every time. At trial, the Trial Court held that not only was Misitchelli's purchase price not dispositive, but also that he failed to properly interpret the contract documents and that his calculation needed to be adjusted. Further, the Trial Court denied Plaintiffs' demand for a closing credit, and their improper eleventh-hour request for a Site Control Credit. Also, Plaintiffs filed multiple motions throughout the case which were denied. At the end of the day, Plaintiffs cannot be considered prevailing parties and are not entitled to fees.

Plaintiffs misquote the Trial Court's decision and declare that DiPiano refused to accept the sale price determined by Mistichelli on numerous grounds, and that all of those grounds were debunked at trial. (Pl. Br. p. 49). That is simply not true. Mistichelli failed to include the correct rent amount in his Capitalization of Income appraisal, and as a result, reached a flawed purchase price. (Ra. 507-510 (Email objection from DiPiano's transactional attorney objecting to Mistichelli's flawed appraisal based on improper inclusion of rent credit to adjust entire rent amount in the Lease)). The record demonstrates that, in several emails, Plaintiffs refused to correct mistakes in the appraisal report and therefore they refused to close on the property. The Trial Court agreed with DiPiano and altered the rent amount to accurately reflect the parties' agreement. (Pa. 259-263).

Plaintiffs' arguments relating to the *ex parte* communications and Mr. Lamicella's trial testimony are irrelevant. Those citations do not change the fact that the Trial Court refused to award them specific performance and force a sale at their flawed price calculation. Similarly, Plaintiffs' claim that they are a prevailing party because the purchase price was lower than the appraisals offered at trial is a total misdirection. At bottom, the Trial Court's purchase price was nearly two million dollars ***higher*** than the price Plaintiffs have been seeking to force.

Plaintiffs are trying to rewrite history to cover their losses. They did not prevail at trial, and this Court should disregard their attempt to obtain fees for the first time on appeal and their demand for fees was waived after the Property was sold.

F. Plaintiffs' demand for a new purchase price and sales terms is barred under the doctrine of merger (Not Raised Below).

Plaintiffs cannot obtain a new sales price pursuant to the Settlement Agreement or REPA as those documents have now merged with the new deed. The parties' rights are governed by the deed, not the REPA or Settlement Agreements and Plaintiffs cannot demand a new purchase price or additional credits. "[I]n real estate transactions, all warranties and representations made in connection with a sale, unless specifically reserved to hold over after the passage of title, are merged into the deed." See e.g., Andreychak v. Lent, 257 N.J. Super. 69, 72 (App. Div. 1992). "[T]he acceptance of a deed by the purchaser from the vendor terminates the contractual relationship between the parties, and their respective rights and liabilities are thereafter determined ***solely by the deed and not by the contract of sale*** [which is the] . . . prevailing law throughout the country." Ibid. (emphasis added) (quoting Levy v. C. Young Construction Co., Inc., 46 N.J. Super. 293, 296 (App. Div. 1957), rev'd on other grounds, 26 N.J. 330 (1958)).

"'[T]he acceptance of a deed for lands is to be deemed *prima facie* full execution of an executory contract to convey, unless the contract contains a covenant collateral to the deed.'" Ibid. (quoting Caparrelli v. Rolling Greens, Inc., 39 N.J. 585, 590-91 (1963)). To determine whether a covenant is collateral, "[i]t is the intention of the parties which is to be given effect, as the doctrine of merger is simply a rule of presumed intention." Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134, 143 (App. Div. 1960).

The Court's holding in Zaken v. Camden Gateway, LLC, No. A-4913-09T1, 2011 WL 4974768 (App. Div. Oct. 20, 2011) is instructive. In that case, the plaintiff-appellant entered into a purchase agreement with defendant-respondent for the sale of a building in an "as is condition." The purchase agreement included a requirement that the defendant keep the property in the same condition that it was on the day of the execution of the purchase agreement, but also stated that conditions in the purchase agreement could be deemed waived by plaintiff after closing. Id. at *1. That agreement included a selection of remedies clause which stated that, in the event of a breach of the agreement by defendant, plaintiff could either (i) terminate the contract and seek damages, (ii) delay the Closing by no more than 90 days, or (iii) accept the Property in its condition and proceed with the sale. Ibid.

After the building's condition deteriorated prior to the sale due to multiple vandalisms, the plaintiff sued defendant for breach of the purchase agreement and sought specific performance compelling the sale of the property and a monetary award to repair the vandalism damage. Id. at * 1-2. The trial court ordered that the sale of the property occur within 30 days, or that plaintiff make a decision pursuant the purchase agreement regarding which remedy he would pursue. The trial court also denied plaintiff's application to be relieved from the real estate doctrine of merger. Ibid. Plaintiff elected to proceed with the sale of the Property.

On appeal, this Court upheld the trial court's order and held that "[b]y choosing [to move forward with the sale], plaintiff waived all conditions to closing and any other obligation defendant may have had under the contract and purchased the property 'as is.'" Id. at *3-4. The Court held that the doctrine of merger applied:

> Except for plaintiff's right to payment or an assignment of defendant's insurance proceeds, the contract contained no collateral provisions, and no conditions that the parties intended to survive the closing. Plaintiff waived all conditions to closing and purchased the property "as is." ***His acceptance of the deed and the [proceeds paid out by the insurance carrier] terminated the parties' rights and obligations under the contract.***
>
> [Id. at *3-4 (emphasis added).].

Here, Paragraph 6 of the REPA stated that Plaintiffs were accepting the Property in an "as is" condition and that Defendant "does not make any promises about the condition ***or value of the Property*** included in this sale[.]" (Pa. 351 ¶ 6). The REPA indicates that only representations and warranties which would survive closing in Paragraphs 10-12—none of which provided Plaintiffs with the right to pursue a claim for credits or a change to the purchase price after closing. (Pa. 353-355, ¶ 10-12). In fact, Plaintiffs knew that by proceeding with the closing after Trial, they were accepting the $5,904,210 purchase price (with no closing credits) given the Trial Court ***denied*** their motion to require the deposit of the disputed portion of the price in an escrow fund and ***no appeal was taken.*** (Pa. 283-294; Pa. 297-305). If Plaintiffs wanted to contest the purchase price, they should have sought a full stay of the sale at the Trial Court or Appellate Division, R. 2:9-1(a), or terminated the REPA and seek liquidated damages. (Pa. 355-356, ¶ 13(b)(ii)).

At this point, the REPA and Settlement Agreements have merged with the new Deed. They no longer exist. Plaintiffs cannot seek to enforce contracts which no longer exist and their argument to the contrary is meritless. If Plaintiffs wanted to challenge the Trial Court's purchase price, they should have sought a full stay of the Trial Order. Instead, they decided to move forward with the sale at the purchase price determined by the Trial Court.

POINT II: THE COURT SHOULD ORDER A REVERSAL OR REMAND ON THE ISSUES RAISED IN THE DEFENDANT'S CROSS APPEAL. (PA. 277-281).

A. The Trial Court erred when it disregarded the requirements in Paragraph 1(a) of the REPA that Mistichelli use "neighboring properties" in his Comparable Sales Approach appraisal, that his appraisal be based upon an "automotive use" and that he search for comparable sales from "January 1, 2018 to the present." (Pa. 259-263).

The Trial Court's interpretation of the REPA presents a legal question, which is reviewed under a de novo standard. See Matter of Cnty. of Atl., 230 N.J. 237, 255 (2017) ("[T]he interpretation of a contract is subject to de novo review by an appellate court." (quoting Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011)).

Any error made by the Trial Court harmed Defendant and not Plaintiffs. For instance, paragraph 3(a) of the REPA required that Mistichelli's appraisal be based off of "the Sales Comparison Approach using the sale of neighboring automobile dealerships since January 1, 2018[.]" (Pa. 20-21 ¶ 3 (emphasis added)); see also 1T 92:3-6 (Plaintiffs' transactional attorney testifies at trial that the REPA required Mistichelli to base his appraisal on "neighboring properties"); 5T 8:2-23 (DiPiano testifies at trial that neighboring properties provision in REPA was important part of appraisal agreement); see also 1T 92:3-6)). However, Mistichelli testified that he unilaterally concluded that the term neighboring was "inappropriately used" in the REPA, and as such, he did not

only use "neighboring properties" in his Sales Comparison appraisal. (1T 167:4-14).

In disregard of the REPA, Mistichelli decided that he had to go beyond the immediate adjacent properties to find comparable sales. (2T 134:12- 16). As a result, Mistichelli admitted that comparable sales one, two, three, four, and six in his Sale Comparison appraisal were not "neighboring properties," but he still used those properties and just made adjustments for location instead. (2T 130:1-3). Critically, he used properties which were over 30 miles away. (2T 88:3-17). Had Mistichelli used properties significantly closer in proximity (i.e. closest to neighboring the Property as possible) the Comparable Sales approach would result in market values which was $308.00 per square foot or $6,286,400 (without adjustments). (See Pa. 551-561).

At bottom, the Trial Court erred and should have found that Mistichelli's failure to use "neighboring properties" in his Sales Comparison appraisal constituted a breach of Paragraph 3(a) of the REPA.

The Trial Court incorrectly concluded that both appraisers were unable to find "neighboring properties," and therefore, it excused Mistichelli's failure to use properties in the surrounding area as comparable sales. (Pa. 250). For starters, Defendant's appraiser was able to locate comparable sales which were much closer to the Property than the sales used by Mistichelli. (See Pa. 551-

561). However, even assuming *arguendo* that there were no "neighboring properties" to use as comps, the Trial Court should have then refused to enforce the REPA or order a sale of the Property under the doctrine of impossibility. See e.g., Capparelli v. Lopatin, 459 N.J. Super. 584, 606 (App Div. 2019) (the doctrines of impossibility or frustration of purpose "apply to certain situations in which a party's obligations under a contract can be excused or mitigated because of the occurrence of a supervening event. The supervening event must be one that had not been anticipated at the time the contract was created, and one that fundamentally alters the nature of the parties' ongoing relationship." The event makes performance under the contract impossible, or defeats the purpose of the agreement. (quoting JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass'n, 431 N.J. Super. 233, 245 (App. Div. 2013)). It is inappropriate to refuse to enforce the language in the agreement or re-write the agreement.

Likewise, Paragraph 3(a) also required that Mistichelli's appraisal be based off of an "automotive use." (Pa. 349-350 ¶ 3). In other words, he was supposed to value the Property primarily considering its potential use as a new car dealership.

At trial, Defendant introduced evidence that Mistichelli failed to follow the automotive use provision. (5T 62:22 to 63:6 (testimony from Defendant's

expert that used car dealership leases do not accurately reflect the Property's automotive use); 4T 56:6 to 57:12 (testimony from Defendant's expert that new car dealerships are more valuable than used car dealership. Given the foregoing, to reach a proper automotive use of the Property, new dealerships should be used); 3T 16:15 to 17:1 (testimony from Mistichelli admitting that he had used car dealerships as comparable leases to value the Property); see also 5T 110:15 to 111:19; 6T 62:22 to 63:6; 4T 56:6 to 57:12; 5T 110:15 to 111:19). For example, even though the Property is only being used as a new car dealership, Mistichelli admitted that he used leases for "mixed use" properties (i.e. properties which are not solely being used as car dealerships, but may also include other uses such as a car wash, service center, etc.) to determine comparable rental data to the Lease and calculate the purchase price under the Capitalization of Income Approach. (Pa. 349-350; 2T 21:15 to 22:8).

Likewise, two out of the three properties that Mistichelli used to calculate comparable rental data were also used car dealerships, which do not adequately reflect the automotive use of the Property (i.e. which is operating as a new dealership). (Pa. 401). New car dealerships are unique from used dealerships and are used differently. They have lower vacancy rates than used dealerships and are more valuable. (5T 62:22 to 63:6; 4T 56:6 to 57:12; 3T 16:15 to 17:1). As a result of Mistichelli's failure to base his appraisal off of an "automotive

use," his purchase price was artificially reduced. (3 T21:9 to 24:4; 4T 61:4 to 23; 4T 62:14 to 64:8). His failure to base his appraisal off an "automotive use" was a breach of the REPA. In short, the Trial Court erred when it failed to analyze whether Mistichelli's appraisal violated the "automotive use" requirement in Paragraph 3(a).

Further, Mistichelli completely disregarded the REPA's requirement that he look "since January 1, 2018" to find neighboring properties to use as comparable sales. (2T 130:1–24). Again, the Trial Court's failure to even analyze whether this action constituted a breach of the REPA is reversible error which warrants a reversal or remand on that issue.

It is also worth noting that the Trial Court incorrectly relied on a mischaracterization of Lamicella's testimony to conclude that Mistichelli's appraisal should be upheld because the Trial Court did not believe that his appraisal violated any industry standards. (see Pa. 247; Pa. 262). However, the Trial Court's reasoning on that issue missed the mark. --- i.e. regardless of whether the Trial Court believed the appraisal was in line with industry standards (which Defendant disputes), it does not change that Mistichelli's appraisal did not comply with the "neighboring property," "automotive use" and temporal requirements of Paragraph 3(a) of the REPA. (See Pa. 349-351 ¶ 3).

Mistichelli's failure to follow these provisions was critical because the parties had previously used different appraisers to calculate the value of the Property, and disputed the methodologies used by those individuals. The parties carefully negotiated an appraisal process that Mistichelli was required to follow. (see Pa. 118-119 ¶'s 68-72). The Trial Court should have held that Mistichelli's failure to follow the "neighboring property," "automotive use" and temporal requirements in Paragraph 3(a) resulted in an appraisal which was flawed and breached the Settlement Agreement and REPA.

