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| <b>GRAND TETON DEVELOPERS, LLC</b>     | : | <b>SUPERIOR COURT OF</b>          |
|  | : | <b>NEW JERSEY</b>                 |
| <b>Plaintiff,</b>                      | : | <b>APPELLATE DIVISION</b>         |
|  | : |                                   |
| <b>v.</b>                              | : | <b>DOCKET NO: A-004072-23</b>     |
|  | : | <b>Civil Action</b>               |
|  | : |                                   |
| <b>UNITED DEVELOPMENT OF</b>           | : |                                   |
| <b>AMERICA, LLC</b>                    | : | <b>On Appeal from: Chancery</b>   |
|  | : | <b>Division -Passaic County</b>   |
| <b>Defendant/Third-Party Plaintiff</b> | : | <b>PAS-C-130-21</b>               |
|  | : | <b>Sat Below: Hon. Randal C.</b>  |
| <b>v.</b>                              | : | <b>Chiocca, P.J. Ch. and Hon.</b> |
|  | : | <b>Frank Covello, P.J. Ch.</b>    |
|  | : |                                   |
| <b>MAXX SPANN REAL ESTATE &amp;</b>    | : |                                   |
| <b>AUCTION CO., MAXIMILLION M.</b>     | : |                                   |
| <b>SPAN, JR., INDIVIDUALLY, XYZ</b>    | : |                                   |
| <b>CORPORATION, ABC LLC, JOHN</b>      | : |                                   |
| <b>DOES AND JANE DOES</b>              | : |                                   |
|  | : |                                   |
| <b>Third-Party Defendants</b>          | : |                                   |

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**BRIEF OF DEFENDANT/THIRD-PARTY PLAINTIFF APPELLANT,  
UNITED DEVELOPMENT OF AMERICA, LLC**

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## PRELIMINARY STATEMENT

This real estate matter resulted in summary judgment for Plaintiff, Grand Teton (“GT”), as buyer, decreeing specific performance on an unsigned contract. Third Party Defendant, Max Spann Real Estate (“Spann”) auctioned United Development of America, LLC’s (“United”) property on December 1, 2021. Prior to Spann’s auction date the seller, United, instructed Spann to postpone because development approvals (the “Approvals”) that were believed to be in place and impacted the Property value were discovered to have expired. United’s owner testified in his deposition that Spann had agreed to his instruction to postpone until Approvals were reinstated. He testified he did not even know the auction had occurred until after he received the buyer-signed contract from Spann.

United also never approved or signed the form of real estate contract that Spann’s auction agreement required as a condition for Spann to proceed. Spann used a draft contract that he, as a real estate broker, had unlawfully created. United’s prior counsel made “suggestions” for changes to Spann’s draft. However, he did not adopt the form Spann wrote as his own. He did not tell Spann that either he or United had approved finality or use. Instead, he sent his suggestions back requesting: “please advise.” United and its counsel then understood the auction was postponed on United’s instruction so no contract form needed to be approved.

Spann did not ever respond to United’s counsel’s suggestions, as requested. Instead, he took those suggestions and used that version of his contract to proceed with the auction. Without United’s prior consent, Spann also revised his bid package stating that Approvals “previously” existed and were “expired”. Spann then opened and closed his auction in a matter of 2 hours despite United’s

expectation it would be open several days and Spann having 3 bidders who had paid the \$40,000 deposit. Spann quickly accepted GT's bid for the minimum price of \$1.7million, which had been set when both Spann and United believed the Approvals would entice multiple bidders. He closed the auction, filled in the price on his draft contract and sent it to GT for execution.

United refused to countersign because it had revoked Spann's authority to auction until Approvals were reinstated, and had never approved the required form of contract. United also disputed the timing and methods Spann employed in the auction, including accepting the first bid after only 2 hours.

When GT sued to enforce the unsigned contract United asserted the Statute of Frauds and denied Spann had authority to auction when and how he did. GT claimed that in an auction an unsigned contract overcomes the Statute of Frauds. However, the case on which GT relied, Golfinopoulos v. Padula, 218 N.J. Super. 38, 46 (App. Div. 1987), held the Statute of Frauds does bar an auction buyer's contract claim unless a certain type of auction occurred and unless buyer can prove the auctioneer had seller's undisputed authority to proceed. Golfinopoulos actually reversed a summary judgment and directed a plenary hearing on its seller/auctioneer dispute before buyer could enforced its unsigned contract. Ibid.

The two judges who heard parts of this case either did not read Golfinopoulos or ignored its import. The first judge restrained United's Property despite United's certified dispute to Spann's authority to proceed. The second judge granted summary judgment to GT, finding United's dispute as to Spann's authority, and instruction to postpone, were immaterial. He overlooked that Golfinopoulos held the opposite, and that the seller/auctioneer dispute could not

be resolved on motion. He ruled instead that GT obtained an enforceable contract from Spann independently of United's dispute of Spann's authority to auction. He did so even while accepting as true that United did instruct Spann to postpone until Approvals were reinstated. (7T44:17-20)

He also made improper procedural decisions that caused United enormous harm. First, he did not consider United's counsel's request to adjourn GT's motion due to personal problems and illness that left him unable to file timely and complete opposition. The Judge then rejected the late-filed (and bare) opposition that United's counsel was able to submit. However, he did that a month after the opposition was filed and before GT's motion was decided.

The Court did not reject United's simultaneously filed cross-motion for summary judgment, which was made on the same facts disputing Spann's authority to auction and the Statute of Frauds. GT did not oppose that cross-motion. However, the Court intentionally decided GT's motion independently of United's reciprocal 'unopposed' cross-motion, because it was "filed first".

The Court also ignored there were 4 motions for judgment pending simultaneously, all on the same facts and issues. Only one day after deciding GT's motion separately and without argument, and ignoring United's unopposed cross-motion, the Court heard argument on the other motions. There, it heard the material facts disputing Spann's authority to auction, and even accepted as true that United did instruct the postponement. (7T44:17-20) The Court ignored the import of that finding both on those motions and as to GT's rights which it had decided beforehand. *De novo* review will demonstrate reversible errors on all motions, and that United was entitled to judgment, or at least a trial.

## PROCEDURAL HISTORY

On December 22, 2021, GT filed a verified complaint and Order to Show Cause to restrain United's sale or lease of United's property in Paterson (the "Property"). (Da1) On December 27, 2021, Hon. Randall Chiocca, P.J.Ch., granted a temporary restraint despite United's objection, *inter alia*, that there was no signed contract. (Da70) On February 1, 2022 United filed an answer and counterclaim, and third-party complaint against a real estate broker who auctioned the Property, Maximillian Spann ("Spann"). (Da78)

On February 2, 2022 Judge Chiocca continued the TRO, again over United's certifications and objections. (Da113; 126) Reconsideration was denied.<sup>1</sup>

On April 22, 2022, United moved to recuse Judge Chiocca and to change venue based on its discovery that Judge Chiocca was the former law partner of GT's counsel. (Da148) On May 20, 2022, Judge Chiocca recused himself. (Da156) On June 14, 2022 the Court refused to change venue. (Da161)

The parties conducted discovery which was extended to September 27, 2023 with a pre-trial conference set for October 3, 2023. (Da294)

On July 6, 2024, GT moved for summary judgment declaring the unsigned contract valid and a right of specific performance. United's former counsel, Romi Saleh, Esq. ("Saleh") requested an adjournment to file a cross-motion to dismiss with its opposition. (Da302) The Court set September 8, 2023 as the return date. On September 7, 2023 Saleh wrote to the Court asking for another adjournment, this time based on his personal illness, personal problems and a lack of staff.

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<sup>1</sup> References to transcripts are: 1T February 2, 2022; 2T April 4, 2022; 3T June 14, 2022; 4T June 29, 2022; 5T October 3, 2023; 6T October 5, 2023; 7T October 6, 2023; 8T October 11, 2022

(Da326) The Court did not immediately respond to the request. Thus, at 2:00 am on September 8, 2023 Saleh filed a very basic opposition and cross-motion to dismiss. (Da713-726)(Da327-331)

Also on September 8, 2023, Spann filed a motion for summary judgment to dismiss United's third-party complaint which had asserted breaches of the auction agreement. (Da332) On September 27, 2023, separate counsel for Spann filed a cross-motion for judgment granting a broker's fee if GT's contract was upheld.

None of the motions were decided as of the October 3, 2023 pre-trial conference, which the Court convened. (5T) There, the Court advised United that GT's motion for specific performance would be decided as "unopposed" because United's opposition had been filed late. (5T13) The Judge then said all motions would be considered together, but he "doesn't take oppositions on the return date" and "should have decided GT's motion "on the papers" already. (5T13)

On October 4, 2023, Saleh asked the Court to consider United's opposition to avoid prejudice to United itself and because the opposition raised genuine issues for dispute. (Da815) Saleh again cited a substantial personal problem that had caused his delay. (6T9) In response, on October 5, 2023, Judge Covello held another conference. He again refused to consider United's opposition because it was late. (6T8) On that same day Judge Covello granted GT's motion for summary judgment as "unopposed" and "on the papers" without even oral argument.

The next day, Judge Covello held oral argument on the other 3 pending motions. (7T) He decided them all based on his prior decision to grant GT's motion for specific performance and to uphold the unsigned contract. (7T51-55)(Da829-833) First, he denied United's cross-motion to dismiss GT's complaint, which had

asserted that the unsigned contract violated the Statute of Frauds, and that Spann had no authority to auction to GT both because he was instructed to postpone until approvals were reinstated and because there was never a contract that United or its counsel “approved” and authorized in the auction. (Da829) Judge Covello granted Spann’s motion to dismiss United’s third-party complaint which had asserted breaches of the auction agreement. (Da830) He granted Spann’s motion for a \$170,000 broker fee. (Da832)

Judge Covello then failed to decide the final issue in the case, Spann’s fee request, for several months. On April 23, 2024, United was forced to file a motion to certify the summary judgment orders as final so it could appeal. (Da876) Judge Covello did not timely decide that motion either. After 2 more months passed, on July 10, 2024, United was forced to file a second motion to change venue based on its perceived bias and prejudice that the Court’s decisions and then 7-month delay was causing to United. (Da932)

Six days later, on July 16, 2024, Judge Covello finally granted Spann’s fee request and amended the October 6, 2023 judgment to include a \$15,000 award. (Da965-974) He also granted United’s now moot motion to certify orders as final.

United’s second motion to change venue was then not decided on its August 2024 return date. It was withdrawn to avoid a loss of appeal rights since Judge Covello had certified the summary judgment orders as final.

### **STATEMENT OF FACTS**

In September 2021 United entered an auction agreement with Spann that allowed Spann to auction the Property under certain conditions, and which set a floor price of \$1,700,000. (Da7) Spann testified that the \$1.7 million floor was an

“enticing low number designed to create excitement and increased bids.” (Da355-356) United testified that Spann told him to start with the \$1.7 million floor price because bidding over 10 days would increase the price. (Da466 l. 1-8) United testified Spann also assured he would not sell to the first bidder. (Da466 l. 19-25)

At the time the auction agreement was finalized, both United and Spann believed the Property’s development Approvals were current and made it more valuable. (Da370; 466p.40:15-25; 495p.195) The Approvals’ existence was material to United and Spann setting the “enticing” floor price and bidding strategy. (Da355-56; 407p.153:4-15) United paid Spann \$12,000 to market the Property, and Spann advertised has having current approvals. (Da370-371)(Da478)

However, during marketing Spann learned the Approvals had expired. (Da373 l. 4-11) On that news United immediately requested that Spann “freeze” the auction until the Approvals could be renewed. (Da467 p.44:2-17)(Da480 p.96:13-25)(Da496p.161:18-23)(Da504p.191:18-25)(Da505 p.195:18-25)(Da505 p.195:11-13)(Da507p.202:19-25) United believed that the lapse in Approvals would quell potential buyers’ interest and prevent the “enticing” low floor price strategy from attracting multiple bidders, as originally expected. (Da484p.111)(Da64)(Da81)(Da119) United also believed Spann’s ads that Approvals did exist could subject United to claims by bidders. (Da484)

United’s owner, Bashar Sabbagh, testified at his deposition that Spann agreed to postpone the auction so that the Approvals could be renewed. (Da467p.44:2-17)(Da497p.162:11-15)(Da496p.161:20:25) Spann disputed that, and testified United told him to proceed anyway using the same \$1.7million low floor price strategy. (Da375-376) Sabbagh denied Spann’s assertions as illogical.

(Da507 p.203:15-16 & p. 202:22-25)(Da497p.162:11-15) In fact, Spann admitted that the expiration “hurt the value of the property.” (Da375, l. 11)

Spann’s auction agreement was an agency agreement and United, as principal, could not be bound to sell its property over its decision to change its mind. (Da7) United’s instructions to postpone had to be honored. Spann’s non-cancellation provision was not enforceable. *See, Point IV, infra.* Spann’s auction agreement also required, as a prerequisite to the auction occurring, that Spann receive a contract “created and approved” by United’s attorney for use at the auction. (Da9) That agreement also stated ‘Seller’ agrees to sell only “pursuant to the terms of a real estate contract that Seller’s attorney prepares.” (Da8)

As a real estate broker, Spann was not even permitted to draft commercial real estate contracts. Nevertheless, on November 9, 2021, Spann sent United a form contract that Spann had created. (Da490 p.134:1-18)(Da56-59)(Da658) It was not a residential contract that Spann could legally draft, even with a 3-day attorney review period in it. Nevertheless, Sabbagh testified Spann asked him to sign the form he drafted. (Da490p. 134:6)(Da117) Sabbagh instead instructed Spann to send his form of contract to United’s former attorney, Romi Saleh, Esq. (“Saleh”). (Ibid.) Saleh reviewed Spann’s form of contract and made “suggestions” to it. (Da60)(Da681)(Da661) In Saleh’s email back to Spann with those suggestions Saleh did not state to Spann that, with them included, either he or United, had ‘approved’ the form of contract for use in the auction. (Da661) Instead, Saleh asked Spann to, “please advise.” (Da661) That request clearly sought further action, and at least a response, before the contract could be deemed ‘approved’ by seller for use in the auction. (Da714-716) Saleh argued and certified

in the case that he did not intend his suggested changes either to be the final word or to bind his client to sell without his direct approval. (7T46)(Da50-53) (1T19:2-12)(1T20:13-15)(1T21:15-17)(1T23:18-25)

Sabbagh also testified that, as owner of United, he did not approve the form of contract, even with his attorney's suggested changes. (Da495 p.155:1-17)(Da63-66)(Da117-119) He further testified that Spann had agreed to postpone the auction as requested anyway in order to reinstate the Approvals. (Da496-97p.161:20-162:8) Therefore, in Sabbagh's mind, finalizing the terms of any 'approved' contract was not important until the Approvals were reinstated. (Da497p.162:11-15)(Da684) He testified at deposition that, because Spann agreed to "freeze" the auction until Approvals were reinstated, United did not need to approve any form. (Da497p.162:11-15)

Despite Saleh's request to "please advise", Spann did not respond at all. He did not ever confirm with United's attorney, or with United itself, that United had approved a contract for use in the auction. (Da312p.75:8-18) Instead, Spann simply took the draft contract he created and deemed it approved by United with Saleh's suggestions. Spann put that draft contract in his bid package. (Da596) Spann also revised his bid package to say that the Property "previously" had approvals, and having "expired". (Da597) Spann then proceeded with the original auction design against United's wishes using the same low floor price, but without either the Approvals both parties expected to increase bidding, or a contract that his client had approved in advance, as required by his agreement. (Da9, para. 6)

Although the auction agreement required the auction to occur "on or about November 2021" Spann opened and closed his "auction" on December 1, 2024.

(Da634; 753) The auction somehow lasted only 2 hours instead of the 10 days that United expected. (Da468pp. 48-49)(Da119) GT was the only bidder in those 2 hours, for the original floor price. Spann immediately accepted GT's bid and closed the auction although 63 others had registered to bid and 3 had paid the \$40,000 deposit to do so. (Da690) Spann then sent GT the draft contract that Spann had created, and GT signed it. (Da25) Although the draft contract that GT signed required its deposit to be sent to United's attorney, GT did not even follow its terms. GT sent the deposit to Spann instead. (Da26; 35)

After several days, Spann wrote to Saleh and advised that he had auctioned the Property. He asked for United to countersign the contract that GT signed. (Da41) Predictably, United refused because Sabbagh had instructed Spann, and understood that Spann had agreed, to postpone the auction until Approvals were renewed. (Da 692) United also disputed that Spann had conducted an actual auction, versus a straight sale to GT as the only bidder and after only 2 hours. (Da119-120) United expected any auction to last for several days as Spann stated would be the strategy to get bids over the "enticing" low floor price. (Da466p.38:5-8) United also asserted that GT was not permitted to bid at all because its owner, Hamdan, had been United's attorney in the past. (Da468p.48) The auction contract precluded "affiliates" of seller from bidding so the lone bidder should have been disqualified. (Da11, para. 8)

At the minimum, Spann knew of United's instruction not to proceed but did so anyway without confirming anything in writing after it was realized the Approvals were not current. Spann also did not advise United in writing that he could not honor United's instruction to postpone. In fact, Spann could honor it.

The auction agreement permitted Spann to “postpone” the auction with United’s consent, which he had. (Da8, para. 2) As well, Spann’s bid registration package, signed by bidders, permitted Spann to “delete” property from the auction without liability to bidders. (Da818) Moreover, as an agent for United, Spann was legally bound to follow his principal’s instructions not to proceed regardless of what his auction agreement said. He could not overrule his principal’s instructions even if his contract said it was non-cancelable. *See, Point IV, infra.*

Notably, when United refused to countersign or sell the Property to GT, it was not GT’s attorney who insisted he was required to do so. It was Spann’s attorney. (Da41) He told United that failing to proceed was a breach of his auction agreement, and was also a breach of the unsigned draft sale contract. (Da41)

On December 27, 2021, GT filed a breach of contract action and Order to Show Cause seeking a TRO, despite having no signed contract from United, or any document even signed by United’s prior lawyer purporting to bind United to sell real estate. (Da1) GT did not name Spann as a party. On December 27, 2021, the Hon. Randall Chiocca, J.S.C. nevertheless temporarily restrained sales, leasing or encumbrance of the subject property. (Da70)

In opposition to that TRO, United asserted that the Statute of Frauds’ writing requirement, N.J.S.A. 25:1-13, barred the contract claims without United’s actual signature and where Spann was instructed not to proceed. (Da50-69) United also argued that Sabbagh, himself, had never approved the form of contract that Spann utilized. (Da64-69) Saleh also certified in opposition to GT’s OSC that he, as United’s counsel, did not intend his suggested changes of Spann’s draft contract to bind United without further discussion and United’s own approval and execution

of the form contract. (Da50-63) Saleh also disputed that he, as counsel for United, expected to have authority to bind United to any contract without United's approval and signature. (Ibid.) Saleh certified that his request to Spann to "please advise", expected a response before United would have finalized the prerequisite draft, and therefore there "was no meeting of the minds". (Da53)

Moreover, United and Saleh certified to Judge Chiocca they both believed the auction was postponed on Spann's confirmation of United's instruction. (Da52 para.14)(Da64, para.12)(Da65) United testified he did not know Spann went to auction until afterward. (Da467p. 44:21-25) (1T10-11; 1T13-5) (1T29:13-20)

However, on February 2, 2022, Judge Chiocca ignored those arguments and continued the restraints on United's property. He focused heavily on his belief that GT was allowed to act on Spann's "apparent authority" as auctioneer, even though that was disputed in United and Saleh's certification. (1T23:24-25:13) Judge Chiocca also relied on the case that GT had cited, Golfinopolous v. Padula, 218 N.J. Super. 318 (App. Div. 1987), an auction-related case that only held a signed sales contract might not be needed for the Statute of Frauds in some cases if there is an auction without reserve and if seller authorized the auctioneer to proceed. (1T5:17-25)(1T33:5-35:24) However, Judge Chiocca did not address either that: (1) the holding in Golfinopolous required threshold proof that the agent was authorized to auction the property before a seller could be bound without a signed contract; (2) that United and Saleh had both certified Spann was not authorized to proceed when he purported to sell to GT; and (3) neither United nor its attorney pre-approved a contract, as the auction agreement required before Spann's agreement allowed him to proceed to auction at all.

United believed GT had not presented a well-settled right to relief to justify a TRO, or that Judge Chiocca followed the R. 4:52-1 standard. Upon investigation of its suspicions, United learned that Judge Chiocca had been the former law partner of GT's counsel, Peter Bray, Esq. for 10 years. (Da134-146) The Judge did not disclose that prior partnership to United or give United the opportunity to consider any potential conflict of interest before presiding on the OSC's and ruling against United. (1T)

United believed that relationship led to biased rulings in the TRO's. It promptly sought recusal of Judge Chiocca and a change of venue out of Passaic County. United also filed a complaint against Judge Chiocca with the Advisory Committee on Judicial Ethics. (Da148-157) On May 20, 2022, Judge Chiocca recused himself. (Da156) He sent this case to his regular "conflicts" judge, Hon. Frank Covello, J.S.C. (3T9:15-18)

United then argued before Hon. Ernest Caposella, A.J.S.C. that venue change entirely out of county was required not only because of Judge Chiocca's recusal but also because United had made a complaint with the Advisory Committee on Judicial Ethics. United believed that other judges in the Passaic Vicinage, and certainly other Chancery Judges who worked under the supervision of Judge Chiocca as Presiding Judge, might retaliate based on United's judicial ethics complaint. United argued that only a change entirely out of county would avoid any potential appearance of impropriety, unfairness or retaliation. (3T13:9-25)

On June 14, 2022, Judge Capossela denied that motion. He agreed with United that Judge Chiocca was correct to recuse himself. (3T15:15-18) He didn't think there was risk of impropriety if the case stayed with the regular conflict

judge, other than “this doesn’t look good.” (3T14:12) He ruled that if United felt something nefarious was later going on it should come back and file another motion. (3T16:3-10). Judge Capossela did not consider that this was a Chancery matter and a substitute judge who worked directly with Judge Chiocca would be the ultimate trier of fact in the case, not a jury.

No trial even occurred. Judge Covello disposed of the entire case by a series of improper summary judgment orders that weighed evidence and did so against United. On July 6, 2023, GT moved for summary judgment to declare the unsigned contract valid, and compelling specific performance. GT again argued that Spann was authorized to auction the Property despite United’s dispute of that fact. It argued United was therefore bound to sell because this was an auction, arguing Golfinopolous provided a blanket exception to the Statute of Frauds.

