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LOWENSTEIN SANDLER LLP, Plaintiff, v. HARMONY FOUNDATION OF NEW JERSEY, INC, ALLEN WILEN, in his capacity as RECEIVER of HARMONY FOUNDATION OF NEW JERSEY, INC., TRIF & MODUGNO, LLC, LOUIS A. MODUGNO, ESQ., and SECAUCUS INVESTORS, LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO.: ESX-L-007647-24 CIVIL ACTION **ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS**

THIS MATTER having been opened to the Court by Trif & Modugno LLC, attorneys for Defendants, Harmony Foundation of New Jersey, Inc. and Allen Wilen, in his capacity as Receiver Harmony Foundation of New Jersey, Inc. ("Defendants"), by way of Notice of Motion ("Motion") for an Order, pursuant to Rules 1:20A-6 and 4:6-2(a), to dismiss Counts One, Two and Four of the Complaint and Amended Complaint to be filed (with leave of the Court) by Plaintiff, Lowenstein Sandler LLP ("Lowenstein"); and the Court having reviewed the papers submitted in connection with the Motion and any arguments by the parties; and the within form of Order having been submitted to the Court for signature; and for good cause having been shown;

IT IS on this **16th** day of **January,** 2025;

ORDERED that the Defendants' Motion to Dismiss Counts One and Two of the Complaint and Amended Complaint is and shall hereby be **GRANTED in part**; and it is further

ORDERED that Counts One and Two of the Complaint and Amended Complaint are and shall hereby be **DISMISSED without prejudice**, subject to service by Lowenstein upon Harmony

of a Pre-Action Notice as contemplated by R. 1:20A-6, and the expiration of 30 days from such service during which Harmony shall not have elected fee arbitration pursuant to R. 1:20A-2,3,6; and it is further

ORDERED that Count Four is and shall hereby be **DISMISSED without prejudice** as to Defendant Wilen; and it is further

ORDERED that a copy of this Order is and shall hereby be deemed served on all counsel of record upon being uploaded to the New Jersey e-Courts filing system. Pursuant to R. 1:5-1(a), counsel for movant shall serve a copy of this Order on all parties not served electronically within seven (7) days of the date of this Order.

HON. KEITH E. LYNOTT, J.S.C.

[**X**] OPPOSED
[ ] UNOPPOSED

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LOWENSTEIN SANDLER LLP, Plaintiff, v. HARMONY FOUNDATION OF NEW JERSEY, INC.; ALLEN WILEN, in his capacity as RECEIVER of HARMONY FOUNDATION OF NEW JERSEY, INC.; TRIF & MODUGNO LLC; LOUIS A. MODUGNO, ESQ.; and SECAUCUS INVESTORS LLC, Defendants.	NEW JERSEY SUPERIOR COURT LAW DIVISION: ESSEX COUNTY CIVIL ACTION CBLP ACTION DOCKET NO. ESX-L-007647-24 **ORDER GRANTING PLAINTIFF LEAVE TO FILE AN AMENDED COMPLAINT**

THIS MATTER having come before the Court on the cross-motion of Plaintiff, Lowenstein Sandler LLP ("Lowenstein"), through its attorneys, Marino, Tortorella & Boyle, P.C. (Kevin H. Marino, Esq., appearing) for entry of an Order granting leave to amend its Complaint against Defendants, Harmony Foundation of New Jersey, Inc. ("Harmony"); Trif & Modugno LLC ("T&M"); Louis A. Modugno, Esq. ("Modugno") and Secaucus Investors LLC ("Secaucus", collectively with Harmony, T&M, and Modugno, the "Defendants"); and the Court having considered the submissions and argument of the parties; and good cause having been shown;

IT IS on this **16th** day of **January**, 2025;

ORDERED that the Plaintiff's cross-motion for leave to file an Amended Complaint is and shall hereby be **GRANTED;** and it is further

ORDERED that a copy of this Order is and shall hereby be deemed served on all counsel of record upon being uploaded to the New Jersey e-Courts filing system.

HON. KEITH E. LYNOTT, J.S.C.

[**X**] OPPOSED
[ ] UNOPPOSED

Statement of Reasons

This is an action brought by a law firm seeking to recover legal fees allegedly earned, due and unpaid. The Defendants Harmony Foundation of New Jersey, Inc. ("Harmony"), Allen Wilen, in his capacity as Receiver of Harmony Foundation of New Jersey, Inc. ("Wilen"), Trif & Modugno, LLC, Lewis A. Modugno, Esq. (collectively, "Modugno"), and Secaucus Investors, LLC ("Secaucus") have moved to dismiss the Complaint and Demand for Jury Trial (the "Complaint") and proposed Amended Complaint and Demand for Jury Trial (the "Amended Complaint") of the Plaintiff Lowenstein Sandler, LLP ("Lowenstein"). Specifically, Harmony and Wilen move to dismiss Counts One, Two and Four of the pleadings. Modugno and Secaucus move to dismiss Counts Three and Four of the Complaint/proposed Amended Complaint.

Lowenstein opposes the motion, save as to its claims against Wilen. Lowenstein has cross-moved to amend its Complaint and for leave to interpose the Amended Complaint.

For the reasons set forth herein, the Court grants in part and denies in part the Defendants' motion. It dismisses Counts One and Two without prejudice. It finds that, prior to initiating a lawsuit against Harmony for attorneys' fees, it must first serve a Pre-Action Notice as required by R. 1:20A-6. The claim must proceed to fee arbitration pursuant to R. 1:20A-2,3,6, if Lowenstein serves a Pre-Action Notice and Harmony timely seeks fee arbitration.

The Court denies the motion as to Counts Three and Four (save as to Harmony and Wilen). It grants the cross-motion for leave to amend.

I

As this is a motion to dismiss pursuant to R. 4:6-2(e), the Court must conduct a searching examination of the Complaint/proposed Amended Complaint to determine if it is possible to discern the "fundament" of a cause of action from even an "obscure statement" of the claim.