B. The Trial Court erred when it improperly dismissed Defendant's counterclaims. (Pa. 259-263; Pa. 215-216; 6T96:2-12).

i. Breach of Contract (Pa. 259-263; Pa. 215-216; 6T96:2-12).

The Trial Court incorrectly granted Plaintiffs' directed verdict motion and dismissed Defendant's breach of contract claim based off Plaintiffs' multiple breaches of the Lease. This Court applies the "same standard that governs the trial courts" when reviewing a motion for a directed verdict. Vitale v. Schering-Plough Corp., 447 N.J. Super. 98, 119 n. 33 (App. Div. 2016), aff'd as modified, 231 N.J. 234 (2017).

Pursuant to "Rule 4:40-1, a party may make a motion for a directed verdict 'either at the close of all the evidence or at the close of the evidence offered by an opponent.'" Ibid. (citations omitted). A motion for directed verdict must be denied if, "accepting as true all the evidence which supports the position of the

party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom reasonable minds could differ." Potente v. Cty. of Hudson, 187 N.J. 103, 111 (2006) (quoting Monaco v. Hartz Mountain Corp., 178 N.J. 401, 413 (2004)). In other words, the Trial Court was required to deny Plaintiffs' directed verdict application if reasonable minds could differ regarding whether Plaintiffs' actions constituted a breach of the Lease. See also Goldfarb v. Solimine, 245 N.J. 326, 339 (2021) (to establish a breach of contract claim, the plaintiff must show the existence of an agreement, that defendants breached that agreement and that he or she suffered resulting damages).

Here, the Trial Court's directed verdict was erroneous. First, the Trial Court disregarded the plain language in the Lease Agreement which provided that Plaintiffs were not to "create or permit to be created or to remain, and will promptly discharge at its sole cost and expense, any liens caused to be levied against the Premises by [Garden State Nissan, Inc.], including mechanics' or construction liens, ***encumbrances or other charges*** upon the Premises[.]" (Pa. 312 ¶ 5). Even though Plaintiffs filed a lis pendens which forced Defendant's mortgage into default, the Trial Court incorrectly held that that filing was not a breach of the Lease because the Trial Judge did not think that a lis pendens was a lien. However, the Trial Court never even analyzed whether the filing of a lis

pendens constituted an encumbrance or "charge on the Property." (Pa. 225-226). At bottom, Plaintiffs' lis pendens affected the title to the Property and interfered with Defendant's ability to refinance its mortgage.

Reasonable minds could differ regarding whether Plaintiffs' filing of the lis pendens constituted an encumbrance or charge which violated the Lease, improperly forced the mortgage into default and forced Defendant to pay default interest rates. See Chrysler Corp. v. Fedders Corp., 670 F.2d 1316, 1322 (3d Cir. 1982) (a "lis pendens impairs the marketability of the property by depriving the owner of the ability to convey clear title while the litigation is pending.")

Further, the Trial Court also disregarded the subordination clause in the Lease which required Plaintiffs to refrain interfering with the mortgage on the Property:

> This Lease shall be subject and subordinate at all times to the lien of existing mortgages and of mortgages which hereafter may be made a lien on the Premises. Although no instrument or act on the part of the LESSEE shall be necessary to effectuate such subordination, LESSEE will, nevertheless, execute and deliver such further instruments subordinating this Lease to the lien of any such mortgages as may be desired by the mortgagee within three (3) days' prior written notice by LESSOR or mortgagee. Failure to provide same within the three (3) day period shall be deemed an event of default under this Lease. The LESSEE hereby appoints the LESSOR its attorney-in-fact, irrevocably, to execute and deliver any such instrument for the LESSEE.
>
> [(Pa. 326-327 ¶ 16).]

Critically, Defendant notified Plaintiffs that, by filing the lis pendens, they caused Defendant's mortgage to go into default and caused Defendant to pay default interest rates. (Ra. 1756). Defendant filed a motion to alter the lis pendens to allow refinancing, and the Trial Court entered an Order requiring Plaintiffs to meet and confer to take action to subordinate the lis pendens to the mortgage. (Ra. 1747). Despite this mandate, Plaintiffs' counsel notified Defendant's counsel that Plaintiffs would not agree to a temporary recission and refiling of the Lis Pendens to allow for the refinancing, reasserting his allegations in the lawsuit as a reason for the release amount to be lower than the new mortgage on the Property. Defendant was forced to pay default interest rates for months and the bank almost foreclosed on the Property.

The Trial Court should have considered whether Plaintiffs' refusal to subordinate the lis pendens to the existing mortgage on the Property constituted a violation of the subordination clause and a breach of the lease agreement or breach of the covenant of good faith and fair dealing, entitling Defendant to damages.

The Trial Court improperly dismissed the breach of contract claim based on the filing of the lis pendens by incorrectly reasoning that 1567 Route 23 Holdings was the one who filed the lis pendens, and because that entity was not tenant under the Lease, there could be no breach of contract. In so holding, the

Trial Court overlooked Paragraph 28 (a) of the Lease which states that "[t]he covenants, conditions, and agreements in this Lease shall bind and inure to the benefits of the parties hereto and their heirs, successors and, except as otherwise provided herein, their assigns." Further, Paragraph 28(b) provides that the "covenants, conditions, and agreements shall be binding upon each new owner or mortgagee in possession until the Premises is resold[.]" (Pa. 333 ¶ 28-29). The Trial Court erred because the Lease explicitly held that Holdings could be held liable for a breach of the subordination agreement as the assignee of the option to purchase. The Trial Court should have considered whether Holdings could be liable for a breach of the covenant of good faith and fair dealing. (Pa. 259-263).

Second, the Trial Court misapplied the law in its Trial Order and incorrectly held that Defendant's breach of lease claims related to Plaintiffs' violation of multiple ordinances (which caused Defendant to pay tickets and attorney's fees), unauthorized structural alterations to the Property and failure to timely pay rent were all released by the Settlement Agreement. However, it is well-settled law that only those claims specifically contemplated by the parties will be deemed released in a settlement and release agreement. Olewinsky by Olewinsky v. Aetna Cas. & Sur. Ins. Co., 234 N.J. Super. 429, (Law. Div. 1988) ("The question of whether the defendant should pay the

plaintiff an additional sum of money for attorney fees was specifically left open for future discussion and determination. It was not contemplated by the parties that settlement amounts would include attorney fees."); Pappalardo v. Pee Wee Prep, Inc., No. A-3065-15T3, 2017 WL 2391715, *2 (App. Div. June 2, 2017) (released claims must be contemplated by the parties).

Here, the recitals in the Settlement Agreement indicate that the release applied only to those claims relating to "the sale of the subject motor vehicle" Property. The Settlement Agreement did not release the claims relating to the Lease. (Pa. 342). In fact, the parties included a carve out noting that "nothing contained in this Agreement, or the [REPA] is intended to and shall not function as a modification, amendment, or novation of the Lease, which will remain in full force and effect until the Closing as more particularly set forth in the PSA." (Pa. 345 ¶ 4). In sum, the Trial Court erred when it dismissed the breach of contract counterclaims given the above language demonstrated that Defendant's claims relating to the alleged breach of the Lease fell outside the scope of the release.

Further, the Trial Court also improperly dismissed Defendant's breach of contract claim based on Plaintiffs' breach of the confidentiality provision in the Settlement Agreement and REPA. (Pa. 225-226). Specifically, the Trial Court mischaracterized DiPiano's trial testimony regarding the filing of the Complaint

in this case to conclude that Defendant did not suffer any damages as a result of Plaintiffs' breach of the confidentiality agreement. (Ibid.). In so holding, the Trial Court overlooked DiPiano's testimony that the disclosure of the Settlement Agreement was not good for business. (5T109:6-13). The Trial Court's failure to consider this testimony before dismissing the counterclaim warrants a reversal on this issue. The contract does not require DiPiano to be damaged for the violation of the confidentiality provision to be a breach sufficient to create consequences for Plaintiffs. (Pa. 342-348).

ii. Breach of Covenant of Good Faith and Fair Dealing (Pa. 256-257).

The Trial Court also misapplied the law and incorrectly dismissed Defendant's breach of the duty of good faith and fair dealing counterclaim.

Both parties to an agreement are "bound by a duty of good faith and fair dealing in both the performance and enforcement of the contract." Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 224 (2005) (citing Wilson v. Amerada Hess Corp., 168 N.J. 236, 241, 244 (2001)). "Good faith is a concept that defies precise definition." Ibid. However, "[g]ood faith conduct" is considered to be "conduct that does not 'violate community standards of decency, fairness or reasonableness.'" Ibid. (quoting Wilson, 168 N.J. at 245; Restatement (Second) of Contracts, § 205 cmt. a (Am. Law Inst. 1981)).

To establish a breach of the covenant of good faith, the party asserting the claim must show that the violator "engaged in some conduct that denied the benefit of the bargain originally intended by the parties." Brunswick Hills, 182 N.J. at 224. "'[S]ubterfuges and evasions' in the performance of a contract violate the covenant of good faith and fair dealing 'even though the actor believes his conduct to be justified.'" Ibid. (quoting *Restatement (Second) of Contracts*, § 205 comment d)).

Here, the Trial Court added a non-existent requirement that Defendant prove "malice" to establish a breach of the covenant of good faith and fair dealing. (Pa. 257); see also Repack v. Akimova, No. A-2147-21, 2023 WL 3312355 (N.J. Super. Ct. App. Div. May 9, 2023) ("malice in the law means nothing more than the intentional doing of a wrongful act without justification or excuse."). However, a breach of the implied covenant of good faith can also be established through a showing that the violating party participated in conduct to intended to evade performance under the contract. Brunswick Hills, 182 N.J. at 224

Here, Plaintiffs tried to skirt their obligations under the REPA. For instance, Defendant notified Plaintiffs that Mistichelli performed an appraisal which did not conform with Paragraph 3(a)'s requirements (i.e. that Mistichelli average the two appraisal methods, he use the correct rent in the Lease, he failed

to use neighboring properties, etc.). Plaintiffs took inconsistent positions. At first, Plaintiffs' counsel told Defendant's counsel that there was no way to fix Mistichelli's appraisal and that Defendant had to accept Mistichelli's flawed calculations no matter what. (Ra. 18). However, when Plaintiffs realized that Mistichelli failed to average the two appraisals and that averaging the two appraisal methods would actually benefit them, Plaintiffs instructed Mistichelli to adjust his calculation and average the two methods (which he did). (Ra. 256). Despite admitting that the appraisal could be changed, Plaintiffs' counsel refused to instruct Mistichelli to correct it to include the correct base rent in the Lease, because that correction did not help them. Defendant presented evidence demonstrating that Plaintiffs tried to evade Paragraph 3(a)'s formula and deprive Defendant the benefit of the bargain. This is a classic case where the covenant of good faith and fair dealing was breached. This Court should order a reversal on the Trial Court's dismissal of Plaintiffs' counterclaim for breach of the covenant of good faith and fair dealing.

iii. *Fraud (Ra. 32; Ra. 80; Ra. 82; Ra. 2110; Pa. 215; Pa. 258).*

The Trial Court incorrectly *sua sponte* reconsidered its prior order denying Plaintiffs' motion to dismiss Defendant's fraud counterclaim.

This Court reviews the dismissal order under a de novo standard, owing no deference to the Trial Court's legal conclusions. See e.g., Dimitrakopoulos

v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019).

On a motion to dismiss, "[a] plaintiff is entitled to a liberal interpretation [of the pleadings] and given the benefit of all favorable inferences that reasonably may be drawn." State, Dep't of Treasury ex rel. McCormac v. Qwest Commc'ns Int'l, Inc., 387 N.J. Super. 469, 478 (App. Div. 2006); Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989) (motions to dismiss "should be granted in only the rarest of instances."). The court's "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Green, 215 N.J. at 451. "[T]he test for determining the adequacy of a pleading . . . [is] whether a cause of action is 'suggested' by the facts" alleged in the complaint. Printing Mart, 116 N.J. at 772 (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988).

Here, the Trial Court improperly applied a summary judgment standard and held that "in the course of litigation and discovery . . . new information has arisen providing a basis for Court to reconsider" its motion to dismiss the fraud counterclaim. (Ra. 2114). Without identifying the "new information," the Trial Court held that it now believed that Defendant could not establish fraud based off Plaintiffs failure to disclose that they were under investigation for defrauding customers and the subject of numerous customer complaints. (Ra. 2113-2114).

Defendant pled in their counterclaims that (1) Plaintiffs failed to disclose that they were subject of an investigation and that there were numerous complaints against them, (2) they knew that Defendant would never agree to include an option to purchase or enter into the Lease had Defendant knew about the complaints, (3) Plaintiffs intentionally withheld that information in order to induce Defendant into entering into the Lease, (4) Defendant relied on the omission and (5) as a result, the good will of the Property has been damaged. (Pa. 135-137 ¶'s 172-192); Banco Popular N. Am. v. Gandi, 184 N.J. 161 (2005) (fraud requires the plaintiff to prove: (1) a material misrepresentation of a presently a 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). At bottom, Defendant adequately pleaded a claim for fraud and the Trial Court improperly went beyond the pleading to dismiss that claim.