At Saleh’s request, that motion was adjourned to September 8, 2023 so United’s opposition could be filed with an intended cross-motion for summary judgment to dismiss claims on the unsigned contract. (Da324) However, Saleh then failed to file his opposition timely for the September 8<sup>th</sup> return date. Instead, on September 7, 2023 Saleh asked the Court for a second adjournment. He explained that he had illness, personal problems and no staff to help him. (Da326) He advised that he had requested consent of GT’s counsel but had not yet heard back. (Ibid.) The Court did not immediately respond, but also did not thereafter deny the adjournment request. (Da993-994)

With no response, Saleh apparently worked all night on September 7<sup>th</sup> and, at 2:12 am on September 8<sup>th</sup>, he filed a basic opposition brief and statement of facts that were not nearly as fulsome as they could have been with the time

requested. (Da713-726) However, that opposition did assert disputes that presented genuine issues for trial on the threshold issue of Spann's authority. It showed that: (1) United had instructed Spann to temporarily postpone the auction until Approvals were reinstated; (2) Spann did not have a contract 'approved' by United, which was a necessary condition of his auction agreement before he could proceed; (3) neither United nor Saleh believed that Saleh's proposed edits to the contract Spann drafted were intended to be binding, or deem the draft contract Spann had sent to be "approved" by United; and (4) the lack of authority of the auctioneer made an unsigned contract void by the Statute of Frauds. That was not all that could have been shown to the Court in opposition to a motion for judgment seeking specific performance, clearly because Saleh was unable to do so based on his stated personal problems. Nevertheless, he did file some opposition to GT's motion which did present dispute to the threshold issues of the auctioneer's authority and GT's right to sue without a signed contract of sale.

Saleh simultaneously filed a cross-motion to dismiss on September 8<sup>th</sup>, asserting the same facts of an unsigned contract and United's dispute to Spann's authority required dismissal of GT's claims on the Statute of Frauds. (Da713)

Also on September 8, 2023, Spann filed his own motion for summary judgment to dismiss United's third-party complaint, which had alleged several claims based on how Spann proceeding to auction and how he conducted it. (Da327) On September 27, 2023, Saleh opposed that motion. (Da741-808) In that submission, Saleh similarly argued that Spann had no authority to proceed as he did, and that the pre-condition of an 'approved' contract did not exist, as the "prerequisite" under Spann's auction agreement before he could proceed. (Da732-

742) Saleh also cited United's instruction to postpone the auction until the Approvals were reinstated. (Da736)

On September 27, 2023, separate counsel for Spann filed a cross-motion for summary judgment on its counterclaim for payment of his broker fee, which motion was clearly contingent on GT having a valid contract. On September 28, 2023, United filed similar opposition to that motion again disputing Spann's authority to proceed without reinstated Approvals and without a contract that United pre-approved. (Da812-814) Thus, on all motions still pending on October 5, 2023 Saleh had presented the relevant points which, if accepted as true, created genuine issues for trial that Spann was not authorized to auction the Property when or how he did, and therefore GT had no enforceable contract.

Despite Saleh's late opposition the Court did not decide GT's summary judgment motion on its September 8<sup>th</sup> return date. The Court also did not advise United or send a deficiency notice on eCourts that indicated Saleh's late opposition had been rejected. (Da993-994) The Court apparently did accept United's simultaneously filed cross-motion to dismiss on the same arguments. (6T5)

By the time of the October 3, 2023 pre-trial conference all four competing and related motions for judgment were still pending. At that conference, Judge Covello advised for the first time that he would not consider Saleh's September 8, 2023 opposition to GT's motion simply because it was late and he, "does not consider late oppositions". (5T p 13) When Saleh advised that he had experienced personal problems, Judge Covello said he should have said something earlier. However, he ignored that Saleh did write the Court on September 7<sup>th</sup> and therein stated that he did ask his adversary for consent. (5T p.6-7; p.13:5-18)(Da326)

The next day, Saleh wrote Judge Covello to request that his opposition be considered since it had been filed as of September 8, 2023 and GT's motion had not yet been decided almost a month later. (Da815) Saleh again cited his personal problems as the reason for his delay in filing before September 8<sup>th</sup>. (Da815) In response, on October 5, 2023, Judge Covello held another conference to discuss the competing motions. He again refused to consider United's opposition even though he said he knew that would "prejudice" United. (6T5:20)(6T8-9) He again incorrectly criticized Saleh for not contacting Mr. Bray to cite his personal problem and to ask for consent, when Saleh had done so on September 7, 2023, and when the Court had never denied the adjournment request. (Ibid.)

Judge Covello then advised GT's counsel that United's cross-motion to dismiss had not been rejected like the opposition. Therefore, he said United's cross-motion would also be deemed 'unopposed'. (6T6) However, despite the two motions being for reciprocal relief and both 'unopposed', Judge Covello then said GT's motion would be considered first simply because it was "filed first". (6T6) He then asked GT's counsel if GT wanted all motions to be put off and heard on the merits so that GT had an opportunity to "oppose" United's cross-motion late. (6T7) Predictably, GT's counsel declined that opportunity since Judge Covello had just said that GT's motion would be "decided first" and deemed "unopposed". Yet, when Saleh requested that same adjournment and consideration of all motions at once on their merits, but the Judge refused him. (6T8)

On that same day, October 5, 2023, Judge Covello then granted GT's summary judgment motion as "unopposed" and "on the papers" without oral argument, despite the motion being for summary judgment and granting the highly

discretionary remedy of specific performance. (Da835-844) Judge Covello declared the unsigned real estate contract valid simply because Saleh had sent his suggested changes to Spann's form of contract and sent it back. Judge Covello somehow found that "there was no question" Spann was authorized to auction by "apparent authority", simply because there was an auction agreement that said United could not "cancel". (Da842) He thus ignored the factual dispute raised throughout the case that disputed Spann's authority because he was requested temporarily to postpone (not cancel) until valuable Approvals were reinstated. The Judge also ignored United's dispute to Spann's authority to proceed without a contract created by United's counsel and approved by United. He ignored United's disputes as to how Spann quickly ran the auction, not as United expected.

Notably, while refusing to consider Saleh's opposition which he had "in hand" for a month, in his decision in favor of GT Judge Covello said he had gone back and examined United's and Saleh's similar arguments asserted in opposition to the two TRO's that recused Judge Chiocca had entered back in 2022. (Da842) The decision to grant summary judgment for GT then improperly relied on the 'fact' that recused Judge Chiocca had rejected United's opposing arguments back then, despite that his rulings were alleged to have arisen from a conflict and that the standard for summary judgment is far different than a TRO's design to maintain the *status quo*. (Da842) In fact, Judge Covello failed to give import to United's certifications and arguments back then. However, in distilling them on the summary judgment motion he actually recognized United had presented material disputes all along in this case, and which as a matter of law precluded summary

judgment for GT on the unsigned contract. He paraphrased those arguments from the TRO's as follows:

Spann breached its agreement with Plaintiff and as a result, there could not be a valid and enforceable contract to convey title to the property to the Plaintiff. This court rejects that argument (as a previous court rejected it at the order to show cause stage) because Spann acted as the Defendant's agent, and as such, when the auction sale was conducted and the bid was presented for the required \$1.7million, and enforceable agreement to sell the property arose." (Da842)

Judge Covello continued that, "the form contract was reviewed and revised by Defendant's counsel (and revised) before it went into the bid packet. Any irregularities in the auction – that would constitute a breach of the auction contract between Defendant and Spann – do not invalidate the auction itself, but could give rise to a cause of action by the defendant against Spann." (Da844)(emph. added)

As shown more particularly at Point I, *infra*, Judge Covello applied those facts to rule oppositely to Golfinopolous. He found that United's dispute of Spann's authority to auction did not impact GT's contract claims. (Da828) He found GT had a contract right independently of the dispute between United and its agent, Spann. (Da842) The Appellate Division in Golfinopolous held to the contrary; a seller/auctioneer dispute requires a trial and decision before a buyer on an unsigned contract can claim any exception to the Statute of Frauds. (Point I)

In addition, by considering GT's motion first "because it was filed first" and ignoring all other competing motions which presented the same factual issues disputing Spann's authority, Judge Covello misapplied the law and standard of summary judgment. He upheld an unsigned contract that was legally contingent on first finding the auctioneer had seller's authority. Yet, he had before the Court on all of the motions, the seller's material dispute to the auctioneer's authority. He

had United's proof of its instruction to the auctioneer not to proceed until material Approvals could be reinstated. (Da713-726)(Da741-42)(Da809-814) He even accepted as true that United instructed the postponement. (7T44:17-20) He also had United's dispute to Spann proceeding without United approving a contract form, and conducting the auction in short form and accepting GT's opening bid after 2 hours. He had to accept all of those arguments both as true and material to GT's claims. Indeed, since he relied on Judge Chiocca's rulings, he should have also considered and accepted as true Saleh's and United's certifications disputing the approval of the contract and Spann's authority to proceed. (Da50-66) He did the opposite, finding GT obtained rights independent of that dispute.<sup>2</sup> (Da835-842)

Judge Covello also then made no findings that the discretionary remedy of specific performance was equitable to both GT and United under these facts, as required. *See, Point VII, infra.* He ruled simply that, "plaintiff is entitled to specific performance" because the contract was enforceable. (Da828)

The improper decision for GT then formed the foundation for all of the next summary judgment rulings, all against United. Just 1 day after deciding GT's motion independently of the others, Judge Covello held oral argument on the remaining motions. Despite accepting as true that United did instruct the postponement, and again hearing the other disputes to Spann's authority to proceed, Judge Covello denied United's cross-motion for summary judgment to dismiss GT's complaint for violation of the Statute of Frauds. He did so as moot

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<sup>2</sup> As the Court will see in United's Argument section, this particular finding when correctly applied to the law required denial of GT's and Spann's motions for judgment, and entry of judgment for United, on several legal bases.

because he had granted GT's motion. He then granted Spann's motion to dismiss United's claims against Spann, and Spann's motion for a broker fee. (Da843-860)

Indeed, United's deposition testimony that Spann had agreed to the requested postponement was included in the record of Spann's motion for judgment. (Da467p.44) Since Judge Covello had "searched the record" to go back to Judge Chiocca's TRO's, he should have done so in the summary judgment record. The material fact alone that Spann agreed to United's instruction to wait to auction until Approvals were reinstated, precluded a finding that Spann had "apparent" or any "authority" to auction when and how he did.

The 4 summary judgments left only Spann's legal fee request, which Judge Covello said he would consider on receipt of an affidavit of services. (7T58) That affidavit was promptly served and opposed. Saleh thereafter substituted out of the case for the undersigned counsel to present this appeal. (Da850)(Da878-879)

For the next month, new counsel for United and Spann wrote back and forth to Judge Covello on that final issue. (Da883-886) On December 13, 2023, United's counsel asked Judge Covello for the fee ruling because it was holding up the appeal that United wished to file. (Da886) A month later there was still no decision. On January 18, 2024, Spann's counsel wrote to Judge Covello to ask for entry of the final order in the case. (Da887) Two more months went by with no decision or explanation. After phone calls to the Court, on March 7, 2024, United's counsel again wrote Judge Covello to try and get the final order entered and explaining the delay left the Property and United's appeal rights in limbo. (Da891) Six more weeks passed still without a decision or explanation for the delay.

On April 23, 2024, United was forced to file a motion to certify the summary judgment orders as final so that United could appeal. (Da892) Although the motion to certify as final was listed for decision on May 10, 2024 it too was somehow not decided for the next two months. (Da994)

Finally, in July 2024, 7 months after the minor and final fee request still had not been decided, without explanation from the Court, United was convinced that Judge Covello was acting unfairly and with bias. As it argued in the first motion to change venue, United believed that Judge Chiocca's substitute would retaliate for United's complaint about Judge Chiocca's failure to disclose his prior law partnership with GT's attorney. Thereafter: (1) the refusal to consider opposition; the offer to allow GT's counsel to file late opposition; (2) the consideration of GT's motion first and independently of United's cross-motion; (3) the improper reliance on recused Judge Chiocca's "rejection" of United's dispute in the TRO's as a basis to grant judgment to GT; (4) the improper summary judgment decisions; and (5) the findings that clearly weighed evidence against United; were all factors forming that belief. The Judge's subsequent 7-month lapse in deciding what was a \$15,000 fee request, as well as his refusal to decide United's motion to certify, convinced United that it was not treated fairly after Judge Chiocca's conflict was raised. Since Judge Caposella had expressly invited a new motion to change venue if United believed that Judge Covello was not acting fairly, on July 10, 2024, United filed its second motion to change venue. (Da948-960)

Six days later, Judge Covello decided Spann's October 2023 fee request. (Da981-989) He also granted United's motion to have the summary judgment orders deemed final, although that motion was then moot. (Da990) He did not

then hear United's second motion to change venue on its August 2, 2024 return date. Where his July 16, 2024 Order to certify his summary judgment orders as final impacted United's deadline for appeal, United was forced to withdraw that. This appeal followed.

**I. UNITED'S DISPUTE AS TO SPANN'S RIGHT TO PROCEED TO AUCTION PRESENTED A GENUINE ISSUE FOR TRIAL ON ALL PARTIES' CLAIMS, AND BEFORE THE COURT COULD ENFORCE AN UNSIGNED REAL ESTATE CONTRACT (Da835-842)**

In Golfinopoulos *supra*, 218 N.J. Super. 318, there was a sealed bid auction conducted for two sellers by one lawyer. That lawyer, as auctioneer, held a sealed bid auction and advised buyers that a contract would definitely be awarded to the highest sealed bid received. Id. at 42. Plaintiff was the high bidder and received a contract. When a higher offer came in one seller, Padulla, refused to countersign. Id. at 44. The trial judge dismissed the original plaintiff/buyer's specific performance case on 3 grounds: (1) the draft contract was revised demonstrating no meeting of the minds on material terms; (2) "there was no writing which constituted a satisfaction of the statute of frauds"; and (3) "the bid was merely an offer and until the bid was accepted there was no contract." Ibid.

The Appellate Division reversed and reinstated that buyer's claim for trial. It found that, in response to seller's dispute the auctioneer had certified he was authorized to proceed, which had to be accepted as true on summary judgment. Ibid. It therefore ruled, "there is a clear factual issue as to Padulla's grant of authority to Moran to hold the closed bid auction upon the terms that he did...." Id. at 45. The Appellate Division further found that this type of auction guaranteed a contract would be awarded to the winning bidder, elevating a bid above a

“solicitation” to a firm offer and creating a possible exception to the Statute of Frauds. It ruled that, since the buyer did not retract its bid, “a contract was then formed, if the attorneys are shown at trial also to have had Padula’s authority to offer the property.” Id. at 46 (emph. added). It recognized the auctioneer/seller dispute was a threshold issue before the Statute of Frauds can be overcome:

Since the authority of Moran to offer the property is still subject to the resolution of the factual agency issue, we must remand this matter to the Chancery Division for a plenary hearing on this point.” [Id. at 48].

Thus, contrary to GT’s assertions and the Court’s apparent acceptance throughout this case, Golfinopoulos did not hold that any auction always creates a binding contract as an exception to the Statute of Frauds. It held that a sealed bid auction created an offer that the auctioneer could legally accept if the auctioneer had seller’s authority to auction the way he did. As the Appellate Division recognized, that was a “major point” requiring a plenary hearing. Id. at 40.

This case presented the same factual dispute as to the auctioneer’s authority. From the outset of this case United argued the unsigned contract granted GT no rights and the Statute of Frauds governed GT’s claims. United had certified throughout the entire case that it had instructed Spann to postpone (not to cancel), and not proceed until the Approvals were reinstated. United even testified in his deposition that Spann had agreed to the request to postpone. (Da467p. 44) Judge Covello even agreed to accept as true that United did instruct the postponement. (7T44:17-20) Judge Covello was incorrect to find that United’s instructions to

Spann to postpone were immaterial and did not present a genuine dispute as to whether he had authority to auction and to award a bid to GT.<sup>3</sup> It was.

United also testified that it did not ever approve the form of contract that Spann gave to GT, and did not think the auction was going forward. (Da4967-497pp.161-162) Saleh certified also that he did not approve the form of contract for United. (Da53-60) He certified that he sent suggested edits and that his “please advise” request to Spann meant more had to occur before the form contract was deemed “approved” for use. (Ibid.) Saleh’s dispute as to the intent of his suggested edits also had to be accepted as true here. Instead, the Court weighed that evidence and ruled that Saleh’s suggestions, as an attorney for United, did constitute an approval by United that could bind the client to the unsigned contract. (7T56:12) That improper finding also violated the standard of summary judgment, and was actually required to be made by clear and convincing evidence. *See*, more particularly, Point III, *infra*.

All of United’s disputes were material to Spann’s authority as auctioneer. Judge Covello instead ruled the opposite of Golfinopoulos. He found that, whether or not United had a claim or dispute as to Spann, Spann’s “apparent authority” granted GT an enforceable contract. (Da842) He decided that GT was an innocent buyer who obtained rights from Spann independently of proof that Spann had authority to proceed as United’s agent. “Apparent authority” could not be found without refusing to accept United’s disputes of fact as true, which alone was a

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<sup>3</sup> As also shown below at Point IV, *infra*, United’s instruction to postpone was binding on Spann, as an agent, whether or not Spann agreed, precluding any chance for GT to prove at a plenary hearing that the unsigned contract can be enforced.

violation of the Court's duty on summary judgment. Moreover, Golfinopoulos holds that GT has no rights until United's dispute as to Spann's authority is resolved, which that case required to be decided in a plenary hearing. That dispute was required to be accepted as true and was accepted by the Court as true. (7T44:17-20) The Court misapplied that fact to the governing law.

Finally, it was not even clear in this case that Spann's auction was the same type of auction that Golfinopoulos ruled could be overcome the Statute of Frauds. In Golfinopoulos the process was to accept "sealed bids" at once and to then offer the contract to the highest bidder. Id. at 42. Spann's auction was not a sealed bid auction and did not take all bids at once. Bids could be presented at any time that the auction was open and would compete against each other. (Da586) Spann had more than one party register and pay to bid. (Da690) Spann simply closed the auction after 2 hours once he received GT's minimum bid. (Da119) (Da468)

According to United, Spann was expected to have the bidding open for days. Bidders were also aware of what had been bid. (Da757:14) Spann's bid package also reserved the right to "delete" property from the auction. (Da628) It also provided that, "all announcements made at the auction take precedence over all advertising or previously stated terms", which clearly retained control over the auction and precluded a buyer from believing a bid would be a contract. (Da628)

These facts, when considered at the required trial, also may lead a rational fact finder to decide this was not the type of auction that could ever overcome the Statute of Frauds defense, by the limited potential exception that Golfinopoulos recognized. For that separate reason, GT could have no factual basis to overcome the Statute of Frauds' writing requirement. N.J.S.A. 25:1-13.

In either event, Judge Covello misapplied the law by granting summary judgment to GT in the face of the United/Spann dispute of authority. Had he properly analyzed Golfinopoulos, as GT cited at the outset of the case, and he said he reviewed when cited to Judge Chiocca, he would have recognized GT's rights were completely contingent on the prior resolution of the United/Spann dispute, not independent of it. He should have found the principal's dispute of the agent's authority (which he did accept as true) could not be decided in the agent's or buyer's favor on summary judgment. (7T44)

**II. THE COURT INCORRECTLY REFUSED TO CONSIDER UNITED'S OPPOSITION TO GT'S SUMMARY JUDGMENT MOTION, SHOULD HAVE GIVEN UNITED THE REQUESTED ADJOURNMENT DUE TO COUNSEL'S PERSONAL PROBLEMS, AND SHOULD HAVE HEARD ALL INTERRELATED MOTIONS FOR JUDGMENT TOGETHER (5T5-8)(5T13)(6T5-7)(6T8-10)**

It is clear, "decisions should be made where possible on the merits." Tyler v. N.J. Auto. Full Ins. Underwriting Ass'n, 228 N.J. Super. 463, 468 (App. Div. 1988). "Cases should be won or lost on their merits and not because litigants have failed to comply precisely with particular court schedules, unless such noncompliance was purposeful and no lesser remedy was available." Irani v. K-Mart Corp., 281 N.J. Super. 383, 387 (App. Div. 1995). "No eagerness to expedite business, or to utilize fully the court's time, should be permitted to interfere with our high duty of administering justice in the individual case." State v. Lawrence, 445 N.J. Super. 270, 276 (App. Div. 2016). "It is a mistaken exercise of judgment to close the courtroom doors to a litigant whose opposition papers are late but are in the court's hands before the return day for a motion which determines the meritorious outcome of a consequential lawsuit." Ibid. In addition,

"[l]ate filings of motion papers can be met with a variety of judicial responses afforded by existing court rules. Among them are sanctions designed to discourage late filings without determining the outcome of a case." Ibid. (emph. added).

As well, the Appellate Division reviews refusal to grant an adjournment for abuse of discretion and will reverse if it causes "manifest wrong or injury." State v. Hayes, 205 N.J. 522, 537 (2011).

In Tyler, *supra*, just like this case, the Law Division refused to consider late opposition, and ruled on a motion for judgment without oral argument because it was deemed unopposed. Id. at 467. The Appellate Division reversed.

Here, the Court refused late opposition based on an arbitrary rule that the Judge had: he does not consider late oppositions. (5T13)(6T5:23) However, the Court had that opposition 'in hand' for a month before its decision. The Court also had 3 other motions on the same facts, including a cross-motion from United for reciprocal relief against GT, which was not rejected. The Court did not ever consider alternatives to rejection of United's opposition papers. Meanwhile, it offered GT's counsel a chance to file late opposition to the United cross-motion, or to adjourn all motions so they could be heard together. (5T13) It had denied United's request for that same relief. It did so acknowledging that the client would suffer prejudice. (6T8:18-9-20)

The Court even had two conferences after getting the late opposition and heard of United's prior counsel's personal problems in both. It even recognized at the second conference that Saleh did request an adjournment before the September 8<sup>th</sup> return date, and had asked his adversary for consent. The Court criticized Saleh nonetheless, refusing to recognize his personal hardship, saying, "the day before

the return date you requested an adjournment again after not having filed that motion – that cross-motion or opposition but you didn't do anything.” (6T8:18-9-20) In fact, the Court never ruled on the adjournment request, which produced Saleh's barren opposition that was nevertheless refused.

This decision was an abuse of discretion under these circumstances, particularly where there were 3 other completely related motions and the Court did accept Saleh's cross-motion that presented the same facts. Some remedy was required, short of refusing to consider GT's summary judgment motion 'unopposed' which led the Court to then decided GT's motion “first” and independently of the directly related cross-motion that the Court accepted. The Court should have done for Saleh what it offered to do for GT; adjourn all motions to hear them together on their merits at a later date with all parties filing complete submissions and holding oral arguments. There was no prejudice raised to doing so and all parties had dispositive motions. Not doing so, without any reason except the Court's arbitrary statement that “I do not take oppositions on the return date” led to the manifest denial of justice to United. (5T13:14)

The Court thereby also unfairly visited the sins of the lawyer on his client. United had not failed to do anything. It was Saleh's personal problems that led to these procedural decisions, all of which the Court knowingly prejudiced United itself. Because the Court did not consider all motions opposed and together, it granted GT's motion by incorrectly overlooking that the Spann/United dispute was a contingent and controlling issue to GT's rights, if any. As strong evidence of this harm, the next day after doing so the Court heard the Spann/United dispute in detail, and therein it even agreed to accept that United did request the

postponement of the auction. (7T44:17-20). However, it still then decided against United because it had previously and incorrectly held that GT has an independent contract right regardless if Spann was authorized to proceed. (Da842) The harm in deciding everything separately was complete. United lost its property on a summary judgment ruling that ignored the central and material factual disputes as to Spann's authority and the governing law from Golfinopoulos, *supra*.