Printing Mart-Morristown, Inc. v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). Put differently, the Court's function on a motion to dismiss is to examine the pleadings to determine if a cause of action is suggested by the facts alleged.

The Court does not determine the truth of the matters asserted and is not concerned, at this juncture, with the Plaintiff's ability to prove the facts alleged. Indeed, it must accept as true the well-pleaded factual averments of the pleadings and confer upon the Plaintiff the benefit of all favorable inferences to be reasonably drawn from such facts. That said, the Court is not required to accept conclusory, unsupported averments or legal conclusions pleaded as facts.

Ordinarily, the Court considers the factual allegations of a complaint only and may not consider documents or items that are de hors the pleading. An exception exists for documents or items that are referred to in the complaint and/or attached exhibits; that are matters of public record; or that are integral to the claims lodged by the Plaintiff. Banco Popular N. Am. v. Gandi, 184 N.J. 161 (2005). In this case, the motion record includes – and the Court has considered – pleadings, Orders and other materials from an action brought by the Defendant Secaucus against Harmony that are described at length in the Complaint/proposed Amended Complaint and that are matters of public record.

New Jersey courts rarely grant motions to dismiss. When they do, they ordinarily dismiss the pleading without prejudice to a right to re-plead to allege facts to address a deficiency identified by the Court. However, where the factual averments of a complaint are "palpably insufficient" to give rise to a viable claim, the Court will grant a motion to dismiss. Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987). Where there are no facts that a plaintiff could allege that would establish a viable claim, the Court will grant a motion to dismiss with prejudice. Nostrame v. Santiago, 213 N.J. 109 (2013).

II

The Court draws the facts relevant to the disposition of these motions from the Complaint/proposed Amended Complaint.[1] In this case, as there is no opposition to the motion for leave to amend and the movants have directed their motions and arguments to both the Complaint and proposed Amended Complaint, the Court considers the factual averments of the proposed Amended Complaint as if such pleading were already interposed. It accepts as true all factual averments of the Amended Complaint, save for legal conclusions stated as facts. It emphasizes that it does so solely for the purpose of adjudicating these motions.

At relevant times, Harmony was a New Jersey non-profit corporation licensed by the New Jersey Cannabis Regulatory Commission (the "CRC") to grow and dispense medical cannabis. It operated a medical-marijuana treatment center pursuant to an Alternative Treatment Center or "ATC" permit obtained in 2018.

Harmony operated under the aegis of the New Jersey Compassionate Use Medical Marijuana Act ("CUMMA") and the Jake Honig Compassionate Use Medical Marijuana Act (the "Jake Honig Act"). Initially, the CUMMA provided that the first ATCs granted to applicants were to be operated as non-profit entities and expressly proscribed distribution to anyone of income or profit. The Jake Honig Act permitted the original non-profit ATCs to apply to "sell or transfer" their permits to a for-profit entity subject to regulatory approval, provided that the CRC determined that such sale or transfer was consistent with the purpose of the CUMMA.

[1] The movants contend the Complaint/proposed Amended Complaint fails to state a viable claim against Wilen in his capacity as court-appointed Receiver of Harmony on the basis that this Court lacks subject matter jurisdiction over any such claims against Wilen. Lowenstein agrees (as to Wilen only) and further acknowledges that there is no viable claim for tortious interference with contract – i.e., its retainer agreement for legal services – against Harmony, as the latter was a party to such contract. It has modified the proposed Amended Complaint accordingly, dropping Wilen as a named Defendant. As a result, it is not necessary to address further the claims asserted against Wilen or any claim against Harmony for tortious interference with contract.

Prior to the enactment of the Jake Honig Act, the New Jersey Department of Health (the "DOH") permitted entities holding ATC permits to enter management services agreements with parties having expertise or additional resources, even if such providers were themselves for-profit entities. However, the statute required the ATC permittee to maintain a not-for-profit status and to comply with all laws pertaining to not-for-profit entities.

Lowenstein is a prominent New Jersey law firm. Harmony engaged Lowenstein in April 2016 to advise it regarding its then pending application for the ATC permit. In July 2020, Lowenstein submitted, on Harmony's behalf, an application to the DOH, referred to in the Amended Complaint as a "placeholder application", to establish a for-profit limited liability company, with Harmony as its sole member and to transfer Harmony's assets and its ATC permit to such entity, which would then be a for-profit concern and would assume all of Harmony's obligations and liabilities.

Prior to receipt of its ATC permit, according to the Amended Complaint, Harmony had sought financing from individuals who would later form Secaucus. Harmony's principals had entered a non-binding letter of intent with representatives of "not-yet-formed" Secaucus.

The Amended Complaint avers that the letter of intent provided for a loan, a sub-lease and management services agreements. According to the Amended Complain, the "stated goal" of this letter of intent "was to use for-profit vendors to provide services to Harmony, such that the non-profit's trustees 'shall have an overall interest of 45% of the Business' and Secaucus's representatives 'shall have an overall interest of 55% of the Business.'" The Amended Complaint alleges that "the [letter of intent] and the contracts it proposed were an attempt to funnel profits from the non-profit to private investors, in violation of law."

The Amended Complaint states that, after Harmony/Secaucus explained the then contemplated structure of the transaction to the DOH, the head of the medical marijuana program determined it "'[would] not work.'" He advised that the other permitted entities paid salaries to their trustees/officers/employees and reinvested all profits in the non-profit entity and that they maintained only arms'-length contracts with vendors at commercial rates and not "relationships – as proposed here – between non-profit permit holders and related for-profit entities."

Subsequently, with legal assistance from Lowenstein, Harmony executed a new series of proposed contracts with Secaucus. "These replacement contracts purported to be arms'-length transactions giving Secaucus no ownership or profit-sharing rights in Harmony's business. Indeed, they were expressly 'designed to appease or satisfy the DOH's concerns about not funneling Harmony's profits to anyone."

Following the adoption of the Jake Honig Act, Harmony submitted a set of corporate documents to the DOH in connection with its July 2020 "placeholder application", described above. "The package made clear that [the for-profit entity Harmony sought to form] would be wholly owned and controlled by the non-profit entity, which was to be the sole member of the for-profit subsidiary." On September 2, 2020, in accordance with instruction from the DOH, Harmony created Harmony Holdings of New Jersey, LLC.

