ORDER PREPARED BY THE COURT

AMIT SHAH, individually and derivatively
And on behalf of JAI SWAMINARAYAN
MOUNT LAUREL, LLC,

Plaintiffs,

v.

VIJAY SHROFF; HEMA SHROFF;
603 FELLOWSHIP, LLC; MEHUL
KHATIWALA; ANTHONY J. FOSCHI; TUCKER
ARENSBERG, P.C.; John Does 1-10 and XYZ
Corporations 1-10,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CAMDEN COUNTY

CIVIL ACTION

DOCKET NO.: CAM-L-002934-20

(CBLP)

ORDER

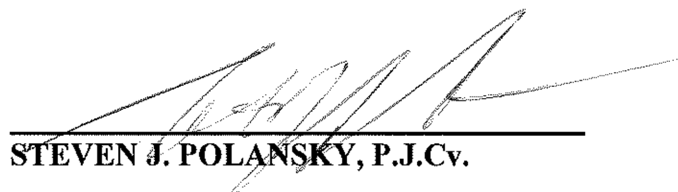
THIS MATTER being brought before the Court by Defendants, Vijay Shroff, Hema Shroff, 603 Fellowship, LLC, Mehul Khatiwala, Anthony J. Foschi and Tucker Arensberg, P.C., for an Order granting summary judgment and dismissing plaintiffs' complaint with prejudice, and the matter having been argued before the Court on December 8, 2022, and for the reasons set forth in the attached Memorandum Decision:

IT IS on this 6th day of April, 2023 **ORDERED** that:

1. The motion is granted in part and denied in part;
2. Plaintiffs' claims in Count 2 of the Complaint against Defendant Vijay Shroff are dismissed;
3. Plaintiffs' claims in Count 5 of the Complaint against Defendants Hema Shroff, Anthony Foschi and Tucker Arensberg, P.C. are dismissed;
4. Plaintiff's claims in Count 7 of the Complaint are dismissed; and

5. In all other respects, the motions for summary judgment are denied.

IT IS FURTHER ORDERED that a copy of the executed Order shall be deemed served on all parties upon its posting on eCourts.



STEVEN J. POLANSKY, P.J.Cv.

__✓__ Opposed

______ Unopposed

"Reasons Set Forth in the Attached Memorandum Decision"

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

AMIT SHAH, individually and derivatively And on behalf of JAI SWAMINARAYAN MOUNT LAUREL, LLC, Plaintiffs, v. VIJAY SHROFF; HEMA SHROFF; 603 FELLOWSHIP, LLC; MEHUL KHATIWALA; ANTHONY J. FOSCHI; TUCKER ARENSBERG, P.C.; John Does 1-10 and XYZ Corporations 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: CAMDEN COUNTY CIVIL ACTION DOCKET NO.: CAM-L-2934-20 (CBLP) **MEMORANDUM DECISION**

Decided: April 6, 2023

Natalie B. Molz, Esquire and Justin E. Proper (pro hac vice), White and Williams, LLP, Attorneys for Plaintiffs, Amit Shah, individually and derivatively on behalf of Jai Swaminarayan Mount Laurel, LLC

Michael J. Lauricella, Esquire, Archer & Greiner, P.C., Attorneys for Defendants, Vijay Shroff, Hema Shroff, Mehul Khatiwala and 603 Fellowship, LLC

Marshall D. Bilder, Esquire, Jason S. Feinstein, Esquire, Eckert Seamans, Attorneys for Defendants, Anthony J. Foschi and Tucker Arensberg, P.C.

STEVEN J. POLANSKY, P.J.Cv.

I. INTRODUCTION

Defendants Vijay Shroff, Hema Shroff, 603 Fellowship, LLC and Mehul Khatiwala move for summary judgment. Defendants Anthony Foschi and Tucker Arensberg, P.C. also move for summary judgment.

II. BACKGROUND

These claims arise out of an offer to purchase a Red Roof Inn located in Mount Laurel, New Jersey. The initial purchase was to have been made by Jai Swaminarayan Mount Laurel, LLC (hereinafter referred to as JSML). Ultimately, the property was purchased by 603 Fellowship, LLC.

The following claims are asserted in plaintiff's Amended Complaint:

> Count I – Usurpation of a Corporate Opportunity against Hema Shroff and Vijay Shroff
>
> Count II – Breach of Fiduciary Duty against Hema Shroff and Vijay Shroff
>
> Count III – Aiding and Abetting Breach of Fiduciary Duty against All Defendants
>
> Count IV – Fraudulent Inducement on behalf of Amit Shah against Hema Shroff and Vijay Shroff
>
> Count V – Tortious Inference with Contract and/or Inducing Breach of Contract against All Defendants
>
> Count VI – Civil Conspiracy against All Defendants
>
> Count VII – Breach of Contract against Defendants Anthony Foschi and Tucker Arensberg, P.C.
>
> Count VIII – Legal Malpractice against Defendants Anthony Foschi and Tucker Arensberg, P.C.
>
> Count IX – Breach of Fiduciary Duty against Defendants Anthony Foschi and Tucker Arensberg, P.C.

In or about August of 2014, plaintiff Amit Shah made an offer for the purchase of the Red Roof Inn in Mount Laurel, New Jersey. The purchase offer for the sum of $4.5 million dollars required a $100,000 non-refundable deposit. The initial deposit was paid for the purchase of the Red Roof Inn by an entity formed for that purpose, Jai Swaminarayan Mount Laurel, LLC.

The initial investor in the purchase was to be Peter Bhi, Shah's brother-in-law who is not a party to this litigation. Bhi brought defendant Foschi in as the attorney for structuring the deal and completing the transaction. By October of 2014, Bhi had decided not to participate in the Red Roof purchase.

The Red Roof property was involved in litigation related to a proposed Walmart on an adjacent tract of land. Foschi as counsel raised serious concerns about the impact that litigation would have on the value and viability of the Red Roof Inn property.

In September 2014, shortly after Bhi had withdrawn from the transaction, Vijay Shroff expressed an interest in participating in the purchase of the Red Roof Inn. Ultimately, an undated Operating Agreement for JSML was executed in February 2015 between Amit Shah and Hema Shroff. A separate Power of Attorney Agreement was executed giving Vijay Shroff the power to act on behalf of Hema Shroff with respect to the Red Roof Inn property and the

operation of JSML. While undated, there is no dispute that the agreement was signed in February 2015.

The Purchase and Sale Agreement between FMW RRI II, LLC and JSML was signed on November 26, 2014. Under the signed agreement, email notifications to Jai Swaminarayan were to be provided to SSN Hotel Management in Wilmington, Delaware. The email address for notification was that of Peter Bhi.

Sometime in February 2015 a dispute arose between Shah and Vijay Shroff. The dispute purportedly involved a request by Shah that Shroff contribute money towards a counsel fee bill. Plaintiff asserts that Vijay Shroff backed out of the deal during the exchange. Shroff asserts that it was plaintiff who backed out of the deal during this exchange. This unresolved dispute involves an issue of fact for a jury.

Following this exchange between Shah and Vijay Shroff, Shah requested that Foschi obtain a refund of the $100,000.00 non-refundable deposit made by JSML. There does not appear to have been a vote by the members of JSML, nor is there any documentation that Shroff withdrew from JSML. Foschi as counsel followed the instructions of Shah and was successful in obtaining a refund of the deposit. On or about February 23, 2015, Foschi received the returned deposit and forwarded the same to Shah with a reduction for counsel fees.

On February 19, 2015, the seller wrote to Foschi asking that he call to discuss whether they could still proceed with the sale. Foschi then sent an email to Vijay Shroff and Shah reading "thanks Vijay. It's up to you if you want to call her but don't let her play you". On February 20, 2015, Peter Bhi wrote asking "what happened". On February 23, 2015, Foschi again wrote to plaintiff Shah asking "do you want the deal?"

On February 24, the seller wrote to Vijay Shroff asking whether he planned to proceed with the deal and reinstate the contract. Khatiwala responded to Sue Eastman on February 24, 2015 indicating they were in agreement to move forward and to reinstate. Subsequently, on April 20, 2015 Khatiwala wrote to Foschi and Vijay Shroff indicating that the lender requires a release from Shah so that he can be reimbursed at closing for the Spring Bank deposit of $7,852.00, the survey fee of $3,000.00 and attorney's fees of $9,093.00.