In addition, the date or order of filing of GT's motion and then United's cross-motion should not ever have been controlling to the Court. The merits, and certainly their interrelated facts, should have controlled how a "just determination" was rendered to all. State v. Lawrence, *supra*. Opposition should have been considered. Oral argument should have been held for summary judgment motions. R. 1:6-2. Indeed, all 4 of the motions should have been decided together since all of them sought summary judgment on the same facts, or facts that were contingent based on the law that GT had cited.

Particularly in this case, had the Court considered all 4 motions together it would have mattered less that it refused to consider United's opposition to GT's motion for judgment. In United's cross-motion which the Court did not reject, United presented the same facts and dispute as to Spann's authority to proceed, and United's failure to approve any draft contract that Spann sent out. (Da810-814) Just that information presented a genuine issue for trial against GT's claim for specific performance under GT's primary case, Golfinopoulos. As well, included in Spann's motion was United's deposition testimony wherein Sabbagh testified that Spann had agreed to his postponement request. (Da467p.44) Just that material fact, accepted as true, created a genuine dispute that precluded judgment for GT.

Again, the Court did accept as true in argument for the 3 motions that United did instruct Spann to postpone. (7T44:17)

The Court also should have searched the record on these 4 competing motions for summary judgment. For no apparent reason it did “search the record” for its decision to grant GT’s motion, unopposed as it was, by somehow looking back at United’s TRO arguments made to the recused Judge Chiocca. Judge Covello even improperly used the fact that Judge Chiocca had “rejected” those arguments as a basis to grant GT’s summary judgment. Of course, that was error in and of itself. A TRO has a far different standard than summary judgment. R. 4:52-1. Here, United’s disputes were required to be accepted as true. R. 4:46-2.

As shown *supra* at Point I, Judge Covello was actually required to decide United’s and Spann’s competing motions first to see if he could resolve their dispute as to Spann’s authority to auction by summary judgment. If not, that issue was required to be tried as the threshold issue before GT could contend the unsigned contract overcame the Statute of Frauds which applies. Golfinopoulos, supra. Judge Covello did the opposite, and did so because of his procedural decisions against United resulting in him considering GT’s motion first and unopposed. Where one day later he did accept as true that United did instruct Spann to postpone until Approvals were reinstated, the law required him to deny the GT and Spann motions. (7T44)

To avoid the manifest harm and injury that unfairly resulted to United, who was a blameless client with a meritorious dispute to the auctioneer’s authority to proceed to sell its Property, this Court should reverse and vacate the summary

judgment Orders for GT and Spann. For reasons of law shown herein, the Court should direct entry of judgment for United.

**III. GT DID NOT HAVE CLEAR AND CONVINCING EVIDENCE OF UNITED'S APPROVAL OF THE UNSIGNED CONTRACT, PRECLUDING ENFORCEMENT WHERE EVEN UNITED'S ATTORNEY DID NOT SIGN OR REPRESENT HIS AUTHORITY TO BIND HIS CLIENT (Da835-842)**

In Busciglio v. Dellafave, 366 N.J. Super. 135 (App. Div. 2004), the question was presented of the “apparent authority” of a real estate lawyer to bind his client to a contract document that only the lawyer and not the client signed. There, the lawyers for buyer and seller exchanged riders which they had signed as “attorney for”. Id. at 137. Both lawyers appeared willing to accept their counterpart’s signatures as substitute for the actual buyer and seller. Id. at 138. However, at some point after exchanging attorney-signed riders, seller’s lawyer [Lynch] wrote to buyer’s counsel and said, “my client has requested that I not revive the contract of sale.” Ibid. Sellers themselves had never executed any changes to the broker form of contract or a power of attorney allowing Lynch to bind them. Id. at 138.

Buyer sued and the trial court granted summary judgment for specific performance. Id. at 139. The Appellate Division reversed and remanded for a plenary hearing. Id. at 141. The Court stated, “at issue is whether Lynch (seller’s attorney) had the authority to bind defendants to the contract.” Id. at 140. The Court found significant that, “the court’s grant of summary judgment was developed upon the underpinning of apparent authority,” not on a finding of “express authority” because the trial court found that seller’s attorney had, “raised a presumption that his clients had imbued him with apparent authority to negotiate

on their behalf.” Ibid. The Appellate Division disagreed that ‘apparent authority’ could be found either by summary judgment or by a preponderance of the evidence:

The motion judge incorrectly focused upon the actions of Lynch, the agent, rather than the actions of defendants, the principals, to support his finding of apparent authority. Apparent authority must be established clearly and convincingly by the actions of the principals, not of the alleged agent. *Lobiondo, supra*, 357 N.J. Super. at 496-497, 815 A.2d 1013. The trial court erred in its finding that there was no competent evidence of an issue of material fact that would decide the question of apparent authority in favor of defendants. The record reflected an intent on the part of the attorneys themselves to have their clients' signatures on an amended contract of sale. Indeed, Lynch, in response to plaintiff's cross-motion, certified that he did not have defendant Finn's authority to bind him to the contract of sale.

[Busciglio v. DellaFave, *supra*, 366 N.J. Super. at 140 (emph. added)].

Likewise, in LoBiondo v. O’Callaghan, 357 N.J. Super. 488 (App. Div. 2003), a judgment for specific performance of an oral right of first refusal was reversed and judgment was entered for seller. The Appellate Court held that the buyer had obtained the agreement of only a husband, and not his wife, to sell a jointly owned property. The Court held the buyer did not demonstrate clear and convincing evidence to overcome the wife’s denial that she gave apparent authority to her husband. The Court recognized that of the 6 factors the trial court noted, the first 4 were based on the actions of the husband, not the wife. It found that was improperly relying on the conduct of the agent and not the principal, as required. Id. at 498. The Court also recognized that the wife’s testimony disputing her husband’s authority was not overcome by clear and convincing evidence, requiring judgment voiding any purported transfer by the husband alone. Id. at 499.

Here, there was even less evidence of “apparent authority” than was overruled in Busciglio or LoBiondo. In this case, Saleh signed no contract

document on United's behalf. He represented to no one that he had authority to bind United to a contract. He simply reviewed an unlawfully drafted contract received from Spann, a real estate broker, and suggested edits to it. He wrote back to Spann, not that the contract was approved with those 'suggestions', but for Spann to "please advise." (Da661) Spann could not have believed, by clear and convincing evidence, that Saleh had authority from that email to bind United to have "approved" a contract that not even Saleh had signed. At minimum, this was a triable issue on the higher evidentiary threshold to be met.

Ignoring the standard of summary judgment, Judge Covello nevertheless weighed the evidence and found that Saleh had "apparent authority" simply because he was United's lawyer and had suggested edits. (7T56) The Court imputed authority to Saleh without clear and convincing evidence. That was completely contrary to Busciglio where at least the lawyer had signed contract documents and was asserting he had the right to bind his client. In that case a trial was still required and the higher evidential standard met. Here, Saleh made "suggestions" to an unlawfully prepared broker contract and sent them back to the broker requesting a response. He did not state any intent that his suggested edits were approved by either him or United, or that he was authorized to bind United. (Da661) He certified he did not have intent or authority to bind United. (Da50-53)

In addition, both Saleh and United certified they thought the auction was agreed to be postponed anyway, so finalizing the contract was not necessary, expected or intended. (Da52 para. 14)(Da64 para. 12) Granting all favorable inferences to United, the Court was in no way able to find clear and convincing

evidence that Saleh's edits constituted United's approval of Spann's draft that might bind it to sell to GT without a contract satisfying the Statute of Frauds.

Like Busciglio, in this case the, "trial court erred in its finding that there was no competent evidence of an issue of material fact that would decide the question of apparent authority in favor of defendants." Id. at 140. Just like in Busciglio, reversal of summary judgment for GT on that finding of "apparent authority" is required. Indeed, on this evidence, LoBiondo requires reversal and entry of judgment for United dismissing GT's claims. Neither the client nor the lawyer signed anything here. The lawyer did not ever express an intent or right to bind his client to an unsigned contract. The client disputed approval. (Da495) Neither Spann nor GT can reach the higher evidential standard to be overcome here.

**IV. THE LAW OF AGENCY BOUND SPANN NOT TO PROCEED TO AUCTION WHERE HIS PRINCIPAL HAD SO INSTRUCTED, AND THE COURT'S OPPOSITE RULING WAS A MISAPPLICATION (Da835-842)(7T55-57)**

[I]t is a general rule that agency contracts are not specifically enforceable in a suit brought by the agent against his principal. *Fiedler, Inc. v. Coast Finance Co., Inc.*, 129 N.J. Eq. 161 (E. & A. 1941). Courts are not wont to force a principal to keep an agent against his will, "because the law has allowed every principal a power to revoke his deputation at any time." *Wheeler v. Trotter*, 3 Swanston, 174 (Chan. 1737)... To do so would violate the basic concept in the law of agency, viz., the right of a principal to select his own *alter ego*, to exercise his *delectus personarum*.

The mere fact that the appointment recites that it will be irrevocable during the term of the appointment does not preclude the principal from exercising the power to revoke it. Restatement, Agency 2d (1958), § 138. So, too, "it is not necessary for the principal to have any good reasons for his action in revoking the agency, and he may cancel the agent's authority at his caprice, even though the instrument creating the agency contains an express declaration of irrevocability." 3 Am. Jur. 2d, Agency, § 37 (1962). This does not mean that the principal may breach such a contract with impunity. For a

wrongful breach, the agent may sue at law and recover money damages. 3 *Am. Jur. 2d, Agency*, § 38 (1962). Normally, that is the only remedy available to him.

[Sarokhan v. Fair Lawn Memorial Hospital, Inc., 83 N.J. Super. 127, 133-134 (App. Div. 1964) (emph. added)].

Here, the Court incorrectly accepted Spann's argument the auction agreement was not cancelable. (7T50)(7T55) This was clearly contrary to the law of agency. Spann's auction agreement was for his personal services as an auctioneer. A provision against cancelation was not enforceable to preclude United, the principal, from revoking the agency, temporarily or permanently. Ibid.

Thus, even if the Court here had inferred that United's requests to postpone the auction until the Approvals were reinstated was an attempt to "cancel" the auction agreement permanently, United had that right. Ibid. Spann was an agent. As principal, United controlled the termination of the agency "at his caprice". Ibid. Spann did not have the right to specific enforcement of his agency agreement, or to proceed to auction over his principal's instructions not to do so. His personal services contract was subject to revocation by his principal at any time, even if his auction agreement contained a provision to the contrary. Restatement, Agency 2d (1958), § 138. Sarokhan, *supra*, 83 N.J. Super. at 133-134.

As a matter of the law of agency here, the Court was therefore required to accept as true that United had revoked Spann's authority to proceed to the actual auction once United learned the Approvals had expired. Indeed, Judge Covello conceded to Saleh at oral argument that he did accept as true United instructed Spann to postpone. (7T44:17-20) He simply failed to recognize the legal import of that instruction. United's statement that he instructed Spann not to proceed until the Approvals were reinstated governed this case based on the law of agency.

(Da492 p.143:19-22)(Da492 p.144:10-12) Spann's non-cancelation provision was unenforceable as a matter of law. On the finding made, that United did instruct Spann not to proceed until Approvals were reinstated, the law required Judge Covello to rule that Spann did not have authority to proceed. His opposite finding was a misapplication of that law, and a decision an agent can ignore his principal.

Moreover, on the finding made that United did instruct Spann to postpone, there could be no "apparent authority" for Spann to proceed. However, that was the basis for Judge Covello's grant of summary judgment to GT. (Da842) The right to revoke the agency was inviolate even if it created a damage claim for Spann, and United did give that instruction. (7T44:17-20)

Therefore, the Court was required as a matter of law to rule that GT had no enforceable unsigned contract on these facts. Golfinopoulos requires "sufficient" proof of the auctioneer's authority as a pre-condition of a buyer's chance to overcome the Statute of Frauds on an unsigned contract. Where the Court agreed that United did instruct Spann to postpone, and where United's right to give that instruction could not be limited by his agent, as a matter of law, Spann proceeded without his principal's authority. Pursuant to the holding of Golfinopoulos, GT cannot overcome the statute of frauds because Spann proceeded without the seller's authority. Accordingly, on the finding that United instructed Spann to postpone, United's motion to dismiss GT's complaint for breach of contract should have been granted, and GT's and Spann's motions denied. The Court did the opposite.

This Court should reverse the Orders of judgment for GT and Spann which did the opposite. It should enter judgment for United dismissing GT's claims.

**V. UNITED WAS ALSO ENTITLED TO RESCIND SPANN'S AUCTION AGREEMENT BASED ON MUTUAL MISTAKE AS TO THE STATUS OF DEVELOPMENT APPROVALS, PRECLUDING SPANN FROM PROCEEDING AND GT'S ATTEMPTED ENFORCEMENT OF THE UNSIGNED CONTRACT (7T55-57)**

Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

[Boncco Petrol, Inc. v. Epstein, 115 N.J. 599, 608 (1989)].

In Beachcomber Coins, Inc. v. Boskett, 166 N.J. Super. 442, 445 (App. Div. 1979), the Appellate Division reversed a trial judge's refusal to void an agreement to sell a coin that both the buyer and seller thought was valuable. It held the mutual mistake allowed rescission of the contract to sell:

The evidence and trial judge's findings establish this as a classic case of rescission for mutual mistake of fact. As a general rule, \*\*\* where parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable by either party if enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be. [Restatement, Contracts, § 502 at 961 (1932); 1 13 Williston on Contracts (3 ed. 1970), § 1543, 74-75]

The Court further held that, "negligent failure of a party to know or to discover the facts as to which both parties are under a mistake does not preclude rescission or reformation on account thereof." Id. at 445-446.

Here, the facts that United put before the Court demonstrated that he and Spann were operating under a mutual mistake of fact when they entered the auction agreement, and particularly when they agreed on the \$1.7million floor price as the strategy to "entice" multiple bids. (Da355)(Da466p.40:15-25) Both believed the

Approvals were current, and Spann advertised as if they were. (Da370-371) When Spann found out that the Approvals had expired, United instructed him not to proceed because it would affect value. (Da467p.44) (7T44:17-20) United testified Spann had agreed. (Da467 pp.44:15-22) (Da714-722)

The Court did not appreciate, likely because Saleh was not able to submit a fulsome opposition, that United was arguing that a mutual mistake of fact led to the auction agreement's floor price and bidding strategy. The change in circumstances, once discovered, legally allowed United to rescind the auction agreement as it testified it wished not to proceed without Approvals. (Ibid.)(Da460-461pp. 17-18) Assuming that Saleh had time he needed, he could have more clearly argued that United's instructions to postpone were based on the mutual mistake of fact that the Approvals were current. Spann does not dispute that he auctioned the Property with a change from his advertising. (Da425)(Da597) Spann did not get United's written agreement to proceed with a statement that Approvals were "expired". (Da597) Just the opposite, Spann was instructed to postpone, a fact the Court accepted as true. (Da467p.44)(7T44:17-20)

Therefore, a rational factfinder here could have determined that United's instructions to Spann not to proceed, when accepted as true, were the proper exercise of a legal right of rescission based on mutual mistake of fact. The bid price and strategy were no longer sound and United did not agree to proceed with disclosure by Spann of the opposite fact, that Approvals were "expired", which is what Spann did. (Da597) Thus, in addition to United's unfettered right, as principal, to revoke Spann's agency and prevent the auction, United presented facts that demonstrated he exercised a legal rescission right.

For this reason as well, the Court misapplied the law to the facts before it, ignoring the import of United's instructions for Spann not to proceed. Applying that fact, which the Court said it accepted for the motions, and applying the law of rescission, the Court could not have properly found on summary judgment that GT obtained an enforceable unsigned contract from Spann. Pursuant to Golfinopoulos GT could not show that Spann had authority to proceed when and how he did.

For this reason also, GT's motion should have been denied, and United's motion to dismiss GT's claims granted.

**VI. SPANN'S FORM OF CONTRACT WAS THE UNAUTHORIZED PRACTICE OF LAW BY A REAL ESTATE BROKER, WHICH SHOULD RENDER IT A NULLITY (7T56)**

In New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Boards, 93 N.J. 470 (1983) we held that a licensed real estate broker or salesperson who prepares a contract for the sale of certain categories of residential real estate does not engage in the unauthorized practice of law, provided that the agreement prescribes a three-day attorney review period during which either party's counsel may cancel the contract. 93 N.J. 470, 471-86, 461 A.2d 1112, modified, 94 N.J. 449, 467 A.2d 577 (1983).

[Sullivan as Trustee of Sylvester L. Sullivan Grantor Retained Income Trust v. Max Spann Real Estate & Auction Co., 251 N.J. 45, 50 (2022)].

In N.J. State Bar, *supra*, the Court also entered judgment for injunction, *inter alia*, that:

7. The failure of any licensee to include [attorney review] language in any such contract of sale or lease agreement prepared by the licensee shall be construed by the Commission as engaging in the unauthorized practice of law and shall be considered by the Commission as conduct which demonstrates the licensee's unworthiness and incompetency, thereby subjecting the licensee to sanctions pursuant to N.J.S.A. 45:15-17(e).

Levison v. Weintraub, 215 N.J. Super. 273 (App. Div. 1987), recognized

that the restriction on brokers drafting contracts without the right of rescission was designed to protect the client's interests:

The clause in question is the product of a court approved settlement in N.J. State Bar Ass'n v. N.J. Realtor Bds. Ass'n., 186 N.J. Super. 391 (Ch.Div.1982), mod. 93 N.J. 470 (1983), suppl'd, 94 N.J. 449 (1983). Its purpose is to protect parties against being bound by broker-prepared contracts without the opportunity to obtain adequate protection of their separate interests. [Id. at 277]

Thus, N.J. State Bar Ass'n, *supra*, also included an injunction restricting real estate brokers, which provides:

5. The right of the Buyer and Seller, or Landlord and Tenant, under any contract for the sale of real estate or lease (subject to the provisions of paragraphs 1 and 2, respectively, of this Final Consent Judgment) to obtain attorney review of the contract of sale or lease shall not be waived, disclaimed, relinquished or abridged, and real estate brokers and salesmen licensed by the New Jersey Real Estate Commission are permanently enjoined and restrained from preparing or assisting in any manner in the preparation of any written instrument, the intended effect of which would be to waive, disclaim, relinquish or abridge the right of the parties to such contract of sale or lease to obtain attorney review thereof.

New Jersey State Bar, *supra*, 93 N.J. at 481(emph. added)].

In Carmagnola v. Hann, 233 N.J. Super. 547 (App. Div. 1989), the Appellate Division even invalidated an N.J.A.C. provision which the NJ Real Estate Commission got adopted which limited the right of a seller to void a contract prepared by a broker, a so-called "Agreement to Honor" clause. Id. at 548.

The ATH collides with the underlying purpose of the consent judgment which "is to protect parties against being bound by broker-prepared contracts without the opportunity to obtain adequate protection of their separate interests." Levison, *supra*, 215 N.J. Super. at 277. The ATH purports to bind the parties before they have had an opportunity to review the contract with counsel. In addition to being inconsistent with the judgment's rationale, the ATH also contravenes paragraph five of the judgment which provides in part

that the right of attorney review shall not be waived, disclaimed, relinquished or abridged, and real estate brokers and salesmen . . . are permanently enjoined and restrained from preparing or assisting in any manner in the preparation of any written instrument, the intended effect of which would be to waive, disclaim, relinquish or abridge" the right of attorney review. N.J. State Bar Ass'n, *supra*, 93 N.J. at 481. [Id. at 552]

Here, Spann created the contract GT signed. (Da819)(Da821)(7T14) He was not permitted to do so. The Property is not a 1-4 family residential property. His creation of what he called merely a "template" was the unauthorized practice of law which is enjoined by N.J. State Bar., *supra*. 93 N.J. at 481. That contract is the one on which GT claims its right to take United's Property. (Da672)

Saleh's suggestions for changes to Spann's unlawfully drafted contract did not come back to Spann with any statement from Saleh that he had adopted that draft as his own. It did not come with any statement from Saleh or United that the contract was now one deemed created by Saleh or United. Instead, Saleh's suggestions came with a request for Spann to "please advise". (Da661) That statement indicated clearly that further discussion was expected before any contract was approved by either Saleh or United, or could have been 'deemed' the creation of Saleh, not Spann.

Spann did not respond to Saleh's request to please advise. Spann did not thereafter confirm that his creation was adopted by Saleh or United as a contract created by United's attorney, which the auction agreement required. Spann simply took his unlawfully created draft contract, with Saleh's minor suggested edits, and deemed it approved as if written by Saleh. (Da597) He then attempted to bind his own client, United, to that contract without inclusion of a right of rescission.

In fact, Spann's violation of law in creating the draft contract is the only reason that the auction occurred. United's attorney was required to "create" the

contract pursuant to Spann's auction agreement, and for Spann to be able to go forward. (Da9 para. 6) He did not do so. Spann then sent his draft contract and asked United to sign. (Da505p. 196)(Da51;56;58)

This conduct cannot be condoned and cannot be permitted to convey away any of United's property rights. Calling a real estate contract a "template" does not vitiate the violation of law. Spann's creation deprived United of the intended protection of the injunctions against real estate brokers doing precisely what Spann did, as set forth in N.J. State Bar., *supra*; Levison, *supra*. The purpose of the restriction against what Spann did is to, "protect parties against being bound by broker-prepared contracts without the opportunity to obtain adequate protection of their separate interests." Levison *supra*.(emph. added) United, as Spann's client, must be deemed to have had the protection of the injunction against Spann's unlawful contract preparation under N.J. State Bar Ass'n, *supra*, 93 N.J. at 481.

Spann went to auction here with his own unlawfully created contract in direct violation of the injunction of N.J. State Bar., *supra*. The Court ignored that unlawful conduct. It bound United to that unlawful instrument. It did so by ruling that Saleh's suggested edits were the implied adoption of the document, where Saleh had certified and argued that he had no such intent. (7T56)(7T46) United and Saleh also had certified the contract would not be approved by them because of the instruction to postpone the auction. (Da64) (Da467p.44) (Da484p.111)(Da504p.192) (Da505p.192) The Court accepted that fact as true. (7T44:17-20)

Clearly, but for Spann's unlawful creation of a commercial real estate contract he could not have gone to auction at all. GT's specific performance claim

therefore originates solely from Spann's unlawful practice of law in violation of N.J. State Bar Ass'n. Since Spann was the defendant in the Sullivan case *supra*, he clearly knew of the prohibition to what he did in this case. Calling his created contract a "template" does not circumvent the Supreme Court's injunction. The contract that GT signed, therefore was a not a legal instrument that Spann was entitled to present to either United or GT at all.

Judge Covello was required to recognize the unauthorized practice of law by Spann here under N.J. State Bar, Assn., *supra*. He was required to apply the injunctions against that conduct. He was required to protect United from being bound by this real estate agent's unlawful practice. Levison, *supra*. In order to afford United those intended protections, Judge Covello was required to deem Spann's unlawfully created contract a legal nullity as to his client, United.