On September 7, 2020, Secaucus filed an objection with the DOH, seeking to have the agency deny the application to transfer assets from Harmony to Harmony Holdings of New Jersey, LLC. According to the Amended Complaint, "Secaucus argued that it had an ownership interest in Harmony's business because it 'structured the transaction to assure that Secaucus as the sole and exclusive source of capital for the development of Harmony would acquire ownership of any for-profit successor to Harmony.'"

Secaucus contended that any conversion of Harmony to for-profit status was subject to Secaucus's written consent. The Amended Complaint alleges that Harmony responded to the DOH that any claim by Secaucus of an ownership interest in Harmony was illegal.

Lowenstein avers that the DOH approved Harmony's application over the objection of Secaucus. According to the pleading, the DOH concluded that Harmony Holdings of New Jersey, LLC would be wholly owned by Harmony and any change in ownership would require approval of the DOH.

The Amended Complaint asseverates that, contemporaneously with these events, Secaucus filed, in September 2020, an action in the Superior Court of New Jersey, Chancery Division, Bergen County, alleging breaches of the loan agreement between Harmony and Secaucus. Acting as counsel for Harmony in this case, Lowenstein secured an order compelling arbitration of all of Secaucus's claims.

The Amended Complaint alleges Harmony initiated an arbitration of such claims before the American Arbitration Association. By final award rendered in October 2021, the arbitrator recognized, so the Amended Complaint avers, that Secaucus's alleged ownership interest in Harmony was inconsistent with the latter's non-profit status, but nonetheless determined to enforce the "illegal agreements" between Secaucus and Harmony "because 'both sides, operating with unclean hands, were complicit in the evasion.'"

The Amended Complaint alleges that, in November 2021, Secaucus initiated an action in the Superior Court of New Jersey, Chancery Division, Bergen County (the "Bergen County action"), to confirm the arbitrator's award in its favor. Harmony sought to vacate the award.

On February 22, 2022, the trial court presiding over the Bergen County action entered a Judgment and Order confirming the award. Harmony, represented by Lowenstein, appealed the trial court's Order to the Appellate Division.

On July 28, 2022, after Secaucus's loan to Harmony had matured and while the appeal was pending, Secaucus's counsel Modugno issued to Harmony a Notice of Seizure, Demand for Inventory of Collateral and Marshalling of Assets. This Notice demanded that Harmony turn over to Secaucus all cash, funds and deposits. On December 26, 2022, Secaucus issued to Harmony an Additional Notice of Seizure, Demand for Inventory and Collateral and Marshalling of Assets (the "Additional Notice") that informed Harmony that Secaucus would pursue recourse against "anyone who received payment from Harmony by use of Harmony's credit cards." The Amended Complaint alleges that this Additional Notice followed a determination by Secaucus that Harmony had paid the invoices of Lowenstein via a credit card and such notice was "intentionally designed to deprive Lowenstein of payment for services rendered."

The Amended Complaint avers that "[i]n preventing Harmony from paying the bills of its litigation counsel, Secaucus [and Modugno] made it impossible for Harmony to resist Secaucus's hostile takeover attempt." It alleges the Additional Notice "made clear these Defendants' ultimate goal was not repayment of a loan, which by then had been converted to equity as part of the [arbitrator's] Award, but crippling Harmony in that fashion."

The Plaintiff asseverates that, while the appeal was pending, Secaucus accused Harmony's then management of improprieties warranting interim relief. Despite the denial of such improprieties by Harmony's management, the court, without an evidentiary hearing, appointed a Special Fiscal Agent, revamped Harmony's Board of Directors by placing representatives of

Secaucus and a law partner of the Special Fiscal Agent on the board, appointed a custodian, and partially disqualified Lowenstein as counsel.

Lowenstein sought and obtained an Order permitting it to withdraw as counsel for Harmony in trial-level proceedings, though at the time it remained as counsel to Harmony for the then-pending appeal of the Order enforcing the arbitration award. Lowenstein alleges that, at the time, a different law firm was undertaking "to negotiate agreements and settlements between Harmony and Secaucus that impacted the litigations in which Lowenstein was engaged."

Thereafter, according to the Amended Complaint, the trial court "continued to enter various forms of relief adverse to Harmony's then-managers." This included the appointment of a Receiver, ouster of certain officers and directors, "and ultimately the forced sale of the company to a third-party purchaser by an order entered in Secaucus Investors, LLC, No. BER-C-600275-21 on October 30, 2023…"

The Amended Complaint alleges this Order converted the custodian to a Receiver and authorized the Receiver to resolve or dispute any claim submitted by a creditor of Harmony. Lowenstein alleges that "[t]he court-established procedure authorized that, to the extent that claim is not amicably resolved by the parties, the creditor shall be entitled to all rights set forth in N.J.S.A. 15A:14-17. Those rights include a trial by jury on the creditor's claim upon written demand." Lowenstein asserts that, "[a]s part of the overall process", and at the "direction" of Wilen as Receiver, Harmony and Secaucus "'settled' their respective claims against one another."

The Amended Complaint alleges that, in November 2023, the Receiver established a procedure and issued a notice of receivership and a bar date for creditor claims. The notice required creditors to submit claims by May 31, 2024. Lowenstein submitted a proof of claim for its

outstanding, unpaid legal fees in the amount of $766,276.13 on May 23, 2024. Lowenstein alleges that this procedure "was not followed for Secaucus's claim."

The Amended Complaint avers that the Receiver "disputed Lowenstein's claim [for unpaid attorneys' fees] by threatening to sue Lowenstein for damages in an amount that exceeded Lowenstein's claim." As a result, according to the pleading, "the Order [of October 30, 2023] vested Lowenstein with the right to file suit to pursue that claim and demand a trial by jury."