The Trial Court inappropriately blocked Defendant from obtaining evidence relating to its fraud claims during discovery. (Ra. 80; Ra. 82). For example, Defendant filed a motion seeking to compel Plaintiffs to provide information relating to the customer complaint, fraud claims and other counterclaims. It also issued several non-party subpoenas which sought information relating to the customer complaints, investigations and other

documents relating to Defendant's counterclaims. However, the Trial Court improperly denied critical portions of Defendant's discovery motions and limited Defendant to obtaining evidence after the parties entered into the Settlement Agreement – i.e. thereby preventing Defendant from obtaining any information relating to his fraud claim (which was based on conduct which occurred prior to the Settlement Agreement). For this reason alone, this Court should enter a reversal or remand of the Trial Court's sua sponte order granting reconsideration and dismissing the fraud claim.

The Trial Court also improperly dismissed Defendant's fraud claim after trial and incorrectly found that Osiashvili "did not have a duty to disclose" the investigation with the Division of Consumer Affairs, lawsuits or complaints. (Pa. 258). For starters, a plaintiff is not required to prove a duty to disclose to establish a fraud in the inducement claim. See e.g., United Jersey Bank v. Kensey, 306 N.J. Super. 540, 551 (App Div. 1997) (While a duty to disclose may only arise under certain circumstances, "that does not mean a fraudulent inducement claim cannot be maintained." (quoting Berman v. Gurwicz, 189 N.J. Super. 89, 93 (Ch. Div. 1981)). Here, Defendant's claim was that Osiashvili fraudulently induced DiPiano into entering the Lease by promising that him and his partner were reputable, honest and trustworthy and that they would use the Property in an honest manner so as not to damage the reputation of the

Property—Defendant was not required to establish a duty to disclose in a fraudulent inducement case. (Pa. 60-61 ¶'s 18-25).

During Osiashvili's cross examination, the Trial Court impermissibly blocked Defendant's Counsel from eliciting testimony regarding the prior lawsuits against Osiashvili and other critical topics relating to the fraud claim. Such testimony was also critical to impeach Osiashvili's credibility and yet Defendant's Counsel was prevented from using that evidence as Osiashvili's propensity to be untruthful.

The Trial Court made clear that it felt that the case was only about the enforcement of the Settlement Agreement and the REPA and that:

> This is a trial that should not be going as long as it's going, and it's because we're going down these trails, these rabbit holes, that I'm not sure – I'm not sure why the parties are doing it, other than at this point to really try the Court's patience and waste the Court's resources.
>
> I have another two trial days set up for this. This goes on those next two days, there's going to be some orders entered that the parties and their clients are not going to be happy about. Everybody is on notice, right?
>
> I'm very patient. I've reviewed all these documents, I've done multiple motions in this case, I'm familiar with everything that's going on in this case. I'm familiar with what's going on in the other cases because they've been in front of me as well. But the issues in front of me on this case is the enforcement of the Settlement Agreement and whether it's enforceable or not, and whether the appraisals complied with the settlement agreement.
>
> [4T 33:12 to 34:8.]

At this point, Defendant's counterclaims (including portions of the counterclaim for fraud, civil conspiracy and promissory estoppel) were still viable. The cross-examination questions relating to the prior lawsuits and conduct prior to the Settlement Agreement were all proper questions relating to the fraud counterclaims as well as Osiashvili's credibility. Given the foregoing, this Court should reverse or remand the Trial Court's dismissal of Defendant's counterclaim for fraud.

iv. Promissory Estoppel (Pa. 257-258).

The Trial Court improperly relied on Osiashvili's testimony and dismissed Defendant's counterclaim for promissory estoppel. See also E. Orange Bd. of Educ. v. New Jersey Sch. Const. Corp., 405 N.J. Super. 132 (App. Div. 2009) ("The elements of promissory estoppel are "1) a clear and definite promise, 2) made with the expectation that the promisee will rely upon it, 3) reasonable reliance upon the promise, 4) which results in definite and substantial detriment."). Specifically, the Trial Court incorrectly found Osiashvili's testimony to be credible and held that there was no agreement to purchase the Property between 8,000,000 to 9,000,000. (Pa. 243 (Trial Court holds that Osiashvili was a credible witness "with respect to the transactions between the parties" but not credible otherwise); Pa. 257 (Trial Court holds there was no agreement to sell the Property between 8 and 9 million dollars without allowing

Counsel to impeach Osiashvili). However, the Trial Court did so without affording Defendant's Counsel a fair opportunity to impeach Osiashvili's credibility. Accordingly, the Trial Court's dismissal of the counterclaim for promissory estoppel should be reversed.

CONCLUSION

For the foregoing reasons, the Court should: (i) dismiss Plaintiffs' appeal of the June 18, 2024 Trial Order in its entirety; and (ii) order a reversal or remand of the specific issues outlined in Defendant's cross appeal.

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229949316 v1

GARDEN STATE NISSAN, INC. and
1567 ROUTE 23 HOLDINGS LLC,

Plaintiffs/Appellants,

v.

1567 SOUTH REALTY LIMITED
LIABILITY COMPANY,

Defendant/Respondent/Cross-
Appellant,

1567 SOUTH REALTY LIMITED
LIABILITY COMPANY,

Third-Party Plaintiff,

YURIY MIRGORODSKIY and
RICHARD OSIASHVILI,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3784-23

Civil Action

On Appeal from a Final Judgment,
Superior Court of New Jersey,
Morris County, Chancery Division

Sat Below:
Hon. Frank J. DeAngelis, P.J.Ch.

Date Submitted:
August 22, 2025

REPLY/CROSS-RESPONDING BRIEF OF GARDEN STATE NISSAN, INC. AND 1567 ROUTE 23 HOLDINGS LLC

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PRELIMINARY STATEMENT

Defendant 1567 South Realty Limited Liability Company asserts the court below did not "'substitute its judgment' for that of the appraiser," Db2, but that is exactly what happened. The court below came up with an appraisal number different than everyone who testified. "[T]he Court disagrees with [the parties' appraiser's] use of a modified base rent when calculating the value of the Premises under the income capitalization method." Pa262.

Defendant next asserts, since the court-ordered closing occurred, Plaintiffs Garden State Nissan, Inc. ("GS Nissan") and their holding company, 1567 Route 23 Holdings LLC ("Route 23 Holdings"), waived the right to appeal. This is the mootness argument Defendant was ordered to remove from its brief. To avoid the Order, Defendant re-label it "doctrine of merger" and omits how Route 23 Holdings repeatedly, expressly preserved its right to appeal. Also omitted is their attorney represented to the court below, if the closing occurs, it is not meant to foreclose appellate review. Importantly, Plaintiffs are not seeking to undo the sale, but to have the sales price be what the parties' appraiser concluded it should be.

To avoid reversal, Defendant argues, "It was up to the Trial Court - not the appraiser – to interpret and apply the contracts." Db1. We agree conceptually, but the court below did not interpret and apply the contracts. It substituted its judgment for that of the appraiser. Once the record included the fact the appraiser (whose

testimony the court found credible, Pa239) employed a sales comparison approach and capitalization of income approach, per the property acreage/building square footage set forth in the agreement, and then averaged the two numbers, the court's role was completed. This occurred, as confirmed by Defendant's own expert, in addition to the appraiser's and Ms. DiBello's testimony. There remained nothing to interpret. Changing the appraiser's analysis is not contract interpretation.

If we accept Defendant's argument this is a contract interpretation case, it assures reversal because there is nothing in the record to enable the trial judge to interpret requirements for an appraisal under the sales comparison approach or capitalization of income approach. Both appraisers testified about their personal methods, which involves a subjective analysis. There is nothing in the record about the sales comparison approach or capitalization of income approach to enable the court to change Mr. Mistichelli's approach. His opinion the rental value assigned by the seller should be reduced by the amount the parties agreed to as a part of a rent credit is sacrosanct, even if the court below (or this Court, for that matter), disagrees.

Defendant also challenges rent credits due at closing. "[As] supported by the REPA: Plaintiffs were only entitled to the credit if the closing occurred within thirty (30) days, and the Trial Court correctly found that the closing did not occur within that time." Db1-2. Here too, accepting the argument, reversal is warranted based on the part of the REPA that Defendant omits that contradicts the argument. The REPA

applies the rent credit if the closing occurs on or before the "Closing Date," Pa22, but extends the time if the Seller causes delay due to an uncured breach. The court below mistakenly relied on the lease, not the REPA. In the lease, rent credits expired in 2020. Pa329. The parties entered into the REPA, which includes the applicable rent credits, in 2022. The judge made an honest mistake, but a big one. This is not an issue of exercising equitable powers. The judge either relied on the wrong document (lease) or changed the language of the REPA, either warrants reversal.

As for the claim we omit the Site Control Credit issue in our notice of appeal, the notice identifies the judgment being appealed. We are not required, in the notice, to parse out each issue. Nor are we required to appeal a decision on a motion to modify a judgment (which the court labeled 'reconsideration') when we are appealing the judgment itself. Nor is filing the motion a prerequisite to appeal. Nor does an order denying relief change the appealability of the judgment itself. The corollary argument that we never properly raised the issue below ignores trial testimony - and the settlement agreement and RESA, both of which are in-evidence.

As for Defendant's argument the decision below set a purchase price "with no closing credits," Db1, this is wrong. The court set a purchase price without addressing closing credits. Pa227-228. The closing credits are and were a different issue than the purchase price.

SUPPLEMENTAL PROCEDURAL HISTORY[1]

On February 4, 2025, Defendant filed a motion to dismiss our appeal, Pra1-3, by arguing we waived our right to appeal, thus rendering it moot, by proceeding with the court-ordered closing. Pra4. We opposed the motion by identifying repeated instances where the right to appeal was preserved, Pra5-9, and cited where defense counsel advocated for the closing regardless of the appeal, Pra7, and how defense counsel did not view proceeding with the closing as a waiver of appellate rights. Pra8. On March 10, 2025, this Court denied the motion to dismiss and denied Defendant's request to supplement the record to include material from the property closing needed to support their mootness argument. Pra10.

After Defendant included the argument anyway, and material in the appendix this Court ordered them to remove, we filed a motion to strike. Pra11-13. On June 9, 2025, this Court ordered Defendant to remove the argument. Pra14. Defendant then filed a brief making the same argument, but re-labeling it "doctrine of merger," which prompted us to file another motion to strike. Pra15-17. On July 7, 2025, this

[1] Transcripts and our supplemental appendix are as follows:
1T = March 4, 2024 trial transcript;
2T = March 5, 2024 trial transcript;
3T = March 6, 2024 trial transcript;
4T = March 13, 2024 trial transcript;
5T = April 8, 2024 trial transcript;
6T = April 9, 2024 trial transcript; and
Pra = Plaintiffs' reply appendix.

Court denied our motion, Pra18, thereby leaving the "doctrine of merger" argument, but without a citation to the record to support it.

RESPONSE TO DEFENDANT'S COUNTER-STATEMENT OF FACTS

In response to all of Defendant's facts, Mr. Mistichelli's testimony is unrebutted that he employed the sales comparison approach and the capitalization of income approach. See 1T171-21 to 172-1 (Mr. Mistichelli testified his appraisal used both appraisal methods); see also Pa449 (the portion of Mr. Mistichelli's report, in evidence, 2T30-20 to -21, titled, "Sales Comparison Approach") and Pa453 (the portion of Mr. Mistichelli's report, in evidence, 2T30-20 to -21, titled, "Income Capitalization Approach"); and see 1T78-19 to -20 (Ms. DiBello testified without objection that Mr. Mistichelli employed both appraisal methods).[2]

Defendant recites facts testified-to by Mr. DiPiano the court below found not credible, including as "not credible that the parties agreed to an $8 million value for the Premises but then put in place a process for appraisals to determine the sales price." Pa251-252. We will therefore not address these facts from Section B. As for the citation to the record for these facts, Defendant cites its own pleading, Db4-5, which is less reliable and more removed than sworn trial testimony by Mr. DiPiano that the court found not credible.

[2] The court below found Ms. DiBello "credible." Pa236. Page 8 of our merits brief omits the word "credible."

Defendant also cites, to support the trial judge's decision, a certification filed by Mr. DiPiano in opposition to summary judgment, Db6 (citing Ra2078) wherein he claims there was a violation of the lease because, in his opinion, "significant changes" were made to the property. Defendant does not cite trial testimony by Mr. DiPiano on this issue. Other facts in Section B simply lack a citation. See e.g., Db5.

Section C suffers similar defects. For example, Defendant asserts Plaintiffs committed municipal ordinance violations that resulted "in a case" against Mr. DiPiano, Db6, but the citation to Ra631-635 does not say this. Defendant claims customers were misled, overcharged, and defrauded by Plaintiffs, Db7, but cite Mr. DiPiano's summary judgment certification as its source. Ra2071-2073.

Section D recites the lease, without reference to the settlement agreement replacing various provisions of the lease.

Section E takes liberties with facts by, for example, representing the third appraiser "used a flawed method which resulted in a steep discount and purchase price which did not reflect the Property's value." Db7-8. In truth, the citation to Pa342 says the parties selected someone "to perform a third appraisal, which resulted in a fair market value of $4,575,000.00. WHEREAS, thereafter, in light of the conflict between the Parties, the sale of the Premises has not occurred[.]" Thus, from the word "conflict," Defendant represents the fact is that a "flawed method" resulted in a "steep discount" that "did not reflect" the value.