Instead, Judge Covello ignored the unlawful actions of the real estate agent here. (7T51)(7T56) He went further to weigh the evidence of Saleh's dispute to transform that into Saleh's (and United's) implied adoption and approval of Spann's form of contract. That was the improper weighing of evidence on summary judgment. (7T14; 17; 24-25) It was also the judicial endorsement of the enjoined actions by Spann, and exposure of Spann's client to harm from them.

For these additional reasons, this Court should reverse all Orders Judge Covello entered against United. It should Order dismissal of GT's contract claims as unenforceable. It should dismiss Spann's claim for a broker fee. It should reinstate United's third-party complaint against Spann for damages.

**VII. THE COURT FAILED TO MAKE FINDINGS THAT SUPPORTED THE DISCRETIONARY REMEDY OF SPECIFIC PERFORMANCE AND COULD NOT DO SO BY MOTION HERE (Da835-842)**

the right to specific performance turns not only on whether plaintiff has demonstrated a right to legal relief but also whether the performance of the contract represents an equitable result. That is, after determining that the purchaser has a legal right to recovery, a court of equity must make a further determination that has been said to be discretionary.... As explained by Professor Pomeroy:

The right to an equitable remedy . . . is never in this sense absolute, and may, therefore, when compared with the legal right, properly and to a limited extent, be called discretionary....

For these reasons, when specific performance is sought, the court is required to do more than merely determine whether the contract is valid and enforceable; the court of equity must also "appraise the respective conduct and situation of the parties," *Friendship Manor, supra*, 244 N.J. Super. at 113, 581 A.2d 893, the clarity of the agreement itself notwithstanding that it may be legally enforceable, *Salvatore, supra*, 109 N.J. Super. at 90, 262 A.2d 409, and the impact of an order compelling performance, that is, whether such an order is harsh or oppressive to the defendant, *Stehr, supra*, 40 N.J. at 357, 192 A.2d 569, or whether a denial of specific performance leaves plaintiff with an adequate remedy, *Fleischer v. James Drug Stores, Inc.*, 1 N.J. 138, 146-47, 62 A.2d 383 (948).

....

This weighing of equitable considerations must represent, in each case, a conscious attempt on the part of the court of equity to render complete justice to both parties regarding their contractual relationship.

[Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 599-600 (App. Div. 2010)].

In this case, even if the Court could ever be found to have had a right to enforce the unsigned contract Spann unlawfully created and United never approved, it should not have automatically granted GT specific performance. The Court was required but made no findings regarding the "equities" of the remedy it imposed. It analyzed the claims for legal relief and, once (incorrectly) ruling GT

had an enforceable contract, it simply awarded its requested relief. However, the Court was required to find specifically that the remedy was fair to United, not just GT, under all of the circumstances here. It could not have done so by motion and without a plenary hearing on the evidence United had submitted to have occurred.

United and Spann had both confirmed the floor price was designed to “entice” multiple bids, and Spann advertised the Property as having Approvals. (Da355)(Da370-71) However, Spann then auctioned the Property disclosing the Approvals were “expired” but without changing the price or bid strategy. (Da597) He did so, while admitting the expiration “hurt the value”. (Da375) United had testified Spann agreed to postpone so the material fact of the Approvals could be reinstated, and the Court at oral argument accepted that as true. (Da467p. 44) (7T44:17-20) United did not even know Spann went to the auction. (Da753)

The manner in which the auction was conducted was also an equitable consideration for the Court to evaluate before it could grant GT a right to own United’s Property at the floor price. Spann promised to conduct the auction for days when the plan was originally designed. (Da757) However, he opened it and closed it as soon as he received GT’s bid, after 2 hours. (Da757) Spann did so when he had 63 pre-registered bidders and 3 bidders who had paid the \$40,000 deposit. (Da690) There was no reason not to wait for more bids and GT was not necessarily even allowed to bid as a former lawyer for United. (Da483p. 107:7).

Moreover, while Spann and GT made significant argument that United had not presented evidence the Property was worth more than \$1.7million, GT also had presented no such evidence of value either. (7T57) That was significant to the Court reviewing whether GT had any monetary damages to prove if the Court did

not think it was fair to compel United to sell versus an alternative relief. On the evidence in the record GT had shown no economic damages on a breach of the unsigned contract if the Court did not compel a sale. GT had not shown the Property was worth more than GT offered to pay. The lack of evidence of “benefit of bargain” damages to GT if specific performance was not awarded was also an equitable factor the Court failed to consider here.

Indeed, all the Court said on this issue is that United got what it wanted by selling its property for the floor price. (Da844)(7T32) That was untrue and was certainly an incorrect analysis of these specific facts. This was an auction. United was not selling for the ‘asking price’ of \$1.7million price as simply a listing on the open market. GT did not offer United its ‘asking price’ as if the Property was for sale for that amount. Both Spann and United expected a higher price and multiple bidders, as most auctions do. (Da355-356) That is a main reason to auction versus simply list a property for sale. Spann also said he would not sell to the first bidder, but did exactly that. (Da466p.41:19-25) And, the Court accepted as true that United instructed Spann to postpone until the Approvals were in place. (7T44) That was a recognition that the Approvals impacted value and bidding interest. Spann told bidders there were no approvals, also likely impacting interest. (Da597) Yet, Spann also testified he knew the expiration would “hurt the value”. (Da375)

Therefore, it was error for the Court not to make specific findings supporting the equitable remedy it granted. More importantly, on this evidence, the Court could not have undertaken the required analysis by motion. It needed a plenary hearing before it could find the remedy was fair to United.

**VIII. THE COURT SHOULD HAVE CHANGED VENUE BASED ON JUDGE CHIOCCA'S FAILURE TO ADVISE UNITED OF HIS PRIOR LAW PARTNERSHIP WITH GT'S COUNSEL AND UNITED'S JUDICIAL ETHICS COMPLAINT (3T16-17)**

R. 4:3-3 provides that a motion for a change in venue may be ordered "if there is a substantial doubt that a fair and impartial trial can be had in the county where venue is laid." Decisions granting or denying a request for a change of venue are reviewed for an abuse of discretion. State v. Biegenwald, 106 N.J. 13, 35-36 (1987). "Such a discretion must be a sound discretion guided by law. It must be neither arbitrary, vague nor fanciful and must be in consonance with well-established principles of law." State v. Collins, 2 N.J. 406, 411 (1949).

In this case, it was an abuse of discretion not to change venue out of Passaic County. The Presiding Chancery Judge had failed to disclose his 10-year law partnership with GT's counsel. (Da134-150) He had the duty to avoid even the appearance of impropriety and should have told United of that relationship from the outset, or recused. (3T9-10) When he did not, and then granted two TRO's on an unsigned contract, he breached his duty. United was within its rights to seek recusal and assert a violation of the judicial canons of ethics.

Once United did so the Court should have sent the case out of county to preserve the public confidence in the integrity of the judiciary, and protect United from its fear of further unfair conduct. This was not a case to be heard by a jury. It was Chancery and the finder of fact was simply going to be a different judge with whom Judge Chiocca worked regularly. Simply that fact should have compelled a transfer of venue out of county. Judge Caposella acknowledged Judge Chiocca should have recused. (3T15) He should have further recognized that the

appearance of impropriety which led to his recusal should have been extended to all Chancery Judges in Passaic County because of the close working relationship.

The decision to let the regular ‘conflicts’ judge take over may have been appropriate if Judge Chiocca had disclosed his prior partnership before he made rulings against United. However, once he made rulings against United and created the appearance of impropriety, a more circumspect approach was warranted. Judge Caposella should have heeded United’s fears of potential for future bias or retaliation and accommodated United’s request to change Counties, erring on United’s side of caution. He did not.

And then, as United predicted, it believes it was the victim of continued bias. Judge Covello apparently decided to reject United’s late opposition but told Saleh of that decision only a month later. (5T13) He ignored that Saleh had requested an adjournment on September 7<sup>th</sup> and asked his adversary for consent. (Da326)(6T9) He did not care that Saleh’s personal problems were “prejudicial” to United. (5T13) He then showed favoritism to GT’s counsel in asking if he wanted to file late opposition and adjourn the judgment motions. (6T7) Yet, he refused Saleh the same relief despite the personal hardship cited. (6T8)

He then inexplicably considered GT’s motion before, and independently of, United’s reciprocal cross-motion, which was also “unopposed”. When doing so he improperly reviewed United’s arguments made to recused Judge Chiocca on the Orders to Show Cause which United had argued should never have been entered given the conflict. (Da842) Merely that Judge Covello relied on what the recused Judge did was wholly inappropriate. The standards of law were different and the only reason Judge Covello had the case is because United argued Judge Chiocca

made biased decisions. Doing that, while refusing to consider United's opposition, 'in hand' for a month, was further evidence of bias.

But still further, even after granting judgment contrary to the facts and the law, Judge Covello failed to decide a simple fee request for 7 months without explanation. Despite repeated requests he further prejudiced United by precluding an appeal for 7 months while forcing United to pay carrying costs. He did not even decide United's motion to certify his orders as final for 3 months, doing so only when it was moot. (Da878)(Da974) It was only when United sought its second change of venue, citing these facts, that he acted quickly. (Da934)(Da967)

United submits that what occurred after Judge Chiocca's recusal is strong inferential evidence that a change of venue out of County was needed. As a litigant and member of the public who had 2 orders unknowingly entered by the Plaintiff's counsel's former long-time law partner, United's concerns were valid. There was no prejudice to anyone in changing venue. The decision to leave United at risk in the same County, with a Judge with whom Judge Chiocca worked daily, quite possibly led to the unjust result here. That should have been avoided.

Therefore, United requests that, if this Court remands for any plenary hearing, it direct a change of venue out of Passaic County.

### CONCLUSION

For the foregoing reasons, United requests that the Court reverse and vacate all Orders of summary judgment and the refusal to change venue. United requests entry of judgment in its favor as a matter of law.

Dated: December 19, 2024

**ANTHONY X. ARTURI LLC**  
Attorneys for Appellant

*/s Anthony X. Arturi, Esq.*



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MAXX SPANN REAL ESTATE :  
AND AUCTION COMPANY, :  
MAXIMILLION M. SPAN JR., :  
INDIVIDUALLY, XYZ :  
CORPORATION, ABC LLC, JOHN :  
DOES AND JANE DOES, :  
*Third-Party Defendants-* :  
*Respondents.* :

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Order for Summary Judgment of the Honorable Frank Covello, P.J. Ch., Granting Third-Party Defendants'/Counterclaimants' [Max Spann's] Motion for Summary Judgment dated October 6, 2023. (Da848.) (*see also* 7T at pp. 51-58 for the trial court's reasons set forth on the record at oral argument.)

Amended Order for Summary Judgment of the Honorable Frank Covello, P.J. Ch., Granting Third-Party Defendants'/Counterclaimants' [Max Spann's] Motion for Summary Judgment dated July 16, 2024. (Da981.)

Amended Order for Summary Judgment of the Honorable Frank Covello, P.J. Ch., Granting Third-Party Defendants'/Counterclaimants' [Max Spann's] Motion for Summary Judgment dated July 16, 2024. (Da983.)

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<sup>1</sup> This Table of Rulings Being Appeal is compiled based on attachment to Plaintiff's Notice of Appeal. (Da999). However, contrary to *Rule 2:6-2(a)(2)*, the Appellant's Brief does not contain any "table of judgments, orders and rulings being appealed."

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## PRELIMINARY STATEMENT

This appeal arises from a case with a complicated procedural history competently unraveled by the trial court, wherein several motions for summary judgment were lodged by the parties after filing a complaint, countersuits, and a third party complaint. However, the dispute's origins are relatively simple. The defendant, United Development of America, LLC ("United"), entered into a contract with Max Spann Real Estate & Auction Co. ("Max Spann") to sell at auction real property located in Paterson, New Jersey. Max Spann conducted the auction, wherein the plaintiff, Grand Teton Developers, LLC ("Grand Teton"), was the highest bidder for the listed minimum reserve price. After the auction, Grand Teton executed a contract of sale and wired the total purchase price, plus a 10% buyer's premium, into escrow. United refused to sign the contract or otherwise convey the property to Grand Teton. This litigation ensued.

United has offered several alleged justifications for why Max Spann should have postponed the auction: that certain development approvals had expired, even though the auction advertisement was amended to show the expired approvals; that United's attorney had not approved the final version of the real estate sales contract, even though the attorney had provided revisions to the proposed contract; and that the auction was closed after only receiving one bid, even though the bid was for the published reserve price agreed to by United.

None of these justifications alter the plain language of the agreement United entered into with Max Spann, which provided Max Spann with explicit authority to conduct the auction on the date and in the manner in which it occurred.

The trial court recognized that the undisputed facts and plain language of the contract entitled Grand Teton to specific performance and Max Spann to recover its broker's fee. Here again United has offered justifications for why the court should have denied summary judgment, including that the trial court refused to consider United's late-filed opposition papers. However, these explanations also fail to rebut the undisputed facts and contractual language relied upon by the trial court. For these reasons and the reasons set forth in more detail below, the appellate court should uphold summary judgment in favor of Max Spann and Grand Teton.

### **PROCEDURAL HISTORY**

Grand Teton filed suit against United on December 22, 2021, requesting specific performance to compel Grand Teton to sell the property in accordance with the sales contract executed after the auction. (Da1-3.) It further requested injunctive relief to prevent United from conveying title to or an interest in the property during the pendency of the suit, and pleaded entitlement to compensatory damages in the alternative. (Da3-6.)

On December 27, 2021, an Order to Show Cause with Temporary Restraints was entered by the Honorable Randal C. Chiocca, P.J. Ch., preliminarily enjoining and restraining United from selling, transferring, encumbering or leasing the subject property. (Da70-73.) The court ordered that the parties submit briefing in advance of a show cause hearing set for February 2, 2022. (*Id.*) On February 2, 2022, United filed an untimely Answer, Counterclaim, and Third Party Complaint. (Da84-96.) In its Counterclaim, United alleged that the property “was advertised as having approvals to build 90 units [*sic*] residential units” and that the auction proceeded with this erroneous advertising. (Da88 at ¶¶3-5.) It claimed that since the lawsuit was filed it had been unable to resolve the expired approvals. (Da88 at ¶7.)

United alleged seven causes of action against Max Spann in its Third Party Complaint: breach of the auction agreement due to United’s lack of consent to hold the auction on the particular date (First Count); declaring the auction agreement null and void because of the lack of property approvals (Second Count); declaring the auction itself null and void because United did not prepare the contract of sale (Third Count); declaring the auction agreement null and void because the property was erroneously advertised and treated as a direct sale to Grand Teton (Fourth Count); misrepresentation (Fifth Count); damages against Max Spann for disregarding United’s request to suspend the auction (Sixth

Count); and violation of the New Jersey Consumer Fraud Act (Seventh Count). (Da87-95.)

After the show cause hearing was conducted, on February 2, 2022, the trial court entered a Preliminary Restraining Order, which continued the temporary restraints previously entered against United. (Da113.) United sought reconsideration of these preliminary restraints, alleging that Grand Teton misled the court regarding the auction agreement and the contract of sale. (Da114-122.) United also sought to distinguish case law relied upon by the trial court. (Da120 at ¶¶15-16.) The trial court declined to reconsider its order. (Da126.)

On June 17, 2022, Max Spann filed a Counterclaim against United. (Da167-170.) This alleged that Max Spann had fully performed all of its obligations under the Auction Agreement, including advertising and conducting the online public auction of the subject property on December 1, 2021. (Da167.) Max Spann further alleged that United's failure to execute the Contract of Sale after the auction constituted a breach of its own obligations under the Auction Agreement. (*Id.*) Therefore, Max Spann was entitled to the 10% buyer's premium in the amount of \$170,000 along with costs and expenses incurred in the litigation. (*Id.*)

On July 6, 2023, Grand Teton moved for summary judgment against United, requesting that the trial court compel conveyance of title to the subject

property in accordance with the terms of sales contract. (Da297-298.) Grand Teton further requested summary judgment as to United's counterclaim. (*Id.*) United opposed the motion by filing its own Statement of Undisputed Facts, wherein it did not dispute the existence or form of the auction agreement or that its attorney had reviewed and submitted revisions for the contract of sale. (Da714-716.) It also filed an untimely brief in opposition to the motion for summary judgment, alleging that genuine issues of material fact existed as to whether Grand Teton was entitled to specific performance. (Da717-726.)

On September 8, 2023, Max Spann moved for summary judgment as to United's third party complaint, requesting that it be dismissed with prejudiced. (Da327-331.) That same day, United moved for summary judgment, requesting an order granting summary judgment in its favor and dismissing Plaintiff's Complaint with prejudice. (Da713-716.) On September 26, 2023, separate counsel for Max Spann also moved for summary judgment, specifically requesting that the court order payment of the buyer's premium in the amount of \$170,000 along with prevailing party attorney's fees. (Da727-730.)

After conducting multiple hearings, the trial court entered several orders disposing of the various motions for summary judgment that are the subject of this appeal. On October 5, 2023, the court entered an Order Granting Summary Judgment in favor of Grand Teton and against United. (Da835-36.) This order

compelled conveyance of title to the subject property in accordance with the sales contract executed by Grand Teton. (*Id.*) The order also dismissed United's counterclaim against Grand Teton with prejudice. (*Id.*) The trial court denied United's Cross Motion for Summary Judgment on October 6, 2023, as moot, given that it had granted summary judgment against United. (Da845.)

On October 6, 2023, the trial court also granted Max Spann's motion for summary judgment, dismissing United's Third Party Complaint against Max Spann. (Da846-47.) It found that there were no material facts in dispute that would give rise to a finding of either fraud or breach of contract on the part of Max Spann. (7T at pp. 57-58.) The trial court also granted summary judgment in favor of Max Spann for payment of the buyer's premium in the amount of \$170,000. (Da848-49.)

On July 16, 2024, the trial court entered two separate amended orders for summary judgment in favor of each of the separate counsel for Max Spann. (Da981, 983.) These orders granted reasonable attorney's fees incurred by Max Spann in this litigation and adjusted the total judgment amount accordingly. (Da982, 984.) That same day, the trial court entered an order certifying as final all prior rulings of the Chancery Court so that United could file a notice of appeal as of right. (Da990.)

## STATEMENT OF FACTS

This dispute arises out of the online auction sale of real property owned by United and its subsequent attempt to back out of the sale post-auction. (Da2.) United entered into an agreement with Max Spann to sell the property at auction and Max Spann performed its duties under this agreement by conducting the auction. (Da8-12; Da2.) The successful bidder sued for specific performance, which was ultimately granted by the trial court on summary judgment. (Da1-6; Da835.) The undisputed facts show that Max Spann was contractually obligated to put United's property up for auction and that Grand Teton was the highest bidder for the agreed reserve price. Therefore, the trial court properly entered summary judgment ordering United to execute the contract of sale and convey the property to Grand Teton. (Da835-844.) It also properly entered summary judgment entitling Max Spann to its broker's fee as a result of the successful auction. (Da846.)

### **United's Auction Agreement with Max Spann**

On September 21, 2021, United's representative executed a Real Estate Auction Agreement (the "Auction Agreement") with Max Spann, which granted Max Spann the exclusive right to sell via auction the property located at 44-48 Ryle Avenue, Paterson, New Jersey, as more particularly described in the contract. (Da8-13.) The contract obligated Max Spann to conduct the auction

“on or about November of 2021,” with a published reserved price of \$1,700,000. (Da8.) United explicitly agreed to sell the property at or above this amount pursuant to a contract of sale. (*Id.*) The contract also included application of a 10% buyer’s premium, payable by the purchaser, to be added to the total amount of the final bid. (Da9.)

With respect to the auction date, the Auction Agreement granted Max Spann “the exclusive right to sell or exchange the herein named property from this date and to conduct a Public Auction on or about November of 2021.” (Da8.) The contract further stated “[t]his Agreement may not be terminated by [United] prior to the Termination Date,” previously defined as “120 days after auction sale.” (Da8.) It also establishes United’s obligation to pay the commission to Max Spann “[i]f a contract of sale, lease or other instrument of transfer for the Property(s) is executed within 60 days following the expiration of this Term . . . by any person or entity who was registered with [Max Spann] or who was obtained or contacted by or through the efforts of” Max Spann. (*Id.*)

The Auction Agreement did not provide United with a right to unilaterally cancel or postpone the auction without the mutual assent of Max Spann. To wit, the contract provided that Max Spann “*shall* conduct a public auction of the Property(s) on or about the date cited herein” and that Max Spann “*may* postpone or advance the date of the Auction with the consent of the Seller.”

(Da8-9) (emphasis added.) Further, the contract placed all responsibility for the “layout and design of brochure, fliers, newspaper advertising and news releases” with Max Spann. (Da8.)

### **The Auction and Sale**

In advance of the auction, based on representations from United, Max Spann prepared initial marketing materials advertising that the property had approvals from the City of Paterson. (Da688-690.) When Max Spann subsequently learned that the property’s approvals had expired, it promptly modified the auction advertisement to reflect the changed status of the relevant approvals. (Da820 and the citations therein.) The final promotional flyer issued by Max Spann accurately described the property as a “Mixed-Use Development Site” that had a “*Previously Approved* Site Plan for 10,000 +/- of Commercial and 90 +/- Residential Units.” (Da595) (emphasis added.) The “Guaranteed Minimum Bid” was listed as \$1,700,000. (*Id.*) The flyer stated that the auction would conclude December 1, 2021, at 11:00 a.m. (*Id.*) It directed prospective bidders to sign up online, at which time they would be required to wire a refundable \$40,000 prior to bidding. (Da598.) Texts and emails throughout the period between September and November 2021 between representatives for Max Spann and United indicate that both were aware of the auction timeline, with the auction to be conducted and concluded on December 1, 2021. (Da661-667; 678-

686; 710-712.) The promotion materials also included a copy of the proposed Contract of Sale with the edits made by United's counsel incorporated therein. (Da630-638.)

Grand Teton received a copy of the revised promotional flyer and conducted its own independent due diligence about the building and its potential as an investment asset. (Da34-35 at ¶¶3-4.) Grand Teton's member, Abdul Hamdan, was approved by Max Spann to bid at the auction on November 30, 2021. (Da15; Da35 at ¶8.) The auction was held on December 1, 2021, and concluded at 11:00 a.m. the same day. (Da65.) On the date of the auction, Grand Teton submitted a bid for the published minimum bid: \$1,700,000. (Da35 at ¶8.) After being informed that it was the highest bidder, Grand Teton sent two wires totaling \$1,870,000, which represented the total bid price plus the 10% buyer's premium. (Da26; Da28-33; Da35 at ¶¶9-10.)

The next day, Grand Teton was presented with and executed a Contract for Sale of Real Estate (the "Contract for Sale"), agreeing to purchase the property for a total price of \$1,870,000, which consisted of \$1,700,000 as the purchase price and \$170,000 as a buyer's premium. (Da17-24.) The Contract for Sale obligated the seller to transfer ownership of the property to Grand Teton at closing via a properly executed deed and affidavit of title. (Da21.)

This Contract for Sale originated as a draft contract that Max Spann sent to United prior to the auction. (Da661-62.) Counsel for United edited the Contract for Sale and returned it to Max Spann for use prior to the auction. (Da658-667; 678-686.) Max Spann distributed the Contract of Sale, with the edits made by United's counsel incorporated therein, to prospective bidders, including Grand Teton, before the date of the auction. (Da630-638.) Max Spann emailed this Contract of Sale to Grand Teton after the conclusion of the auction, who then inserted the date of the contract and total price before executing it on December 2, 2021. (Da17-24.)