The Plaintiff asseverates that, on December 20, 2023, the Receiver filed a motion to engage Modugno, which had previously represented Secaucus and remained counsel of record to Secaucus on the appeal, as special litigation counsel to Harmony. The proposal contemplated that Modugno would represent the Receiver and Harmony in pursuing various affirmative claims.

On February 26, 2024, counsel for the Receiver instructed Lowenstein to withdraw the appeal from the Order enforcing the arbitration award. Lowenstein sought, by motion, to withdraw as counsel and "Harmony and Secaucus then convinced the Appellate Division to dismiss the appeal as moot, thereby depriving the parties of any appellate review of the illegal [arbitration] Award."

The Amended Complaint avers that Modugno, as the Receiver's and Harmony's counsel, "also set out to deprive the many unsecured creditors of Harmony (including Lowenstein) from being paid as part of the sale of Harmony's assets to an entity known as Illicit Cannabis New Jersey, LLC ("Illicit") without creating a proper reserve to pay off creditors, in violation of the Jake Honig Act." It alleges that the Jake Honig Act required, prior to a sale or transfer of assets to a for-profit entity, to establish a reserve fund for the purpose of paying the debts and obligations of the non-profit entity. The Amended Complaint alleges that Harmony and Modugno knowingly arranged for a sale of assets without establishing such a reserve fund.

The Plaintiff avers that, at the time of these events, Harmony was seeking a conditional approval from the City of Hoboken ("Hoboken") to operate a dispensary there. On August 2, 2023, Hoboken had withdrawn its conditional use permit for this facility. The Receiver appealed, but Hoboken affirmed its withdrawal, thereby preventing either Harmony or Illicit from operating the dispensary there.

A Membership Interest Purchase Agreement (the "MIPA") between Illicit and Harmony permitted Illicit to purchase 100% of Harmony in consideration of a contingent promissory note in the amount of $10 million (among other consideration). Such note was contingent, according to the Amended Complaint, on Harmony's ability to operate a dispensary in Hoboken – a condition that could not be met given Hoboken's decision the prior month that neither Harmony nor Illicit would be able to operate a dispensary in Hoboken. Lowenstein alleges that Harmony and Illicit thus entered into the MIPA despite having full knowledge that (i) Hoboken had withdrawn Harmony's conditional use permit; (ii) the contingency established in the note would not occur; and (iii) the reserve fund required by the Jake Honig Act would not be established.

The Amended Complaint avers that Harmony, represented by Modugno, sought court approval of the sale to Illicit "knowing that the Note remained worthless." It alleges that "the court entered an Order approving the sale based on representations that the Jake Honig Act – and specifically, its reserve requirement – had been satisfied."

Lowenstein asserts that Harmony "moved to force" Hoboken to approve the operation of the dispensary in Hoboken. According to Lowenstein, "[t]he Receiver acknowledged that if Harmony could not operate in Hoboken, the Note would be worthless, and Harmony would not have enough cash to satisfy its creditors." The Amended Complaint asserts that, after the court "approved the MIPA containing the Note", the Receiver "acknowledged that Hoboken had

concerns about Harmony's financial viability and Illicit's ability to operate a dispensary." The court denied the Receiver's attempts to require Hoboken to reinstate the conditional use permit for the dispensary.

The Amended Complaint alleges that the Receiver represented to the court that "conversations" with Hoboken to revive the conditional use permit "were ongoing", but then acknowledged that the condition precedent to the issuance of the note would not be met by December 31, 2024. Lowenstein avers that the Receiver acknowledged that the reserve fund required by the Jake Honig Act had not been established "to satisfy Harmony's creditors' claims, which total $42.6 million and include the claim Lowenstein seeks to vindicate by this lawsuit."

Lowenstein alleges that Modugno also represented to the CRC that "'Harmony [would] comply with the statutory requirements of the for-profit transfer' as outlined in a Cannabis Regulatory Board Memorandum dated February 15, 2024." It asserts that representation was false, as Secaucus and Modugno "ensured that Harmony would not pay its debts or establish a required reserve fund" to pay creditors such as Lowenstein. Lowenstein asseverates that "[t]hrough [Modugno], the sale of Harmony's assets to Illicit was effectuated to interfere with Harmony's ability to pay Lowenstein for its services."

The Amended Complaint seeks relief against Harmony and/or Secaucus and Modugno in four Counts. Count One purports to state a claim against Harmony for breach of contract. Count Two alleges a claim against Harmony for unjust enrichment. Counts Three and Four purport to state claims against Secaucus and Modugno for tortious interference with a contract between the Plaintiff and Harmony.

Count One avers that "Harmony retained Lowenstein to provide it with legal services to support its initial application to operate a medical-marijuana ATC" and later in its efforts to

"convert to a for-profit structure in accordance with applicable law." It alleges that Harmony asked it to represent Harmony "and its non-conflicted officers and directors" in litigation arising from the conversion application.

Lowenstein asserts that it provided legal services to Harmony, in accordance with the retainer agreement, but that Harmony failed to pay $766,276.13 for such services, despite demand for payment. It claims such conduct breached the retainer agreement.

Lowenstein contends it submitted a timely proof of claim for such amount to the Receiver in accordance with the Receiver's procedures. It alleges that "[b]ecause the Receiver disputed Lowenstein's claim by threatening to sue Lowenstein for damages in an amount that exceeded Lowenstein's claim, Lowenstein exercised its right under the Order [of October 30, 2023] to file suit to pursue its claim in accordance with N.J.S.A.15A:14-17 by filing this action."

Lowenstein claims entitlement to damages in the amount of $766,276.13. It also seeks interest, attorneys' fees and costs.

In Count Two, Lowenstein asserts that Harmony "received a benefit from Lowenstein in the form of legal services with which Harmony was completely satisfied." It alleges that Harmony was aware of the benefit, agreed to pay for such benefit and then chose not to do so. It claims entitlement to damages on account of unjust enrichment in the amount of $766,276.13, plus interest, attorneys' fees and costs.