Foschi then wrote to Shah on April 21, 2015 asking him to confirm the amounts owed, stating "I want to get you paid at closing, but you will have to sign a release attached". In response, Shah signed the release both on behalf of himself and JSML providing as follows:

> Amit Shah and Jai Swaminarayan Mount Laurel, LLC hereby release and discharge, and by these presents do for ourselves, our heirs, executors, administrators, successors and assigns, release 603 Fellowship, LLC, their successors, assigns, members, partners and affiliates, of and from any and all past, present and future actions, causes of action, claims, demands, damages, costs, expenses, suits at law or in equity, of whatever nature, and all consequential damage

> on account of, or in any way growing out of the purchase of the Red Roof Inn, 603 Fellowship Road, Mount Laurel, NJ.
>
> It is further understood, and agreed, that this is the complete release, and that there are no written oral understandings, or agreements, directly or indirectly connected with this Release and settlement that are not incorporated herein. THE UNDERSIGNED HEREBY DECLARES that the terms of this Release have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise of any and all claims.

While the record is not completely clear, a new entity, 603 Fellowship LLC, completed the purchase of the Red Roof Inn. Members of that LLC are identified as Hema Shroff, Kishor Shroff, Ashish Shroff, Sima Patel and Neel Parikh. It is unclear whether this was a continuation of the same deal negotiated by JSML, or a new deal for the purchase of the Red Roof Inn.

The involvement of Khatiwala is unclear. The documents reflect that Khatiwala wrote to Sue Eastman who was representing Red Roof Inn on behalf of Delaware Hotel Group indicating his interest in purchasing the Red Roof Inn if they had not formalized a deal with a buyer. He submitted a letter of intent for the purchase of the Red Roof Inn for $4.75 million dollars on October 6, 2014. On January 22, 2015, Khatiwala wrote to an attorney at the Fox Rothschild firm inquiring about having the attorney review the JSML Operating Agreement on behalf of Vijay Shroff. Shroff is copied on the email.

On March 3, 2015, Sue Eastman on behalf of Red Roof Inn sent an email which read in relevant part:

> Amit is out. New principals are Vijay Shroff and Mike Khatiwala, and the buyer is 603 Fellowship LLC, a Delaware Limited Liability Company.

Khatiwala, despite not being identified as a principal of 603 Fellowship, was involved in the transaction in some aspect. He sent an email to Foschi with a copy to Vijay Shroff on April 20, 2015 asking Foschi to coordinate with Shah so that he could be reimbursed the remaining monies from the Spring Bank deposit, the survey and attorney's fees. This generated an email the following day from Foschi to Shah regarding those monies which was blind copied to Khatiwala and Vijay Shroff.

Plaintiff asserts that Shroff conspired with other defendants to purchase the Red Roof Inn without Shah. Shroff in response asserts that he never backed out of the transaction, and only sought to bring others into the transaction to salvage the purchase after Shah backed out of the agreement. Defendants point to communications with Shah giving him the continuing opportunity to participate in the Red Roof Inn purchase.

Foschi claims he never represented Shah. There is a letter of September 23, 2014 addressed to Peter Bhi, Pinky Bhi and Shah requesting that all three individuals sign a conflict waiver as a result

of the "inherent conflict between each of you regarding the execution of loan documents". The letter goes on to indicate that Foschi "will not be able to represent either of you if an issue arises regarding the loan and the collection of the same".

III. ANALYSIS

Under Rule 4:46-2, summary judgment is appropriate when the pleadings, depositions and other documents or affidavits establish no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the competent evidentiary materials presented, when viewed in a light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Insurance Company, 142 N.J. 520, 540 (1995).

A. Usurpation of Corporate Opportunity

The corporate opportunity doctrine is "one aspect of the general rule that a fiduciary's loyalties may not be divided" Valle v. North Jersey Auto. Club, 141 N.J. Super 568, 573 (App. Div. 1976) (internal citations omitted).

"[I]f there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself. And, if, in such circumstances, the interests of the corporation are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired." Id. at 573–74 (internal citations omitted). "New Jersey subscribes to this view of corporate opportunity." Id. at 574 (internal citations omitted).

The Chancery Court explained the circumstances where a claim for usurpation of corporate opportunity will not exist.

> "(a) wherever the fundamental fact of good faith is determined in favor of the director or officer charged with usurping the corporate opportunity, or (b) where the company is unable to avail itself of the opportunity, or (c) where availing itself of the opportunity is not essential to the company's business, or (d) where the accused fiduciary does not exploit the opportunity by the employment of his company's resources, or (e) where by embracing the opportunity personally the director or officer is not brought into direct competition with his company and its business."

Solimine v. Hollander, 128 N.J. Eq. 228, 246–47 (Ch. 1940).

There is a factual dispute regarding who backed out of the agreement. Defendants argue that during Shah's testimony, he admitted that he backed out of the deal during the phone call with Vijay Shroff. Plaintiffs argue that Shah backed out of the deal only after the Defendants anticipatorily breached the agreement during that phone call, as Vijay Shroff, who has power to deal on behalf of Hema Shroff through a Proxy Agreement, indicated he and Hema Shroff were not going to provide their capital share for the deal to close.

Defendants argue that Vijay Shroff is not a member of Jai Swaminarayan, as Shah held an 18% interest and Hema Shroff held an 82% interest. After the phone call, Shah made it clear that he was no longer interested in pursuing the deal with the Shroffs in any capacity. Defendants further argue that Shah could have found additional investors to complete the deal. Defendants also cite to Sections 2.03, 5.08(a), 6.08, and 10.08 of the Operating Agreement to argue that their conduct was not a breach of the Operating Agreement. These provisions are as follows:

> 2.03 **Purpose and Business of the Company**. The object and purpose of, and the nature of the business to be conducted and promoted by, the Company is engaging in any lawful act or activity for which a limited liability company may be organized under the Act and engaging in any and all lawful activities necessary, convenient, desirable or incidental to the foregoing.
>
> 5.08. **Conflicts of Interest**. **(a) Other Business Opportunities**, Subject to the other express provisions of this Agreement, each Manager of the Company at any time and from time to time may engage in and possess interests in other business ventures of any and every type and description, independently or with others, with no obligation to offer to the Company or any Member or Manager the right to participate therein.
>
> 6.08 **Limitation of Liability of Members**. No Member shall be personally liable for the debts, obligations, losses, liabilities, or expenses of the Company, whether that liability or obligation arises in contract, tort, or otherwise, except as expressly set forth in this Agreement or as may be required by applicable law. No Member shall be required to contribute or to lend any cash or property to the Company except as expressly set forth in this Agreement. No negative balance in a Member's Capital Account shall create any liability for a Member to any third party or to the Company.

Section 10.08 establishes a resolution procedure in scenarios where "Members are not able to agree upon an action or other matter or if any other form of deadlock or dispute..." Further, the parties "shall in good faith attempt to resolve such Dispute promptly and in an amicable manner." Defendants assert that Plaintiff should have followed this procedure rather than deciding to no longer go into business with the Shroffs after one phone call. Neither party sought relief under these provisions until after the completion of discovery.

Defendants further note that Shah was given another opportunity to join in on the deal when he was emailed several times, but he failed to pursue the offer and instead invested in other hotels.

Plaintiffs assert that when Shah backed out of the deal, this was a result of an anticipatory breach by Shroff who had already backed out of the deal by failing to comply with the Operating Agreement. Plaintiffs cite to Section 4.01 of the Operating Agreement, which provides that "[a]ll mandatory additional Capital Contributions that are unanimously approved by the Board shall be made equally by all Member regardless of the Percentage Interests then held by the Members." Because purchasing the Red Roof Inn would require each member to contribute 50% of the capital to close the deal, Shroffs allegedly breached their obligations under the agreement. The court notes that no evidence is presented that any vote occurred.

Plaintiffs also argue that Defendants used JSML resources to purchase the Red Roof Inn by using an identical purchase and sale agreement; the same lawyer; bank financing; franchise agreement; and insurance. Plaintiffs argue that this act exploits JSML's resources.

