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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17-1170

JOHN W. FINK,
Appellant

v.

J. PHILIP KIRCHNER;
FLASTER/GREENBERG P.C.

[DATE FILED: 06/25/2018]

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 1-12-cv-04125)
District Judge: Noel L. Hillman

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, and FISHER,[1] *Circuit Judges*

The petition for rehearing filed by appellant in

[1]Judge Fisher's vote is limited to panel rehearing only.

the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: June 25, 2018

CJG/cc: John W. Fink
Christopher J. Carey, Esq.

APPENDIX B

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1170

JOHN W. FINK,
Appellant

v.

J. PHILIP KIRCHNER;
FLASTER/GREENBERG P.C.

On Appeal from the United States District Court
for the District of New Jersey
(D.N.J. No. 1-12-cv-04125)
District Judge: Honorable Noel L. Hillman

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 1, 2018

Before: SHWARTZ, KRAUSE and FISHER,
Circuit Judges

(Opinion filed: May 4, 2018)

OPINION*

PER CURIAM

John Fink appeals pro se from the District Court's order granting summary judgment against him in this civil action that he brought against his former attorney, J. Philip Kirchner, and Kirchner's law firm, Flaster/Greenberg P.C. ("Defendants"). For the reasons that follow, we will affirm the District Court's decision.

I.

Because we write primarily for the parties, who are familiar with the background of this case, we discuss that background only briefly. In 2012, Fink filed a pro se diversity action in the District Court, raising several claims relating to Defendants' representation of him in earlier litigation that he had brought in New Jersey state court against Advanced Logic Systems, Inc. ("ALSI"). Fink subsequently retained an attorney in the federal case; that attorney filed an amended complaint on Fink's behalf, raising an additional claim relating to Defendants' prior representation. Fink's attorney in the federal case later withdrew in 2014, and Fink has proceeded pro se since that time.

In 2015, while discovery was still ongoing,

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*This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Defendants moved for summary judgment.[1] In April 2016, the District Court granted that motion in part and denied it in part. Specifically, the District Court concluded that Defendants were entitled to summary judgment on Fink's legal-malpractice claim, explaining that no amount of additional discovery would enable Fink to show a causal link between Defendants' alleged conduct and his alleged harm. As for Fink's claims alleging fraud and a breach of fiduciary duty, the District Court denied Defendants' summary-judgment motion without prejudice to their ability to refile that motion after the close of discovery.

Fink subsequently moved the District Court to reconsider its grant of summary judgment on his legal-malpractice claim. He also obtained permission to file a second amended complaint, which added two spoliation claims.[2] After the close of discovery, Defendants filed another motion for summary judgment. On December 20, 2016, the District Court

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[1]By that time, Fink had withdrawn one of his claims (a claim for unjust enrichment) and the District Court had dismissed another one (a claim for intentional infliction of emotional distress). Those claims are not before us here. *See Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in [his] opening brief, and for those purposes a passing reference to an issue . . . will not suffice to bring that issue before this court.") (ellipses in original) (internal quotation marks omitted); *see also Emerson v. Thiel Coll.*, 296 F.3d 184, 190 n.5 (3d Cir. 2002) (per curiam) (applying waiver doctrine to pro se case).

[2]Those claims alleged that Defendants had concealed and tampered with evidence.

issued an opinion and an accompanying order addressing all of these outstanding issues. Specifically, the District Court granted Fink's motion to reconsider his legal-malpractice claim, but the court once again concluded that Defendants were entitled to summary judgment on that claim based on an absence of causation. The District Court also granted summary judgment in Defendants' favor on all of Fink's remaining claims (including the two new claims raised in his second amended complaint), concluding that those claims, too, failed to show the requisite causal link. In light of these rulings, the District Court directed the District Court Clerk to close the case. This timely appeal followed.[3]

II.

The District Court had diversity jurisdiction over this case pursuant to 28 U.S.C. § 1332(a),[4] and we

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[3]After Fink filed his notice of appeal, he moved the District Court to reconsider its December 20, 2016 decision. The District Court denied that motion on July 25, 2017. Because Fink did not file a second notice of appeal or amend his original notice to include a challenge to the July 25, 2017 order, that order is not before us. See Fed. R. App. P. 4(a)(4)(B)(ii); *Witasik v. Minn. Mut. Life Ins. Co.*, 803 F.3d 184, 191 (3d Cir. 2015). To the extent that Fink requests our permission to amend his notice of appeal to (1) correct a typographical error in that notice, and (2) add a sentence to the notice explaining his challenge to the District Court's December 20, 2016 decision, we hereby grant those requests.