Count Three, lodged against Modugno and Secaucus, asserts a contract between Lowenstein and Harmony for legal services. Lowenstein alleges that "[a]fter Secaucus prevailed in a bid to have its loan to Harmony transformed into an equity interest through the Arbitration, [Modugno] and Secaucus, acting wrongfully and with malice, intentionally prevented Harmony from paying Lowenstein's bills while old management was in charge."

Lowenstein contends that Modugno issued the Notice of Seizure, Demand for Inventory and Marshalling of Assets and the Amended Notice and "thereby prevented Harmony from paying bills of its litigation counsel, including Lowenstein, as a means of preventing Harmony from defending against Secaucus's hostile takeover." Lowenstein asseverates that these demands were wrongful "because Secaucus's debt was converted to equity as part of the Arbitration award."

Lowenstein avers that Modugno and Secaucus acted wrongfully, with malice and with the intent to harm Lowenstein. It claims entitlement to compensatory damages in the amount of $766,276.13, together with interest, attorneys' fees and costs of suit.

Count Four asserts that Modugno, "acting at the behest and direction, and with the knowledge and involvement, of Secaucus and the Receiver," brought about the sale of Harmony's assets to Illicit to "prevent Harmony from paying Lowenstein's legal fees for its services." It asserts that Modugno acted wrongfully, with malice, and with the intent to harm Lowenstein. It claims entitlement to damages in the amount of $766,267.13, together with interest, attorneys' fees and costs.

III

On this motion to dismiss, Harmony contends that Counts One and Two of the Complaint/proposed Amended Complaint fail as a matter of law as Lowenstein has failed to allege that it notified Harmony and the Receiver of Harmony as to their right to pursue fee arbitration pursuant to R. 1:20A-6 via a Pre-Action Notice, and the expiration of 30 days following such Notice. Harmony asserts that such Notice is a precondition to the right of an attorney to bring a lawsuit against the client for unpaid attorneys' fees and that Lowenstein has not alleged the required Notice because it has never tendered one.

Harmony asserts this case is not an "ancillary legal action" contemplated by the express exception to R. 1:20A-6, but it is instead a "lawsuit" that cannot be initiated unless the attorney initiating such action has first given the notice concerning fee arbitration. Although acknowledging that Lowenstein was permitted to rely on an exception for an ancillary legal action to submit a notice of claim to the Receiver, Harmony contends that Lowenstein was not then permitted to commence a lawsuit against its client – in a different court and venue – on the basis of such exception.

Harmony posits that, notwithstanding the reference in N.J.S.A. 15A:14-17 to a trial by jury, a law firm does not have the right to pursue a lawsuit and a jury trial against its client without first affording the client the opportunity to pursue fee arbitration. It argues that there is no irreconcilable conflict between the statute and the applicable Court Rule, as the Rule controls the rights and remedies of the parties in a receivership setting when the claimant is an attorney and the party in receivership is the client. It contends there is nothing in the letter or manifest purpose of the Court Rule that permits an attorney to avoid fee arbitration simply because the client is subject to receivership.

Harmony points out that, even if this lawsuit did not trench on the client's rights under R. 1:20A-6 and were permitted as an ancillary legal action, as claimed, the action is nonetheless premature and not ripe for adjudication. That is so, according to Harmony, because the Receiver has not yet acted on Lowenstein's proof of claim and the latter has not demanded a response from the Receiver.

Secaucus and Modugno contend that the Counts Three and Four lodged against them fail as a matter of law to state viable claims for several different reasons. They assert the action is barred by the operation of the judicially crafted litigation privilege. They contend that Lowenstein

is seeking relief based on statements made by Modugno on Secaucus's behalf in the course or conduct of litigation – specifically the Bergen County action. They assert, for example, that any statements made to that court concerning the creation of a reserve fund in relation to the sale to Illicit occurred during the course of litigation and thus are not actionable.

The movants posit that the essential underpinning of the privilege is to facilitate access to the courts without fear of risking liability for statements or contentions advanced in, or in anticipation of, litigation. They contend the limited exception for claims asserting malicious abuse of process or related theories is not applicable here as the Plaintiff is not pursuing such claims.

The movants assert the action is also a legally invalid collateral attack on the judgment(s) of the court in the Bergen County action. They contend that the court, in such action, expressly permitted Secaucus to pursue its contractual rights against Harmony as a lender, including by service of the Notice of Seizure, Demand for Inventory and Marshalling of Assets, as well as the Additional Notice, and authorizing the sale of Harmony's assets to Illicit, while directing and approving the terms of the reserve fund.

Secaucus and Modugno point out that the court in the Bergen County action retained jurisdiction to address claims and disputes over its orders and that Lowenstein could have challenged the court's orders by pursuing appropriate applications in that court (along with available appellate rights). They assert that, by initiating the claims lodged in Counts Three and Four in this Court, Lowenstein is asking this Court to invalidate or otherwise proceed in direct contravention of the determinations of the court in the Bergen County action.

Finally, the movants contend the Plaintiff has not alleged any facts establishing the required element of malice in order to state viable claims sounding in tortious interference with contract. They argue that, as every action they have taken has been approved and endorsed by the court in

the Bergen County action, there is no basis whatsoever for a claim in this Court that such actions occurred without justification. The movants assert they are permitted under law to pursue their own interests even when at the expense of another party.

Lowenstein contends the action is an ancillary legal action expressly authorized by the exception to R. 1:20A-6. It asserts it has invoked its rights under the very procedures established by Harmony's Receiver by first tendering a notice of claim and then pursuing a statutory right to challenge the Receiver's failure to pay its claim via a trial by jury.

Lowenstein points out that, prior to initiating this action, it notified Harmony's Receiver of its claim and the Receiver responded by threatening to sue Lowenstein for more than the amount of that claim. In such circumstances, according to Lowenstein, there is no need or basis for any further action to verify that the Receiver disputes Lowenstein's claim.

The Plaintiff rejoins that the litigation privilege has no applicability in the circumstances of this case. It argues that its claim is not grounded in the content of any statement by Secaucus or its representatives in or relating to the Bergen County action, but to the alleged conduct of Secaucus and Modugno in acting maliciously by initiating and pursuing litigation, and securing related orders and judgments, undertaken to ensure that Lowenstein's claim for attorneys' fees would never be satisfied.