Plaintiffs attack Defendants' reliance upon Section 5.08 of the Operating Agreement. They argue that the section is titled "Other Business Opportunities," arguing Section 5.08 does not allow Defendants to back out of the existing Red Roof deal under alleged false pretense to pursue the same deal through another company. Plaintiffs also cite to the New Jersey Revised Uniform Limited liability Company Act, which provides that an Operating Agreement is not allowed to diminish the duty of loyalty to cause "intentional infliction or harm on the company or a member." N.J. Stat. § 42:2C-11g(3). They argue any limitation to the duty of loyalty would be unenforceable even if the JSML Operating Agreement attempted to allow such limitation.

Defendants provide no case law to support their position. Plaintiffs only cite to Nicolazzi v. Bone, 564 S.W.3d. 364 (Mo. Ct. App. 2018) and Brady v. Van Vlaanderen, 2016 NCBC 56 (N.C. Sup. Ct. July 21, 2016), which are not binding upon this court. Nicolazzi held that a party may breach an Operating Agreement by failing to provide the required initial capital contribution. The Brady Court granted summary judgment for breach of an operating agreement where a party to the agreement did not contribute the required capital contributions.

There are material factual disputes regarding who backed out of the deal, arguably breaching the Operating Agreement. It is alleged that Vijay Shroff on behalf of Hema Shroff told Shah that he did not want to pursue the deal. This is denied by Shroff. There are questions regarding what authorization, if any, allowed Shah to seek the return of the JSML deposit for the purchase.

B. Breach of Fiduciary Duty

Plaintiff asserts two claims for Breach of Fiduciary Duty, one against Hema Shroff and Vijay Shroff, and the other against Anthony Foschi and Tucker Arensberg, P.C.

The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship. Restatement (Second) of Torts § 874 cmt. a (1979); see In

re Stroming's Will, 12 N.J. Super. 217, 224 (App.Div.), certif. denied, 8 N.J. 319 (1951) (stating essentials of confidential relationship "are a reposed confidence and the dominant and controlling position of the beneficiary of the transaction"); Blake v. Brennan, 1 N.J. Super. 446, 453 (Ch.Div.1948) (describing "the test [as] whether the relationship between the parties were of such a character of trust and confidence as to render it reasonably certain that the one party occupied a dominant position over the other"); Bogert, Trusts and Trustees 2d § 481 (1978) (stating "[t]he exact limits of the term 'fiduciary relation' are impossible of statement. Depending upon the circumstances of the particular case or transaction, certain business, public or social relationships may or may not create or involve a fiduciary character."). The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. Restatement (Second) of Trusts §§ 170, 174 (1959). The fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship. Restatement (Second) of Torts § 874 (1979).

F.G. v. MacDonell, 150 N.J. 550, 563–64 (1997).

a. *Claim against Hema Shroff and Vijay Shroff*

Pursuant to N.J.S.A. § 42:2C-39(b), "[t]he fiduciary duty of loyalty of a member in a member-managed limited liability company includes the following duties:

> i. to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member:
>
> (a) in the conduct or winding up of the company's activities;
> (b) from a use by the member of the company's property; or
> (c) from the appropriation of a company opportunity;
>
> ii. to refrain from dealing with the company in the conduct or winding up of the company's activities as or on behalf of a person having an interest adverse to the company; and
>
> iii. to refrain from competing with the company in the conduct of the company's activities before the dissolution of the company."

N.J.S.A. § 42:2C-39(b).

Defendants argue that Vijay Shroff was not a member of JSML, only Hema Shroff. Shah testified that he did not speak with Hema Shroff and does not know whether she personally acted to prevent the purchase of the Red Roof Inn. Further, Defendants argue that the phone call between Vijay Shroff and Shah does not create a cause of action, as JSML still had the ability to purchase the Red Roof Inn but for Shah terminating the deal. Defendants also assert that Shah could have been part of the purchase of the Red Roof Inn if he read the emails offering him that opportunity with 603 Fellowship.

Plaintiffs argue that the Shroffs violated their fiduciary duty, pursuant to N.J.S.A. § 42:2C-39(b)(3), by backing out of the deal to purchase the property under 603 Fellowship, in competition with JSML. There was a Proxy Agreement that allowed Vijay Shroff to act on behalf of Hema Shroff in matters relating to JSML. In this capacity he was an agent acting on behalf of a disclosed principal. Vijay Shroff represented at deposition that he was a member of JSML (Shroff Dep., Vol. I at 66:12-67:2), and testified he made the business decisions for Hema Shroff (Shroff Dep., Vol. I at 96:18-20). Plaintiffs assert that Vijay's actions bound Hema to any potential breach of fiduciary duty committed by Vijay Shroff. Defendants counter by arguing that any conduct to purchase the Red Roof after Shah stated he would never go into business with Shroff cannot be considered a breach of fiduciary duty.

As a general rule, an agent has no personal liability for conduct taken on behalf of a disclosed principal. Stopford v. Boonton Molding Co., 56 N.J. 169, 188 (1970). An agent does however have personal liability for their own tortious conduct.

Here, at all relevant times it is undisputed that Vijay Shroff was acting on behalf of Hema Shroff pursuant to a written proxy signed by Hema Shroff. To the extent that the conduct of Vijay Shroff alleged by plaintiff involves agreements with JSML, Vijay Shroff would have no personal liability when acting on behalf of his disclosed principal, Hema Shroff. No claim has ever been made by defendant Hema Shroff that the conduct of Vijay Shroff was outside the scope of the rights granted to act on her behalf with respect to JSML.

The JSML Operating Agreement reflects there are only two members of the LLC, namely Amit Shah and Hema Shroff. Because the fiduciary duty arises out of membership in the LLC, a claim for breach of fiduciary duty can only exist against Hema Shroff. Since Vijay Shroff was not a member of the LLC, he owed no fiduciary duty to any other member of the LLC. Under the proxy agreement, Vijay Shroff was authorized to act on behalf of Hema Shroff. An agent acting on behalf of a disclosed principal does not assume any fiduciary duty that may be owed by that principal.

For these reasons, the motion for summary judgment on Count 2 alleging a breach of fiduciary duty will be denied as to Hema Shroff and granted as to Vijay Shroff.

b. *Claim against Anthony Foschi and Tucker Arensberg, P.C.*

"All fiduciaries are held to a duty of fairness, good faith and fidelity, but an attorney is held to an even higher degree of responsibility in these matters than is required of all others." In re Honig, 10 N.J. 74, 78 (1952). This duty is "anxiously guarded by the law" with "stern[] principles of morality and justice." See In re Loring, 73 N.J. 282, 289 (1977) (internal citations and quotations omitted).

An attorney-client relationship, and thereby a fiduciary relationship, can be found in situations where there is no official express or implied relationship. "If the attorneys actions are intended to induce a specific non-clients reasonable reliance on his or her representations, then there is a relationship between the attorney and the third party," and "when courts relax the privity requirement, they typically limit a lawyers duty to situations in which the lawyer intended or

should have foreseen that the third party would rely on the lawyers work." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 180 (2005).

Defendants argue that the Red Roof deal was dead as it pertained to Shah, and that there was a defined split at the time when Shah and JSML withdrew from the transaction before 603 Fellowship sought to purchase the property. Defendants' most convincing evidence is found within Shah's testimony. Shah admittedly told Foschi to "forget the deal" and to "get the money back." (Shah Dep. Tr. Vol. I at 96:9-10; 101:16-18). Shah further testified that "[w]hen Tony got my $100,000 back, it was my assumption that I was out of it and I'm out. I quit. That's it." (Shah Dep. Tr. Vol. III, 26:19-37:4). Defendants assert that Foschi represented that the later release was required for Shah to get the rest of his money back. Defendants point out that Shah never read the release, which kept him in the dark about the continuing Red Roof deal.

Plaintiffs counter this by asserting the Foschi email to Plaintiffs with the attached release creates an issue of fact as to whether Foschi was representing Plaintiffs during the transaction. The release was related to the Red Roof deal where Foschi represented Plaintiffs, and Foschi was also representing Shah in other matters during this time. Further, even if there was no actual attorney-client relationship at the time of the signing of the release, Plaintiffs argue that Foschi's email induced reliance from Plaintiffs. This argument is supported by Shah's deposition testimony, where he testified "I didn't even read the whole [release]. I trusted Tony so I signed it and sent it. I didn't even know what 603 Fellowship was." (Shah Dep., Vol I at 34:5-7).