[4]For diversity jurisdiction to lie, there must be "complete diversity" amongst the parties. *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 346 (3d Cir. 2013). "Complete diversity,"

have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's grant of summary judgment. *See Lomando v. United States*, 667 F.3d 363, 371 (3d Cir. 2011). Summary judgment is appropriate when the movants "show[] that there is no genuine dispute as to any material fact and the movant[s] [are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Although the non-movant's evidence "is to be believed, and all justifiable inferences are to be drawn in his favor in determining whether a genuine factual question exists," summary judgment should be granted "unless there is sufficient evidence for a jury to reasonably find for the nonmovant." *Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 826 (3d Cir. 2011) (internal quotation marks omitted).

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which must exist at the time the action is initiated, means that the plaintiff cannot be a citizen of the same state as any of the defendants. See id. Although Fink's District Court pleadings failed to clearly identify the citizenship of each of the parties, it does not follow that the District Court lacked diversity jurisdiction in this case. "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653; *see Kiser v. Gen. Elec. Corp.*, 831 F.2d 423, 427 (3d Cir. 1987) (explaining that § 1653 "permits amendments broadly so as to avoid dismissal of diversity suits on technical grounds"). In this appeal, Fink seeks to amend his District Court pleadings to reflect that he is a citizen of New York, and that Defendants are each a citizen of New Jersey. Defendants do not object to these proposed amendments. We hereby grant Fink's request to amend pursuant to § 1653, and we conclude that, in light of these amendments, the complete-diversity requirement has been satisfied in this case. Accordingly, the District Court did not err in exercising diversity jurisdiction in this case.

As noted above, the District Court granted summary judgment in Defendants' favor with respect to Fink's claims alleging legal malpractice, spoliation, breach of fiduciary duty, and fraud. Each of these claims required Fink to show a causal link between Defendants' alleged conduct and his alleged harm. *See Jerista v. Murray*, 883 A.2d 350, 358-59 (N.J. 2005) (discussing legal-malpractice claim); *Rosenblit v. Zimmerman*, 766 A.2d 749, 757-58 (N.J. 2001) (discussing claim for fraudulent concealment)[5]; *F.G. v. MacDonell*, 696 A.2d 697, 704 (N.J. 1997) (discussing claim for breach of fiduciary duty); *Zorba Contractors, Inc. v. Hous. Auth. of the City of Newark*, 827 A.2d 313, 324 (N.J. Super. Ct. App. Div. 2003) (discussing common-law fraud claim).[6]

As the District Court explained, Fink's claims principally revolved around the following: (1) "Kirchner's alleged lie to Fink that the judge presiding over Fink's state court suit to enforce the settlement

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[5]Under New Jersey law, there is no freestanding tort claim for the intentional spoliation of evidence. *See Rosenblit*, 766 A.2d at 757. Rather, a plaintiff alleging spoliation may seek relief via a claim for fraudulent concealment. *See id.* at 760.

[6]Because New Jersey has the "most significant relationship" to Fink's claims, we agree with the District Court that New Jersey's substantive law governs here. *See Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202, 206 (3d Cir. 2013) ("A federal court sitting in diversity applies the choice-of-law rules of the forum state—here, New Jersey—to determine the controlling law. New Jersey has adopted the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws.") (citations omitted).

agreement with ALSI told the parties to go to arbitration instead of litigating in court"; (2) "Kirchner's alleged alteration to an email presented to the arbitrator and [Kirchner's] alleged lies about his involvement"; and (3) "these two lies caused Fink to lose his claims against ALSI, thwart another settlement with ALSI, and were intended to milk Fink for unnecessary and exorbitant attorney's fees." (Fink's App. at 10.) The District Court determined that, even if one were to assume that "Kirchner lied about the judge's suggestion that Fink should arbitrate his claims," and that "Kirchner submitted an altered document to the arbitrator," Fink had failed to show "how those actions caused him to pay more legal fees than he otherwise would have incurred, or caused his settlement with ALSI to fall through." (*Id.* at 14-16 (footnotes omitted).) The District Court explained that "there are numerous unknown variables as to why Fink's settlement talks with ALSI stalled," and that "[i]t is unknown how costly Fink's state court proceeding could have become had he declined Kirchner's advice [to go to arbitration]." (*Id.* at 14.)