Lowenstein further asserts that it is not in any way challenging the validity of the orders or judgments of the court in the Bergen County action or asking this Court to invalidate such orders or judgments. Instead, according to Lowenstein, it is pursuing an individual action for damages based on the Defendants' wrongful conduct in seeking and pursuing such orders and judgments. It contends as well that there is a recognized right to assert, in a separate action, that an order or

judgment of another court was obtained by fraud on that court and it posits that Secaucus and Modugno are guilty of having committed such conduct.

Lowenstein asserts it has adequately pleaded facts sufficient to establish the element of malice in both Counts Three and Four of its Complaint/proposed Amended Complaint. It contends that it has adequately alleged conduct by the movants undertaken with the specific purpose of injuring Lowenstein and depriving Lowenstein of payment for the legal services it rendered to Harmony.

IV

A

New Jersey Court Rule 1:20A-6 provides that "[n]o lawsuit to recover a fee may be filed until the expiration of the 30 day period herein giving [sic] Pre-Action Notice to a client; however, this shall not prevent a lawyer from instituting any ancillary legal action." A Pre-Action Notice, in turn, must advise the client of the right to request fee arbitration.

The manifest purpose of the rule is to afford the client the choice of fee arbitration in lieu of a lawsuit when a dispute arises over an attorney's claim for legal fees. Moreover, the Rule places the affirmative burden on the attorney to notify the client of the arbitration procedure, via Pre-Action Notice, as an express precondition to initiating a lawsuit against the client to recover a disputed or otherwise unpaid fee. It follows that an attorney who did not first tender such notice cannot pursue a lawsuit on the basis that the client was otherwise aware of the right to pursue arbitration and failed to elect it. Any such claim by an attorney would plainly be at odds with the letter and import of this Rule.

In this case, there is no dispute that Lowenstein initiated this lawsuit without first submitting a Pre-Action Notice to Harmony, its client, and Lowenstein's pleadings do not allege

that it did so. In the circumstances, the Complaint/proposed Amended Complaint – insofar as it seeks to recover from Harmony unpaid attorneys' fees allegedly due and owing to Lowenstein and to enforce against the client the fee arrangement resulting from the attorney-client relationship – withstands scrutiny under R. 1:20A-6 only if the Court determines the present action is an ancillary legal action that falls within the ambit of the exception to the Pre-Action Notice requirement established by the Rule.

It is readily apparent that the purpose of the exception for an "ancillary legal action" is to permit an attorney seeking to recover an unpaid attorneys' fee from a client to undertake such actions as submitting a proof of claim in a bankruptcy proceeding or to a receiver without first tendering the required Pre-Action Notice, and then pursuing such claim in bankruptcy court or before a receiver – and thereby avoid any applicable bar to such claim established by a bankruptcy court or receiver. But it is equally apparent that the Rule does not authorize an attorney to file a separate lawsuit to recover a claimed fee without compliance with the Rule and thus the obligation to notify the client of the right to elect fee arbitration.

The Rule explicitly distinguishes between a "lawsuit" and an "ancillary legal action", requiring the notice in the former and establishing an exception to such requirement for the latter. The word "ancillary" is carefully chosen and, by its dictionary definition, relates to actions that are "subordinate", "subsidiary", "auxiliary" and/or "supplementary". See Merriam-Webster Dictionary (3rd ed. 1986) (definition of "ancillary"); see also Black's Law Dictionary (5th ed. 1979) (ancillary defined as "[a]iding; auxiliary; attendant upon, subordinate; a proceeding attendant upon or which aids another proceeding considered as principal"). A separate lawsuit such as the present action is not ancillary within the plain meaning or intendment of this term.

In Cole, Schotz, Bernstein, Meisel & Forman, P.A. v. Owens, 292 N.J. Super. 453 (App. Div. 1996), involving the assertion by an attorney of a lis pendens on the property of a client, the court, citing Mateo v. Mateo, 281 N.J. Super. 73, 79 (App. Div. 1995), noted that the assertion of an attorney's lien upon a client's claim or cause of action was an ancillary legal action pursuant to R. 1:20A-6. But the court also concluded that, although an application for an attorney's lien must be brought in the main cause advanced by the client, the attorney's claim for unpaid legal fees must be "'tried as a separate and distinct plenary action.'" Cole, Schotz, 292 N.J. Super. at 458 (quoting Mateo, 281 N.J. Super. at 79). And "an action for attorneys' fees 'must be dismissed when the attorney does not allege that he or she gave the client notice of the availability of the Fee Arbitration Committee proceedings.'" Ibid. (quoting Mateo, 281 N.J. Super at 80).

The United States Court of Appeals for the Third Circuit in In re MicroBilt Corp., 610 F. App'x 169, 172 (3d Cir. 2015), on which Lowenstein relies, expressly distinguished Cole, Schotz when it determined that the filing by an attorney of a proof of claim, fee application and motion to compel payment of post-petition fees in a bankruptcy proceeding was an ancillary legal action for purposes of R. 1:20A-6. The court observed that, unlike the pursuit of an attorney's lien claim, authorized by statute, which requires a separate and distinct action, the pursuit of a claim in a bankruptcy proceeding does not require the creditor to file a complaint or initiate a separate action.

In this case, the applicable statute requires the creditor to submit a proof of claim with the receiver and, upon failure to resolve the claim, authorizes the creditor to pursue litigation by filing an action, thereby securing a right to a jury trial as to issues "so triable." N.J.S.A. 15A:14-17. But the statute plainly contemplates a distinct plenary "lawsuit" in respect of which compliance with R. 1:20A-6 is then required. Such a lawsuit, unlike the submission of a proof of claim to the

receiver, is simply not an ancillary legal action to which the exception set forth in R. 1:20A-6 is applicable.