Plaintiffs' argument is lacking in supporting case law. Plaintiffs cite to an unpublished case to demonstrate that lawyers are prohibited "from taking on a new client where the matter is the same or substantially related to the one involving the former client." (Pl. Opposition, p. 28). Plaintiffs rely on Strauss v. Fost, 209 N.J. Super. 490 (App. Div. 1986) which involved an attorney's failure to respond to a notice of motion to dismiss with prejudice after Plaintiff fired the attorney. The Appellate Court decided that the attorney's failure to act was improper, as the attorney could not demonstrate that Plaintiff would have been able to appear pro se or was otherwise represented for the motion. This is not similar to the situation here.

Defendants' argument that there was a clear break of representation when JSML backed out of the deal is not dispositive on the issue whether Defendants Foschi and Tucker Arensberg, P.C. owed a fiduciary duty to Plaintiffs. The release makes no mention of who 603 Fellowship is or who represented them, nor does Shroff's name appear in the release.

C. Fraudulent Inducement

Plaintiffs allege that "[t]he Shroff defendants fraudulently induced Amit Shah into forming Jai Swaminarayan with them based upon the representation that they would engage Jai Swaminarayan to purchase the Mt. Laurel Red Roof Inn." (Pls. Complaint at ¶ 147).

To establish legal fraud or fraudulent inducement, a Plaintiff must show "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. Banco Popular North America v. Gandi, 184 N.J. 172-73

(2005). The related claim of equitable fraud differs in that "the elements of scienter, that is, knowledge of the falsity and an intention to obtain an undue advantage therefrom are not essential if plaintiff seeks to prove that a misrepresentation constituted only equitable fraud." Jewish Center of Sussex County v. Whale, 86 N.J. 619, 624-25 (1981). A determination of whether the fraud is legal or equitable in nature depends on the relief sought. Marino v. Marino, 200 N.J. 315, 341 (2009).

Misrepresentations that are made with the intent that they be communicated to others in order to induce reliance can form the basis for a fraud claim. Port Liberte Homeowners Assoc., Inc. v. Sordoni Const. Co., 393 N.J. Super. 492, 508 (App. Div 2007). To succeed on a claim of fraud under this theory, a Plaintiff must demonstrate that they were "an intended recipient" of the misrepresentation. Id. at 509. Fraud must be established by clear and convincing evidence. Weil v. Express Container Corp., 360 N.J. Super. 599, 612–13 (App. Div. 2003) (citing Albright v. Burns, 206 N.J. Super. 625, 636 (App. Div. 1986).

"A promise to pay in the future is fraudulent if there is no present intent ever to do so." Van Dam Egg Co. v. Allendale Farms, Inc., 199 N.J. Super. 452 (App. Div. 1985) (internal citations omitted). Futher, "[i]nferring mental state from circumstantial evidence is among the chief tasks of factfinders." Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 228 N.J. 596, 620 (quoting United States v. Wright, 665 F.3d 560, 569 (3d Cir. 2012) (explaining that jury may permissibly rely on circumstantial evidence to reach a verdict on federal conspiracy and fraud charges).

Federal Courts in New Jersey have held that "claims for fraud in the performance of a contract, as opposed to fraud in the inducement of a contract, are not cognizable under New Jersey law." Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co., 226 F. Supp. 2d 557, 564 (D.N.J. 2002). "The conceptual distinction between a misrepresentation of statement of intent at the time of contracting, which then induces detrimental reliance on the part of the promise, and the subsequent failure of the promisor to do what he has promised" impacts how the economic loss doctrine applies. Id. at 563 (quoting LoBosco v. Kure Eng'g Ltd., 891 F. Supp. 1020, 1032 (D.N.J. 1995).

The critical issue regarding economic loss in fraud-in-the inducement claims "is whether the allegedly tortious conduct is extraneous to the contract." Bracco at 564. "[A]n act that is in breach of a specific contractual undertaking would not be extrinsic, but an act that breaches some other duty would be." Id. "With the example of fraud, to break a promise is to breach a contractual duty; to falsely state that one intends to honor a promise is a misstatement of present fact and breaches a separate and extraneous duty not to commit fraud." Id.

Defendants argue that the Plaintiffs' Fraudulent Inducement claim does not assert a claim regarding the Operating Agreement. Rather, the Complaint only claims there was Fraudulent Inducement in the formation of JSML. Defendants assert that JSML was formed before the Shroffs were involved, and Defendants therefore could not have fraudulently induced Shah to form JSML. JSML was originally formed between Shah and his brother-in-law, Bhai. Defendants also argue that Plaintiffs are attempting to change the focus of their claims by arguing that the fraudulent inducement was related to the Operating Agreement.

Plaintiffs argue that the Shroff Defendants did not intend to perform the obligations outlined in the Operating Agreement at the time the Agreement was executed. Plaintiffs assert that Khatiwala offered to purchase the Red Roof Inn at a higher price than what JSML agreed upon with the seller, and Khatiwala's offer came months before the JSML Operating Agreement was executed. Khatiwala then hired a lawyer to review the Operating Agreement for Shroff before it was executed. One month after the execution of the Agreement, the Shroffs allegedly backed out of the deal and shortly thereafter entered a deal with Khatiwala at the lower price that JSML secured. Vijay Shroff claims he does not remember the extent of Khatiwala's involvement during the time between the execution of the Operating Agreement and the new deal involving Khatiwala and the Shroffs.

Here, the Complaint alleges that Shroff fraudulently induced Shah into forming JSML. The Fraudulent Inducement claim within the Complaint makes no mention of the Operating Agreement. JSML was formed prior to any defendant joining as a member, making it impossible for Defendants to have induced the formation of JSML through fraud. That is not the end of the inquiry. While perhaps inartfully phrased in the complaint, the essence of this claim is that Shroff fraudulently induced Shah to bring Shroff in as a member of JSML.

Whether the Shroff Defendants fraudulently induced Shah to sign the Operating Agreement survives Summary Judgment. Plaintiffs' claim rests on circumstantial evidence, and there is sufficient circumstantial evidence in the record for a jury to infer that the Shroff Defendants told Plaintiffs that they would fulfill their contractual obligations in order to induce Plaintiff to execute the Operating Agreement. The timeline of events, from the involvement of Khatiwala prior to the execution of the JSML Operating Agreement to the signing of the Operating Agreement and subsequent deal with Khatiwala, could allow a jury to conclude that Defendants acted fraudulently. A jury not need come to this conclusion, as there are other potential and practical explanations why Khatiwala joined in business with the Shroffs after the Red Roof Inn deal fell through. This is a factual dispute which requires the jury's determination.

D. Tortious Interference with Contract

Plaintiffs assert claims for tortious interference with contract against all defendants. One who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract. Nostrame v. Santiago, 213 N.J. 109, 122 (2013).

Actions for tortious interference with prospective economic advantage safeguard "the right to pursue one's business, calling, or occupation, free from undue influence or molestation. Not only does the law protect a party's interest in a contract already made, but it also protects a party's interest in reasonable expectations of economic advantage." Lamorte Burns & Co. v. Walters, 167 N.J. 285, 305 (2001) (internal citations omitted). To survive a motion to dismiss, a complaint of tortious interference must allege facts that show some protectable right such as a prospective economic or contractual relationship. While the right need not equate with that found in an enforceable contract, there must be allegations of fact giving rise to some reasonable expectation of economic advantage. Printing Mart- Morristown v. Sharp Electronics Corp., 116 N.J. Super.

739, 751-52 (1989). Additionally, "it is fundamental to a cause of action for tortious interference with a prospective economic relationship that the claim be directed against defendants who are not parties to the relationship." Id. at 752 (internal citations and quotation marks omitted).

In determining whether the conduct complained of is tortious, the Restatement offers general guidance, identifying a variety of relevant considerations. See Id. at §767. Those considerations include an evaluation of the nature of and motive behind the conduct, the interests advanced and interfered with, societal interests that bear on the rights of each party, the proximate relationship between the conduct and the interference, and the relationship between the parties. Ibid. These considerations are expressed as a balancing test for courts to apply in evaluating whether an act of interference is improper. MacDougall v. Weichert, 144 N.J. 380, 404-05, 677 A.2d 162 (1996).