United's representative refused to sign the Contract of Sale. (Da41-42.) This resulted in Grand Teton filing suit on December 22, 2021, against United for specific performance. (Da1-6.) United subsequently filed a Counterclaim as well as a Third Party Complaint against Max Spann. (Da84-96.)

During litigation, Max Spann disclosed the expert report of Carlo Losco of Balsley Losco Realty dated June 27, 2023. (Da561.) Mr. Losco reviewed the relevant documents and evidence concerning the auction and sale of the subject property with an eye towards evaluating the practices and procedures maintained by Max Spann during the transaction as compared to the reasonable and acceptable industry standards in the State of New Jersey. (Da562.) Ms. Losco ultimately concluded that Max Spann and Maximillion M. Spann, Jr.,

individually, fulfilled all of their duties as a realtor and auctioneer as required under the relevant code of ethics and standards promulgated for said professions. (Da572-75.) United failed to provide any rebuttal to Mr. Losco's report.

### **The Summary Judgment Orders**

After conducting multiple hearings, the trial court entered several orders disposing of the various motions for summary judgment that are the subject of this appeal.

On October 5, 2023, the court entered an Order Granting Summary Judgment in favor of Grand Teton and against United, which compelled United to convey title to the subject property in accordance with the Contract for Sale. (Da835-36.) The Court made explicit findings of undisputed facts, including that Max Spann "provided a proposed Contract of Sale which was reviewed by United's attorney and included the agreement in the bid package submitted to prospective bidders." (Da838.) It further found that "Grand Teton registered for the auction and submitted a bid of \$1.7 million." On December 1, 2021, Grand Teton received notification "that it was the highest bidder and approved buyer." On that same day, "Grand Teton received, executed, and returned the Contract of Sale and delivered the required payment" into Max Spann's trust account. (*Id.*) The court also found that "United refuses to sign the Contract of Sale and convey the building for the agreed upon price of \$1.7 million. Grand Teton is

ready, willing, and able to perform and consummate the purchase.” (*Id.*) Ultimately, the trial court determined that even if Max Spann had breached the Auction Agreement, it was acting as United’s agent at the time of auction and therefore an enforceable agreement to sell the property arose when Grand Teton presented a bid for the required \$1.7 million. (Da843.)

The trial court denied United’s Cross Motion for Summary Judgment on October 6, 2023, as moot. (Da845.) It determined that the motion was moot because it had decided to grant Plaintiff’s motion for summary judgment and therefore grant summary judgment against United. (*Id.*)

On October 6, 2023, the trial court also granted Max Spann’s motion for summary judgment, thereby dismissing United’s Third Party Complaint against Max Spann. (Da846-47.) The court presented its reasons for granting summary judgment on the record more fully at oral argument. It found that United entered into the Auction Agreement for Max Spann to conduct a public auction of the subject property and that auction was to be conducted on or about November 2021. (7T at p. 52.) It further found that when the auction closed at 11 a.m. on December 1, 2021, there had been one bidder – Grand Teton – who submitted a bid for the published minimum reserve price of \$1,700,000. (*Id.*) The court also noted evidence that there were three bidders who put up an initial deposit to

qualify to bid at the auction, but that it was only Grand Teton who submitted a bid. (*Id.*)

The trial court explicitly determined that United was unable to show the required elements under the Consumer Fraud Act and that there was no breach of contract. (7T at p. 54.) It found that Max Spann provided a *pro forma* contract of sale to United prior to the auction and that United's attorney reviewed it, made changes, and submitted it to Max Spann. (7T at p. 56.) There was nothing in the Auction Agreement or elsewhere that would require United to formally state that its own changes to the Contract of Sale were acceptable before the auction sale could go forward. (*Id.*) While the Contract of Sale was not prepared "word for word" by United, "it was adopted by them. Their attorney reviewed it, made all the changes that needed to be made and submitted it." (*Id.*) The court found that there was no factual issue that the Contract of Sale, with the revisions submitted by United's counsel, was part of the packet of documents sent to prospective bidders prior to the auction. (*Id.*) Therefore, the court determined that there was no evidence for a finder of fact to determine that Max Spann breached the Auction Agreement or that it had committed fraud. (7T at pp. 57-58.)

On October 6, 2023, the trial court also granted summary judgment, made by Max Spann's separate counsel, in favor of Max Spann for payment of the buyer's premium in the amount of \$170,000. (Da848-49.)

On July 16, 2024, the trial court entered two separate amended orders for summary judgment in favor of each of the separate counsel for Max Spann. (Da981, 983.) These orders granted reasonable attorney's fees incurred by Max Spann in this litigation and adjusted the total judgment amount accordingly. (Da982, 984.) That same day, the trial court entered an order certifying as final all prior rulings of the Chancery Court so that United could file a notice of appeal as of right. (Da990.)

### **United's Motions to Recuse and Change Venue**

During litigation, United filed motions to recuse the first judge assigned to the case and change the venue. While these motions do not affect the most important substantive factual or legal issues of this matter, nor do they affect Max Spann in any way, they will nevertheless be briefly discussed. On April 22, 2022, United filed a motion to recuse Judge Randal C. Chiocca and to change venue. (Da132.) In response to the restraining order, counsel for United "launched an investigation into a potential conflict of interest due to [his] personal belief that Judge Chiocca's behavior [was] improper." (Da135.) This "investigation" discovered that Judge Chiocca was a partner at the law firm

representing Grand Teton prior to taking the bench. (Da135-136.) United asked not only for Judge Chiocca to recuse himself, but to have the entire case transferred out of the Passaic County Superior Court so as to obtain “a fair hearing.” (Da150.) On May 20, 2022, Judge Chiocca entered an order recusing himself but denying the change of venue. (Da156-57.) The case was reassigned to Judge Frank Covello.

## **ARGUMENT**

### **POINT ONE**

**THERE WAS NO GENUINE ISSUE OF FACT REGARDING THE ENFORCEABILITY OF THE AUCTION AGREEMENT OR MAX SPANN’S AUTHORITY TO CONDUCT THE AUCTION.**

The trial court properly granted Grand Teton’s motion for summary judgment and specific performance. (Da835-844.) In doing so, it specifically recognized the undisputed facts of this straightforward transaction. Pursuant to the Auction Agreement, United gave Max Spann the exclusive right to sell the subject property at auction on or about November 2021, with a minimum reserve price set at \$1.7 million with a 10% buyer’s premium. (Da837.) United agreed to sell the property to the highest bidder pursuant to the terms of a Contract of Sale that had been reviewed and edited by United’s counsel. (Da838.) After a successful auction, which resulted in a high bid of \$1.7 million, Max Spann

provided the Contract of Sale to Grand Teton, which executed and returned the Contract of Sale and delivered the required payment to be held in trust. (*Id.*)

United refused to execute the Contract of Sale and failed to convey title of the property to Grand Teton. It has offered a litany of excuses for its nonperformance, but none of them change the terms of the Auction Agreement or the legal effect of the auction itself. The trial court appropriately ignored United's self-interested justifications and ordered that the property be conveyed to Grand Teton per the terms of the written sales contract.

At its core, this is a breach of contract action wherein United alleges that Max Spann breached the Auction Agreement by failing to postpone the auction. To sustain a claim for breach of contract, a plaintiff has the burden of showing that: (1) the parties entered into a valid contract; (2) the defendant did not do what the contract required; and (3) the defendant's breach or failure to do what the contract required caused a loss to the plaintiff. *Murphy v. Implicito*, 392 N.J. Super. 245, 265, 920 A.2d 678 (App. Div. 2007). Interpretation of a contract is generally appropriate to resolve on summary judgment. *Globe Motor Co. v. Igdalev*, 225 N.J. 469, 482-83, 139 A.3d 57 (2016). To defeat summary judgment, it is not sufficient for the non-moving party to merely make a denial of the moving party's facts. *Heljon Management Corp. v. DeLeo*, 55 N.J. Super. 306, 150 A.2d 684 (App. Div. 1959); *see also Brae Asset Fund, L.P. v. Newman*,

327 N.J. Super. 129, 134, 742 A.2d 986 (App. Div. 1999) (finding that conclusory assertions without factual support will not defeat summary judgment).

There is no dispute that United and Max Spann entered into a valid contract – the Auction Agreement – for Max Spann to auction the subject property. United ultimately does not allege that Max Spann failed to do what the actual *contract* required. Rather, it seeks to prove breach of contract by reaching for concepts outside of contractual law. United’s case rests upon disputes as to Max Spann’s authority to conduct the auction as United’s agent and not as against the plain language of the Auction Agreement. In effect, United asks the appellate court to rewrite the Auction Agreement to give it unlimited authority to dictate the terms of the auction and the manner in which it was to be performed. That authority is explicitly reserved to Max Spann contractually via the Auction Agreement. United also asks to insert additional language into the Auction Agreement to require some kind of “formal” declaration that it approved of the Contract of Sale’s language before the auction could take place. This power is also absent from the plain terms of the Auction Agreement and thus cannot not be used as a basis for United’s breach of contract claim.

There are no genuine issues of material fact that would disturb the trial court’s conclusion that Max Spann upheld its obligations under the Auction.

Therefore, the appellate court should similarly recognize that the undisputed facts lead inexorably towards summary judgment against United and in favor of Grand Teton and Max Spann.

**A. Max Spann Conducted the Auction on a Date Permitted by the Auction Agreement**

United's Initial Brief does not dispute the validity of the Auction Agreement or the terms therein, but rather argues that United had extra-contractual authority over Max Spann's ability to perform its own duties under the contract. This claimed power is not based on the terms of the contract or on any established law. The appellate court should not bestow such extraordinary rights on United but should instead find that the trial court's straightforward interpretation of the Auction Agreement was correct.

The plain language of the Auction Agreement between United and Max Spann is unambiguous with respect to the authority provided to Max Spann. Through the contract, United granted Max Spann "the exclusive right to sell or exchange the herein named property from this date and to conduct a Public Auction on or about November of 2021." (Da8.) This is precisely what Max Spann did when it conducted the auction on December 1, 2021.

United pleaded in its Counterclaim against Max Spann that because it did not provide consent to conducting the auction in December, Max Spann therefore breached the Auction Agreement and the auction was invalid. (Da89.)

Perhaps recognizing the frivolity of the argument, United does not argue in its brief that December 1, 2021, was an inappropriate date for the auction. This argument must therefore be considered abandoned for the purposes of this appeal. *W.H. Industries, Inc. v. Fundicao Balancins, Ltda*, 397 N.J. Super. 455, 459, 937 A.2d 1022 (App. Div. 2008) (“An issue not briefed is deemed waived.”).

**B. The Auction Agreement Did Not Allow United to Unilaterally Postpone the Auction**

United argues that it was entitled to unilaterally withdraw Max Spann’s authorization to conduct the auction. (Da36.) This entitlement cannot be found in the plain language of the contract and the trial court correctly determined that United lacked such entitlement as a matter of law. The Auction Agreement plainly states that “[t]his Agreement may not be terminated by [United] prior to the Termination Date,” previously defined as “120 days after auction sale.” (Da8.) It also establishes United’s obligation to pay the commission to Max Spann “[i]f a contract of sale, lease or other instrument of transfer for the Property(s) is executed within 60 days following the expiration of this Term . . . by any person or entity who was registered with [Max Spann] or who was obtained or contacted by or through the efforts of” Max Spann. (*Id.*)

The authority to postpone the date of the auction required the agreement of both United and Max Spann. The Auction Agreement stated that Max Spann

“*shall* conduct a public auction of the Property(s) on or about the date cited herein” and that Max Spann “*may* postpone or advance the date of the Auction with the consent of the Seller.” (Da8-9) (emphasis added.) All responsibility for the “layout and design of brochure, fliers, newspaper advertising and news releases” rested in the hands of Max Spann. (Da8.) As consideration for conducting the auction, United agreed to allow Max Spann to retain the 10% buyer’s premium as a commission upon sale of the property. (Da9.) There is no language in the Auction Agreement that would give United the unilateral right to demand that Max Spann cancel or postpone the auction. While Max Spann had the contractual ability to postpone the auction with United’s consent, this ability was entirely voluntarily. “When the intent of the parties is plain and the language is clear and unambiguous, a court *must* enforce the agreement as written, unless doing so would lead to an absurd result.” *Quinn v. Quinn*, 225 N.J. 34, 37, 137 A.3d 423 (2016).

United relies on agency principles in arguing that it had the right to cancel the Auction Agreement at will. (Da35-37.) This stretches the limits of both agency and contract law. It is generally true that a principal may revoke the appointment of an agent, despite written language purporting to make the appointment irrevocable. *See Sarokhan v. Fair Lawn Memorial Hospital, Inc.*, 83 N.J. Super. 127, 133-34, 199 A.2d 52 (App. Div. 1964). However, the

*Sarokhan* case cited by United dealt with specific enforcement of a personal services contract. *Id.* at 133. A “personal services contract” is one where performance contemplated by the contract is particular to the individuals involved, which is determined by evaluating whether the contracted work involves the sort of “special knowledge, judgment, taste, skill or ability” unique to an individual. *In re Headquarters Dodge, Inc.*, No. 92-1030, 1992 U.S. Dist. LEXIS 18640, \*22 (D.N.J. Nov. 25, 1992); *see also In re Compass Van & Storage Corp.*, 65 B.R. 1007, 1011 (Bankr. E.D.N.Y. 1986) (providing examples such as “a contract to paint a picture; a contract between an author and his publisher; an agreement to sing; an agreement to render service as a physician”). Generally, personal service contracts cannot be specifically enforced because “[e]quity will not compel performance of the personal services.” *Sarokhan*, 83 N.J. Super. at 133. Further, while principals can revoke an agency’s authority at will, “[t]his does not mean that the principal may breach such a contract with impunity.” *Id.* at 134. In that situation, the principal would invariably be liable for the wrongful breach. *Id.* United’s refusal to convey the property after auction was certainly a breach of the Auction Agreement according to its plain terms.

This discussion is academic but has no ultimate bearing on the outcome of this commercial dispute. The trial court was not asked to determine whether the Auction Agreement was a “personal services contract” or whether it

established an agency relationship between United and Max Spann. This is because this was a transaction between two corporate entities in which one entity contracted with another entity to perform a task – i.e., conduct a real estate auction. Another key distinction is that Max Spann is not requesting specific performance of the Auction Agreement itself. Rather, both parties to the Auction Agreement have alleged that their counterpart breached the contract. It is Grand Teton that sought specific performance of the real estate sale, which resulted from the auction. Thus, the general prohibition on specific performance of personal services contracts is inapplicable here.

Even if this Court were to view the Auction Agreement through the prism of a principle-agent relationship, *see, e.g., McMakin v. Pine Bush Equip. Co.*, 242 B.R. 271, 277 (D.N.J. 1999) (finding that relationship between auctioneer and a seller of goods is one of agent and principal), there is no competent evidence that United revoked Max Spann's authority as agent to conduct the auction per the terms of the Auction Agreement. The undisputed facts show that United was aware that Max Spann would be auctioning the subject property on December 1, 2021. (Da658.) It was provided a form contract of sale to review weeks prior to the auction date, after which time United's attorney returned the Contract of Sale with edits. (Da661-66, 678-679, 681-686.) United definitively

knew that Max Spann was planning on conducting the auction on December 1, 2021.

United alleges that it requested Max Spann to “freeze” the auction until after certain development approvals could be renewed. (Appellant’s Br. at p. 7.) However, the only evidence for this alleged request was self-serving testimony from United’s representative, stating that he told Max Spann’s representative to freeze the auction in a phone call. (*See id.* and the references cited therein.) For his part, Max Spann’s representative testified that while United’s representative initially asked to postpone the auction, he was convinced to proceed when presented with several options. (Da375.) United has failed to provide any written evidence that it requested that Max Spann postpone the auction. This is key given that the Auction Agreement states unequivocally that “[a]ll notices which may be required or desired to be given by either party hereto ***shall be given in writing...***” (Da11) (emphasis added.) Therefore, even if United wished to revoke Max Spann’s authorization to proceed with the auction it needed to do so in writing pursuant to the terms of the Auction Agreement. *See also Jacob v. McDuell*, 99 N.J. Eq. 652, 653, 134 A. 191 (Ch. 1926) (observing that revocation of auctioneer’s authority was given by “written notice”). United has failed to demonstrate with competent evidence that it overcame this minimum hurdle in

the Auction Agreement. It does not even contend that it provided a written request or demand for postponement.

In addition to the above, the expert put forward by Max Spann concluded that it conducted the auction and sale of the property in accordance with the relevant codes of ethics and standards for auctioneers in New Jersey. United completed failed to rebut these contentions with its own expert, as raised in oral argument before the trial court. (7T at p. 10.) When presented with “speculation” that postponing the auction until approvals were renewed could have resulted in a higher auction price, the trial court correctly observed that “that’s why I would have expected that the – that [United] would have had an expert on that issue.” (7T at p. 12.)

Just as Max Spann was required to demonstrate that it was entitled to summary judgment based on competent evidence, United was also “required to show by competent evidential material that a genuine issue of material fact did exist.” *Merchants Exp. Money Order Co. v. Sun Nat. Bank*, 374 N.J. Super. 556, 563, 866 A.2d 189 (App. Div. 2005). “[A] non-moving party cannot defeat a motion for summary judgment merely by pointing to *any* fact in dispute.” *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 529, 666 A.2d 146 (1995). The trial court, therefore, was correct in determining that Max Spann did not breach the Auction Agreement by moving forward with the auction as planned.

### **C. United's Agency Argument is Not Preserved for Appeal**

Finally, it must be noted that United's entire argument with respect to the scope of Max Spann's agency and United's allegedly unfettered ability, as principal, to revoke Max Spann's authority to act as its agent is being raised for the first time on appeal. "It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234, 300 A.2d 142 (1973); *see also Monek v. Borough of South River*, 354 N.J. Super. 442, 456, 808 A.2d 114 (App. Div. 2002) (declining to consider matters not developed at the trial court level).

There is no evidence that United raised this argument at any point at the trial court level despite having numerous opportunities to do so. For example, United did not raise this defense when opposing Plaintiff's request for injunctive relief. (Da50-54, 63-68.) United also failed to raise this defense in its Answer, Counterclaim, and Third Party Complaint. (Da84-96.) It similarly failed to raise the agency issue in its Motion for Reconsideration of the court's preliminary injunction. (Da116-122.) In its brief in opposition to Grand Teton's motion for summary judgment and in support of its own cross motion for summary

judgment, United specifically cited to the provision in the Auction Agreement stating that Max Spann could only postpone the date of the auction with the consent of United, “which must be in writing accordingly.” (Da720.) United did not, however, argue that as principal it could unilaterally revoke Max Spann’s authorization to proceed with the auction. (Da717-724.) Instead, the primary thrust of United’s argument against Max Spann was that it had proceeded with the auction before United had approved and finalized the Contract of Sale. (Da722-24.) Alleged revocation of agency was not an issue.

At oral argument on Max Spann’s motion for summary judgment, perhaps its last opportunity to raise its alleged agency argument, counsel for United opposed summary judgment on a number of grounds: that the auction was not open for a sufficient amount of time (7T at pp. 19-20); that its representative had orally requested that the auction be postponed (7T at p. 20); that conducting the auction would have opened United up to civil liability for a material misrepresentation (7T at p. 21); that the Auction Agreement required the auction to take place in November 2021 and not on December 1, 2021 (7T at p. 22-24); that the auction was more accurately characterized as a “straight sale.” (7T at 25); and that that Contract of Sale was not originally prepared by United (7T at p. 26-27). United did not, however, argue that it could unilaterally revoke the Auction Agreement based on agency principles. Therefore, this issue was not

properly preserved for appeal and should not be considered by the appellate court.

## **POINT TWO**

### **THE AUCTION WAS CONDUCTED IN ACCORDANCE WITH THE AUCTION AGREEMENT**

United has failed to demonstrate that Max Spann lacked authority to proceed with the auction as planned on December 1, 2021, or that the auction was not conducted in accordance with the plain language of the Auction Agreement. United again asks this Court on appeal to read additional language and requirements into the contract where none exist, with the sole purpose of retroactively erecting hurdles for Max Spann to overcome before conducting the online auction. There is no material evidence to support these claimed requirements. This Court need only look to the explicit terms of the Auction Agreement to conclude that Max Spann had the authority – indeed, the obligation – to conduct the online auction of the property on December 1, 2021. For these reasons, this Court should affirm the trial court’s entry of summary judgment in favor of Max Spann and against United.

#### **A. The Pre-Auction Advertising Materials were Accurate**

The Auction Agreement contains straightforward language with respect to Max Spann’s contractual obligations. Ultimately, the contract left most of the discretion in how best to prepare for and conduct the auction in the hands of

Max Spann. United granted Max Spann “the exclusive right to sell or exchange the herein named property from this date and to conduct a Public Auction on or about November of 2021.” (Da8.) Max Spann was obligated to “conduct a public auction of the Property(s) on or about the date cited herein, and, shall coordinate marketing efforts in connection with such public auction.” (*Id.*) It was similarly “responsible for layout and design of brochure, fliers, newspaper advertising and news releases, site selection, registering bidders, working with third party Real Estate Agents *and all other work necessary for a successful auction.*” (*Id.*) (emphasis added.) Most importantly, the Auction Agreement gave Max Spann the sole option of postponing or advancing the date of the auction “with the consent of the seller.” (Da8-9.)

In accordance with its obligations under the Auction agreement, Max Spann prepared marketing materials advertising that the property had approvals from the City of Paterson. (Da688-690.) This was based on initial representations from United. (*Id.*) When Max Spann learned that the property’s approvals had expired, it promptly modified the auction advertisement to reflect the changed status of the relevant approvals. (Da820 and the citations therein.) The final promotional flyer issued by Max Spann accurately described the property as a “Mixed-Use Development Site” that had a “*Previously Approved* Site Plan for 10,000 +/- of Commercial and 90 +/- Residential Units.” (Da38)

(emphasis added.) The “Guaranteed Minimum Bid” was listed as \$1,700,000. (*Id.*) The flyer stated that the auction would conclude December 1, 2021 at 11:00 a.m. (*Id.*) Texts and emails between representatives for Max Spann and United prior to the auction show that both were aware of the auction timeline, with the auction to be conducted and concluded on December 1, 2021. (Da661-667; 678-686; 710-712.) The undisputed facts show that the revised advertising materials accurately reflected the status of development approvals at the property. Therefore, United cannot claim that Max Spann breached the Auction Agreement or that the auction was invalid due to any inaccurate publications.

**B. The Auction Agreement Did Not Require United’s Final “Approval” of the Sales Contract**

United also alleges that the auction could not move forward, and the sale could not be completed, until it provided final approval of the Contract of Sale. (Appellant’s Br. at p. 25.) This requirement is not found within the Auction Agreement and cannot be read into the contract *post facto*. With respect to the sale of the subject property, the Auction Agreement plainly stated that United “agrees to sell the Property at or above [the published reserve price of \$1,700,000] pursuant to the terms of the Contract of Sale as prepared by [United’s] attorney.” (Da8.) This is the sole term in the Auction Agreement that speaks to the Contract of Sale. The agreement certainly does not require United to provide any formal approval before the auction can take place.