There is no irreconcilable conflict between the statutory right established by N.J.S.A. 15A:14-17 to pursue litigation if a receiver fails to recognize, dispute or otherwise does not resolve a claim, and R. 1:20A-6. The latter Rule, applicable in the specific (and limited) circumstance in which the creditor seeking to pursue that right is an attorney attempting to collect an unpaid fee from a client, requires the attorney first to afford the client the right to elect fee arbitration before proceeding with the lawsuit. Nothing in the statutory provision generally authorizing a plenary lawsuit to pursue claims denied or not resolved by a receiver suggests a legislative intention to supplant or override the more specific procedure that applies when the creditor is an attorney. To conclude otherwise would undermine, without legitimate reason or basis, the intention of R. 1:20A-6 to afford clients the right to arbitrate fee disputes with their attorneys.

There is certainly no conflict, despite the movants' argument to the contrary, between the statutory recognition of a right to a jury trial and R. 1:20A-6. The statute affords a right to a jury trial as to issues "so triable". The Rule affords clients of an attorney the right to arbitration and operates, where the client so elects, to render the issues relating to an attorney's fee not triable by jury.

The present record establishes that the submission by Lowenstein of a proof of claim for unpaid legal fees to the Receiver was an ancillary legal action, the invocation of which did not require a Pre-Action Notice or give rise to a right to arbitrate. But this case, initiated by the filing of a Complaint by Lowenstein against its former client and/or that client's Receiver is a lawsuit within the intendment of R. 1:20A-6. It cannot and should not proceed unless and until Lowenstein

tenders a Pre-Action Notice and Harmony fails to exercise its right to fee arbitration over the ensuing 30 days.

For these reasons, the Court grants Harmony's motion to dismiss Counts One and Two without prejudice in favor of the service of a Pre-Action Notice. It finds the Plaintiff was required to tender such a notice to Harmony as a precondition to its right to proceed against Harmony with this action seeking its attorneys' fees and Lowenstein's failure to provide the Notice deprived the client of its right to elect fee arbitration. The facts that Harmony and the Receiver may otherwise be aware of a client's right to arbitrate or that the Receiver, on Harmony's behalf, (apparently) intends to pursue a malpractice claim against Lowenstein are not grounds to avoid a dismissal as R. 1:20A-6 explicitly places on the attorney the obligation and burden of providing the Notice.

As the Court has determined to grant Harmony's motion on this basis, it need not address the movants' assertion that the present action is premature due to the claimed inaction by the Receiver on the pending notice of claim and/or lack of demand to the Receiver for disposition of Lowenstein's claim. Should Lowenstein serve a Pre-Action Notice without any further action by the Receiver and/or tender of a demand upon him, and should Harmony timely elect arbitration before the Fee Arbitration Committee, the question of the ripeness of Lowenstein's claim in such circumstances would thereby become a matter for consideration by an arbitrator.[2]

B

The Appellate Division in Brown v. Brown, 470 N.J. Super. 457 (App. Div. 2022), confirmed that the litigation privilege operates to cloak in the mantle of privilege statements made

[2] Rule 1:20A-6 authorizes the Fee Arbitration Committee to exercise discretion to decline jurisdiction in a variety of potentially applicable circumstances – including a claimed amount in controversy in excess of $100,000. In the event that Harmony does not elect arbitration within 30 days of receipt of a Pre-Action Notice or Harmony timely elects arbitration, but the Fee Arbitration Committee were to decline jurisdiction, Lowenstein is free to seek reinstatement of Counts One and Two.

by a litigant in a judicial proceeding, including statements made in a complaint. The judicially crafted principle thus bars civil liability for defamation or related claims for harmful statements or communications made in the course of judicial proceedings. But the court held that the privilege does not operate to immunize the act of filing and maintaining a judicial proceeding.

In that case, involving claims alleging tortious interference with prospective economic advantage and malicious prosecution arising from a legal action initiated by the defendant against the plaintiffs, the court affirmed the trial court's order denying judgment for the defendant on the tortious interference claim. In so holding, the court stated:

> The privilege does not protect a party from tortious impact caused by a party's prior suit; it protects only statements made during the prior suit. That is, ..., the protective shield of the litigation privilege applies to 'any communication ... made in judicial or quasi-judicial proceedings ....' It does not protect a litigant from a subsequent suit seeking redress for injuries caused by an adversary's very act of communicating and prosecuting the earlier suit if that suit was frivolous, vexatious or tortious.
>
> [470 N.J. Super. At 463-464 (emphasis in original; citations omitted; quoting Loigman v. Twp. Comm. of Middletown, 185 N.J. 565, 585 (2006)).]

The Brown court observed that the origin of the litigation privilege was the need, "indispensable to the due administration of justice," id. at 464 (quoting Fenning v. S.G. Holding Corp., 47 N.J. Super. 110, 117 (App. Div. 1957)), to enable persons to speak and write freely in the course of legal proceedings "'without the restraint or fear of an ensuing defamation action.'" Ibid. Thus, according to the Brown court, the privilege immunized the defendant Brown from liability for a defamatory or malicious statement made in prior proceedings. "But the privilege doesn't immunize Patricia Brown from an action that alleges her earlier suit tortiously interfered with the stepchildren's contract to sell the Burger King property or other prospective economic advantage. A statement made during that judicial proceeding may be privileged but the suit's commencement and prosecution is not." Id. at 465.

Brown is controlling and on all fours with the circumstances here – at least, on this motion to dismiss. When one examines the Amended Complaint liberally and hospitably, as Printing Mart, 116 N.J. 739 requires, one can read such pleading to assert claims for tortious interference with contract – specifically, the retainer between Lowenstein and Harmony – based on the filing and prosecution of the Bergen County action by Secaucus and its counsel. The pleading, so examined, does not claim, or seek relief based on statements by Secaucus or Modugno in such litigation. As in Brown, any such statements would be protected by the litigation privilege. But the conduct of Secaucus and Modugno in filing and prosecuting a legal action is not.