Plaintiffs' complaint asserts that "Defendants interfered with the [Purchase Sale Agreement] and the Operating Agreement by instructing Hema Shroff to withhold her vote from approving the acquisition of the ... Red Roof Inn ... and/or preventing Jai Swaminarayan's acquisition of the ... Red Roof Inn." (Pls. Complaint at ¶156). Plaintiffs also allege that if Vijay Shroff is found to not be a member of Jai Swaminarayan, he should be found liable for tortious interference.

Since Hema Shroff was a member of JSML, no action for tortious interference with the contract exists. Such claims exist only against defendants who are not parties to the relationship. Vijay Shroff was not a member of JSML. Rather, he was an agent acting on behalf of a disclosed principal who was the member. Because Vijay Shroff was not a member of the LLC, the court finds sufficient facts exist to create a jury issue with respect to these allegations.

Defendants Foschi and Tucker Arensberg, P.C. assert that there are no facts to support the claim that they advised Hema Shroff to withhold her vote for the purchase of the Red Roof Inn. They argue the record shows that Shah and Vijay Shroff argued over legal expenses, and that Vijay Shroff allegedly told Shah that he was no longer interested in purchasing the Red Roof Inn. Shah responded that he would never do business with Vijay Shroff in the future.

Although the Plaintiffs' Complaint asserts the Tortious Interference claim against all Defendants, Plaintiffs in their Opposition to Attorney Defendants argue that the Tortious Interference claim is brought against Vijay Shroff in the alternative in the event that he is not found to be a member of JSML. Plaintiffs provide no argument supporting this claim against the Attorney Defendants. Therefore, the Tortious Interference claim is dismissed as to Defendants Foschi and Tucker Arensberg, P.C.

Plaintiffs claim that Vijay Shroff tortiously interfered with the Operating Agreement by having Hema Shroff breach the agreement by backing out of the deal and failing to pay 50% of the capital to close the deal. Khatiwala was given the JSML Operating Agreement and allegedly knew that he was inducing a breach through Hema Shroff.

Defendants argue that the purchase agreement between JSML and the Red Roof Seller lapsed on February 10, 2015, asserting JSML would have needed to reinstate the agreement during the time of the alleged tortious interference. Shah allegedly did nothing to reinstate the agreement. Defendants also argue that even if Shroff told Shah that he no longer wanted to proceed with the

deal, there is nothing to suggest that this was intentionally done to interfere with the purchase agreement. They assert no evidence exists that Khatiwala had a conversation with Shah or the Red Roof Seller that would be considered tortious interference.

Plaintiffs' Tortious Interference claims assert Defendants Vijay Shroff and Mehul Khatiwala survive Summary Judgment. There is a factual dispute whether these Defendants engaged in conduct to intentionally interfere with the contract and prevent JSML from purchasing the Red Roof Inn. Shroff's phone call with Shah where Shroff allegedly was no longer interested in purchasing the Red Roof Inn, and Khatiwala having his attorney review the JSML Operating Agreement prior to its execution, is conduct that occurred prior to Shah's backing out of the deal, and could conceivably interfere with the contract. There is the possibility a jury could conclude that Shroff told Shah that he was no longer interested in the deal with the intent that Shah would be unable to move forward with the deal at that time, so that Shroff and Khatiwala could purchase the Red Roof Inn themselves. While there is evidence to suggest that the Defendants did not tortiously interfere, such as Shah's failure to read emails regarding the Red Roof deal revival, issues of fact preclude summary judgment.

E. Civil Conspiracy

A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." Morgan v. Union County Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App.Div.1993), *certif. denied,* 135 N.J. 468 (1994)(quoting Rotermund v. U.S. Steel Corp., 474 F.2d 1139, 1145 (8th Cir.1973)(internal quotations omitted)). "It is enough [for liability] if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them." Banco Popular N.Am. v. Gandi, 184 N.J. 161, 177 (2005) (quoting Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir.1988). Most importantly, the "gist of the claim is not the unlawful agreement, 'but the underlying wrong which, absent the conspiracy, would give a right of action.'" Morgan, supra, 268 N.J. Super. at 364 (quoting Bd. of Educ. v. Hoek, 38 N.J. 213, 238 (1962)); Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177-78 (2005); *see also* Weil v. Express Container Corp., 360 N.J. Super. 599, 614 (App.Div.), *certif. denied,* 177 N.J. 574 (2003). To establish a conspiracy, the plaintiff must demonstrate that there was one plan and that its essential scope and nature was known to each person who is charged with responsibility for its consequences. Morgan, supra, 268 N.J. Super. at 365.

Plaintiffs allege that they were "damaged through lost profits and lost economic advantage as a result" of the conspiracy, and "but for Defendants' actions, JSML would have completed the purchase of the Property." (Pl. Amended Complaint ¶¶ 167–68). Defendants Foschi and Tucker Arensberg, P.C. respond there are no facts to support the conclusory assertions in Plaintiffs' claim. Plaintiffs respond that Foschi's involvement in representing 603 Fellowship, drafting the release, failing to advise Shah that he represented 603 Fellowship and Khatiwala, and blind copying Vijay Shroff and Khatiwala on the April 21, 2015 email is sufficient evidence for a reasonable jury to conclude that Foschi was engaged in a civil conspiracy with other Defendants. The fact that Foschi sent emails to Shah asking if he wanted to remain part of the group purchasing the Red Roof Inn may substantially weaken plaintiff's claim, but does not conclusively preclude the claim.

While the evidence of a civil conspiracy may be weak, there are facts present which could, if presented as represented, create an issue of fact for the jury. First, Khatiwala was somehow involved in the transaction while JSML had entered into an agreement to purchase the Red Roof Inn. Khatiwala also, based on documentation, was involved in putting together the subsequent 603 Fellowship purchase, despite the fact that Khatiwala was not a member of either entity. There are questions of fact involving who terminated the original purchase by JSML. Should a jury find that the transaction was terminated by Shroff, there are questions whether these actions were taken as part of an effort to push Shah out of the transaction and bring others into the transaction. The alleged conduct of Foschi and Tucker Arensberg in obtaining a release from Shah while arguably still his counsel in order to benefit the other defendants likewise raises issues of fact for the jury.

F. Standing of Shah

Defendants, Hema Shroff and Vijay Shroff assert that Plaintiff Shah lacks standing because the alleged injury was to the JSML and not Shah.

Standing is a justiciability requirement that refers to a plaintiff's "ability or entitlement to maintain an action before the court." N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 410 (App. Div. 1997). Standing is a threshold issue that in no way depends on or determines the merits of a plaintiff's claim. Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 417 (1991). Rather, standing "involves a threshold determination of the court's power to hear the case" and must be determined before proceeding to the substantive merits of the case. Id. at 417-18.

For a Court to confer standing, a plaintiff "must have a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and there must be a substantial likelihood that the plaintiff will suffer harm in the event of an unfavorable decision." N.J. Citizen Action, 296 N.J. Super. at 409-10 (citing N.J. State Chamber of Commerce, 82 N.J. at 67). Absent this showing, a Court will not entertain further proceedings, nor can it render an "advisory opinion" on the issue. In re Quinlan, 70 N.J. 10, 34 (1976).

N.J.S.A. § 42:2C-67 outlines the standard for whether a member of an LLC can bring a direct action against another member. Subsection (b) states "[a] member maintaining a direct action under this section shall plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company."

N.J.S.A. § 42:2C-68 provides that "[a] member may maintain a derivative action to enforce a right of a limited liability company if: (a) the member first makes a demand on the other members ... requesting that they cause the company to bring an action to enforce the right, and the managers or other members do not bring the action within a reasonable time; or (b) A demand under subsection (a) of this section would be futile."

Defendants argue any alleged harm was to JSML, which was allegedly prevented from purchasing the Red Roof Inn, not to Shah individually. Further, they argue that Shah fails to demonstrate that it would have been futile to ask JSML to bring this suit.