Other citations, such as to "Ra1440; Ra1455; 4T24:15-20" for the proposition, "Plaintiffs refused to produce" an appraisal in discovery, Db8, finds no support in those citations. Other facts in Section D cite Defendant's own pleading, i.e., the pleading of a person who offered trial testimony the court below found not credible. Db8 (citing Pa118-119).

Section E ends with defense counsel informing this Court, underlined, the parties' agreement was "with respect to the sale of the subject motor vehicle,'" Db8, without counsel disclosing the person who prepared the agreement testified the reference to a car was a typo, 1T112-17 to -19, Mr. Osiashvili testified it was a typo, 4T35-1 to -10, and Mr. DiPiano testified it was a typo, too. 5T108-1 to -14. Nor does Defendant cite Pa231, where the court below similarly identifies it as a typo. Contrary to testimony from each person who addressed it at trial, Defendant cites the "subject motor vehicle" to advance Defendant's arguments on appeal.

Section F is suspect from the first sentence. It says Plaintiffs "discontinued" the first lawsuit. Db8. That lawsuit was dismissed pursuant to the settlement agreement, Pb2, which is a significantly different fact. The section then misrepresents a critical fact, as defense counsel represents, "[T]he parties agreed that Mistichelli [(the final appraiser)] was not intended to be an arbitrator." Db8. To perpetuate this alleged fact, counsel cites 1T97:15, but page 97 does not say that.

This fact is false, and a critical false fact because it is contrary to Plaintiffs' position below, and on appeal.

In Section G, Defendant asserts as fact that "insinuate[ing] that there was confusion regarding who [attorney] Dobbs represented . . . is simply untrue." Db10. Our brief recites countless excerpts from trial that demonstrates there was confusion. Defendant produced no witness to counter these facts. As for all the facts Defendant relies on that originate with Mr. Dobbs, it bears repeating that Mr. Dobbs did not testify. 1T-5T.

While Defendant recites language from the agreement respecting comps of "neighboring properties," Db11, Defendant's brief cites nothing that identifies any accepted standard for what constitutes "neighboring properties." The same is true for the citation to "automotive use." Db11. The agreement says the appraisal shall be based upon an automotive use, Pa15, without requiring it to be exclusively automotive use or, as more applicable here, exclusively new car use as opposed to both new and used car use.

Section H addresses the underlying lawsuit, including the parties' pleadings and motion practice. We address this in our merits brief and respectfully do not repeat it here.

In Section I, contrary to Defendant's factual recitation, rent credits are mentioned in the pre-trial brief. Pra19-20. The relief sought in the pre-trial brief

includes conveying title "in accordance with the terms of the [REPA]," Pra22, which are identified to include the rent credits. Pra19-20. The attorney fee issue is also addressed, as relief sought includes a request "Plaintiffs be awarded attorney fees and costs provided for in the Settlement Agreement and [REPA]." Pra22.

On the critical issue of Mr. Mistichelli's assessment of fair rental value, Defendant states Mr. Mistichelli calculated base rent "by using the Lease Agreement and the REPA," Db16, without disclosing he also testified about this entire process for arriving at rental value including, "I researched the market for comparable rental data. I come up with the comparable rental data and from there, I ascertain whether or not the subject's rent is market oriented or not. So effectively I try to come up with a market rent for the property irrespective of the lease in place." 3T26-7 to -12. Also omitted, he testified he looked at the lease, but then "located what [he] believe[d] were comparable rentals[.]" 3T26-13 to 27-6.

He also testified he "research[es] the market, and based upon that data, [he] ascertain[s] a market rent for the subject property," 3T49-4 to -6, and when he, as here, has a copy of the lease, he compares it with "market rent" to see if the lease and market rent align. 3T49-7 to -9. While attorney Dobbs indicated fair market rent in the appraisal should be different, i.e., the amount set by Mr. DiPiano, Mr. Mistichelli did not agree with that amount. 3T48-10 to -15. Mr. Mistichelli "established market value consistently" with comparables, 3T49-12 to -13, which

differed from Mr. DiPiano's rental number. Thus, while he reviewed the lease, he did not rely on it to set the rental number. 3T49-22 to 50-1.

Defendant then represents Mr. Mistichelli "admitted to improperly applying closing credits up front and calculating an incorrect base rent . . ." Db16. This, too, is untrue. The citation for this fact says nothing of the sort (1T170:20-25[3]; 1T171:9-10[4]).

Similarly, the fact Mr. Mistichelli "conceded" the rent credit, Db16, is not supported by the citation, 1T179:7 -180:2. This explains why the next fact about Mr. Mistichelli having "ignored the requirement in the REPA that he use 'neighboring properties' for comparable sales," Db16, does not include a citation. Defendant then says Mr. Mistichelli did not look for comparable sales that neighbored the property, Db16, but this too in untrue, and the citation does not support the alleged fact.

---

[3] The testimony for this citation, in total, says in response to being asked what the base rent and credit would be:

> Well, page 2 I don't break out, I just give the credit. As part of the option -- so the tenant's base rent was $52,260. Of this amount $17,973.54 will be applied as a credit against the purchase price. So what's the math, it's -- so roughly $35,000 was the base rent.

[4] The testimony for this citation, in total, says in response to a question about why Mr. Mistichelli performed the calculation in the manner he performed it:

> Because the $17,953 is monies being paid by the tenant towards the purchase price.

Contrarily, Mr. Mistichelli testified his comparisons were based on five Morris County properties, one in Warren, and one in Passaic. 1T174-18 to -22. For the five Morris County properties, "I would consider those certainly neighboring properties, and he testified the Warren County property was neighboring, and he considered "all" appropriate "from a locational perspective." 2T14-17 to -23. There is no standard in the industry offered by Defendant that rebuts Mr. Mistichelli's testimony about what he considered "neighboring" properties.

Also false, it is repsented as fact the "automotive use" requirement for the appraisal meant "he was to conduct an appraisal with primary consideration of the Property's value if used to operate a new car dealership," Db17, but this appears nowhere in the settlement agreement, or REPA. This Court is then informed Mr. Mistichelli "ignored that requirement," Db17, but the citation for the alleged fact, 2T16:15-17:1, 3T21:9-24:2, does not say this.

Defendant cites its expert, Mr. Lamicella, as testifying "new dealerships are more valuable than used dealerships," Db17, but the citation does not say this. Defendant also says, "Lamicella stated that Mistichelli's calculation of a $35,000 per month rent amount was inappropriate because . . .," Db17, but the citation does not say this, either.

Defendant's recitation of the decision below takes liberties, as the court below did not find Mr. Mistichelli "misinterpreted" anything, let alone misinterpreting the

lease and REPA, as Defendant asserts. Db20. Nowhere in the decision is there a mention of his interpretation. Pa229-263. Instead, "[T]he Court disagrees with [Mr. Mistichelli's] use of a modified base rent when calculating the value of the Premises under the income capitalization method." Pa262. Defendant's recitation of alleged testimony by Mr. Mistichelli about the appraisal value "had he used the correct" rent figure, Db20, is also not supported by the citation to Pa262.

Moving to Section L, Defendant presents facts that are not part of the appellate record and which include no citation.

LEGAL ARGUMENT

POINT I

CONTRARY TO DEFENDANT'S ARGUMENT, THE COURT BELOW DID NOT FIND MR. MISTICHELLI MISINTERPRETED ANYTHING, BUT INSTEAD THE COURT SUBSTITUTED ITS AND DEFENDANT'S EXPERT'S JUDGMENT FOR THAT OF THE APPRAISER THE PARTIES AGREED WOULD BE THE SOLE PERSON TO SET THE DISPOSITIVE PURCHASE PRICE.

The premise of Point I.A. in Defendant's brief about the court below holding Mr. Mistichelli "misinterpreted the REPA" is incorrect. Db24. The court did not make any such finding. The parties settled prior litigation by agreeing to have Mr. Mistichelli perform an appraisal that set the dispositive purchase price. The unrefuted evidence is Mr. Mistichelli performed the appraisal, as required.

The court then changed the fair rental value included in Mr. Mistichelli's appraisal. There is nothing in the record to identify any industry standard Mr. Mistichelli failed to follow.

The parties' agreement required only that Mr. Mistichelli use a sales comparison approach and capitalization of income approach, based on property acreage and building square footage set forth in the agreement, and then average the two numbers. It is uncontradicted Mr. Mistichelli did this. Mr. Mistichelli, who the

court found credible, detailed how he did this. Defendants' expert admits it was done. This should have ended the court's inquiry.

To avoid the record, Defendant's brief carefully crafts the argument about rental value as Mr. Mistichelli failing to arrive at an appraisal that "adequately reflect[s] a price which conformed with the parties' agreements." Db30. Defendant's brief does not provide any evidence Mr. Mistichelli failed to use the income capitalization method (or, for that matter, the sales comparison approach).

The court, however, accepted a disagreement Defendants' expert had with the dollar amount Mr. Mistichelli assigned to one of the many factors he considered: rental value. Rental value is one of the factors under the capitalization of income approach. Mr. Mistichelli rejected as excessive a rental value put on the property years earlier by the property owner, Mr. DiPiano. Mr. Mistichelli opined the monthly rent affixed by Mr. DiPiano did not reflect fair market rent for this property. 3T48-10 to -15. Mr. Mistichelli's decision is consistent with the REPA, which provides, Mr. DiPiano "does not make any promises about the . . . value of the Property included in this sale[.]" Pa351, ¶6.

Mr. DiPiano did not testify his rental value was fair market value, but instead testified he came up with the rental value based on a number that satisfied his personal desire to avoid negative cash flow, 3T75-22 to 76-1, and to cover his expenses, 5T103-1 to -8, including his mortgage, 5T103-1 to -8, despite the

mortgage being for three lots (the dealership and two separate lots). 5T96-12 to -17; 5T99-23 to 100-5. As for Mr. DiPiano's ability, in the first instance, to make an appraisal, the court found him to be unqualified. Pa252.

Mr. Mistichelli used rental comparables to arrive at a market rate. 3T49-22 to 50-1. He "researched the market for comparable rental data," 3T26-7 to -12, and "located what [he] believe[d] were comparable rentals[.]" 3T26-13 to 27-6. His analysis includes researching the market and using market data. 3T49-4 to -6. He compares the lease, but tempers it with "market rent" to see if they align. 3T49-7 to -9. He "established market value consistently" with comparables, 3T49-12 to -13, which differed from Mr. DiPiano's rental number.

As for Defendant's recitation of the law on contract interpretation, this is not a contract interpretation case. There is nothing this Court is being asked to interpret, nor was there anything the court below had to interpret: all Mr. Mistichelli had to do was perform an appraisal with the sales comparison approach and capitalization of income approach, based on a certain acreage and square footage, and then average the two numbers. There is nothing in the record to enable the court below, or this Court, to find Mr. Mistichelli did not use the sales comparison approach or capitalization of income approach; the latter implicating rental value.

Defendant is left relying on an unpublished opinion, Leach, which arose out of a summary judgment. The Leach case supports our claim. In Leach, the parties

provided no instruction to the appraiser other than to find the "fair market value." Here, as Defendant asserts, the parties set forth "an appraisal formula carefully negotiated by the parties." Db26; see also Db30 ("the contract documents set forth a carefully negotiated formula"); Da52 ("The parties carefully negotiated an appraisal process that Mistichelli was required follow").

There is nothing in the parties' agreement that requires Mr. Mistichelli to use the rental value used by Mr. DiPiano. It is Mr. Mistichelli's duty to independently assess rental income instead of relying on Mr. DiPiano. Contrary to Defendant's argument, the court did not have the authority to apply "the correct rent" absent evidence Mr. Mistichelli's appraisal failed to comply with the capitalization of income approach.

Here, unlike Leach, Mr. Mistichelli detailed the factors employed and how calculations were made. Mr. Mistichelli's detailed protracted testimony is not the "spinning a wheel or flipping a coin" this Court disapproved of in Leach. In addition to the trial testimony, Mr. Mistichelli's eighty-one page report is in-evidence, Pa401-481 (report); 2T30-20 to -21 (report in-evidence); see also Pa454 (an analysis in the report of rental appraisal including a chart of comparable rental properties).

The decision below is all the support needed for reversal. It says, "[T]he Court disagrees with Mistichelli's use of a modified base rent when calculating the value of the Premises under the income capitalization method." Pa262. The court below

had no authority to do this. There is not a scintilla of evidence in the record that Mr. Mistichelli's assessment of base rent failed to comply with the income capitalization method.

The fact Defendant's expert would have done it differently is irrelevant. Mr. Lamicella's personal opinion should never have been introduced, or considered, by the court below because it is inadmissible net opinion. "A standard which is personal to the expert is equivalent to a net opinion." Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999) (citation omitted); see also Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103 (App. Div. 2001) (a standard personal to the expert and not based on supporting authority in the field of expertise is "equivalent to a net opinion") (citation omitted); Riley v. Keenan, 406 N.J. Super. 281, 296 (App. Div. 2009) (experts "must be able to point to generally accepted, objective standards of practice and not merely standards personal to them"). Even when a personal standard is permitted, it must be shown to be generally recognized in the field. Ibid. Evidence Defendant cites on appeal is not credible evidence in the record that can be used to support the decision below.

A difference in opinion is not tantamount to a deviation from any accepted standard employed by appraisers, per Defendant's own expert. The court below supplemented its opinion for that of Mr. Mistichelli, and ignored Mr. Mistichelli's testimony that changing the rent value, to adopt the court's belief as to fair rental

value, would not affect Mr. Mistichelli's final appraisal number, Pa262, as other factors (and comparable rental properties) were considered.