There is no basis established in this record that the only type of claim that may withstand the scrutiny of a motion to dismiss grounded in the litigation privilege is a claim for malicious prosecution. Moreover, given the essential character of Lowenstein's claims in Counts Three and Four – alleging improper pursuit of litigation intended to prevent Lowenstein from collecting its fees – its theory of tortious interference is highly analogous to a claim for malicious prosecution. And, as noted above, Brown itself involved a claim for tortious interference with prospective advantage.

Whether further development of the record will demonstrate that the essential claim of Lowenstein, in actuality, is predicated on statements of Secaucus and its counsel spoken or written in the Bergen County action, as opposed to conduct in pursuing such litigation, remains to be determined. The Court only determines here that, given the thrust of its factual averments and legal claims asserted in Counts Three and Four of the Amended Complaint, examined in Lowenstein's favor, such claims are not barred as a matter of law by the operation of the litigation privilege.

C

In Catabene v. Willner, 16 N.J. Super. 597, 601 (App. Div. 1951), involving an action to set aside the sale of property that had taken place in the context of a foreclosure action, the court described a collateral attack on a prior judgment as "any attempt in a separate and independent proceeding to question the integrity and validity of any adjudication in another proceeding and challenge its existence as valid and binding." The court concluded that "all collateral attacks on judgments are not barred." Ibid. Instead, a judgment of a prior tribunal, even though vested with jurisdiction over the subject matter and the parties thereto, "may be collaterally attacked when the judgment is procured through fraud of either of the parties or by collusion of both for purposes of defrauding a third person." Ibid.

In Catabene, the court concluded that the plaintiff's action was a collateral attack on the prior foreclosure judgment, as the plaintiff sought to set aside the sale of property that resulted from such judgment. However, the court reversed the dismissal by the trial court of the plaintiff's action, rejecting the contention that the complaint was an improper collateral attack and that the court lacked jurisdiction over the subject matter. The court found that the plaintiff was permitted "to make a collateral attack on the ground that it is fraudulent." Ibid.

In this case, it is not apparent at this stage of the proceeding, as it was in Catabene, that the Plaintiff seeks to attack the integrity or validity of any aspect of the judgment rendered in the Bergen County action. The Plaintiff here, unlike the plaintiff in Catabene, does not explicitly seek to set aside or avoid any order or judgment of the court in such action and, indeed, on this motion disclaims any intention of doing so.

What is more, the Plaintiff alleges in Count Four that Secaucus and Modugno committed a fraud on the court in connection with the court approved transfer of the membership interest in

Harmony to Illicit by falsely representing that a sufficient reserve fund would be established in relation to the obligations of Harmony when, according to the Amended Complaint, they knew this was not true.

When one examines the Order of the Court in the Bergen County action approving the completion of the conversion of Harmony to for-profit status and then approving the sale of assets to Illicit, it is apparent that much of the content of the Order, and an essential purpose of its entry, was to establish that Illicit was to receive the assets free and clear of all claims, liens and encumbrances, and Illicit was not to be considered or deemed a successor to Harmony under any legal theory. The Order explicitly provides that any such claims attach only to the proceeds of the sale and requires the establishment of a reserve fund from such proceeds to satisfy claims.

There is no indication from the present pleading, certainly when examined in Lowenstein's favor, that Lowenstein seeks to undermine or contest the validity of that disposition. It is not seeking to unwind the conversion of Harmony to for-profit status or invalidate the sale of assets to Illicit. Nor does Lowenstein contend that Illicit is responsible, as a successor or otherwise, for Harmony's obligations, including Lowenstein's legal fees.

Instead, the gravamen of Lowenstein's claim, as presently pleaded, is that Secaucus and Modugno procured such outcome by improper means and did so, at least in part, to harm Lowenstein by depriving it of its ability to secure payment for such fees. It claims these parties ensured, by misleading the court, that the transaction would result in an insufficient reserve fund to pay creditors, including Lowenstein. It claims Secaucus and Modugno, and not Illicit or Harmony, bear liability for such conduct.

At this stage of the proceedings, and on a motion to dismiss, the Court is not concerned with the Plaintiff's ability to prove such allegations. It must instead accept as true Lowenstein's

factual averments. Although the Court may consider extrinsic materials – here, the pleadings and orders in the Bergen County action – for a determination that the averments of the Plaintiff's pleading are contradicted by such materials, the Court is unable to reach that conclusion at this time. As noted, the Amended Complaint does not specifically assert the invalidity of the prior legal proceedings or seek to set aside the result of such proceedings, and it avers that the court's actions in the Bergen County action were the product of a fraud on the court committed by Secaucus and Modugno.

In such circumstances, there is no basis supplied for this Court to dismiss the Complaint/proposed Amended Complaint at this juncture as an improper collateral attack on the Bergen County action. The movants are free to renew their application predicated on such grounds at a later time and on the basis of a more complete record.

D

The Court concludes the Amended Complaint adequately alleges facts that, if later proven to be true, could establish a basis for a claim of tortious interference with contract. The pleading alleges that Secaucus and its counsel acted not only to protect Secaucus's interests, but specifically with an intention to harm Lowenstein by depriving it of any opportunity to secure payment of its legal fees from Harmony or its estate. Such actions include (as alleged) intentionally structuring the transaction with Illicit so as to ensure a sufficient reserve fund would not be established, despite representations to the contrary given to the court and the relevant regulatory authority.

Whether the Plaintiff will prove its allegations remains, of course, for another day. Accepting as true the factual averments of the Complaint, as the Court must on this motion, it concludes the Plaintiff has stated viable claims for relief in Counts Three and Four.

E

The Court grants the Plaintiff's cross-motion to amend the Complaint and to interpose the Amended Complaint. The Court is required to grant leave to amend pleadings freely. R. 4:9-1. Limited exceptions to this principle exist in circumstances in which the proposed amendment would be futile and/or the granting of leave to amend would result in prejudice to the opponent. As this case is in a nascent stage, no prejudice to the Defendants would result from granting leave to amend.

Nor is the proposed amendment futile. The gravamen of the proposed amendment relates to Counts Three and Four. As discussed herein, the Court has examined the motion to dismiss as though the Amended Complaint were in place and has determined that Counts Three and Four state viable claims for relief.