It is uncontested that Max Spann initially provided the form Contract of Sale to United for review prior to the auction. However, it is similarly uncontested that United's counsel received the proposed Contract of Sale, made edits to the agreement, and returned it to Max Spann prior to the auction. Neither United nor its attorney raised any issue at that time as to who initially drafted the Contract of Sale, nor did they claim that this arrangement breached the Auction Agreement. "[I]t is not the function of the court to make a better contract for the parties, or to supply terms that have not been agreed upon. If the terms of a contract are clear, we must enforce the contract as written and not make a better contract for either party. *Graziano v. Grant*, 326 N.J. Super. 328, 342, 741 A.2d 156 (App. Div. 1999) (citations omitted). The Court should not allow United to invent additional requirements for performance of the auction to retroactively create a breach.

The trial court appropriately interpreted the exchange of the proposed Contract of Sale in context and through the lens of common sense. It found that "even though the actual contract was not prepared word for word by the defendant, [United], it was adopted by them. Their attorney reviewed it, made all the changes that needed to be made and submitted it. The [] changes were incorporated [] into that agreement that were made part of the big packet. There's [not] even an issue about that." (7T at p. 56:11-18.) "A basic principle

of contract interpretation is to read the document as a whole in a fair and common sense manner.” *Hardy ex rel. Dowdell v. Abdul-Matin*, 198 N.J. 95, 103, 965 A.2d 1165 (2009). This is precisely what the trial court did when it interpreted the Auction Agreement’s language concerning the proposed Contract of Sale.

With respect to the buyer’s side of the transaction, the undisputed evidence also shows that after Grand Teton received a copy of the *revised* promotional flyer, which advertised the corrected status of the development permits on the property, it conducted its own independent due diligence about the building and its potential as an investment asset. (Da34-35 at ¶¶3-4.) On November 30, 2021, Grand Teton was approved by Max Spann to bid at the auction. (Da15; Da35 at ¶8.) The auction was held on December 1, 2021, and concluded at 11:00 a.m. the same day, as advertised. (Da\_\_\_\_.) On the date of the auction, Grand Teton submitted a bid for the published minimum bid: \$1,700,000. (Da35 at ¶8.) After being informed that it was the highest bidder, Grand Teton sent two wires totaling \$1,870,000, which represented the total bid price plus the 10% buyer’s premium. (Da26; Da28-33; Da35 at ¶¶9-10.)

The next day, Grand Teton was presented with and executed a Contract for Sale of Real Estate (the “Contract for Sale”), agreeing to purchase the property for a total price of \$1,870,000, which consisted of \$1,700,000 as the

purchase price and \$170,000 as a buyer's premium. (Da17-24.) The Contract for Sale obligated the seller to transfer ownership of the property to Grand Teton at closing via a properly executed deed and affidavit of title. (Da21.) Viewing the transaction as a whole, there is no dispute that United reviewed and adopted the proposed Contract of Sale prior to the auction, Grand Teton received accurate promotional materials and conducted its own independent research before bidding, and executed the Contract of Sale after successfully bidding at auction. The Court should therefore affirm summary judgment in favor of Max Spann and against United.

**C. Max Spann was Not Engaged in the Unauthorized Practice of Law by a Real Estate Broker**

United alleges that Max Spann engaged in the unauthorized practice of law because it originally created the Contract of Sale. (Appellant's Br. at p. 42.) This, however, misconstrues precedent concerning the ability of licensed real estate brokers to prepare and circulate real estate sales contracts. The Court should therefore reject it and affirm summary judgment in favor of Max Spann.

In New Jersey, "a licensed real estate broker or salesperson who prepares a contract for the sale of certain categories of residential real estate does not engage in the unauthorized practice of law, provided that the agreement prescribes a three-day attorney review period during which either party's counsel may cancel the contract." *Sullivan as Trustee of Sylvester L. Sullivan*

*Grantor Retained Income Trust v. Max Spann Real Estate & Auction Co.*, 251 N.J. 45, 69, 276 A.3d 92 (2022) (citing *New Jersey State Bar Assn. v. New Jersey Assn. of Realtor Bds.*, 93 N.J. 470, 471-86, 461 A.2d 1112 (1983)). However, the *Sullivan* court found that a real estate auction sale “is distinct from a traditional real estate transaction in which a buyer and seller negotiate the contract price and other terms and memorialize their agreement in a contract.” *Id.* at 51. In doing so, it explicitly carved out an exception for real estate sold at auction versus traditional real estate transactions, since imposing a three-day attorney review period “would fundamentally interfere with the method by which buyers and sellers choose to conduct such [auction] sales.” *Id.* at 52.

In fact, the Court in *Sullivan* reviewed the “template” sales contract used by Max Spann and found it “to serve the consumer protection objectives that we sought to achieve in *State Bar Ass’n.*” *Id.* The auction transaction at issue in this case poses even fewer potential objections on consumer protection grounds, since it involves a corporate entity rather than the sale of residential real estate by a consumer. Further, United’s attorney had an opportunity to review and revise the Contract of Sale prior to its use at auction. Based on its reasoning in *Sullivan*, the Supreme Court would undoubtedly approve the use of the Contract of Sale within the specific facts of this transaction. United’s brief cites to

*Sullivan* but ignores the explicit carve-out created by the case specifically for Max Spann.

### **POINT THREE**

#### **THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AND SPECIFIC PERFORMANCE**

While the issue of specific performance will undoubtedly be addressed in more detail by Grand Teton, Max Spann supports the trial court's granting of this remedy on summary judgment and requests that this Court affirm. To obtain specific performance as a remedy, the terms of a contract must be established such that "the court can determine, with reasonable certainty, the duties of each party and the conditions under which performance is due." *Marioni v. 94 Broadway, Inc.*, 374 N.J. Super. 588, 598-99, 866 A.2d 208 (App. Div. 2005) (quoting *Salvatore v. Trace*, 109 N.J. Super. 83, 90, 262 A.2d 409 (App. Div. 1969)).

#### **A. The *Golfinopoulos* Case is Inapposite**

In its brief, United discusses the *Golfinopoulos v. Padula* decision at length. 218 N.J. Super. 38, 526 A.2d 1107 (App. Div. 1987). That case involved a closed-bid auction sale of farm property, wherein an auction bid was accepted by an attorney who was acting as auctioneer under a perceived authority to conduct the auction on behalf of the seller. *Id.* at 41-43. After the auction, the buyer's attorney exchanged copies of the form of contract with the agent and

negotiated some minor changes. *Id.* at 43. A few weeks later, the sellers refused to sign the contract due to receipt of a much higher offer. *Id.* at 44. It was at this time that the sellers first raised an alleged statute of frauds issue. *Id.* The trial court determined on summary judgment that there was no contract since the parties had continued to negotiate material terms; that since none of the defendants signed a formal contract, there was no writing which constituted a satisfaction of the statute of frauds; that the auction bid was merely an offer and did not constitute a contract until it was accepted; and that changes to the bid and proposed contract negated any finding of a final written agreement. *Id.*

The Appellate Division looked to whether the purported authority given by the seller to its agent must have been in writing in order to satisfy the statute of frauds. *Id.* at 45. It cited *N.J.S.A. 25:1-5*, which provides that “No action shall be brought upon [a contract for sale of real estate] unless the agreement or promise, upon which action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized.” *Id.* (citing *N.J.S.A. 25:1-5*). The Court determined that in New Jersey, an agent’s authority to execute a written contract for sale of real estate need not itself be in writing “so long as the eventual contract or a memorandum of it is in writing.” *Id.* at 45 (citing *Buckley v. Jersey City*, 105 N.J. Eq. 470, 480 (Ch. 1930)). It ultimately

concluded that factual issues remained as to the agent's authority to proceed with the auction as well as the terms presented in the auction itself. *Id.* 45-47. Therefore, the Appellate Court reversed entry of summary judgment so that the trial court could further develop these factual issues of agency. *Id.* at 48.

This case is clearly distinguishable from the instant dispute. The *Golfinopoulos* court noted that there were "clear factual issues" as to the seller's grant of authority to hold the closed bid auction and negotiate on their behalf. *Id.* at 45. There are no such issues here, as the Auction Agreement clearly demonstrated Max Spann's authority to conduct an auction of United's property. This agreement was in writing and executed by representatives from both United and Max Spann. The Contract of Sale was also in writing and had been reviewed and adopted by United's attorney. Therefore, pursuant to the well-established standards discussed in *Golfinopoulos*, United provided written authorization to Max Spann to sell its property at auction and Max Spann had the explicit written authority to bind United with the sale of the property. United claims that "[t]his case presented the same factual dispute as to the auctioneer's authority." (Appellant's Br. at p. 24.) However, contrary to this assertion, none of the ambiguities with respect to the agent's written authority or the terms of the real estate sales contract raised in *Golfinopoulos* are present in the instant dispute.

In addition to the above, the *Golfinopoulos* decision is distinguishable because it ultimately discusses the impact of how certain terms transform a reserve sale into a sale without reserve and how this would affect the general rules of offer and acceptance. This is how the *Golfinopoulos* case has been cited to in subsequent decisions by the Supreme Court of New Jersey. *See, e.g., Sullivan*, 251 N.J. at 69 (citing to *Golfinopoulos* when discussing auctions without reserve); *Panetta v. Equity One, Inc.*, 190 N.J. 307, 324-25, 920 A.2d 638 (2007) (same). United misconstrues the ultimate holding of *Golfinopoulos* and how it could affect the transaction between itself, Max Spann, and Grand Teton.

The same distinctions apply to the *Busciglio v. DellaFave* case cited by United. 366 N.J. Super. 135, 840 A.2d 897 (App. Div. 2004). United argued that *Busciglio* involved the factual issue of whether the seller's attorney had "apparent authority" to bind the seller of real property. (Appellant's Br. at pp. 32-33.) Similar to *Golfinopoulos*, the *Busciglio* decision rested on questions about whether the seller's agent was provided clear authority where the attorneys had not obtained "a written retainer agreement setting forth the scope of either attorney's representation." *Id.* at 138. The Appellate Division determined that "[h]ad defendants expressly authorized their attorney to bind them to the terms of the amended contract of sale, specific performance

appropriately would have been granted.” *Id.* at 140. However, the trial court failed to determine whether the attorneys had express authority from their clients, only finding that the ongoing contract negotiations imbued the attorneys with “apparent authority” to negotiate on the sellers’ behalf. *Id.* This is the same issue in the other case relied upon by United. *See LoBiondo v. O’Callaghan*, 357 N.J. Super. 488, 496-97, 815 A.2d 1013 (App. Div. 2003) (finding that there were issues of fact regarding the apparent authority of the agent to bind the principal).

There is no such issue of “apparent authority” in the instant case. Here, the trial court was presented with a written contract – the Auction Agreement – that clearly laid out the express authority given by United to Max Spann with respect to the auction sale of the subject property. United points to the fact that its representative did not sign the Contract of Sale as evidence that there was a dispute with respect to the authority of United’s attorney to bind United as to the Contract of Sale’s terms. (Appellant’s Br. at pp. 33-34.) However, this misconstrues both *Busciglio* and *LoBiondo*. Given the terms of the written Auction Agreement, there is no issue as to whether Max Spann had *actual authority* to bind United at auction. United cannot fabricate an issue of authority by transferring the analysis to the Contract of Sale. Grand Teton was entitled to accept that Max Spann had authority to bind United through the Contract of

Sale, not least of which because there was a written contract expressly giving Max Spann that authority.

**B. The Trial Court had Discretion to Refuse to Consider United's Untimely Opposition**

The trial court also acted properly within its discretion when it refused to consider United's untimely opposition. At hearing, the court explained its decision directly to counsel for United, stating that:

[Y]ou, on July 24th, asked to adjourn the August 4th motion and stated, I'm in the process of preparing a cross-motion for summary judgement. So, can we put the motion off, essentially, and so I did. And the day before the return date you requested an adjournment again after not having filed that motion – that cross-motion or opposition. You could have just filed opposition to the motion but you didn't do anything, and you filed it the morning of. I'm not doing that.

(6T at p. 8:14-23.)

Ultimately, the trial court's decision not to formally consider United's untimely opposition did not materially affect the outcome of the motion. Its order granting summary judgment to Grand Teton contained a full Statement of Reasons outlining the undisputed facts on which its ruling was based. (Da835-844.) The defenses raised by United were certainly known to the trial court, as well, since it specifically cited many of these defenses in the Statement of Reasons. For example, the trial court addressed that "Defendant United contended at the time of the Order to Show Cause that [Max Spann] had

breached its contract with Defendant and as such, Defendant cannot be liable for specific performance.” (Da842.) The trial court rejected this argument, finding that there was no dispute that Max Spann “was retained as the auctioneer pursuant to a contract with Defendant United and had actual authority to conduct the auction.” (*Id.*) Any breach that might have been committed by Max Spann was not known to Grand Teton and therefore would not affect the enforceability of the Contract of Sale. (*Id.*) The trial court also specifically referenced it was “aware of the claims and defenses being asserted by Defendant United in this litigation” despite the motion technically being unopposed. (Da843.) Thus, any discretion exercised by the court when dealing with United’s untimely opposition was negated when it chose to directly address – and then refute – United’s defenses to summary judgment.

It should also be noted that the trial court’s decision not to consider United’s untimely opposition only related to Grand Teton’s motion for summary judgment. The trial court fully considered written and oral arguments presented by United in its own motion for summary judgment and in opposition to Max Spann’s motion for summary judgment. Thus, for the purposes of summary judgment entered in favor of Max Spann, there is no procedural reason for this Court to disturb the trial court’s rulings.

**C. United was Not Entitled to Rescind the Auction Agreement Based on Mutual Mistake**

United also alleges that it was entitled to rescind Max Spann's authority to proceed with the auction due to mutual mistake. There is no legal or factual basis for this contention and, therefore, this Court should reject it as another meritless attempt to ignore the unambiguous terms of the Auction Agreement.

Here, there was no reasonable misunderstanding between United and Max Spann as to the terms of their arrangement, because the explicit terms were outlined in the Auction Agreement. United alleges that the "change in circumstances" with respect to discovery of the approval status materially altered the Auction Agreement's "floor price and bidding strategy." (Appellant's Br. at p. 39.) This argument is entirely speculative and lacks any competent evidence presented to the trial court below. It has been established that Max Spann revised the advertising materials prior to the auction to reflect the current status of the property's development approvals. It has also been established that United had the opportunity to retain its own expert to opine as to the reasonableness of the auction strategy but failed to do so. United cannot argue that there was a genuine issue of fact when no countervailing evidence was presented in the lower court. There is also no evidence that the status of development approvals was such an "essential fact" that formed the basis of the Auction Agreement itself. *See Beachcomber Coins, Inc. v. Boskett*, 166 N.J.

Super. 442, 444-46 (App. Div. 1979) (reversing summary judgment based on mutual mistake regarding existence of rare mark on a coin that would make it have “a market value greatly in excess of its normal monetary worth”).

It must also be noted that United failed to raise this argument at the trial level and therefore waived its right to present the argument on appeal. *See Monek*, 354 N.J. Super. at 456 (declining to consider matters not developed at the trial court level). United alleges that the trial court did not consider this defense because United “was not able to submit a fulsome opposition.” (Appellant’s Br. at p. 39.) However, the trial court would not have considered this defense even if it had considered United’s untimely opposition, because the untimely opposition itself did not raise “mutual mistake” as a defense against summary judgment. (Da717-724.) United similarly failed to raise this as a defense in its opposition to Max Spann’s motion for summary judgment. (Da732-740.) For these reasons, the Court should decline to consider this defense on appeal.

**D. The Trial Court Appropriately Handled United’s Motion to Recuse and Change Venue**

In a final attempt to reverse its fortunes, United argues that the trial court should have transferred the case out of Passaic County. The first judge assigned to the case granted United’s motion to recuse but denied United’s motion to change venue, which was itself premised on the same grounds as the motion to

recuse. (Da135-136, 150, 156-57.) Because the trial court exercised sound discretion in denying the venue transfer request, and because United has not offered compelling evidence that a change of venue was necessary to receive a fair hearing, this Court should affirm the trial court's rulings.

Determining whether to grant a request to change venue is in the discretion of the court, with "a bias in favor of plaintiff's choice" of venue. *Doyley v. Schroeter*, 191 N.J. Super. 120, 125, 465 A.2d 583 (App. Div. 1983). "Absent the likelihood of substantial inconvenience or injustice, reason dictates a change in venue with its inevitable consequences be avoided." *Id.* at 126.

United argues that the trial court abused its discretion in not changing venue out of Passaic County "to preserve the public confidence in the integrity of the judiciary, and protect United from its fear of further unfair conduct." (Appellant's Br. at p. 48.) United has offered no evidence that there was a likelihood of substantial injustice with remaining in Passaic County beyond the fact that the *any* judge within the venue would be a colleague of and therefore have a "close working relationship" with Judge Chiocca. (*Id.* at 48-49.) Thus, United appears to make the argument that every single Chancery Judge in Passaic was ethically tainted from fairly deciding the case merely because Judge Chiocca once worked at the same law firm as counsel for Grand Teton. Despite this apparent belief, United did not also seek to recuse Judge Covello upon his

appointment. This is undoubtedly because United did not have any evidence of actual or perceived bias on his part or the part of any other Chancery Judge within the venue. United has similarly failed to offer evidence of such bias on appeal, apart from the mere fact that it was not the prevailing party at the trial court level. As such, this Court cannot find that the trial court abused its discretion in denying United's motion to change venue.

### CONCLUSION

There are no genuine issues of fact concerning the real estate auction at the center of this dispute. United retained Max Spann for the purpose of selling its property at auction at an agreed upon reserve price. The terms of the parties' written contract provided Max Spann with significant discretion to advertise and conduct the auction in a manner befitting its experience with auctions and real estate transactions. The contract *did not* provide United with the ability to unilaterally postpone or cancel the auction. Instead, it allowed, but did not require, Max Spann to postpone the auction at its discretion with the approval from United. Max Spann proceeded with the auction as planned, wherein Grand Teton was the successful bidder at the minimum reserve price.

United offers a litany of justifications and excuses for why Max Spann should have postponed the auction. None of these excuses are premised upon the terms of the written agreement between United and Max Spann but are

offered as *ex post facto* reasons why Max Spann was not entitled to proceed with the auction. These legal defenses – some of which were never presented to the trial court in the first instance – are meritless and should be rejected by this Court. Therefore, Max Spann respectfully requests that this Court affirm the trial court’s granting summary judgment in favor of Max Spann and against United. Max Spann further requests that this Court affirm the trial court’s granting summary judgment and specific performance in favor of Grand Teton and against United.

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Dated: April 21, 2025

By: /s/ Andrew S. Turkish  
Andrew S. Turkish, Esq.

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| <p><b>GRAND TETON DEVELOPERS,<br/>LLC,</b><br/><b>Plaintiff-Respondent,</b></p> <p><b>v.</b></p> <p><b>UNITED DEVELOPMENT OF<br/>AMERICA, LLC,</b></p> <p><b>Defendant/Third-Party Plaintiff-<br/>Appellant,</b></p> <p><b>v.</b></p> <p><b>MAXX SPANN REAL ESTATE &amp;<br/>AUCTION CO., MAXIMILLION<br/>M. SPAN, JR., INDIVIDUALLY,<br/>XYZ CORPORATION, ABC LLC,<br/>JOHN DOES AND JANE DOES,</b></p> <p><b>Third-Party Defendants-<br/>Respondents.</b></p> | <p><b>SUPERIOR COURT OF<br/>NEW JERSEY<br/>APPELLATE DIVISION</b></p> <p><b>Docket No.: A-004072-23</b></p> <p><b>Civil Action</b></p> <p><b>On Appeal from<br/>Order of The Superior Court<br/>of New Jersey,<br/>Chancery Division,<br/>Passaic County</b></p> <p><b>Docket No.: PAS-C-130-21</b></p> <p><b>Sat Below:</b></p> <p><b>Hon. Randol C. Chiocca, P.J.Ch. and<br/>Hon. Frank Covello, P.J.Ch.</b></p> |
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**BRIEF ON BEHALF OF  
PLANTIFF/RESPONDENT, GRAND TETON DEVELOPERS, LLC**

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## PRELIMINARY STATEMENT

Defendant/Third-Party Plaintiff-Appellant (“United”) portrays itself as the victim of an over-reaching Real Estate Broker & Auctioneer (“Max Spann Realty”) and injudicious Judges (First, Judge Chiocca and then Judge Covello).

In fact, as the record clearly establishes, United got exactly what it bargained for in connection with the auction sale of its Property. The sale was conducted at an upset price and date United voluntarily set. Plaintiff-Respondent (“Grand Teton”) complied with the bidding requirements and was the successful bidder. United refused to consummate the sale because of “seller’s remorse.”

United focuses the majority of its complaints upon Maxx Spann Realty, who indisputably had the authority to conduct the Auction Sale on behalf of United. The alleged deficiencies in the Auctioneer’s performance do not eradicate the fact that Grand Teton is entitled to acquire the Property at the approved bid price as the successful bidder.

Similarly, United’s quarrel with Judge Covello’s grant of a summary judgment, which awarded Grand Teton a decree in specific performance, ignores the fact that it had no viable defense to this relief. The law and the indisputable facts mandated this decision. Further, United is responsible for the inattentiveness of its prior counsel and cannot demonstrate that its current counsel – or any other attorney for that matter – would have secured a different result. *In fine*, United did not – and

does not – have any viable basis for reneging upon the obligation to sell to the highest bidder.

It is noted that United opens its Brief with argument that the Judge below ignored the holding in Golfinopoulos v. Padula, 218 N.J. Super. 38 (App. Div. 1987) cert. den. 103 N.J. 45 (1987) (Db2 to Db3) That case also involved an Auction Sale of Real Property. The sale terms committed a sale to the highest bidder, which the Appellate Court concluded was an auction “without reserve.” (218 N.J. Super. at 45) It was determined the auction notice constituted the seller’s offer, which was subject to acceptance by a conforming bid and established a binding contract. (Id. at 46) Left open for Trial was the attorney’s authority to set the auction terms since the facts pertinent to that were genuinely disputed.

Here, the facts disclose:

(a) United agreed to sell The Building, employing an on-line auction procedure and engaging Maxx Spann Realty to be its exclusive sales broker to handle all aspects of the Auction, pursuant to a written agreement. (Da8)

(b) United set a reserve price of \$1.7 Million.

(c) United’s counsel adapted the template Sales Contract provided by Maxx Spann Realty.

(d) The Sales Contract, as adapted by United's counsel, was an enclosure in the Bid Package thereby providing prospective bidders with notice of the form of Sales Contract they would be required to execute.

(e) Grand Teton was an approved bidder and submitted a bid of \$1.7 Million.

(f) The Auction closed on December 1, 2021 and Grand Teton was the highest bidder.

(g) Grand Teton immediately signed and returned the Sales Contract, in the form established by United's counsel and paid an additional \$147,000, which together with the previously paid \$40,000 established the required deposit of \$187,000.