Another reason for reversal lies in Defendant's brief. It is argued, as part of the "carefully negotiated" agreement, "Paragraph 3(a) of the REPA expressly required that Mistichelli be provided with a copy of the Lease to be used in his appraisal calculations," Db26 (emphasis added). This is another false fact. It really says, "Furthermore, the appraiser shall be provided with the Lease and this [Settlement] Agreement," Pa21, without any reference to it being for the appraisal calculation. The lease served other purposes, including providing background information. Had the lease been provided because it included a firm rental value that was to be binding upon Mr. Mistichelli, paragraph 3(a) of REPA would have said so. Its omission is glaring.

Paragraph 3(a) establishes the parties were not requiring Mr. Mistichelli to adopt the rental value assigned by Mr. DiPiano. In addition to an integration clause, Pa358 (¶19(d)), the REPA makes no mention of rental value in the lease replacing the income capitalization method, or even being a factor Mr. Mistichelli is required to consider, though he considered it anyway. If the "carefully negotiated" agreement does not say Mr. DiPiano's opinion on rental value governs, the court committed reversable error by including that requirement.

As for Defendant's attack on our "cherry pick[ing] irrelevant trial testimony from Ms. DiBello and Mr. Osiashvili's transcripts regarding the meaning of the term 'dispositive,'" Db28, these witnesses establish contractual intent and context that refutes Defendant's arguments. The testimony is far from irrelevant. And, if Defendant's truly believed we 'cherry picked' these facts about Plaintiffs' contractual intent, we question why Defendant's brief does not refute it with testimony from Ms. DiBello and/or Mr. Osiashvili to the contrary.

Furthering the relevance of Ms. DiBello and Mr. Osiashvili's testimony, "An agreement must be construed in the context of the circumstances under which it was entered into and it must be accorded a rational meaning in keeping with the express general purpose." Tessmar v. Grosner, 23 N.J. 193, 201 (1957). "In the quest for the common intention of the parties to a contract the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain." Ibid.

Similarly, Defendant's argument about the parties removing any provision for dispute resolution corroborates the express language about having Mr. Mistichelli provide the "dispositive" purchase price. The unrebutted testimony of Mr. DiBello puts it into context, Tessmar, thus rendering our argument on appeal supported by trial testimony, from someone the court found credible, while Defendants rely on

argument of counsel, net opinion testimony of Mr. Lamicella, and testimony from Mr. DiPiano that lacked credibility.

For the argument Defendant makes about the availability of closing credits, we refer to our response to their statement of facts. Defendant facts are incorrect. Paragraph 7 of the REPA provides closing shall occur within thirty days of the "Effective Date" which is then referred to as the "Closing Date." Pa22. Paragraph 8(c) provides for the rental credit if closing occurs within the Closing Date. Pa22. Defendant omits a material term in 8(c). It says the credits apply if closing occurs within the Closing Date "or on a later date at the request of or due solely to an uncured breach of this Agreement by the Seller[.]" Pa22. This is what occurred.

In response to Defendant's legal argument that, since the court below found "Defendant had a good faith basis" to breach, Defendant was not "culpable," Db30, this is not the law. Unless bad faith is asserted against an insurance company under the New Jersey Insurance Fair Conduct Act, N.J.S.A. 17:29BB-3, "bad faith is not an element to a breach of contract action." Mickam v. Joseph Louis Palace Trust, 849 F.Supp. 516, 510 (E.D. Mich. 1993). Intent is not an element, either. See generally, Model Jury Charge, §4.10A. The court below erred, as a matter of law, by rejecting Plaintiffs' breach of contract claim based on Defendant having a good faith basis to breach. The error is reversible error.

Defendant's legal argument about equity allowing a judge to modify the settlement agreement to allow the court to change Mr. Mistichelli's appraised rental value is also incorrect. A court's discretion to grant specific performance is distinguishable from a court's discretion to substitute its judgment for that of the appraiser and to then grant specific performance with a court-ordered closing date at an amount Plaintiffs never agreed to. Plaintiffs were not even afforded the option of accepting the court's opinion on the proper rental value; it was court-ordered. Plaintiffs did not dismiss their prior lawsuit based on an agreement to accept a dispositive purchase price set by a judge. Plaintiffs bargained for something different.

"Equitable relief is not available merely because enforcement of the contract causes hardship to one of the parties. A court cannot 'abrogate the terms of a contract' unless there is a settled equitable principle, such as fraud, mistake, or accident, allowing for such intervention." Brunswick Hills Racquet Club, Inc., 182 N.J. 210, 223-24 (2005) (citation omitted); see also In re N. Jersey Title Ins. Co., 120 N.J. Eq. 148, 156 (Ch. 1936) (absent factors for contract avoidance, "neither this court, nor any other court, has the power to change the language, or the terms, of parties to a contract"), aff'd, 120 N.J. Eq. 608 (E. & A. 1936).

A review of the other cases cited by Defendant further supports our argument. Defendant cites Guaclides for the proposition that specific performance with an abatement is a common remedy, Db33, but Defendant omits the remainder of the case that supports our position for reversal. Defendant omits the abatement in Guaclides was because only part of the property was available for sale because another person had a right of first refusal. Nobody can dispute, whether invoking equity or not, if you agree to purchase property, but only part is available for purchase, the remedy of specific performance will be contingent upon an abatement to reflect the portion not being purchased. This is far different than a judge deciding the purchase price should be changed because the judge disagrees with an appraiser's opinion.

Another material fact omitted from Defendant's citation to Guaclides is, in Guaclides, Plaintiff sought specific performance for the available portion of the property with an abatement. Id. at 360. Here, Plaintiffs did not seek specific performance with an abatement; Plaintiffs sought specific performance for the dispositive purchase price set by Mr. Mistichelli.

Another material fact Defendant omits from Guaclides is the court found it would be inequitable to apply an abatement. Id. at 361. This is because the court could not force the sale upon Plaintiff under terms different than agreed "because that would result in a contract by judicial decree different from the agreement

contemplated by the parties." Ibid. Thus, the omitted portion of the case explains why the court in our case committed reversible error. As underscored in Guaclides, "[T]he court should not rewrite their agreement against the will of one of the parties." Id. at 363.

Defendant next cites the unpublished Lydon case. Db33. This, too, supports our position on appeal, after one sees the case in context. In Lydon, a contractor required to build a home "in accordance" with certain plans and specifications made changes, including using inferior materials. Id. at *2. Plaintiff was thus not receiving the home Plaintiff bargained for. The court below dismissed the case due to its belief specific performance was not an available remedy. Ibid. This Court reversed, and noted the presumption of specific performance for land purchases as well as custom construction, as implicated in Lydon. Id. at *3. Here again Defendants omit a material fact from the case they cite. In Lydon, unlike here, the party seeking specific performance "expressed their willingness to accept the property with an abatement of the purchase price." Id. at *4.

Also unlike here, in Lydon the abatement arose out of completed construction that failed to include what was bargained for. Further supporting our appeal, this Court remanded for a hearing to see if the purchaser was ready, willing and able to close title "with an abatement," i.e., a choice. Id. at *4. Thus, had the court below possessed the authority, and facts in evidence, to justify an abatement, Plaintiffs

should have been afforded the option of proceeding in lieu of the court-ordered closing. That said, absent authority and evidence, one does not get to the option because Mr. Mistichelli's dispositive purchase price governed.

Defendant's citation to Koppel similarly supports reversal. In Koppel, unlike here, Plaintiff sought specific performance with an abatement. Id. at 112. The Court recited law that permits an abatement when purchasing something that is incomplete or not as contracted-for due to improper workmanship. Id. at 120. Also, in Koppel, unlike here, the amount subject to abatement arose out of an undeniable dollar amount reflected in a prior judgment, id. at 121-123; thus, not disputable.

Our position on appeal is best summed up in Defendant's brief where they argue, for their cross-appeal, "It is inappropriate to refuse to enforce the language in the agreement or re-write the agreement." Db49. We agree, which is why the decision below to change Mr. Mistichelli's appraisal value should be reversed.

POINT II

DEFENDANT IS MISTAKEN THAT FORCING A SALE AT A PRICE DIFFERENT THAN AGREED UPON IS HARMLESS ERROR.

Absent sufficient facts and with contrary law, Defendant argues error by the court below should be considered harmless. Changing the terms of the parties' settlement agreement to add a requirement that the appraiser accept as gospel the rental value set years earlier by Mr. DiPiano, is not harmless error. Forcing Plaintiffs to purchase property at a different price than contemplated in the settlement agreement, is not harmless error.

For the harmless error argument, Defendant misstates more facts. Defendant cites 2T130:1 to 24 for the proposition Mr. Mistichelli "testifie[d] that he did not look all the way back from 2018 for neighboring properties as required under REPA," Db34, but this is not what the cited testimony says. See also Pa446-478 (Mr. Mistichelli reviewed multiple sales from 2020, 2021, and 2022). Reviewing sales from 2020-2022 meets the requirement in the REPA that he use property sales "since January 1, 2018." Pa20.

Another incorrect fact used by Defendants is the repeated reference to Mr. Mistichelli failing to consider properties based upon an "automotive use," based on Defendant's unsupported belief that "automotive use" is limited to new car dealerships as opposed to new and used dealerships. There is nothing in the record

that sets forth any appraisal standard that says "automotive use" excludes used car use.

The decision by the court below is reversible error. It is not harmless error. It undeniably affects the outcome; here, arguably the most important thing in the litigation, which is the compelled sale at the agreed upon purchase price.

POINT III

CONTRARY TO DEFENDANT'S ARGUMENT, PLAINTIFFS RAISED THE SITE CONTROL CREDIT ISSUE BELOW AND SOUGHT ATTORNEYS' FEES BELOW.

Defendant argues Plaintiffs failed to properly raise the Site Control Credit issue below and separately argue the attorney fee issue was not raised below. The Site Control Credit issue came up several times in trial testimony. It is also included in the proposed findings of fact and conclusion of law the court asked the parties to submit. The attorney fee issue came up at trial, too, and was raised in the pre-trial brief and the post-trial submission with findings of fact and conclusions of law.

Our brief recites repeated instances in which the Site Control Credit issue was introduced at trial. See e.g., Pb13, Pb31. We will not repeat it here, except to note Defendant's argument on this issue also helps us on appeal because it confirms the court below erred by holding that the issue was not introduced at trial. Db35 (citing Pa305). It was introduced. See also Db36 (Defendant's brief says elsewhere, "There were only passing references to the Site Control Credit in the trial testimony").

Plaintiffs raised the issue again their post-trial submission, though admittedly with less detail. Page 4 says, "On July 7, 2022, GSN and South signed the Settlement Agreement, . . . and Holdings and South signed the [REPA], which . . . provided GSN with credits towards the purchase price." Pra23. Then, on page 9, a footnote

says, "Pursuant to ¶8 of the [REPA,] Holdings receives a credit of $2,050,645.69 against the Purchase Price, as follows: ¶8(c)(i) provides a credit of $467,312.04 for June 2020 through July 2022 (i.e. $17,973.54 x 26) and ¶8(d) provides a credit of $1,583,333.65." Pra24 (emphasis added). This issue was raised.

The attorney fee issue was raised as well. Ms. DiBello testified about fees for the prevailing party, and included with that testimony is a citation to the provision of the parties' agreement that provides for such fees. 1T113-8 to 17. The pre-trial brief concludes, ". . . and that Plaintiffs be awarded attorney fees and costs as provided in the Settlement Agreement and PSA." Pra22. The post-trial submission with proposed findings of fact and inclusions of law includes the same request. Pra25.

Arguably conceding the issue was raised, Defendant argues Plaintiffs never made an application for fees. The is because the court did not award fees. In response to the claim that Plaintiffs are not a prevailing party, we rely on our merits brief.

POINT IV

AFTER THIS COURT ORDERED DEFENDANT TO REMOVE THE ARGUMENT THAT PLAINTIFFS WAIVED ITS APPELLATE RIGHTS BY PROCEEDING WITH THE COURT-ORDERED CLOSING, DEFENDANT RE-LABELED IT TO THE "DOCTRINE OF MERGER" AND MADE THE SAME ARGUMENT BUT THIS TIME WITHOUT ANY CITATION IN THE RECORD.

As noted in the Procedural History, this Court ordered Defendant to remove the argument that, by proceeding with the closing, Plaintiffs waived the right to appeal. Defendant therefore changed the wording of their argument to "doctrine of merger" and made the same argument. Defendant does not cite to the record for any fact in support of the "doctrine of merger" argument, even had it been properly before this Court.

The doctrine of merger is inapplicable to this case. It provides that warranties and representations made prior to the sale do not survive the closing unless preserved. This appeal is not about warranties and representations made prior to the sale, but instead about a court-ordered sale at a price Plaintiffs did not agree to, and in contravention to a settlement agreement. Plaintiffs appeal the terms of the forced sale.

Here again Defendant cites law that supports Plaintiffs' position. The Zaken case, Db44-45, involves a sale in which the buyer chose to proceed with the sale.

Here, Plaintiffs were proverbially kicking and screaming while challenging through court process the forced sale under the terms set by the judge below. Pra5-8.