For substantially the reasons provided by the District Court, we agree with its resolution of this case. Because Fink failed to put forth sufficient evidence to allow a jury to reasonably find the requisite causal link between Defendants' alleged conduct and his alleged harm, the District Court did not err in granting summary judgment against him.[7]

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[7]To the extent that Fink argues that the District Court erred in permitting Defendants to file multiple summary-judgment

Accordingly, we will affirm the District Court's December 20, 2016 judgment.[8]

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motions, we find that argument unpersuasive. Federal Rule of Civil Procedure 56 does not limit the number of summary-judgment motions that a litigant may file, and Fink has not cited any authority to support the proposition that there is, in fact, a strict numerical limit. *See also Drippe v. Tobelinski*, 604 F.3d 778, 783 (3d Cir. 2010) ("[W]e accord district courts great deference with regard to matters of case management."). We have considered the remaining arguments in Fink's briefing and conclude that none warrants disturbing the District Court's judgment.

[8]We hereby grant Fink's unopposed motion to seal portions of his brief and supplemental appendix that relate to information and documents that were sealed in the District Court. To the extent that Fink (1) seeks our permission to "re-file one or more of [his] claims," (Fink's Opening Br. 52), and/or (2) asks for any other relief, those requests are denied.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17-1170

JOHN W. FINK,
Appellant

v.

J. PHILIP KIRCHNER;
FLASTER/GREENBERG P.C.

On Appeal from the United States District Court
for the District of New Jersey
(D.N.J. No. 1-12-cv-04125)
District Judge: Honorable Noel L. Hillman

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 1, 2018

Before: SHWARTZ, KRAUSE and FISHER,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on May 1, 2018. On consideration

whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered December 20, 2016, be and the same is hereby affirmed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: May 4, 2018

July 3, 2018 [sic]

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN W. FINK,
Plaintiff,

v.

J. PHILIP KIRCHNER, and
FLASTER/GREENBERG P.C.,
Defendants.

1:12-cv-04125-NLH-KMW

MEMORANDUM OPINION & ORDER

APPEARANCES:

JOHN W. FINK
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APT. 2V
FOREST HILLS, NY 11375
Appearing pro se

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4 HEADQUARTERS PLAZA
PO BOX 1991
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On behalf of Defendants

HILLMAN, District Judge

WHEREAS, on December 20, 2016, this Court granted summary judgment in Defendants' favor on Plaintiff's claims against his lawyer, Defendant J. Philip Kirchner, and Kirchner's law firm, Defendant Flaster/Greenberg P.C., arising out of Kirchner's representation of Plaintiff in 2006-08 on Plaintiff's claims against Advanced Logic Systems, Inc. ("ALSI") concerning Plaintiff's loan to ALSI in 2001 (Docket No. 301, 302); and

WHEREAS, the Court found that Plaintiff's claims for legal malpractice, breach of fiduciary duty, fraud, fraudulent concealment, and spoliation failed, *inter alia*, because he could not prove the essential element of causation for any of his claims; and

WHEREAS, Plaintiff has filed a motion for reconsideration of the Court's decision pursuant to Local Civil Rule 7.1(i) and Federal Civil Procedure Rule 60; and

WHEREAS, a motion for reconsideration may be treated as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e), or as a motion for relief from judgment or order under Fed. R. Civ. P. 60(b), or it may be filed pursuant to Local Civil Rule 7.1(i): The

purpose of a motion for reconsideration "is to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Cafe ex rel. Lou Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). A judgment may be altered or amended only if the party seeking reconsideration shows: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. *Id.* A motion for reconsideration may not be used to re-litigate old matters or argue new matters that could have been raised before the original decision was reached, P. *Schoenfeld Asset Mgmt., L.L.C. v. Cendant Corp.*, 161 F. Supp. 2d 349, 352 (D.N.J. 2001), and mere disagreement with the Court will not suffice to show that the Court overlooked relevant facts or controlling law, *United States v. Compaction Sys. Corp.*, 88 F. Supp. 2d 339, 345 (D.N.J. 1999), and should be dealt with through the normal appellate process, *S.C. ex rel. C.C. v. Deptford Twp Bd. of Educ.*, 248 F. Supp. 2d 368, 381 (D.N.J. 2003); *U.S. v. Tuerk*, 317 F. App'x 251, 253 (3d Cir. 2009) (quoting *Mayberry v. Maroney*, 529 F.2d 332, 336 (3d Cir. 1976)) (stating that "relief under Rule 60(b) is extraordinary,' and may only be invoked upon a showing of exceptional circumstances'"); and