(h) United refused to sign the Sales Contract and announced its refusal to consummate the transaction.

(i) Grand Teton is ready, willing and able to perform.

Thus, Grand Teton was unquestionably entitled to the Specific Performance Judgment.

## REPLY PROCEDURAL HISTORY

United fails to mention the fact that Judge Chiocca voluntarily recused himself on May 20, 2022 not because he had – many years earlier – been in a partnership with United’s counsel. Rather, he disqualified himself because United had filed a Judicial Ethics Complaint, charging him with unethical conduct. (Da152-Da155) Subsequently, the Advisory Committee on Judicial Conduct issued a written determination completely exonerating Judge Chiocca and dismissing the grievance (Pa001)

Grand Teton’s Summary Judgment Motion was filed on July 6, 2023 and returnable August 4, 2023. (Da297) United’s counsel wrote a letter dated July 24, 2023 – one (1) day before the opposition was due – requesting an adjournment because he was then “in the process of preparing a Cross-Motion for Summary Judgment.” (Da324) Grand Teton’s counsel consented to the request and the return date was moved to September 8, 2023.

On September 7, 2023 – this time long after United’s opposition and Cross-Motion were due and one (1) day before the date scheduled for argument – United’s counsel wrote to request another adjournment (Da326). When no response was received to this request, United filed opposition and a Cross-Motion at 2:00 a.m. on the return date (September 8, 2023) (Da713). Based upon this history, Judge Covello refused to consider the opposition. (Da843-Da844) (6T5:23-25). On October 5,

2023, Judge Covello entered an Order granting Summary Judgment to Grand Teton. (Da835)

United did not subsequently file a Motion for Reconsideration or a Motion to Vacate despite the fact the Summary Judgment did not become final until July 16, 2024.

## STATEMENT OF FACTS

### FACTS PERTINENT TO GRAND TETON'S CLAIM<sup>1</sup>

1. United owns the building located at 44 Ryle Avenue, Paterson, New Jersey ("The Building"). (Da306 at 7:10-12)
2. United has owned The Building since 2013. (Id.)
3. United executed an Auction Agreement with Maxx Spann Realty, which was marked Exhibit MS-1 at Depositions. (Da316 at 98:24; Da8)
4. The Auction Agreement (Da8) pertinently provides:
  - a) Maxx Spann Realty is given the exclusive right to sell The Building at an on-line auction to be conducted on or about November 2021. (Par. 1)
  - b) The selling price to be determined by bidding with a published reserve (i.e., minimum) price of \$1.7 Million. (Id.)

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<sup>1</sup> These Facts are established in Plaintiff's Statement of Undisputed Material Facts (Da299-Da301)

c) The auction to be conducted by Maxx Spann Realty, who shall advertise the Auction and may either advance or postpone the date of the Auction.

(Par. 2)

d) United agrees to sell The Building at, or above, the reserve price pursuant to the terms of the Contract of Sale as prepared by United's attorney. (Par.

1)

e) A Buyer's Premium of ten percent (10%) is to be added to the final bid, which will be added to the price and will cover Spann Realty's commission.

f) Maxx Spann Realty will have high bidder submit an executed Contract of Sale in a form approved by United's attorney conforming to the highest bid.

5. Maxx Spann Realty provided a proposed Contract of Sale, which United's attorney reviewed proposing changes displayed in red. (Da60; Da311 at 72:1-24)

6. Maxx Spann Realty incorporated the required changes into the Contract of Sale and included this Agreement in the bid package submitted to prospective bidders. (Da311 at 73:1-8)

7. The Contract of Sale, as approved by United's attorney, was marked Exhibit MS-8. (Da312 at 76:4-7; Da17)

8. While an advertisement listed The Building as having developmental approvals, the bid package submitted to prospective bidders, including Grand Teton, stated the approvals had expired. (Da58; Da313 at 89:22-Da314 at 90:19)

9. Maxx Spann Realty represented, and was the Agent for, United. (Da310 at 69:4)

10. Grand Teton registered for the Auction, tendered the required fee and was approved as a bidder. (Da319 at 18:18)

11. Grand Teton submitted a bid of \$1.7 Million. (Da319 at 19:23-20:3)

12. Grand Teton received notification, on December 1, 2021, that it was the high bidder and was the approved Buyer. (Da320 22:25-23:13)

13. Grand Teton, on December 1, 2021, received, executed and returned the Contract of Sale (Da17) and delivered the required payment. (Da321 26:15-27:15)

14. The deposit in the total amount of \$187,000 (\$147,000 plus the \$40,000 previously paid) was delivered to Spann Realty and is held in its Trust Account. (Id.; Da309 at 32:3-11; Da315 at 95:16-22; Da26)

15. United refuses to sign the Contract of Sale and convey The Building for the agreed upon price of \$1.7 Million. (Da321 at 27:25-28:6).

16. Grand Teton is ready, willing and able to perform and consummate the purchase. (Da3 at ¶15)

## REPLY TO UNITED'S STATEMENT OF FACTS

United references the disqualification of Judge Chiocca and admits it filed a Judicial Ethics Complaint (Da148 to Da157) (3T3:24-3T4:5) (Db13), which the Advisory Committee on Judicial Conduct found was unnecessary. (Pa001) United fails to mention it was the Complaint that prompted the recusal (3T4:10-16)

United complains that its opposition to the Summary Judgment (Da713 to Da726), which Judge Covello rejected, established:

- (i) United instructed Maxx Spann Realty to postpone the auction.
- (ii) The Contract had not been approved by United.
- (iii) United and its counsel did not believe counsel's proposed edits to the Contract would be binding.
- (iv) The Auctioneer lacked authority to make an unsigned contract void by the Statute of Frauds (Db15)

United also filed a Cross-Motion based upon the fact it did not sign the Sale Contract and its assertion that Maxx Spann's alleged misdeeds warranted dismissal of Grand Teton's claims. (Da713) (Db15)

United also complains that its counsel's untimely second adjournment request and papers that were filed late were rejected. (Db15 to Db17) This complaint ignores three (3) key facts: First, United's Counsel claimed six (6) weeks earlier that he was

already in the process of preparing the Cross-Motion. Second, it was impossible to believe that counsel's problems were so time-consuming that he did not have five (5) minutes to place a call to Grand Teton's counsel and another five (5) minutes to call the Court when the deadline for filing approached. Third, while not considering the Opposition and Cross Motion papers, Judge Covello acknowledged familiarity with United's defenses and addressed same when deciding the Motion. (Da842 to Da844)

### **THE DECISION GRANTING SUMMARY JUDGMENT TO GRAND TETON**

Judge Covello issued a written decision granting Summary Judgment to Grand Teton. (Da837) This decision:

(i) Determined the facts presented by Grand Teton were undisputed, and found that the form of Sale Contract was reviewed with United's counsel, included all changes requested by United's counsel and was an enclosure in the Bid Package without any complaint or comment from United or its counsel. (Da838)

(ii) The Bid Package also included a disclosure that the developmental approvals for the Property had expired. (Id.)

(iii) Reviewed the applicable precedents governing Summary Judgment, including the guiding principle that a determination needs to be made whether a

rational fact finder would resolve a disputed fact in favor of the opponent to the Motion. (Da839 to Da841)

(iv) An analysis of the case law applicable to Specific Performance was conducted and it was concluded Grand Teton's claim qualified for a Specific Performance Decree. (Da841 to Da 842)

(v) United's opposition to the applications for *pendente lite* restraints on a sale or transfer were reviewed; and, it was noted that United's opposition to a sale to Grand Teton was based upon alleged breaches of the Auction Agreement by Maxx Spann Realty. (Da842) It was determined that the acts of an authorized agent such as Maxx Spann Realty bind a principal like United. (Id.)

(vi) It was found there was no question that Maxx Spann Realty had actual authority and any breaches were not known to Grand Teton, who was an innocent buyer. (Da842)

(vii) The conflict is between United and Maxx Spann Realty; and, the existence of this conflict does not relieve United of the obligation to perform, in accordance with the Auction Agreement. (Id.)

(viii) Grand Teton relies upon Sullivan v. Max Spann Real Estate & Auction Co., 465 N.J. Super. 243 (App. Div. 2020), which provides that the auction is final and a contract is formed "when the hammer comes down." (Da843)

(ix) While this Motion is deemed unopposed, Grand Teton's Brief references United's arguments made in opposition to the interim restraints and the Court is otherwise aware of the claims and defenses United has asserted. (Id.)

(x) Any irregularity in the auction does not invalidate it and same only gives rise to a cause of action against Maxx Spann Realty. (Da844)<sup>2</sup>

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<sup>2</sup> United's claims against Maxx Spann were dismissed in their entirety. (Da846-Da847)

## LEGAL ARGUMENT

### **POINT I: THE COURT PROPERLY DETERMINED THAT MAXX SPANN REALTY'S ALLEGED FAILURE TO POSTPONE THE AUCTION DOES NOT WARRANT A DENIAL OF SUMMARY JUDGMENT. (Da837-Da844)**

United's primary claim is that Maxx Spann Realty ignored its principal's oral request to postpone the auction, and such request required a denial of Summary Judgment, citing Golfinopoulos v. Padula, 218 N.J. Super 38 (App. Div. 1987) cert. den. 109 N.J. 48 (1987). (Db23) This position is unsustainable on several levels.

First, Golfinopoulos dealt with a closed bid auction where an attorney served as Auctioneer. The dispute came when the seller received a higher offer after the bidding closed. The factual dispute, which precluded summary judgment, was the Auctioneer's scope of authority and not what he had done. It was determined the Auction was a sale without reserve – i.e., the Auction Note constituted the Seller's offer. The disclosed term that the sale would be awarded to the highest bidder made it a firm offer to sell, which offer would be accepted by bidding. A binding contract was formed when the highest bid was accepted – so long as the Auctioneer's authority is established at Trial. Here, however, there is no genuine dispute about Maxx Spann Realty's authority.

Second, the holding in Sullivan v. Max Spann Real Estate & Auction Co., 465 N.J. Super. 243 (App. Div. 2020) aff'd 251 N.J. 45 (2022) is instructive. The issue there was whether it was necessary for there to be a three (3) day review of the Sale

Contract included in the Bid Package, which was a template agreement that was provided by the Auctioneer. The Appellate Court followed the holding in Golfinopoulos that the owner makes the offer via establishing the auction and a minimum price and the highest bid constitutes an acceptance which creates an enforceable contract. The sale is final when the hammer comes down. [The Appellate Court concluded a three (3) day attorney review is not required. The Supreme Court affirmed and also held Maxx Spann Realty had not engaged in the unauthorized practice of law by providing the template agreement.]

Third, in Panetta v. Equity One, 190 N.J. 307, 325 (2007), the Supreme Court held an auction without reserve is unique because the owner becomes the offeree and each successive higher bid becomes a contingent contract with the highest qualified offer creating an enforceable contract.

Fourth, the law is clear – as Judge Covello concluded – an agent with actual authority binds his principal. The agency relationship exists when a party consents to have another act on his behalf. Sears Mortgage Corp. v. Rose, 134, N.J. 326 (1993). An agent binds his principal for acts within the scope of his authority. Carlson v. Hannah, 6 N.J. 202 (1951)

Here, there is no question that Maxx Spann Realty had express and actual authority to conduct the Auction and sell the Property. Here, even if United's principal had the right to orally instruct Maxx Spann Realty to postpone and did

orally instruct it to do so<sup>3</sup>, this does not alter the fact that a third-party like Grand Teton, who had no notice of the postponement request, had the right to rely upon the Auction conducted. Thus, Maxx Spann Realty had the authority to conduct the sale and any quarrel that United has regarding a failure to postpone does not affect the integrity of the sale.

In addition, United attempts to introduce the Statute of Fraud as a basis for it to escape its obligation to complete the sale. However, as set forth above, the Contract was formed with the acceptance of the bid from Grand Teton. An element, or term, of the contract was the agreement to execute – and sell in accordance with the terms established in – the Sale Contract provided with the Bid Package, which was initially suggested by Maxx Spann Realty and modified to conform to the input provided by United’s counsel.

Finally, United weakly – and nonsensically – asserts a trial is needed to determine the authority of Maxx Spann Realty. Why? An Auction Agreement (Da8) was executed and in place, which grants Maxx Spann Realty:

(i) The exclusive right to sell by Auction on, or about, November 2021 at a published reserve price of \$1.7 Million. (¶1)

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<sup>3</sup> The gist of United’s claim was that it wanted the postponement to correct misrepresentations in the sale ads that the Property had approvals. However, the plausibility of this was undermined by the fact the Bid Packages contained a disclosure the approvals had expired. Further, under the Auction Agreement, Maxx Spann Realty had to approve any change in the date for conducting the Auction.

(ii) The Broker shall register bidders, advertise and conduct the auction, which the Broker may postpone with the Seller's consent. (¶ 2)

(iii) The terms of this Agreement may only be modified by a writing signed by all parties. (¶ 7)

As a consequence, it is patent that the alleged failure to postpone would not legitimately be a basis for invalidating the sale and denying the grant of Summary Judgment.

**POINT II: THE SUBJECT MOTION WAS PROPERLY CONSIDERED GIVEN THE CIRCUMSTANCES EXTANT. (Da324-Da326, Da713, Da843-Da844; 6T5:23-25)**

United urges that Judge Covello wrongfully refused to consider its opposition to the Summary Judgment despite its counsel's undefined personal problems (Db27). In this regard, Judge Covello is charged with abusing his discretion in not granting an adjournment.

The circumstances attending United's failure to timely file papers or to timely request an adjournment or provide a legitimate reason for non-compliance are detailed in the Procedural Statement of this Brief. These circumstances ill-behoove someone to request an adjournment in order to secure time to finish a Cross-Motion for Summary Judgment, which is purportedly in the process of being prepared, to then not have any papers prepared twenty (20) days later, to not then ask for more

time and then an additional nine (9) days later still not have any papers prepared and then make an “eleventh hour” to request for an adjournment – followed by a filing at 2:00 a.m. of the return date.

It is patent that the only abusive behavior here was by United and its counsel, who demonstrated a total lack of regard for compliance with deadlines and protocol. Clearly, Judge Covello did nothing wrong.

R.1:2-4(b) give a Judge discretion, when there is a failure timely to file motion papers or briefs, to grant the motion or “take such other actions as it deems appropriate.” In this instance, Judge Covello determined that the appropriate response was to decide Grand Teton’s Motion without reading United’s opposition. This action is not without precedent. Allstate v. Fisher, 408 N.J. Super. 289 (App. Div. 2009).

Nevertheless, as Judge Covello’s decision states, while not considering the opposition papers, he did consider and reject United’s repeatedly articulated opposition, which was by then well know to the Court. (Da843-Da844)

Thus, the subject Motion was properly considered and the Summary Judgment was appropriately granted. In point of fact, United did not have, and does not have, any legitimate basis for escaping its obligation to consummate the sale of the Property to Grand Teton.

**POINT III: FURTHER APPROVAL OF THE SALE CONTRACT WAS NOT REQUIRED. (Da837-Da844)**

United urges that Grand Teton did not establish United's approval of the Sale Contract, citing Busciglio v. DellaFave, 366 N.J. Super. 135 (App. Div. 2004) for the proposition that United's attorney had no authority to bind it to sign. (Db32)

This argument misses the point. Under the Auction Agreement, United's attorney was charged with the job of providing a Sale Contract to be executed after the Auction. (Da8 at ¶1) Thus, by signing the Auction Agreement, United cloaked its attorney with actual authority to establish the Sale Contract.

In this instance, Maxx Spann Realty supplied a template agreement, incorporated the changes stipulated by United's attorney and then included this document in the Bid Package. At no time prior to the conclusion of the closing of the Auction did United or its counsel question the appropriateness, or approval, of the Sale Contract.

Thus, pursuant to the obligations voluntarily undertaken upon executing the Auction Agreement, United was obliged to execute the Sale Contract with Grand Teton.

United then seeks to bolster its position by claiming Judge Covello weighed the evidence by imputing apparent authority to United's counsel "simply because he was United's lawyer and had suggested edits." (Db34) This is not so. There is no

imputation of apparent authority, United's attorney was given actual authority under the Auction Agreement.

As a consequence, United's challenge to the viability, and approval, of the Sale Contract is without substance. This was an agreement approved by its attorney and United was obligated to execute same.

**POINT IV: UNITED'S ALLEGED ORAL DIRECTION TO POSTPONE WOULD NOT HAVE BEEN EFFECTIVE. (Da837-Da844)**

United argues that the agency contract appointing Maxx Spann Realty as its exclusive agent to sell the Property by auction could be, and was, terminated. (Db35) This argument lacks a key ingredient – to wit: United never attempted to terminate Maxx Spann Realty before the Auction was closed. At most, United asserts it wanted to postpone; however, the Auction Agreement stipulates a postponement required the consent of Maxx Spann Realty and a writing – neither of which were sought or obtained.

Moreover, and more importantly, the fact the Auction was conducted and concluded – even if it was without the approval of United – does not alter the fact that Grand Teton acquired the vested right of a purchaser once it was approved as the successful bidder, since a legally enforceable contract was established at that moment – hence, the alleged request to postpone, does not provide a basis for

invalidating the sale, nor a basis for denying the Summary Judgment granted to Grand Teton.

**POINT V: THE AUCTION WAS CONDUCTED AND THERE IS NO BASIS FOR RESCISSION. (NOT RAISED BELOW BY THE APPELLANT)**

United claims it could rescind the Auction Agreement based upon mutual mistake. (Db38) Succinctly, no effort to rescind – for any reason – was asserted before the Auction was conducted and Grand Teton’s rights were set. Thus, any *ex post facto* rescission could not affect Grand Teton’s vested rights.

**POINT VI: THE FACT OF SUPPLYING A TEMPLATE CONTRACT IS NOT PRACTICING LAW AND NOT RELEVANT TO GRAND TETON’S RIGHTS. (NOT RAISED BELOW BY THE APPELLANT)**

United charges Maxx Spann Realty with practicing law without a license when it provided a template Sale Contract. (Db40) Aside from the fact this has nothing to do with Grand Teton’s rights, it is a claim that was rejected by the New Jersey Supreme Court in Sullivan v. Maxx Spann Realty, *supra*.

**POINT VII: SPECIFIC PERFORMANCE WAS APPROPRIATE. (Da837-Da844)**

United challenges the grant of specific performance, claiming – with no competent support – it is inequitable. (Db46) What did Grand Teton do that was inequitable or how is acquisition of the Property upon terms set by United unfair?

The answer is Grand Teton did nothing more than comply with the auction terms and the existence of “seller’s remorse” does not make the mandated transfer unfair.

Specific performance – given the unique nature of each piece of real property – is a remedy traditionally accorded to a non-breaching purchaser. Barry M. Dechtman Inc. v. Sidpaul Corp., 89 N.J. 547 (1982) A claimant must show himself – as Grand Teton did in this case – ready, desirous and eager to perform. Ridge Chevrolet-Oldsmobile v. Scarano, 238 N.J. Super. 149, 156 (App. Div. 1990) Similarly, as is the case here, the relief should include a mandate that the seller must execute all documents necessary for the consummation of the sale. Ringel v. BR Lakewood LLC, 2023 WL 3991711 (App. Div. 2023) (Pa003)

In this instance, we are dealing with a unique piece of property and Grand Teton is a non-breaching purchaser. Further, Grand Teton complied with all requirements to register and then deposit the required funds and stands ready, willing and able to consummate the purchase. Thus, the grant of Summary Judgment was warranted and appropriate.

**POINT VIII: THE JUDICIAL ETHICS COMPLAINT WAS UNWARRANTED AND DID NOT WARRANT A CHANGE OF VENUE. (Da156; Da161)**

United’s dissatisfaction with Judge Chiocca’s rulings, and the filing of the Ethics Complaint (Da152), were unjustified. Indeed, the complaints were unwarranted and summarily dismissed. (Pa001) United used this as a basis for

seeking a change of venue, which was justifiably rejected with the invitation to renew it if it could be demonstrated that Judge Covello was being unfair or demonstrated bias. Given the Committee's determination that a recusal in the fact of a Complaint was unwarranted, it is clear that this offer of perhaps revisiting a venue change request was unduly generous.

United renews its argument that the case should have been transferred to another County. (Db48) But, United cannot demonstrate a basis for this argument. United can neither demonstrate the existence of any animus on the part of Judge Chiocca, Judge Covello or Judge Caposela, nor can it demonstrate any bias having been exhibited by Judge Chiocca or Judge Covello. Further, United did not take the Assignment Judge up on his invitation to return if a problem arose.

Thus, the rejection of the change of venue request was appropriate.

### CONCLUSION

The Summary Judgment granted to Grand Teton and all interim Orders should be affirmed.

BRAY & BRAY, L.L.C.  
Attorneys for Plaintiff-Respondent

By: /s/ Peter R. Bray  
PETER R. BRAY

Dated: April 22, 2025

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|--|---|-----------------------------------|
| <b>GRAND TETON DEVELOPERS, LLC</b>     | : | <b>SUPERIOR COURT OF</b>          |
|  | : | <b>NEW JERSEY</b>                 |
| <b>Plaintiff,</b>                      | : | <b>APPELLATE DIVISION</b>         |
|  | : |                                   |
| <b>v.</b>                              | : | <b>DOCKET NO: A-004072-23</b>     |
|  | : | <b>Civil Action</b>               |
|  | : |                                   |
| <b>UNITED DEVELOPMENT OF</b>           | : | <b>On Appeal from: Chancery</b>   |
| <b>AMERICA, LLC</b>                    | : | <b>Division -Passaic County</b>   |
|  | : | <b>PAS-C-130-21</b>               |
| <b>Defendant/Third-Party Plaintiff</b> | : | <b>Sat Below: Hon. Randal C.</b>  |
|  | : | <b>Chiocca, P.J. Ch. and Hon.</b> |
| <b>v.</b>                              | : | <b>Frank Covello, P.J. Ch.</b>    |
|  | : |                                   |
| <b>MAXX SPANN REAL ESTATE &amp;</b>    | : |                                   |
| <b>AUCTION CO., MAXIMILLION M.</b>     | : |                                   |
| <b>SPAN, JR., INDIVIDUALLY, XYZ</b>    | : |                                   |
| <b>CORPORATION, ABC LLC, JOHN</b>      | : |                                   |
| <b>DOES AND JANE DOES</b>              | : |                                   |
|  | : |                                   |
| <b>Third-Party Defendants</b>          | : |                                   |

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**REPLY BRIEF OF DEFENDANT/THIRD-PARTY PLAINTIFF  
APPELLANT, UNITED DEVELOPMENT OF AMERICA, LLC**

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## REPLY STATEMENT OF FACTS

Respondents' oppositions do not change any of the material facts that should have precluded the judge from granting GT's and Spann's summary judgment motions, and which actually favored judgment for United. It is not refuted that the Court found United had instructed Spann to postpone the auction when it learned approvals had expired which were material to value and price. (7T44) United testified Spann agreed to postpone. (Da497p.162:11-15)(Da467p. 44) Spann admitted United asked to postpone. (Da375) Spann also admitted the lapse in approvals "hurt the value" of the Property. (Da375) Spann did not get authority to change his prior advertising to show that approvals were no longer current. (Da64, par. 12) (Da716, par. 9)(Da720, para. 9)

It also isn't disputed that Spann's auction agreement required the sale contract to be "created and approved" by United's attorney. (Da9) The agreement also stated that United only agreed to sell "pursuant to the terms of a real estate contract that Seller's attorney prepares." (Da8) Despite the limitations of his own auction agreement, and the law, Spann admits he created the contract that GT later signed. (Da819 para. 6) The contract that Spann created is a commercial real estate contract which a real estate broker may not lawfully create under the parameters of N.J. State Bar Assoc. v. Bd of Realtors, 93 N.J. 470 (1983). Calling it a "template" does not change its true character as a commercial land sale contract, the only contract on which GT claims its rights, which Spann's own agreement and the law barred him from creating. (Da8-9) All real estate contracts are templates for the parties' final execution to confirm the specifics of their agreement.