And while Defendant argues, "If Plaintiff wanted to contest the purchase price, they should have sought a full stay of the sale at the Trial Court or Appellate Division, [] or terminated the REPA and [sought] liquidated damages," Db45, there is no support for this argument in the law. Parties can contest court-ordered purchase prices by filing an appeal. The claim Plaintiffs should have sought a stay ignores the fact Plaintiffs sought a stay. The claim Plaintiffs should have terminated the REPA ignores the fact that a court order compelled the sale and terminating the REPA would be contempt of court.

POINT V
(CROSS-APPEAL)

DEFENDANT'S ARGUMENT THAT REVERSAL IS WARRANTED BECAUSE THE COURT FAILED TO REQUIRE MR. MISTICHELLI TO RELY ON "NEIGHBORING PROPERTIES" BASED ON AN "AUTOMOTIVE USE" AND COMPARABLE SALES FROM "JANUARY 1, 2018 TO THE PRESENT" CONTRADICTS THEIR HARMLESS ERROR ARGUMENT AND ALSO IGNORES THE RECORD.

Contrary to their harmless error argument in response to our appeal, Defendant argues for the cross-appeal reversal is warranted because the court's decision failed to account for whether the parties' appraiser relied on "neighboring properties" based on an "automotive use" and comparable sales from "January 1, 2018 to the present." Here, again, Defendant's facts are incorrect.

Defendant quotes the REPA about a requirement to use comparable sales from "January 1, 2018 to the present," but this is not what REPA says. It says comparable sales "since January 1, 2018." Pa20.

The quote about "neighboring properties" is not helpful to Defendant because Mr. Mistichelli testified he used neighboring properties and Defendant failed to identify any standard that provided any definition of "neighboring properties" different than what Mr. Mistichelli used. As Defendant concedes in its brief, Mr. Mistichelli used neighboring properties, in addition to looking at other properties.

He therefore did use neighboring properties, and Defendant failed to demonstrate anything else he reviewed had any effect on the appraisal.

The quote about "automotive use" suffers the same defect as Defendant's complaints about "neighboring properties." It also ignores Mr. Mistichelli's testimony about used and new car sales. Defendant offered no standard that limits "automotive use" to new cars. Defendant instead, through counsel and without citation, argues "automotive use" means "he was supposed to value the Property primarily considering its potential use as a new car dealership." Db49. A successful challenge to Mr. Mistichelli's consideration of "automotive use," which employed both new and used automotive use, required Defendant present evidence that adopts counsel's opinion on "automotive use."

Without facts to support the "automotive use" argument, Defendant revert to misstating the record. Defendant represents, "At trial, Defendant introduced evidence that Mistichelli failed to follow the automotive use provision." Db49-50. Defendant's citations do not say anything about what constitutes "automotive use" or that Mr. Mistichelli failed to follow any recognized definition of automotive use.

The argument based on impossibility was not preserved below, as it is not included as one of the thirty affirmative defenses Defendant raised. Pa53-56; Pa87-90 (amended). See generally, Brown v. Brown, 208 N.J. Super. 372, 384 (App. Div.

1986) ("[A]n affirmative defense is waived if not pleaded or otherwise timely raised").

Had impossibility been included as an affirmative defense, Defendant needed to present clear and convincing evidence for this defense. JB Pool Mgmt. v. Four Seasons, 431 N.J. Super. 233, 248 (App. Div. 2013). The defense, however, would not be available because Mr. DiPiano, as the seller, had to have known whether his business had neighboring properties for comparison. The issue now complained of was therefore one he could have anticipated at the time of the settlement agreement, thereby removing the defense. Id. at 245.

The doctrine of impossibility also fails because Defendant introduced evidence of what Defendant says are neighboring properties Mr. Mistichelli should have considered. Defendant defeats the impossibility argument by demonstrating, Defendant says, Mr. Mistichelli could have considered neighboring properties, but he failed to do so. This is different than neighboring properties not existing.

Equally fatal, the doctrine of impossibility applies to performance – by the contracting parties. It is performance by the contracting parties that must be impossible. Here, the contracting parties could easily perform. It is performance of non-contracting-party Mistichelli that Defendant uses to assert impossibility.

Another reason the doctrine does not apply is because the "impossible" performance is an act of a third party. The Restatement (Second) of Contracts § 261

(impossibility), cmt. e, which is cited in Connell v. Parlavecchio, 255 N.J. Super. 45, 50 (App. Div. 1992) provides, "Even if a party contracts to render a performance that depends on some act by a third party [(e.g., Mr. Mistichelli)], he is not ordinarily discharged because of a failure by that party [(Mr. Mistichelli)] because this is also a risk that is commonly understood to be on the obligor." See also JB Pool Mgmt., 431 N.J. Super. at 245 (citing § 261 as authority).

Thus, under the facts and law, Defendant's argument fails.

POINT VI
(CROSS-APPEAL)

DEFENDANT ARGUES THE COURT BELOW SHOULD NOT HAVE DISMISSED THE COUNTERCLAIMS, BUT DEFENDANT DOES NOT IDENTIFY ADMISSIBLE EVIDENCE THAT SUPPORTS THE COUNTERCLAIMS.

Defendant argues the court below erred by dismissing the counterclaims. Even on appeal, Defendant lacks admissible evidence from the record to support the claims. Argument of counsel, without supporting facts, is insufficient.

A. Counterclaim: Breach of Contract.

For the breach of contract claim, Defendant relies on a provision in the lease that says Plaintiffs could not, among other things, create "encumbrances or other charges upon the Premises[.]" Db53. Defendant provides no definition of "other charges."

For "encumbrances," Defendant relies on the filing of a lis pendens. The lease that includes the provision against encumbrances is signed by Yuriy Mirgorodskiy. Pa306-340. Yuriy assigned the lease to Garden State Nissan, Inc. Pa341. The lis pendens was filed by 1567 Route 23 Holdings, LLC, which was a holding company for the property, upon exercising the purchase option. 2T90-11 to -18; Ra654-656. Defendant provided no evidence the holding company is an assignee of the lease. Contractually, Garden State Nissan, Inc. is the assignee. Defendant cannot maintain

a breach of contract against Garden State Nissan, Inc. for the filing of a lis pendens by 1567 Route 23 Holdings, LLC because there is no privity of contract until a sale is consummated that gives the holding company legal control over the property.

Another reason Defendant's argument fails is Defendant failed to demonstrate a lis pendens is a charge on property or an encumbrance. A lis pendens is "written notice of the pendency" of litigation "to enforce a lien upon real estate or to affect the title to real estate or a lien or encumbrance thereon[.]" N.J.S.A. 2A:15-6. A lis pendens is notice of intention to encumber without yet encumbering. It is therefore not a breach of the lease.

Further, "[T]he notice of lis pendens exists for public policy reasons necessary for the proper administration of justice." Wendy's of S. Jersey, Inc. v. Blanchard Mgt. Corp. of N.J., 170 N.J. Super. 491, 497 (Ch. Div. 1979). A lease provision that seeks to remove a remedy available for public policy reasons should not be enforceable, and should be removed from the parties' agreement as legally unconscionable.

The filing of a lis pendens is also protected under litigation privilege. The absolute litigation privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." Hawkins v. Harris, 141 N.J. 207, 216 (1995); see also

Brown v. Brown, 470 N.J. Super. 457, 467 (App. Div. 2022) (litigation privilege applicable to filing a lis pendens).

Assuming the filing of the lis pendens breached the lease, and it was filed by a party to the lease, and filed outside the litigation context, Defendant fails to identify damages to a reasonable degree of certainty that the court can, in turn, award. Defendant also failed to mitigate damages. The court denied their motion to discharge the lis pendens on October 27, 2023, without prejudice, Ra77-78, and nothing in the record was located to show Defendant filed a motion with the court thereafter to effectuate a discharge.

Defendant's breach of contract claim also alleged breaches of the lease that pre-date the settlement agreement. The court below properly held Defendant lost any right to assert breach based on conduct that pre-dates the settlement agreement, especially here where the conduct Defendant complains of was publicly-available. "Parties are always free to preserve any claim they might have pursuant to a court rule or otherwise when settling a case, but they must clearly state that intention at the time of the settlement." Serico v. Rothberg, 448 N.J. Super. 604, 615-16 (App. Div. 2017) (citations omitted), aff'd, 234 N.J. 168 (2018).

Our record includes unrebutted trial testimony that these parties intended "to settle the lawsuit or anything that could have come up in the lawsuit that's pending," 1T42-21 to -23, including ". . . alleged lease violations[.]" 1T45-5 to -14. Defendant

therefore contractually waived the claim for breach and, per Serico, lawfully waived it by not properly preserving it in the settlement agreement.

To argue to this Court, "The Settlement Agreement did not release the claims relating to the Lease," Db57, is another fact contradicted by the record. Defendant's citation to Pa342 supports our argument because it says the intent was to settle "any and all of the respective claims asserted by each and all those claims which could have been asserted, whether known or unknown with respect to the sale of the subject [property.]" See also Pa342 (the settlement agreement identifies the lease).

To prevail on this argument, Defendant then, again, cites – and underlines – the portion of the settlement agreement that was a typo. Defense counsel's own client testified it was a typo. 5T108-1 to -14. A person who prepared the agreement, who the court found credible, presented unrebutted testimony it was a typo. 1T112-17 to -19. The context similarly leaves no doubt the settlement agreement was to resolve the purchase of the property- not about the sale of a car. The fact Defendant continues to insinuate anything different bolsters the credibility determinations made by the court below, e.g., disbelief of critical portions of Mr. DiPiano's testimony.

The final breach of contract claim is based on disclosure of the settlement in this litigation. Db57. This disclosure is also protected by litigation immunity. Supra. It was also contradicted at trial by Mr. DiPiano who originally testified he did not think disclosure of 'confidential' terms was a problem, despite his counsel's letter,

5T109-14 to -19. The citation in Defendant's brief to 5T109:6-13 omits that, in the cited testimony, Mr. DiPiano really said what is "just not good business" is people knowing "you're involved in litigation cases and things like that." To Mr. DiPiano, it is being involved in litigation that he seeks to shield from the public because it is not good business.

Under the law, too, any penalty provision in the confidentiality agreement constitutes an unenforceable liquidated damages provision bearing no rational relation to actual damages. Westmount Country Club v. Kameny, 82 N.J. Super. 200, 205 (App. Div. 1964). It is an unenforceable penalty.

Fact-wise, there is nothing confidential disclosed, except settlement of the prior litigation. In addition to being publicy-avialable prior to the settlement agreement, this is allowed to be disclosed under the confidentiality clause. See Pa345 ("The Parties acknowledge that the fact that the Parties have settled this Action is not confidential,"). The remainder of the settlement agreement provides for an appraiser, which is publicly-available from the filing of the non-confidential lease. Pa329.

For all the foregoing reasons, the court below properly dismissed the breach of contract claim.

B. Counterclaim: Breach of Covenant of Good Faith and Fair Dealing.

Defendant challenges dismissal of their claim for breach of the covenant of good faith and fair dealing. Defendant asserts the court below added a "malice" element to the claim. It is harmless error that, like other errors raised by Defendant, may be affirmed on appeal even if the court below gave the wrong reason for its decision. Isko v. Livingston Tp. Planning Bd., 51 N.J. 162, 175 (1968).

Removing malice as an element, Defendant still fails to identify admissible evidence from the record to support the claim. Post-litigation conduct is all protected by litigation privilege. Supra. Pre-litigation conduct involves nothing more than statements, by counsel, that Mr. Mistichelli properly performed his appraisal. Even the complained-of error, by Mr. Mistichelli, of initially failing to average the two appraisals, persisted for only an hour or two. Pa397-398. Defendant lacks an actionable breach of the covenant by Plaintiffs. If a breach occurred it was through counsel, i.e., litigation privilege, and if there were damages, those damages would be limited to a period of an hour or two. The record contains nothing on the issue of damages for that hour or two.

Equally fatal, the fact used to support the breach of the covenant of good faith and fair dealing is, "Plaintiffs' counsel [having] refused to instruct Mistichelli to correct" his ministerial error. Db60. Counsel is not a party to the contract. Neither counsel nor Plaintiffs are required to affirmatively instruct Mr. Mistichelli to do

anything. Another major fact omitted from Defendant's argument is that Defendant is equally responsible for Mr. Mistichelli. Mr. Mistichelli was both parties' appraiser.

C. Counterclaim: Fraud.

Defendant challenges dismissal of the fraud claim. Rather than cite to evidence in the record, Defendant again cites the pleading. Defendant first alleges Plaintiffs "failed to disclose that they were subject of an investigation and that there were numerous complaints against them[.]" Db62. This issue is foreclosed by failing to preserve it in the settlement agreement. Serico, 448 N.J. Super. at 615-16. Second, "[Plaintiffs] knew that Defendant would never agree to include an option to purchase or enter into the Lease had Defendant knew about the complaints[.]" This is barred, per Serico. Third, "Plaintiffs intentionally withheld that information in order to induce Defendant into entering into the Lease[.]" In addition to being impermissibly vague, it is barred, per Serico. Fourth, "Defendant relied on the omission and . . . as a result, the good will of the Property has been damaged[.]" This too is barred, per Serico.

As for Defendant's legal argument that the court below "improperly went beyond the pleading to dismiss that claim," Db62, motions based on pleadings in a case that has undergone discovery are considered "in light of the factual situation existing at the time each motion is made." Fisher v. Yates, 270 N.J. Super. 458, 467

(App. Div. 1994) (citations omitted). The court is therefore allowed to consider facts outside the four corners of the pleading.