A shareholder may maintain a direct action against a corporation or its directors if the shareholder suffers a special injury. Strasenburgh v. Straubmuller, 146 N.J. 527, 550-51 (1996); Tully v. Mirz, 457 N.J. Super. 114, 124 (App. Div. 2018). "A special injury exists 'where there is a wrong suffered by [the] plaintiff that was not suffered by all stockholders generally or where the wrong involves a contractual right of the stockholders, such as the right to vote.'" Id. at 550.

In the context of a closely-held corporation, courts have discretion to construe a derivative cause of action as a direct claim if doing so "will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons." *Principles of Corporate Governance: Analysis and Recommendations*, § 7.01 (d) (Am. Law Inst. (1992)). *See also* Brown v. Brown, 323 N.J. Super. 30, 39 (App. Div. 1999) ("adopt[ing] the approach of the ALI in § 7.01(d)").

The factors enumerated in § 7.01(d) follow the holding in Watson v. Button, 235 F.2d 235 (9th Cir. 1956), "which found the usual policy reasons requiring an action that principally alleges an injury to the corporation to be treated as a derivative action are not always applicable to the closely held corporation." *Principles*, § 7.01 cmt. e. In Watson , a multiplicity of actions could not have resulted because there were only two shareholders; each shareholder had agreed to be individually liable for corporate debts; and an individual recovery would not have prejudiced the rights of any other shareholders. 235 F.2d at 237.

Here, plaintiff and Hema Shroff are the only shareholders of the LLC. No other shareholder interest would be harmed by permitting the claims to proceed as direct claims as opposed to derivative claims. Further, it would make no sense to require that plaintiff request a vote of all shareholders since the only other shareholder is an adverse party in this action. Defendant Hema Shroff suffered no loss since she was able to participate in the purchase of the Red Roof Inn.

Here, the special injury requirement is met. For this reason, the Court finds that plaintiff Shah does have standing to pursue his individual claim.

G. Net Opinion

Plaintiffs assert that the opinions of Michael P. Ambrosio, Esquire, plaintiff's legal malpractice expert, constitute impermissible net opinions.

Expert testimony is typically permitted where it would assist the fact finder. State v. One Marlin Rifle, 319 N.J. Super. 359 (App. Div. 1999). New Jersey Rule of Evidence 702 requires an expert witness to be qualified by knowledge, skill, experience, training or education. An expert who is qualified must provide a factual or scientific basis for his or her opinion. Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996). An expert's bare conclusions, unsupported by factual evidence, are inadmissible as a net opinion. Lanzet v. Greenberg, 126 N.J. 168, 186 (1991); Buckelew v. Grossbard, 87 N.J. 512, 524 (1981); Vuocolo v. Diamond Shamrock Chemical Company, 240 N.J. Super. 289, 300 (App. Div. 1990), certif. denied, 122 N.J. 333 (1990).

There must be some evidential support offered by the expert. A standard which is personal to the expert only is a net opinion. Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103 (App. Div. 2001). An expert must explain their methodology and demonstrate that both the factual basis and the methodology are reliable. Townsend v. Pierre, 221 N.J. 36, 55 (2015). This is commonly referred to as providing the why and wherefore to support the opinion rather than providing mere conclusions. Pomerantz Paper Co. v. New Community Corp., 207 N.J. 344, 372-373 (2011). The net opinion rule does not mandate however that an expert organize or support an opinion in any particular manner. Townsend, 221 N.J. at 54. The obligation of the expert remains to identify the factual basis for the conclusions, explain their methodology and demonstrate that both the factual bases and the methodology are reliable. Pierre, 221 N.J. at 55.

N.J.R.E. 703 addresses the foundation for expert testimony. The rule mandates that expert opinion be grounded in "facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts in forming opinions on the same subject." Polzo v. Cty. of Essex, 196 N.J. 569, 583 (2008) (quoting State v. Townsend, 186 N.J. 473, 494 (2006)).

Defendants take issue with the following paragraph in Ambrosio's report:

> Foschi and Tucker Arensberg knowingly or unwittingly allowed 603 Fellowship, its members and Mike Khatiwala to defraud Amit Shah and Jai Swaminarayan out of a lucrative deal. This scheme would not have been possible without Foschi/Tucker Arensberg's active and/or passive assistance.
>
> Ambrosio Report at 17.

Defendants argue that Ambrosio's opinion depends on a false belief that Shah was never informed about Shroff's renewed interest in purchasing the Red Roof Inn. At his deposition, Ambrosio was asked whether his opinion would change if he knew that Shroff informed Shah of Shroff's renewed interest. Ambrosio responded, "Yes. If .. before Shroff went ahead with [Khatiwala] ... and they confer with Shah and he says ... go ahead with the deal, or he was at least told about it, that would change the facts as I understand it." [Ambrosio Dep. at 45:6-19].

Further, Defendants argue that Froom v. Perel, 377 N.J. Super. 298 (App. Div. 2005) requires Plaintiffs to "present evidence that, even in the absence of negligence by the attorney, the other parties to the transaction would have recognized plaintiff's interest and plaintiff would have derived a benefit from it." Id. at 315. Defendants argue that Ambrosio fails to substantively explain how Plaintiffs meet this requirement.

Plaintiffs responded that Ambrosio lists, with factual support, the ethical violations that Foschi committed, and that dispute over the facts underlying an expert report is an issue for the jury. Plaintiffs cite to State v. Freeman, 223 N.J. Super. 92, 116 (App. Div. 1988) to assert that expert reports need not account for all conditions or facts which the adversary considers relevant. The adversary may on cross-examination supply the omitted conditions or facts and then ask the expert if their opinion would be changed or modified. Further, Plaintiffs aver that the malpractice claims

are not based on Foschi's advice given to Shah. Rather, the claims are based on Foschi's failure to run a proper conflict check and inform Shah of this alleged conflict. Plaintiffs also argue that the Ambrosio report does not violate the standard in Froom and explains how Foschi's alleged malpractice proximately led to Plaintiff signing the release and the purchase of the Red Roof Inn by 603 Fellowship.

On its face, it appears that at least a portion of the Ambrosio report may not be based upon facts which are present in this case, or are otherwise contrary to the court's interpretation of the law. In large part, the Ambrosio's opinions are based upon an assumption that Shah would have still proceeded with the transaction despite his cancellation of the same. Whether or not that fact is true however is a question of fact for the jury.

The court will hold a Rule 104 hearing immediately prior to the Ambrosio testimony at trial. More specifically, the court in this decision has concluded that Vijay Shroff owed no fiduciary duty to plaintiffs. The Ambrosio opinion in part relies upon his conclusion that such a duty exists. To the extent it is determined at the Rule 104 hearing that specific opinions require this fact as a predicate, they will be precluded. Additionally, the court notes that while the expert may characterize behavior as a deviation from accepted standards of care, he may not describe the conduct as gross negligence.

H. Legal Malpractice

Plaintiffs assert claims of Legal Malpractice against Anthony Foschi and Tucker Arensberg, P.C.

To sustain a cause of action for legal malpractice, a plaintiff must establish: (1) an attorney-client relationship creating a duty of care, (2) the breach of that duty, and (3) the breach was the proximate cause of the damages sustained by the plaintiff. Jerista v. Murray, 185 N.J. 175, 190-91 (2005). "The most common way to prove the harm inflicted by [legal] malpractice is to proceed by way of a 'suit within a suit' in which a plaintiff presents the evidence that would have been submitted at a trial had no malpractice occurred." Garcia v. Kozlov, Seaton, Romanini, & Brooks, P.C., 179 N.J. 343, 358 (2004). "The 'suit within a suit' approach aims to clarify what would have taken place but for the attorney's malpractice." Ibid. (citing Gautam v. De Luca, 215 N.J. Super. 388, 397 (App. Div. 1987)). "At such a trial, 'plaintiff has the burden of proving by a preponderance of the evidence that (1) he would have recovered a judgment in the action against the main defendant, (2) the amount of that judgment, and (3) the degree of collectability of such judgment.'" Ibid. (quoting Hoppe v. Ranzini, 158 N.J. Super. 158, 165 (App. Div. 1978)).