WHEREAS, the Court has thoroughly considered Plaintiff's 28-page moving brief, and his 15-page reply brief, as well as Defendant's opposition brief; and

WHEREAS, the Court finds that Plaintiff's motion does not meet any of the three bases for the Court to reconsider its decision on its December 20, 2016 Opinion, or any other prior Opinions Plaintiff has challenged and believes that his challenge remains unresolved; and

WHEREAS, the Court further finds that the appellate process is the proper context to raise his disagreements with the Court's decisions[1];

Therefore,

IT IS on this 25th day of July, 2017

ORDERED that the Clerk shall reopen the case and shall make a new and separate docket entry reading "CIVIL CASE REOPENED"; and it is further

ORDERED that Plaintiff's motion for reconsideration [316] be, and the same hereby is, DENIED; and it is finally

ORDERED that the Clerk shall re-close the file and make a new and separate docket entry reading "CIVIL CASE TERMINATED."

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[1]Indeed, prior to filing his motion for reconsideration, Plaintiff filed an appeal with the Third Circuit Court of Appeals. (Docket No. 311.) That appeal has been stayed pending this Court's resolution of Plaintiff's motion for reconsideration. (Docket No. 319.)

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

At Camden, New Jersey

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN W. FINK,
Plaintiff,

v.

J. PHILIP KIRCHNER, and
FLASTER/GREENBERG P.C.,
Defendants.

Civil Action No. 12-4125
(NLH)(KMW)

ORDER

For the reasons expressed in the Court's Opinion filed today,

IT IS on this 20th day of December, 2016

ORDERED that plaintiff's motion to establish a deadline [266] be, and the same hereby is, DENIED AS MOOT; and it is further

ORDERED that plaintiff's motion for permission to use certain information related to an attorney ethics investigation [278] be, and the same hereby is, GRANTED IN PART and DENIED IN PART; and it is

further

ORDERED that plaintiff's motion for reconsideration [225] be, and the same hereby is, GRANTED to the extent that the Court has reconsidered its decision to grant summary judgment in favor of defendants on plaintiff's legal malpractice claim, but DENIED as to the substance of plaintiff's motion; and it is further

ORDERED that defendants' second motion for summary judgment [223] and defendants' third motion to dismiss or for summary judgment [270] be, and the same hereby are, GRANTED; and it is finally

ORDERED that the Clerk of the Court shall mark this matter as CLOSED.

At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN W. FINK,
Plaintiff,

v.

J. PHILIP KIRCHNER, and
FLASTER/GREENBERG P.C.,
Defendants.

Civil Action No. 12-4125
(NLH)(KMW)

OPINION

APPEARANCES:

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FOREST HILLS, NY 11375
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On behalf of defendants

HILLMAN, District Judge

This case is related to three other actions filed by plaintiff, John Fink, all of which concern Fink's loan to Advanced Logic Systems, Inc. ("ALSI") in 2001. Those other cases were resolved in the defendants' favor, and the decisions were affirmed on appeal.[1] The current matter concerns Fink's claims against his lawyer, defendant J. Philip Kirchner, and Kirchner's law firm, Flaster/Greenberg P.C., arising out of Kirchner's representation of Fink in 2006-08 on Fink's claims against ALSI that it breached its settlement agreement with Fink.

Fink claims that Kirchner lied to Fink that the judge presiding over Fink's state court suit to enforce the settlement agreement with ALSI told the parties to go to arbitration instead of litigating in court. Fink also claims that Kirchner altered an email submitted to the arbitrator presiding over an arbitration between Fink and ALSI, and that the arbitrator's decision was unfavorable to Fink as a result. The altered email incident also led to a New Jersey Disciplinary Review Board ethics complaint against Kirchner, in which

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[1] *Fink v. EdgeLink*, Civ. A. No. 09-5078 (D.N.J.); *In re Advanced Logic Systems, Inc.*, Civ. A. No. 12-4479 (D.N.J.); *Fink v. Bishop*, Civ. A. No. 13-3370 (D.N.J.).

Fink participated.