For Defendant's complaints about the motion judge limiting discovery or trial testimony, Defendant fails to demonstrate any error constitutes an abuse of discretion. See generally, In re Subpoena Duces Tecum, 214 N.J. 147, 163 (2013) ("Decisions of trial courts on discovery matters are upheld unless they constitute an abuse of discretion"); Persley v. N.J. Transit Bus Operations, 357 N.J. Super. 1, 9 (App. Div. 2003) ("The conduct of a trial, including cross-examination and its appropriate limits, is within the discretion of the trial court . . . .Exercise of that discretion is ordinarily not interfered with unless there is a clear abuse of discretion which has deprived a party of a fair trial").

Defendant's pleading identifies thirty-three instances of what Defendant says are prior bad acts. Pa96-112. Burdening parties and non-parties alike to locate thirty-four, thirty-five, or more is cumulative and changes nothing. For the same reason, limiting cross-examination on this issue was the correct decision. And if error, it constitutes harmless error because the court already possessed the crux of what Defendant considered bad acts. None of this affects the outcome because Mr. Osiashvili's testimony, and his credibility, do not affect the settlement agreement, the REPA, or Mr. Mistichelli's appraisal.

It is also known, based on Defendant's pleading, Pa96-112, the information Defendant now complains of was publicly available on "Yelp" and "Cars.com," which are online platforms. It was available as far back as 2020, Pa96-112, which predates the settlement agreement by two years. Pa13-19; see also Db63 (Defendant's brief says the evidence sought "was based on conduct which occurred prior to the Settlement Agreement").

As for the entirety of the argument on this issue, Defendants respectfully has it backwards. The prior bad acts Defendant wants to introduce affects the buyer (Plaintiffs), not the Seller (Defendant). The prior bad acts, if considered by Mr. Mistichelli, would be expected to lower the value of the property. A lower purchase price, due to the property being tainted with bad will, helps Plaintiffs. The prior bad acts originate predominantly with inadmissible hearsay from internet postings, N.J.R.E. 802, that also had to overcome N.J.R.E. 404(b) (inadmissibility of prior bad acts to demonstrate conformity therewith).

Another problem is the court rejected Mr. DiPiano's testimony, as not credible, on some of the very facts Defendant relies on for the fraud claim. See e.g., Pa135 (¶181). And yet another problem is Defendant relies on conduct occurring during litigation, Pa135 (¶182), Pa136 (¶188-189), which is covered by litigation immunity, supra, and also supported with conduct Defendant says "caused harm to the public at large," Pa135 (¶184), which Defendant lacks standing to pursue.

Last, while reference is made to all governing documents, Defendant limits the fraud claim in the pleading to the lease: "Had Defendant known of the Plaintiffs' and Third-Party Defendants' past history, Defendant would not have entered into the Lease." Pa137 (¶191); see also Db63 ("Defendant's [sic] claim was that Osiashvili fraudulently induced DiPiano into entering the Lease"). There is no identified duty that required disclosure of the facts Defendant now complains of.

D. Counterclaim: Promissory Estoppel.

Defendant challenges dismissal of the claim for promissory estoppel. For this, Defendant argues the court erred in finding Mr. Osiashvili's testimony credible for the facts that defeat promissory estoppel. The finding by the court below is a credibility determination this Court should not second-guess.

"[A]n appellate court's review of a cold record is no substitute for the trial court's opportunity to hear and see the witnesses who testified on the stand." Balducci v. Cige, 240 N.J. 574, 595 (2020) (citation omitted). "That there is evidence that would have permitted [the trial judge to make a different finding] does not mean the judge was required to credit it." Steiner v. Steiner, 470 N.J. Super. 112, 126 (App. Div. 2021).

But even if we accept Defendant's argument, and we reject Mr. Osiashvili's testimony, Defendant is still required to identify evidence in the record to support the claim that the parties agreed to purchase the property for between $8-9,000,000.

Db65. Defendant's argument is called into question by the settlement agreement and REPA. It would make no sense to have Mr. Mistichelli's appraisal, if the parties already agreed to a purchase price between $8-9,000,000.

This leaves Mr. DiPiano's testimony as Defendant's only evidence. For this evidence, the court held, "[H]is testimony regarding discussions prior to entering into the lease and the other agreements between the patties to be unsupported by the other evidence in the record. Specifically, it was not credible that the parties agreed to an $8 million value for the Premises but then put in place a process for appraisals to determine the sale price." Pa251-252.

In the absence of evidence, the court below properly rejected the promissory estoppel claim.

CONCLUSION

For the foregoing reasons, we respectfully request the decision below be reversed in part for a remand for:

(1) Entry of judgment that enforces the settlement agreement in its entirety including a purchase price of $4,605,000.00 and the agreed upon site control credit and rent credits at closing being due to Garden State Nissan/Route 23 Holdings; and

(2) Entry of judgment following consideration of an application for fees and costs pursuant to the prevailing-party provision of the settlement agreement; and

(3) Rejection of the complaints of error in the cross-appeal.

Respectfully submitted,

/s/ *Jeff Mandel*

Jeffrey S. Mandel

Dated: *August 22, 2025*

GARDEN STATE NISSAN, INC. and 1567 ROUTE 23 HOLDINGS LLC, **Plaintiffs/Appellants** **v.** **1567 SOUTH REALTY LIMITED LIABILITY COMPANY,** **Defendant/Third-Party Plaintiff/Respondent/Cross-Appellant**	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **APPEAL DOCKET NO: A-3784-23** **CIVIL ACTION** **ON APPEAL FROM A FINAL JUDGMENT, SUPERIOR COURT OF NEW JERSEY, MORRIS COUNTY, CHANCERY DIVISION** **SAT BELOW: HON. FRANK J. DEANGELIS, P.J.CH.** **DATE SUBMITTED: September 8, 2025**
1567 SOUTH REALTY LIMITED LIABILITY COMPANY, **Defendant/Third-Party Plaintiff/Respondent/Cross-Appellant** **v.** **YURIY MIRGORODSKIY and RICHARD OSIASHVILI,** **Third-Party Defendants**	

DEFENDANT/THIRD-PARTY PLAINTIFF/RESPONDENT/CROSS-APPELLANT, 1567 SOUTH REALTY LIMITED LIABILITY COMPANY'S REPLY BRIEF IN FURTHER SUPPORT OF CROSS APPEAL

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PRELIMINARY STATEMENT

Plaintiffs cannot ignore the language in the REPA which requires the appraisal to be conducted based upon an "automotive use" and to be based upon a "Sales Comparison approach ***using the sale of neighboring automobile dealerships since January 1, 2018***[.]" (emphasis added). Mistichelli's failure to follow these requirements resulted in an artificially reduced appraisal.

The merger doctrine also applies. When a purchaser transfers a deed to the seller, the deed thereafter governs the parties' relationship and not the sales contracts. Plaintiffs cannot seek to enforce the REPA or Settlement (i.e. sales contract) after the sale. Also, this Court denied Plaintiffs' motion to strike the merger doctrine from Defendant's brief. Merger is different than mootness.

Plaintiffs' argument that Mistichelli's price is valid because "some of" the comparable sales were in the Morris County is meritless, given Paragraph 3(a) required that all comps be "neighboring properties." A property several miles away cannot be a "neighboring property". The "neighboring properties" and "automotive use" requirements must be enforced. Plaintiffs argument that that Defendant "failed to cite" expert testimony defining those terms is meritless since: i) Plaintiffs' have the burden; ii) Misitchelli admitted that he did not comply with the "neighboring properties" requirement (2T14:17-23); and iii) Ted Lamicella testified about the differences between new and used dealerships and explained to the Trial Court why

Misithcelli's use of used dealerships and mixed use properties did not reflect the Property's automotive use. (4T56:16-57:15).

Plaintiffs violated the Lease provisions by refusing to modify the lis pendens. When GSN signed the Lease, it assumed the obligations under Paragraphs 5 (Liens and Encumbrances) and 16 (Subordination Clause) of the Lease. GSN was not permitted to interfere with Defendant's mortgage, and their refusal to modify the lis pendens caused a default in the mortgage. Plaintiffs' refusal to follow the Lease and their failure to allow refinancing was not protected by the lis pendens statute or any privilege. Plaintiffs mischaracterize testimony regarding the scope of the Settlement Agreement. Breaches of the Lease were never "released" since the release was limited.

Plaintiffs also breached the covenant of good faith since they are responsible for the misconduct of their agent. Likewise, Plaintiffs' citation to inapposite case regarding a motion to dismiss based on collateral estoppel does not excuse the Trial Court's dismissal of the counterclaims based on evidence outside the pleadings. Plaintiffs' argument that this Court is required to defer to the Trial Court's decision to credit Osiashvili's testimony relating to Defendant's promissory estoppel claims without providing Defendant with a fair opportunity to cross is not supported.

SUPPLEMENTAL PROCEDURAL HISTORY & STATEMENT OF FACTS

The Court has not ruled on the merger doctrine and permitted its inclusion in Defendant's merits brief.[1] (Pra. 18; Dra. 16-17). The doctrine of merger is different than mootness or waiver. (Dra. 15). Mootness only examines whether there is an existing controversy. (Ibid.). Waiver looks to whether there has been a voluntary relinquishment of a right. The merger doctrine holds that the acceptance of a deed terminates the contractual relationship, and their respective rights and obligations are determined by the deed (not the prior contract). (Dra. 14-15). In the REPA, the only covenants which survive are Paragraphs 10-12 of the REPA, and they ***do not permit a post-closing challenge to the price and credits.*** (Pa. 353-355).

Defendant is allowed to present law showing that, when the parties moved forward with the sale without seeking a stay, the purchase price and closing credits provisions of the REPA merged with the new Deed. (Pra. 18; Dra. 14-23). Plaintiffs improperly[2] cite to their prior legal briefs to argue that they did not waive their rights because they filed a motion seeking to place an amount into escrow. (Prb. 4-5). But

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[1] The Court denied Plaintiffs' June 25, 2025, motion to strike the merger doctrine. (Prb., 1, 4-5, 30-31). Defendant has included relevant portions of prior motions in front of this Court to illustrate that, despite Plaintiffs' claim to the contrary, the merger doctrine argument was never adjudicated. See R. 2:6-1(a)(1).

[2] Plaintiffs improperly cite to their "Responding Procedural History and Statement of Facts" to supplement the record in order to cite to facts which are not a part of the record. Plaintiffs' inclusion of this material in its reply appendix is improper and violates the Court's March 11, 2025 Order.

Plaintiffs did not move for a full stay. Defendants opposed the motion, opposed the appeal and never agreed that Plaintiffs could obtain title and continue to demand for a better price and closing credits. (Pa. 289-91; Pa. 353-355). Plaintiffs misquote oral argument, which is not a part of the record, to suggest that they did not "waive" their challenge. However, Defendant's Counsel only said that he was not aware of case law. (Prb. 4). When the parties moved forward with the sale, their relationship became governed by the new Deed.

LEGAL ARGUMENT

POINT ONE: THE COURT SHOULD ISSUE A REVERSAL OR REMAND ON THE ISSUES RAISED IN THE CROSS APPEAL. (Pa. 277-281).

A. The Trial Court erred when it disregarded Mistichelli's failure to follow the "neighboring properties," "automotive use" and temporal requirements in Paragraph 3(a) of the REPA. (Pa. 259-263).

The failure to apply the appraisal formula in Paragraph 3(a) only worked to Plaintiffs' benefit because the failure to the "neighboring properties", "automotive use" and temporal requirements resulted in a lower valuation. For starters, it was appropriate for the Trial Court to correct Mistichelli's Capitalization of Income Approach appraisal to incorporate the correct rent amount in the Lease, and that was not an error. (Pa. 262; Pa. 350). Plaintiffs' contention that Paragraph 3(a)'s requirement that Mistichelli be provided a copy of the Lease only so that he can "reject" the rent amount as "excessive" is meritless. It would render the requirement

meaningless. See Cumberland Cnty. Imp. Auth. v. GSP Recycling Co., Inc., 358 N.J. Super. 484, 497 (App. Div. 2003). Plaintiffs' argument that Mistichelli was only given the Lease for "background information" is contradicted by Mistichelli's testimony that the Income Approach ***required him*** to consider the Lease, (see 1T155:21-156:15; 3T49:7-9). His use of a discounted rent (rather than the actual base rent) resulted in his Income Approach being discounted by millions. (Pa. 262). Nor should there be a reversal or remand relating to the Trial Court's decision to correct the rent amount because the Trial Court did not alter the REPA's terms when it exercised its equitable powers to ensure that Mistichelli's Income Approach conformed with the agreement. See e.g., Schlecter v. Hollander, 11 N.J. Super. 236, 241 (App. Div. 1951). Additionally, the Court should only grant the cross appeal and not Plaintiffs' demand for attorney's fees and a Site Control Credit. Those issues were not raised at trial. The passing references in Plaintiff's pre-trial submission for a credit and catchall request for credits was insufficient. Defendant did not have a fair chance to cross-examine Plaintiffs' appraiser on that issue. (Pra. 20-24). Further, Plaintiffs' closing request for "fees" in its post-trial submission was insufficient to raise a request for attorney's fees. There is an entire legal analysis as to whether a party has "prevailed" which was never raised before the Trial Court.