It remains as well that United's attorney did not ever approve even Spann's created contract, or convey that he had authority or intent to bind United without United's

execution, instead asking Spann for a response, to “please advise”. (Da661) Spann did not respond to United’s counsel’s request or confirm if the revised draft contract that Spann had created was authorized for use. (Da408-409) United’s attorney told the Court that his statement to Spann to “please advise” showed he expected a response before the contract could be final. (Da52)(7T46:9-17) Yet, the motion judge found “apparent authority” of United’s attorney to make Spann’s draft contract binding on his client. It is not disputed he did so: (a) without a finding that there was clear and convincing evidence of that authority to bind United; (b) where United and its attorney both had certified there was no authority or intent; and (c) where United believed Spann agreed to postpone the auction as instructed. (7T56:1-10)(Da467) There was certainly not clear and convincing evidence that United intended to bind his client to any unsigned draft that a broker unlawfully prepared, or that United itself had authorized its counsel to do so. Busciglio v. Della Fave, 366 N.J. Super. 135 (App. Div. 2004).

It is also undisputed the motion judge ruled Spann was acting as United’s agent. (Da842) Spann’s auction agreement is clearly an agency agreement that Spann could not specifically enforce if his principal, United, revoked his authority to sell. (7T46:7-15)(Da842)(7T44:17-20)97T21) The motion judge accepted as true that United, as principal, had instructed his agent to postpone the auction, which is revocation of authority to proceed. (7T44:17-20) (7T21:2)

However, the motion judge found that GT could still rely on Spann’s (the agent’s) own claims of authority to proceed to sale even though United (the principal) directed him to postpone. (Da842)(7T44) The motion judge thereby bound United, as principal, to a non-cancelation provision in Spann’s agency agreement, which was

legally unenforceable. (7T44:19-25) The motion judge viewed agency authority through the eyes of the agent instead of the principal, as required.

In addition, directly opposite to the holding of Golfinopolous v. Padula, 218 N.J. Super., 318 (App. Div. 1987) the motion judge found that a buyer can obtain rights to an unsigned contract even if there is dispute as to the seller's agent's authority to proceed to auction. (Da844) The motion judge also made no findings that the auction type occurring in this case was the same as Golfinopolous, so as to qualify for the limited exception to the statute of frauds that Court defined. (Da842-844) In fact, the auction that Spann conducted was not a sealed bid auction where all bids were accepted at once, as occurred in Golfinopolous. (Da418-419)(Da8-9) (Da598-600) It was a rolling bid auction where new bids extend the process. From the outset of the case United and its attorney asserted that the statute of frauds precluded GT's claim for specific performance, and this argument was ignored despite Golfinopoulos confirming that it is central. (Da53)(Da63-64)

It is also not refuted that the motion judge's refusal to consider late opposition was due to his own arbitrary rule, and that he recognized the attorney's problems would prejudice United, the client. (5T13:14)(6T5:23) He did not consider any lesser alternatives that would still have allowed a proper and fair decision on the merits.

Finally, it is undisputed that no reason existed for the motion judge to decide GT's motion first just because it was filed first, instead of considering all related and competing motions at one time. Golfinopolous in fact, required a prior analysis of the broker/seller dispute of authority to auction before GT could enforce the unsigned contract. This Judge did the opposite.

**I. RESPONDENTS BOTH IGNORE THE HOLDING OF GOLFINOPOLOUS THAT THE AUCTIONEER'S AUTHORITY GRANTED BY SELLER IS A THRESHOLD ISSUE BEFORE A BUYER CAN BE FOUND TO HAVE RIGHTS TO AN UNSIGNED CONTRACT**

First, GT concedes that Golfinopolous, *supra*, can only create a binding contract without seller's signature, "so long as the Auctioneer's authority is established at trial." (Rb12) Yet, GT then inexplicably argues that, "there is no genuine dispute about Maxx Spann Realty's authority." (Ibid.) GT does not state any facts to show how that authority was 'undisputed'. It cannot do so because the motion judge expressly recognized that United did instruct Spann to postpone. (7T44)(7T21:3) GT also ignores, as did the motion judge, that United testified Spann had agreed to postpone. (Da496-497) Thus, the facts to be deemed true were that Spann was not authorized to proceed to auction when he did and agreed not to do so. GT was not entitled to summary judgment on these facts using a correct analysis of Golfinopolous.

Next, GT incorrectly contends that this auction was one "without reserve" when there was a \$1.7million reserve in the agreement. (Da8-9) Therefore, the auction was not absolute and no contract was guaranteed unless a bidder met the floor price, which is different than occurred in Golfinopolous, *supra*. at 44. In fact, this was also not even a similar auction type to Golfinopolous. (Da418-419)(Da8-9) (Da598-600) There, they had accepted sealed bids with no reserve and all opened at one time. This auction had a reserve to be met. It was online and running continuously, where bids could be submitted at any time until the auction was closed, and bids extended the time for other bidders to counter. (Ibid.) This type of auction did not guaranty any buyer a contract, like in Golfinopolous. A price reserve and acceptance of contract terms approved by United were required in advance. (Da8-10) Since this auction was not even the same type as Golfinopolous, the statute of frauds was definitely a bar to GT's claim. Id. at 46.

GT's next contention, that United's instruction of Spann to postpone does not affect GT's alleged contract rights, is once again directly contrary to Golfinopolous. None of the buyers in Golfinopolous were held to have a claim to the property independently of the auctioneer's right to bind seller. The opposite was found. A contract could be formed only "if" the auctioneers, first "are shown at trial also to have had Padula's authority to offer the property." Id. at 46. That was not only in material dispute here, but the finding that United did instruct Spann to postpone was actually binding as a revocation of Spann's prior authority. Sarokhan, *supra* at 133-134.

GT is also incorrect that the Court found Spann had United's "actual authority" to proceed even after approvals were found to be expired. The Court relied on its understanding of "apparent authority". (Da842) It then used an incorrect analysis of apparent authority to convey to GT an independent right to acquire United's property without execution of a contract, and without United's agreement that his agent could proceed to auction. In fact, the Court misread the very case on which it relied, Tannenbaum v. Mazzola, 309 N.J. Super. 88 (App. Div. 1998). (Da842) Citing that case, the motion judge here said that, "the actions of an agent can bind a principal as against third person when the agent is vested with apparent authority." (Da842)

However, in Tannenbaum the question was whether the president of a company who executed a brokerage commission agreement could be individually liable, and also deemed the 'agent' of another company officer to bind that officer individually as well. Id. at 93. The Appellate Division ruled the statements of the alleged agent were not enough to bind the purported 'principal'.

The answer to interrogatory # 17 makes it clear that only Mazzola made a statement regarding the agreement. At best, plaintiff has shown that Mazzola represented to Giletto that he had authority to sell on Fanelli's behalf. This is not

enough because the statement of the agent cannot bind the principal. Rather, only the principal, can vest an agent with authority. [Id. at 95 (emphasis added)].

Tannenbaum also ruled that whether the principal authorized an agent is a question of fact for a jury to decide, not ripe for summary judgment. Id. at 93.

Here, the motion judge did not find, and could not find, that United made any representations to GT that Spann had United's authority to go to auction (particularly after United revoked authority to proceed). United did not even know the auction was occurring and directed it not to occur at all. (7T44) (Da467, p. 44) In fact, there was actually evidence in the record that United told GT's owner directly a month before the auction that United objected to GT's participation in the auction, because he was previously an affiliate with United. (Da189)(Da468 p.48) GT therefore had notice back then that United did not authorize Spann to auction its property to GT at all. On those facts, at most GT relied only on Spann, the agent, which "is not enough". Ibid.

As such, the very case on which the motion judge relied, if properly analyzed, precluded any decision for GT as a purported third-party claiming 'apparent authority'. Tannenbaum instead required the motion Judge to rule for United. GT presented no evidence that United advised GT that Spann had its authority to auction when he did. To the contrary, GT had direct notice from United that United objected to Spann allowing GT to bid at all. (Da189)

GT's next assertion, that Spann's auction agreement contemplated United signing a contract "after" the auction, is not supported in the record. GT cites only to paragraph 1 of the auction agreement at 'Da8'. That paragraph says only that seller agrees to sell at or above the floor price, "pursuant to the terms of the Contract of Sale as prepared by the Seller's attorney". (Da8) United's attorney did not "prepare" a contract. Spann did.

Finally, GT's effort to elevate Judge Covello's finding that United's attorney had "actual authority" to finalize the Spann draft contract is belied by the Judge's own words. He found "apparent authority". (7T56) There is no evidence, as argued, that United's attorney had "actual authority" to bind his client to Spann's draft contract. Again, that would have to be found by clear and convincing evidence, which the motion judge did not do. Busciglio v. Della Fave, 366 N.J. Super. 135 (App. Div. 2004). (Da842-843) As well, apparent authority required evidence from United's conduct, which United had directly disputed. (Da60-64)

Spann also wishfully ignores that the Court accepted as true, that United did instruct Spann to postpone. (7T44)(7T21) Spann relies only on the original auction agreement as granting 'actual authority' to auction. He refuses to recognize that the principal may always revoke the agent's authority thereafter, which the Court found had occurred. (7T44:17-20); Sarokhan v. Fair Lawn Mem. Hosp., 83 N. J. Super. 127, 133 (App. Div. 1964). Thus, the original grant of authority in the auction agreement was irrelevant once the principal instructed Spann not to proceed, which he is always entitled to do and which the Court found he did. If Spann believed that was a breach of his auction agreement he had only a damage claim. Ibid. He certainly could not sell property over his principal's instructions and 'earn' his commission by doing so. That is what Spann did here.

## **II. GT'S ARGUMENT THAT THE COURT WAS CORRECT TO REFUSE UNITED'S OPPOSITION IGNORES THE LAW**

For this argument GT ignores the reasons that United's counsel was unable to submit its papers as planned. GT blames United as somehow having anything to do with its counsel's personal problems. It mischaracterizes this situation as, "a total lack of regard for compliance with deadlines and protocol." (Rb16) Yet, United had nothing

to do with its counsel's failures. Its counsel also did not intentionally fail to meet his deadlines. (Da326) United's counsel also did request adjournment on notice to GT, which did not ever oppose. The Court did not ever decide the request. (Da993-994)

GT also ignores that the Court had papers in hand for a month before deciding anything. It ignores that the Court inexplicably decided these completely related motions based on the date filed, instead of their relationship to one another. Thus, GT argues, without factual support, that the Court was correct to refuse any lesser alternatives to rejection of opposition. There is not even evidence that the Court considered a lesser alternative for United. Of course, GT also conveniently ignores the fact the Court gave GT a chance to decide if it wanted an adjournment of United's cross-motion that GT had not opposed. This unequal treatment best demonstrates a double standard applied here to the undue prejudice of United.

GT cites only to Allstate v. Fisher, 408 N.J. Super. 289 (App. Div. 2009) as support for the motion judge to refuse to consider United's opposition. It is not. In Allstate the Appellate Division reversed the unopposed grant of summary judgment "to allow defendant to proffer a defense to the motion...." Id. at 293.

**III. RESPONDENTS IGNORE THAT UNITED'S INSTRUCTION TO POSTPONE HAD TO BE HONORED UNDER THE LAW OF AGENCY, EVEN IF SPANN TRIED TO CONTRACT AROUND THAT**

Neither Respondent here disputes the law set forth in Sarokhan v. Fair Lawn Mem. Hosp. 83 N.J. Super., 127, 133-34 (App. Div. 1964), which entitles the principal to revoke the agent's authority at his "caprice" and without regard to any agreement on non-cancelation. No 'actual authority' could be found after the instruction to postpone was given. (7T44)(7T21) It no longer mattered what Spann's auction agreement said

or required. That was simply a matter for Spann to sue for money damages if a breach occurred. GT could get no rights from Spann under these circumstances.

Still further, the Court was required to focus only on the conduct of the principal, United, and clear and convincing evidence was required to show the principal authorized the agent to sell. LoBiondo v. O'Callaghan, 357 N.J. Super. 488, 499 (App. Div. 2003). The Court here found that the principal had instructed Spann not to proceed. (7T44) With that finding, it was error for the Court to rule that Spann had any rights to offer a contract to GT at all, and that is regardless of the agency contract's provision against cancelation. Therefore, it was also error for the Court to find that GT, as a buyer, had obtained rights as against United based on the actions of the agent, Spann. LoBiondo, *supra*, held the opposite in a case involving the sale of real property, like this is. The motion judge also did not find clear and convincing evidence of agency from the actions or statements of United, as LoBiondo would have required anyway. (Da842-843) He could not grant summary judgment to GT on these facts. He actually should have granted judgment to United based on the law the Court cited.

GT's next argument that, even if Spann conducted the auction without United's approvals GT still had a "vested right", again completely ignores the opposite holding of Golfinopolous. GT has no rights unless and until Spann proves he had authority as agent to auction United's Property. Id. at 48. GT also has no rights as a buyer if the principal did not grant the agent authority, and only the actions of the principal can convey that authority, not the agent. LoBiondo, *supra*. The motion judge found that the principal instructed the agent not to proceed here. (7T44) Therefore, GT could not have been deemed to have any "independent" rights as a buyer any more than the buyer in LoBiondo, whose claim was rejected.

#### IV. GT AND SPANN CANNOT DISPUTE SPANN'S CONDUCT WAS THE UNAUTHORIZED PRACTICE OF LAW

Both Respondents overstate the limited holding of Sullivan v. Max Spann, 251 N.J. 45, 50 (2022), as being a blanket exception to the unauthorized practice of law restrictions for all auctions. The facts of that case were far different than here and no blanket exception was ruled. First, Sullivan involved a residential property, the type that falls expressly within the N.J. State Bar Assoc. case's exception to the prohibition on real estate brokers practicing law. Thus, the creation of the form of residential contract by Spann in Sullivan was permitted. The question was whether Spann was required to include the 3-day right of rescission in that draft residential contract, pursuant to N.J. State Bar. Assoc., *supra*. The Supreme Court concurred with the Appellate Division that the form of residential contract a broker could create in a residential auction setting did not require the 3-day rescission period. Neither Court ruled that a broker can create a commercial real estate contract, as was done here, with or without a 3-day rescission period. (Da8)

Second, Sullivan case was an auction without reserve, where seller agreed to "sell the Property Absolute, meaning regardless of price...." Id. at 54. The Supreme Court ruled only that there is no need for a 3-day rescission period in a broker prepared contract drafted for, "the absolute auction setting of this appeal." Id. at 69. This case did not involve an absolute auction, or one without reserve. Here, there was a \$1.7million reserve. (Da8-9)

Third, Spann did not represent the buyer in Sullivan, and had advised buyer in his bid package that it would be wise for her to have counsel, which the Court found to be enough. Conversely, here Spann is United's agent and wrote a contract that Spann's own auction agreement said had to be "created" and "prepared" by United's attorney,

not by Spann. (Da8-9) Thus, here Spann violated both his own agreement's terms and the limitations of N.J. State Bar's injunction on brokers drafting anything other than 1-4 family residential contracts, and this action injured his client's rights and interests.

Fourth, the Supreme Court in Sullivan said that what constitutes the unauthorized practice of law by a real estate agent requires a "case by case" analysis designed to protect the public. Id. at 62. Here, Spann created a commercial sale contract, where N.J. State Bar Assoc., supra., made an exception against the practice of law only for 1-4 family residential sales. Sullivan then allowed an exception to the 3-day rescission only for residential sales in absolute auctions. This was neither. In fact, Spann purported to protect United from the unauthorized practice of law directly in Spann's own auction agreement, which required United's lawyer to "create" the commercial contract. (Da8-9) Yet, Spann wrote one himself, and then used that to sell his client's commercial property. Spann therefore disregarded both his legal limitations against drafting anything other than residential contracts and his own contract's restrictions. Those violations were the only reason that GT ended up getting an unsigned contract to try to enforce. Under these circumstances Spann's actions should be deemed the unauthorized practice of law and predatory to his client, a member of the public. Spann's contract should be declared a legal nullity for this reason and independently of any other defect in Spann's or United's claims that the unsigned contract should overcome the statute of frauds.

Finally, GT's assertion that neither United nor its counsel questioned the appropriateness of Spann's actions is nonsensical. This blames the realtor's customer for not knowing the realtor is engaged in the unauthorized practice of law. That is counter to the entire purpose of the injunction against realtors drafting contracts. N.J.

State Bar Assoc. supra, 93 N.J. at 471-486. The client is to be protected at all times, not just when the client questions the broker's right to draft commercial contracts.

**V. SPANN INCORRECTLY ARGUES THAT HIS AUCTION AGREEMENT COULD NOT BE CANCELED BY HIS PRINCIPAL, AND THAT HIS RIGHT TO PROCEED WAS NOT IN DISPUTE**

Here, Spann argues that United seeks to rewrite the auction agreement such that United, as principal, can control his agent. (Rb18) That is the law. Sarokhan, supra, states that the principal can revoke the agent's authority at "his caprice", and even if the agreement says otherwise. The agent can sue for damages only. Ibid.

Spann then contends that United wants to have this Court add language such that United controls approval of the contract of sale before the auction could take place. That language was already in the auction agreement. Spann wrote that United only agreed to sell at or above the floor price, "pursuant to the terms of the Contract of Sale as prepared by the Seller's attorney" not by Spann. (Da8)(emph. added) Spann's auction agreement also confirmed that Spann was to obtain bids using, "the form of Contract of Sale created and approved by the Seller's attorney conforming to the highest bid." (Da9 para. 6A)(emph. added). United is not trying to 'rewrite' the auction agreement. It is trying to prevent Spann from selling property despite United's instruction to postpone the auction, using a contract that Spann "created" and "prepared", to which United did not agree. Even United's attorney disputed that he intended Spann to be authorized to use the draft contract as edited, and had requested a response before anything else. United could not be bound to an unsigned contract, or any actions by his attorney, without clear and convincing evidence, not found here.

Like GT, Spann all but concedes, as a matter of law, that United was entitled to instruct Spann not to proceed and to revoke the agency, even if Spann's agreement said

the opposite. (Rb21) Yet, Spann still argues that the non-cancelation provision and written notice requirements in his auction agreement preclude revocation. Those provisions directly violated the law of agency. Sarokhan supra, 83 N.J. Super. at 133-134. Indeed, any provision in the auction agreement that purported to prevent the principal from directing his property not to be sold is illegal and unenforceable. Ibid. The principal can revoke authority even if that means the agent can sue for money damages. Ibid. At most, Spann had a claim for a commission on a breach of contract theory. He could not ‘earn’ that commission by actually selling his client’s property over his client’s objection. For this reason as well his auction should be invalidated.

Spann next incorrectly contends the motion judge did not view the auction agreement as an agency contract. (Rb23) Yet, the motion judge actually relied on the principles of agency to rule against United. “The Court rejects that argument ... because Spann acted as the Defendant’s agent....” (Da842) In fact, the motion judge improperly analyzed agency principles stated in Tannenbaum in order to grant GT’s motion. (Da842) He then also misapplied the law of agency to uphold Spann’s non-cancelation provision, “the point of Max Spann is that your client didn’t have the ability to cancel it.... If I accept as true, as I have to, that your client told them don’t do this auction, are they permitted under the contract to do that?” (7T20:21-21:13) The answer to that question was ‘yes’. Where the judge accepted that the principal’s instruction to postpone had occurred, the Judge was required to find the agent’s authority was revoked, subject only to the agent’s claim for money damages. Sarokhan, supra. GT therefore could claim no rights obtained from that agent. It was not entitled to summary judgment. Instead, its contract claims should have been dismissed.

Spann also ignores that there was good reason for the instruction to postpone. Both United and Spann set the floor price for the auction agreement on the mistaken fact that the development approvals were current. (Da424:10-12) Spann admitted in this case the lack of approvals “hurt the value” of the property. (Da375) Nevertheless, without authority, Spann changed his advertising of the Property from having approvals to stating they were “previously” existing. (Da597)

Spann also incorrectly argues that both United and its counsel were aware the Property was being auctioned on December 1, 2021. (Rb23-24) However, United testified he instructed Spann to postpone and that Spann agreed. (Da467 p. 44) That testimony was required to be accepted as true, and was accepted as true. (7T44) These facts certainly contradict the claim United knew the auction was proceeding. This was a summary judgment setting where the standard was misapplied and a trial was required to grant anything to either Spann or United.

Spann is also incorrect that United did not raise the agency argument sufficiently to preserve it for appeal. United and its counsel argued throughout the case that United had instructed Spann to postpone and not to proceed. (1T12:3-13)(1T16:13-19) United’s counsel argued at summary judgment that United had “the right to stop” Spann from proceeding when it discovered the approvals had lapsed. (7T45:7-15) Spann pointed back to the non-cancelation provision (which should have been recognized as unenforceable). The issue of the principal’s control over the agent was before the Court. It was just decided incorrectly even in the analysis of Tannenbaum, by ignoring that statements of the agent as to his authority are not enough. (Da842)

Important to this point is that the motion judge refused to allow United’s counsel more time to oppose summary judgment due to his personal problems which led to

truncated arguments. United should have been given the time in order to avoid exactly this problem. Therefore, some leeway to the scope of the agency argument and revocation of authority is warranted here. However, the argument was made and accepted that the principal had instructed the agent not to sell the Property until approvals were reinstated. (7T44) The Court also clearly ruled the entire case based on agency principles. (Da842-843) It simply did not recognize the import of the instruction by the principal, which Sarokhan required to be upheld as a revocation. It instead looked at GT's standing as a buyer and found it had some independent right to rely on the agent's representation that he had authority. That too was a misapplication of law by Golfinopolous, *supra*, and even the caselaw on which the motion judge relied, Tannenbaum, *supra*. United never represented to GT that Spann was authorized to sell, particularly at any time after the instruction to postpone was given. United did not think the sale was occurring at all. (Da467) Moreover, United had even told GT's owner one month before the auction that United objected to Spann allowing GT to being an eligible bidder. (Da189) That alone is 'notice' that the agent is not authorized to offer a contract to GT on which it could rely without United's countersignature.

### CONCLUSION

For all of these reasons and those originally argued, the Court should reverse all Orders granting summary judgment, and should direct entry of judgment for United as a matter of law or, at minimum, remand for trial on all claims.

June 2, 2025

Respectfully submitted,

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