Attorneys owe a duty of care to their client to "pursue the client's interests diligently and with the highest degree of fidelity and good faith." Gilles v. Wiley, Malehorn & Sirota, 345 N.J. Super. 119, 125 (App. Div. 2001). This duty requires that an attorney "exercise that degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise." St. Pius X House of Retreats v. The Diocese of Camden, 88 N.J. 571, 588 (1982). The attorney-client relationship is fiduciary in nature, and in this capacity as a fiduciary the attorney has a duty to "make full disclosure of all facts within his knowledge which are material for his client to know for the protection of his interest." St. Pius X House of Retreats, supra at 590. Attorneys must keep

their clients "completely and accurately informed" regarding their legal matters. In re Stein, 97 N.J. 550, 563 (1984).

A cause of action cannot be based solely on an alleged breach of a Rule of Professional Conduct, however, "the *R.P.C.s* may be relied on as prescribing the requisite standard of care and the scope of the attorney's duty to the client." Gilles, supra at 125. The breach of an *R.P.C.* is strong evidence of a defendant's failure to conform his conduct to the required standard of care. Id.

The Court in Conklin v. Hannoch Weisman, 145 N.J. 395 (1996) discussed the causation prong of a legal malpractice claim:

> The first and most basic concept "buried" within proximate cause is that of causation in fact. Cause in fact is sometimes referred to as "but for" causation. In the routine tort case, "the law requires proof that the result complained of probably would not have occurred 'but for' the negligent conduct of the defendant..."
>
> The negligent attorney, however, often does not "create" the risk of intervening harm (the attorney does not make the borrower more likely to become insolvent), but rather fails to take the steps that competent counsel should take to protect a client from the risks that ultimately produce the injury." Id. at 417-18

The same facts relevant to Plaintiffs' Breach of Fiduciary Duty claim against Foschi and Tucker Arensberg, P.C. are relevant to the Legal Malpractice claim. An attorney-client relationship can be found in situations where there is no official express or implied relationship. "If the attorneys actions are intended to induce a specific non-clients reasonable reliance on his or her representations, then there is a relationship between the attorney and the third party," and "when courts relax the privity requirement, they typically limit a lawyers duty to situations in which the lawyer intended or should have foreseen that the third party would rely on the lawyers work." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 180 (2005).

Foschi and Tucker Arensberg, P.C. argue that Froom v. Perel, 377 N.J. Super. 298 (App. Div. 2005) is analogous to this case. In both cases, Plaintiffs claim that their attorneys cut them out of a business deal which resulted in the loss of profits, and that their attorneys had a conflict with other clients who were involved in the real estate transaction. Plaintiff in Froom had an expert who claimed the Defendant attorney deviated from accepted standards of care and caused damages. The Froom Court found that the expert did not provide sufficient evidence to support those conclusions. The Froom Court explained "Where... a plaintiff alleges that he suffered a loss in a particular transaction because an attorney failed to take steps to protect his interest, the plaintiff must present evidence that, even in the absence of negligence by the attorney, the other parties... would have recognized plaintiff's interest and plaintiff would have derived a benefit from it." Id. at 315.

Issues of fact exist as to whether the attorney-client relationship with Foschi and Tucker Arensberg, P.C. ended before the attorneys undertook representation of 603 Fellowship. The court is left in the dark concerning whether the work product of JSML was used for the benefit of 603 Fellowship. Issues of fact are presented which could or could not allow plaintiffs to establish a deviation from accepted standards of care and causation.

For example, a jury could conclude that Shah potentially possessed a cause of action for interfering with the contract to purchase the Red Roof Inn by making completion of the purchase impossible. A jury could also conclude that by having Shah sign a release, Shah potentially lost any claims against Shroff, Khatiwala or 603 Fellowship.[1]

I. Aiding and Abetting

Liability for aiding and abetting "is found in cases where one party 'knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.'" State ex rel. McCormac v. Qwest Communications Int'l, Inc., 387 N.J. Super. 469, 481 (App. Div. 2006) (quoting Judson v. Peoples Bank Tr. & Co., 25 N.J. 17, 29, 134 A.2d 761 (1957)). "[T]he mere common plan, design or even express agreement is not enough for liability in itself, and there must be acts of a tortious character in carrying it into execution." Id. at 483 (citing Restatement (Second) of Torts § 876(b) cmt. d (Am. Law Inst. 1979)). To prove such a claim, a plaintiff must show that "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation." Id. at 484-85 (quoting Tarr v. Ciasulli, 181 N.J. 70, 84 (2004)). Furthermore, "A claim for aiding and abetting fraud [thus] requires proof of the underlying tort, that is, the fraud committed by [the principal]." Id. at 484.

Aiding and abetting liability focuses on "whether a defendant knowingly gave substantial assistance to someone engaged in wrongful conduct, not whether the defendant agreed to join the wrongful conduct." Podias v. Mairs, 394 N.J. Super. 338, 353 (App. Div. 2007). Determining how much assistance is considered substantial is fact-sensitive. Ibid.

Where the aiding and abetting claim is based upon a fiduciary duty, plaintiff must establish "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty and (3) a knowing participation in that breach by the defendants who are not fiduciaries." Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 209 (2012 App. Div.).

Plaintiffs allege the following evidence that Khatiwala and Shroff aided and abetted a breach in fiduciary duty toward Plaintiffs:

1. Khatiwala offered to purchase the Red Roof Inn for $4.75 million in October, 2014. The offer was rejected because Red Roof was under contract with Plaintiffs.
2. January, 2015 – Khatiwala retained an attorney on behalf of the Shroffs to review the Jai Swaminarayan Operating Agreement that Foschi drafted.
3. Khatiwala then purchased the property with the Shroffs and 603 Fellowship.

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[1] The court recognizes that if plaintiff is able to establish the claim of fraud or civil conspiracy which includes Foschi and Tucker Arensberg, P.C., the release itself may be void or otherwise unenforceable if it was obtained as part of the conspiracy. On the other hand, if no such fraud is shown and the release is enforced, Shah potentially has a claim against the attorney defendants as a result of the preclusion of any claim against the Shroffs, Khatiwala or 603 Fellowship.

4. Khatiwala received 10% membership of 603 Fellowship through his wife, and Khatiwala's company, Delaware Hotel Group allegedly received hundreds of thousands of dollars in disguised distributions despite the motel having full-time on-site manager. (Shroff Dep., Vol I at 29:7-9, Ex. E (Sima Patel is Mike Khatiwala's wife); 603 Fellowship Operating Agreement, Ex. AA; DHG 2019 Management Fee Invoice, Ex. X; DHG Management Fee Invoice dated Dec. 28, 2020, Ex. Y; 603 Fellowship's management fees paid to DHG and on-site manager from Jan. 2015 – Dec. 2021, Ex. V).

Defendants dispute these allegations. Defendants Foschi and Tucker Arensberg, P.C. argue that since there is fiduciary duty, the Aiding and Abetting claim must be dismissed. No party cites to case law in their argument.

The court finds the evidence presented at the present time is such that a court cannot conclusively determine that no reasonable jury could find conduct constituting aiding and abetting. Accordingly, summary judgment will be denied.

J. Statute of Limitations

Pursuant to N.J.S.A. § 2A:14-1, Plaintiffs had six years after the accrual date to bring their Legal Malpractice claim against Foschi and Tucker Arensberg, P.C. All claims of legal malpractice are governed by the six-year statute of limitations found in N.J.S.A. § 2A:14-1. McGrogan v. Till, 167 N.J. 414, 426 (2001). The purpose of the statute of limitations in a legal malpractice context is to "reduce uncertainty concerning the timeliness of a cause of action." Id. at 425.

A cause of action for legal malpractice accrues when "an attorney's breach of professional duty proximately causes a plaintiff's damages. Grunwald v. Bronkesh, 131 N.J. 483, 492 (1993). Due to the special nature of the relationship between an attorney and his client, the client is often unable to readily detect "the necessary facts underlying a malpractice claim." Id. at 493-94.

The Grunwald Court determined that the discovery rule applies in the legal-malpractice context, and that as a result "the statute of limitations begins to run only when the client suffers actual damage and discovers, or through the use of reasonable diligence should discover, the facts essential to the malpractice claim." Id. at 494.