By contrast, Misitichelli did not use only "neighboring properties" in his Comparable Sales appraisal, which was an error that harmed Defendant. Several of

Mistichelli's comps were in separate counties and not adjacent to the Property. (Pa. 474; Pa. 478). Even the comps which were in the same county were nearly 30 miles away, (2T87:22-88:6; Pa. 476 (approx. 26 miles from Property); Pa. 470 (approx. 32 miles from Property), or at least over ten miles away which does not satisfy the neighboring requirement. (Pa. 467-480). While Misitichelli made "adjustments for location" that should never have occurred if neighboring properties were used. (2T14:17-23 (Mistichelli admits that only five out of the seven comparable sales were in the same county as the Property); 2T14:19-22 (Mistichelli used comparable sales from Warren and Passaic County); 2T9:5-7 (Mistichelli admits that he had to make "adjustments for location"); 2T130:1-3 (Mistichelli admits that he had to make "adjustments for location" to comparable sales one, two, three, four and six because those sales were not in the same neighborhood). ***Nothing in Paragraph 3(a) of the REPA allowed Misitichelli to use comparable sales which were not "neighboring".*** (Prb, p. 32; Pa. 250). The appraisal must incorporate only comparable sales of "neighboring" dealerships.

Mistichelli cannot disagree with a contractual term and refuse to abide by it. The contractual terms reflected the agreed upon formula which must be followed. (1T166:7-25); Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997). If Mistichelli could not follow the contract, he should have declined the appointment. Plaintiffs seek to re-write the REPA by claiming that Mistichelli was allowed to use

comps which were not "neighboring." (Prb, p. 32). That contradicts the plain terms of the REPA. See e.g., Meserve v. Traverso, 119 N.J.L. 566, 569 (1938). Nothing in the REPA allowed Mistichelli to use comparable sales which were not "neighboring" the Property. (Pa. 349-350). As such, the appraisal is nonconforming to the REPA's requirements.

Plaintiffs argue that the REPA should be ignored and a new standard regarding what constituted "neighboring properties," should be applied but they are wrong. Plaintiffs have the burden of establishing that the appraisal conformed with the REPA – not Defendant. See Goldfarb v. Solimine, 245 N.J. 326, 338 (2021). Misitichelli could not explain what a neighboring property was, or how his comparable sales satisfied that definition. (See 1T167:4-16).

Plaintiffs' argument that there was no testimony regarding Paragraph 3(a)'s "automotive use" requirement is belied by Ted Lamicella's testimony: (a) Lamicella testified on appraisal methods generally accepted in the industry, (4T43:24-44:1); (b) the REPA required the appraiser to "appraise the property as a new car dealership with the two approaches," (4T50:11-12); and (c) in order to determine the value under the Capitalization of Income Approach, the appraiser was required to consider the income earning potential ***as a new car dealership*** (i.e. the Property's automotive use). Lamicella explained that new car dealerships are different (and more valuable then used dealerships) because they have franchise

agreements which requires owners to meet standards, including updating facilities; they generally have larger showrooms; and they generally have a larger land to building ratio; the parking area is generally larger; and they generally have larger service areas and are typically on larger lots. (4T56:16-57:15).

New car dealerships are different and to properly appraise the Property with consideration of its "automotive use," Mistichelli must use comparable properties namely, new car dealerships rather than used or mixed-use properties. (Ibid.). Plaintiffs cannot wordsmith Mistichelli's testimony. He failed to search for neighboring properties "since January 1, 2018." Mistichelli claimed that he could not find any comparable sales on Route 23 but he did not look back to 2018. (see 2T129:2-130:24); see also 2T87:19-21 Mistichelli admits that he "***did not go back five years either***, I stayed --- I probably went back – well, how far back I went, ***my oldest sale is February 2020***)). Mistichelli's failure to look back to 2018 for sales on Route 23 constituted a breach of the REPA. (Pa. 249-250). Mistichelli must search for comparable sales of neighboring properties on Route 23, with a look back to January 1, 2018. Similarly, the impossibility defense was preserved. The doctrine did not come into play until after Mistichelli testified that he could not find "neighboring" sales. Defendant did not have a fair chance to assert this defense in its pleading. JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass'n, Inc., 431 N.J. Super. 233, 249 (App. Div. 2013). Plaintiffs' reliance on Connell v.

Parlavecchio, 255 N.J. Super. 45, 49 (App. Div. 1992) is misplaced as this Court rejected an impossibility defense based on the buyer's failure to complete purchase because his uncle did not provide him with the appropriate financing for the purchase. Id. at 49. Here, Paragraph 3(a) was not contingent since the parties recognized that a material term of their agreement was an appraisal based on comparable sales of neighboring automobile dealerships. (Pa. 249-250). If the there are no neighboring dealerships, the REPA cannot be enforced under impossibility.

B. The Trial Court erred when it dismissed Defendant's Counterclaims. (Pa. 259-263; Pa. 215-216; 6T96:2-12).

Defendant was not required to "define" a clear term such as "other charges" in the Lease. The terms were clear on their face requiring no extrinsic evidence. (Prb., p. 37); see also O'Donnell, 301 N.J. Super. at 210. Further, Plaintiffs are liable for refusing to modify the *lis pendens* because they assumed the obligations under the Lease. (Prb., 36-37). GSN agreed "to perform from the date from the date hereof as direct obligation to [Defendant] all the provisions and obligations of the Assignor in the Lease." (Pa. 341). Thus, GSN assumed Paragraph 5's requirement that the tenant "promptly discharge" liens, charges or encumbrances "caused to be levied" against the Property, (Pa. 312 ¶ 5), and Paragraph 16's requirement that GSN execute such documents to ensure that the Lease is subordinate to the mortgage. Regardless, GSN had a duty to ensure that either itself or its affiliate modified the *lis pendens* to prevent Defendant from becoming in

arrears. (Ra. 1866-1867). Plaintiffs' refusal to alter the *lis pendens* to allow refinancing (despite the Court's October 27, 2023 Order requiring the parties to "meet and confer to attempt to reach agreement or subordination agreement presented by the lender to avoid foreclosure issue"(Ra. 78)) constituted a breach. (Ra. 1866-1867). Plaintiffs' argument regarding damages is also meritless. (Prb., 38). Defendant submitted a sworn certification demonstrating that the *lis pendens* created a risk of foreclosure, (Ra. 1749-1755). It caused the lender to declare a default and resulted in default interest rates. (See Pa. 290-291).

Plaintiffs cannot be excused from their breaches regarding their use of a *lis pendens* for "public policy reasons". None of the case law cited by Plaintiffs support the argument that Paragraphs 5 (Liens and Encumbrances) and 16 (Subordination Clause) are against public policy. Those paragraphs required Plaintiffs to not take any actions which interfered with Defendant's mortgage. The Lease did not deprive Plaintiffs of the benefit of the *lis pendens* statute. It required Plaintiffs to modify the *lis pendens* so as not to interfere with the mortgage. Brown v. Brown, 470 N.J. Super. 457, 467-68 (App. Div. 2022) (inapposite case where the court held that the litigation privilege may insulate a party from liability from the contents of a properly filed lis pendens. Here, the lis pendens violated the Lease and it does not insulate Plaintiffs from liability); see also Hawkins v. Harris, 141 N.J. 207, 216 (1995)

(inapposite case involving litigation privilege which does not apply to the breach of contract claim based on Plaintiffs' failure to alter lis pendens to allow refinancing).

Further, the Trial Court did not hold that Defendant "lost" their right to assert breach of contract claims as a result of Plaintiffs' breaches of the Lease. (Pa. 254-255). The Settlement Agreement stated that the agreement was only intended to cover claims relating to the sale of the Subject Motor Vehicle Property, (Pa. 342), and that nothing in the Settlement Agreement was intended to act as a modification, amendment or novation of the Lease. (Pa. 345 ¶ 4). Plaintiffs ignore the terms of the Settlement which kept the Lease in full force, when they claim that Defendant failed to preserve their rights. Serico v. Rothberg, 448 N.J. Super. 604, 615-16 (App. Div. 2017) (inapposite case cited by Plaintiffs for the proposition that parties must "clearly state" their intention to preserve claims in a settlement. Here, the parties stated that the terms of the Lease would remain in effect and that the Settlement only governed claims relating to the sale of the Property), aff'd, 234 N.J. 168 (2018). Plaintiffs mischaracterize testimony relating to the "whereas" clause of the Agreement. (Prb. 38-39). The only typo was the fact that the whereas clause omitted the word "dealership" after "subject motor vehicle". However, Plaintiffs' cite to Ms. Dibello's testimony to argue that the Settlement should have included language which would cover all claims relating to the first lawsuit but that is contradicted by the plain terms of the Agreement since it only covered the claims relating to the sale

of the Property (i.e. not the Lease). (1T112:1-19). Further, DiPiano's testimony relating to the typo simply pointed out that the word "dealership" was omitted. (5T107:24-108:5). The plain terms of the Settlement show that the parties did not release claims relating to the breach of the Lease. As such, the Trial Court erred when it dismissed Defendant's breach of contract claim.

Plaintiffs' argument that their public filing of the Confidential Settlement was protected by an absolute litigation privilege should be disregarded. (Prb, p. 39-40). The filing of a confidential document on a public forum is not a "communication" and is not protected. See Loigman v. Twp. Comm. of Twp. of Middletown, 185 N.J. 566, 589 (2006). The flawed interpretation of Mr. Dipiano's testimony to argue that Defendant did not suffer damages should be disregarded. DiPiano testified that the Confidentiality provision was important, and it was bad for his business. The bald conclusion regarding the effect it had on Defendant's business is irrelevant. (5T109:1-15). Further, Plaintiffs' argument that the Confidentiality Provision somehow constituted an unenforceable penalty is meritless. See e.g., Westmount Country Club v. Kameny, 82 N.J. Super. 200, 205 (App. Div. 1964). Likewise, Plaintiffs' argument that there was "nothing confidential disclosed" is plainly belied by their pleading which disclosed terms of the Settlement Agreement which was forbidden. (Pa. 36-44). There should be a reversal of the Trial Court's dismissal of the breach of contract counterclaim.

The litigation privilege does not shield Plaintiffs from liability for their breach of the covenant of good faith. The privilege only applies to statements made during the course of litigation. Plaintiffs are obligated to act in good faith under the REPA and Settlement Agreement. Peterson v. Ballard, 292 N.J. Super. 575, 581 (App. Div. 1996). Plaintiffs' argument that they did not have a duty to act in good faith because their Counsel acted is ridiculous. (Prb, 41-42). The mere fact that the parties were acting through an agent does not abrogate their duty to act in good faith and ensure that the purchase price was done in accordance with the formula.

Plaintiffs misstate the burden by suggesting that Defendants were required to cite to testimony even though they are appealing a sua sponte Order dismissing the fraud counterclaims. (Prb., p. 41-42). Serico, 448 N.J. Super. at 615-16 does not support Plaintiffs' position that the fraud claims was settled. Unlike Serico, the parties in this case made clear that only the claims relating to the sale of the Property (not fraud claims) were covered by the Settlement. 448 N.J. Super. at 615-16; see also Pa. 342. Plaintiffs mischaracterize this Court's holding in Fisher v. Yates, 270 N.J. Super. 458, 465 (App. Div. 1994) to argue that the Trial Court was allowed to consider discovery on a motion to dismiss. First, Fisher involved a motion to dismiss on collateral estoppel grounds and not based upon R. 4:6-2(e). Ibid. Second, there was no motion pending when it sua sponte dismissed the counterclaims. Nothing in Fisher allowed the Trial Court to dismiss the counterclaims without affording

Defendant an opportunity to submit additional briefing and certifications. See ibid. Third, Plaintiffs cite inapposite case law regarding the appellate standards for discovery motions. The Trial Court dismissed valid counterclaims for fraud, without affording Defendant a chance to obtain discovery. The standard of review is *de novo*. See e.g., Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019).

Plaintiffs' backwards logic that their fraudulent conduct helped Defendant to get a better purchase price is non-sensical. (Prb., p. 44). Plaintiffs damaged the goodwill to the Property, and the fraud renders the contract unenforceable. The Trial Court was not allowed to block Defendant from cross examining Osiashvili relating to conduct. Further, Plaintiffs argue that the Trial Court found Mr. DiPiano to not be credible even though the Trial Court held that "[t]he Court found DiPiano's testimony regarding the Premises to be credible based on his experience as an owner of multiple car dealerships." (Pa. 251).

Defendant is entitled to a fair opportunity to cross examine Osiashvili. State v. Pollack, 43 N.J. 34, 39 (1964). Similarly, Plaintiffs' argument that there was no evidence that the parties agreed on a 8 or 9 million dollar purchase price directly overlooks DiPiano's testimony. (5T98:9-99:10).

The REPA and Settlement Agreements have merged with the new Deed and Defendant never agreed that Plaintiffs could challenge the Trial Court's purchase

price after the sale in a subsequent appeal. The REPA explicitly laid out which covenants would survive closing and which would be extinguished. See Gueye v. Amato, No. A-0773-07T2, 2008 WL 2755832, at *4 (App. Div. July 17, 2008).

Likewise, Trial Court did not err when it made a factual determination that Defendant did not breach the contract when it raised concerns with Mistichelli's flawed appraisal. Therefore, Plaintiffs were not entitled to credits. See Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). Finally, Plaintiffs' are improperly applying an arbitration standard of review even though the parties explicitly removed the arbitration provision.

CONCLUSION

The Court should grant a reversal or remand on Defendant's cross-appeal.

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