The discovery rule is an equitable rule designed to protect against harsh results that can arise from mechanical applications of the statute of limitations, against those who "reasonably are unaware that they have been injured" or who "although aware of an injury, do not know that the injury is attributable to the fault of another." Baird v. American Medical Optics, 155 N.J. 54, 66 (1998). The court in Savage v. Old Bridge-Sayreville Medical Group, 134 N.J. 241(1993) discussed "fault" as follows, in pertinent part:

> "Fault" in the context of the discovery rule is simply that it is possible -- not provable or even probable -- that a third person's conduct that caused the injury was itself unreasonable or lacking in due care. In other words, knowledge of fault does not mean knowledge of a basis for legal liability or a probable cause of action; knowledge of fault denotes only facts suggesting the *possibility* of wrongdoing. Thus,

> knowledge of fault for purposes of the discovery rule has a circumscribed meaning: it requires only the awareness of facts that would alert a reasonable person exercising ordinary diligence that a third party's conduct *may* have caused or contributed to the cause of the injury and that conduct itself might possibly have been unreasonable or lacking in due care.
>
> Id. at 248 (emphasis in original)

The discovery rule operates by tolling the start of the running of the statute of limitations until the injured party discovers, or through the exercise of reasonable diligence should have discovered that a cause of action may exist. Martinez v. Cooper Hosp. University Med. Center, 163 N.J. 45, 52 (2000). A cause of action does not accrue until a plaintiff becomes aware that 1) they have suffered an injury and 2) that the injury is attributed to the fault of another. Id. at 53.

Defendants Foschi and Tucker Arensberg, P.C. argue that Plaintiff Shah failed to exercise due diligence and discover the facts needed to bring the legal malpractice claim. Plaintiff's Complaint was filed on April 15, 2021. Defendants argue that the statute of limitations for the legal malpractice claim began to run no later than February 24, 2015, which would thereby bar Plaintiffs' claims against Defendants Foschi and Tucker Arensberg, P.C. Defendants rely upon the February 24, 2015 date because that was the date that Defendant Khatiwala sent an email to Red Roof about moving forward with the deal, and Shah was copied on this email. (Shah Dep. Tr. Vol. I at 148:5-7, 148:11 to 149:8, 150:15 to 151:1). Defendants argue that it was unreasonable for Shah not to question Foschi about the Red Roof deal at any point thereafter. Further, Shah was copied on seven emails regarding the Red Roof deal after Shah's departure, but Shah said he was so angry that he did not read the emails. (Shah Dep. Tr. Vol. II at 85:1-3).

Plaintiffs assert that the claims against Foschi are not related to the Shroffs backing out of the deal. Rather, the claims are asserted to arise from Foschi representing 603 Fellowship and the Shroffs to obtain a release, which was required for the deal to close. Plaintiffs further argue that Foschi held himself out as Plaintiffs' attorney during this period, and used his relationship with Plaintiffs to get him to sign the release. Plaintiffs were unable to discover that Foschi represented 603 Fellowship until this was disclosed to them on January 26, 2021, as the email related to the release had Khatiwala and Shroff blind copied. Plaintiff further denies knowledge of the identity of the principals of 603 Fellowship.

First, while there is some evidence that plaintiffs could have had knowledge that others were attempting to put the deal back together had they read the emails, the significant facts including the involvement of Shroff and Khatiwala were not known. Additionally, plaintiff had no knowledge of the prior involvement of Khatiwala. Even at the time plaintiff signed the release, plaintiff was unaware that this may have actually been a continuation of the same deal rather than a new agreement.

There is further evidence that even at the time the release was sent to plaintiff and signed in April of 2015, plaintiff was still not aware that Shroff and Khatiwala were participants in the 603 Fellowship purchase. There was nothing in the transmittal to suggest to plaintiff that the request for a release by Foschi was related to representation of 603 Fellowship as opposed to representation

of plaintiffs. The court therefore concludes that the legal malpractice claims are not barred by the six year statute of limitations. Summary judgment will be denied on this basis.

K. Breach of Contract Against Attorney

Plaintiffs have asserted a breach of contract claim against Foschi and Tucker Arensberg, P.C. They allege that these defendants violated an implied term in a contract for legal services. More specifically, they assert these defendants implicitly represented they would comply with the attorney's ethical obligation.

The critical issue here is whether a cause of action arises for a breach of contract, particularly in a case such as here where the claim is for lost profits which would constitute property damage. This issue was presented to the Appellate Division in Cortez v. Gindhart, 435 N.J. Super. 589 (App. Div. 2014), cert. denied 220 N.J. 269 (2015). There, claims were brought against defendant attorney alleging legal malpractice, breach of fiduciary duty and negligence. The decision suggests that a breach of contract claim is subsumed within the legal malpractice. Id. at 607-08. The court went on to explain that where there was no attempt to distinguish the facts supporting a legal malpractice claim from the facts supporting a breach of fiduciary duty claim, summary judgment should be granted. Id. at 608.

Here, the facts alleged in support of the two claims are identical. For these reasons, the breach of contract claim contained in Count 7 will be dismissed with prejudice.

L. Release

On April 21, 2015, Foschi sent an email to plaintiff Shah with a blind copy to Khatiwala and Vijay Shroff asking him to sign a release so that he could receive the sum of $19,945.00 at closing. While the email does not designate what the closing related to, for purposes of this motion it is assumed it related to the purchase of the Red Roof Inn. The release itself releases all claims past, present and future of whatever nature in any way growing out of the purchase of the Red Roof Inn. The release is provided to 603 Fellowship, LLC, their successors, assigns, members, partners and affiliates. The release is being given by Amit Shah individually and Amit Shah on behalf of JSML. The individuals receiving the release as members, partners or affiliates of 603 Fellowship are not identified.

"A contract is an agreement resulting in obligation enforceable at law. . . . To be enforceable as a contractual undertaking, an agreement must be sufficiently definite in its terms that the performance to be rendered by each party can be ascertained with reasonable certainty." W. Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958) (citing Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531 (1956)). "The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them." Karl's Sales & Serv. v. Gimbel Bros., 249 N.J. Super. 487, 492 (App. Div. 1991).

"Generally, the terms of an agreement are to be given their plain and ordinary meaning." M.J. Paquet v. N.J. DOT, 171 N.J. 378, 396 (2002). "[W]here the terms of a contract are clear and

unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written." Karl's Sales, 249 N.J. Super. at 493 (citing Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)); see also Cty. of Morris v. Fauver, 153 N.J. 80, 103 (1998).

Courts may not "remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and the detriment of the other." Ibid. (citing James v. Fed. Ins. Co., 5 N.J. 21, 24 (1950)). "A court has no power to rewrite the contract of the parties by substituting a new or different provision from what is clearly expressed in the instrument." E. Brunswick Sewerage Auth. v. E. Mill Assocs., Inc. 365 N.J. Super. 120, 125 (App. Div. 2004).

A party's failure to read or understand a contract does not excuse performance unless fraud by the other party prevented one from reading or understanding the document. Gras v. Assocs. First Capital Corp., 346 N.J.Super. 42, 56 (App.Div.2001) (internal quotation marks and citations omitted), certif. denied, 171 N.J. 445 (2002). See also Riverside Chiropractic Group v. Mercury Ins. Co., 404 N.J.Super. 228, 238(App.Div.2008) ("The fact that plaintiff did not read the contract before [signing it] is immaterial.").

A release is merely a form of contract. It may well be that some or all of plaintiff's claims against defendants Hema Shroff, Khatiwala and 603 Fellowship are barred by the terms of the release. That however presupposes there was no civil conspiracy or fraud involved in obtaining the release. As discussed previously, questions of fact exist with respect to whether there was such a scheme.

If a jury were to find no fraudulent or conspiratorial conduct by the legal malpractice defendants in obtaining the release, then the release would be enforceable but the attorney defendants would potentially have liability if plaintiff can prove their case within a case. On the other hand, if a jury finds the attorney defendants were involved in a conspiracy or fraudulent scheme to obtain a release, then the release would not be enforceable. This however leaves issues of fact to be determined by the jury.

IV. CONCLUSION

For these reasons, the motion for summary judgment is granted in part and denied in part. Summary judgment is granted to plaintiff Vijay Shroff as to the claims in Count 2 of the Complaint, summary judgment is granted to defendants Hema Shroff, Anthony Foschi and Tucker Arensberg, P.C. with respect to the claims in Count 5 of the Complaint, and summary judgment is granted dismissing Count 7 of the Complaint. In all other respects, the motion is denied.