Fink also claims that the arbitrator's decision revealed to him that defendants were not working in Fink's best interests, but instead defendants were acting in the interests of the firm to maximize billing. Relatedly, Fink claims that in defendants' attempts to collect payment for their legal fees - totaling over $650,000 - Kirchner tried to extort money from him. Fink claims that when Kirchner was subpoenaed to testify in a case where Fink was suing another law firm over its bills, Kirchner stated that he would only testify on Fink's behalf if Fink paid his outstanding bill to Flaster/Greenberg. Based on these allegations, Fink claims in his original complaint that defendants have committed legal malpractice and fraud, and breached their fiduciary duty to him.

In April 2016, this Court resolved defendants' first motion for summary judgment, which Fink opposed because discovery had not yet been completed. The Court granted summary judgment in defendants' favor on Fink's legal malpractice claims, finding that no amount of discovery would provide facts to dispute the arbitrator's own words that the altered email had no impact on his decision. The Court also found that ALSI's bankruptcy, as well as Fink's three failed lawsuits to recoup money from ALSI or its purported successors and related parties, all demonstrate that even if Fink received the arbitration decision he desired, he would not have been able to collect on that arbitration award.

The Court denied without prejudice defendants' motion for summary judgment as to Fink's fraud and breach of fiduciary duty claims, and permitted defendants to refile their motion after the close of discovery, which was only a few weeks away. After discovery was completed, Fink was granted leave to file a second amended complaint, which added claims for concealment of evidence and tampering of evidence relating to the altered email.

Several motions are currently pending before the Court, including Fink's motion for reconsideration of the Court's decision on his legal malpractice claim [225], and defendants' motions for summary judgment as to the other claims in Fink's complaint [223, 270].[2]

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[2]Prior to Fink filing a second amended complaint, defendants had re-filed their motion for summary judgment that had been denied without prejudice pending completion of discovery. Fink then filed his second amended complaint to add spoliation-type claims, after which defendants moved to dismiss, or obtain summary judgment, on those claims as well. In response, Fink filed a motion [266] asking the Court to direct defendants to answer his second amended complaint, and stay decision on defendants' second motion until all briefing was completed on defendants' third motion. Fink has voluntarily withdrawn this motion, ostensibly because it became moot.

Also pending is Fink's motion [278] seeking permission to use Kirchner's May 20, 2011 letter to the New Jersey District IV Ethics Committee investigator, as well as the entire investigator's report which contains the Kirchner letter, in his oppositions to defendants' motions. Defendants have opposed this motion on the basis of privilege and relevancy. The Court will grant Fink's motion nunc pro tunc as to his reference to the existence of these documents, but deny his motion as to their substance, primarily

For the reasons expressed below, the Court will grant Fink's motion to reconsider its decision to grant summary judgment in favor of defendants on his legal malpractice claim, but after reconsideration, the decision will stand. The Court will also grant defendants' motions for summary judgment in their favor on all other claims in Fink's complaint.

DISCUSSION

A. Jurisdiction

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000.

B. Standard for Summary Judgment

Summary judgment is appropriate where the Court is satisfied that the materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, or interrogatory answers, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986); Fed. R. Civ. P. 56(a).

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because the Court finds them irrelevant to resolution of Fink's claims based on his failure to establish the causation element for each of his claims.

An issue is "genuine" if it is supported by evidence such that a reasonable jury could return a verdict in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if, under the governing substantive law, a dispute about the fact might affect the outcome of the suit. *Id.* In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence "is to be believed and all justifiable inferences are to be drawn in his favor." *Marino v. Industrial Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004)(quoting *Anderson*, 477 U.S. at 255).

Initially, the moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the nonmoving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.* Thus, to withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and affirmative evidence that contradict those offered by the moving party. *Anderson*, 477 U.S. at 256- 57. A party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements. *Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001).

C. Analysis

The Court has noted in its Opinions in Fink's other cases that have arisen out of his relationship with ALSI that it is evident Fink feels he has been continuously victimized by the players involved with the ALSI deal and his attorneys who have represented him. The Court does not doubt Fink's emphatic belief of the wrongs he has suffered, and the Court recognizes his avid advocacy on his behalf. The pervasive problem with Fink's allegations in all of his cases, however, is that they have been entirely speculative. Similarly, in this case, even if the Court were to accept all of Fink's propositions as true, gaping holes exist as to causation for his alleged damages.

Fink's claims against Kirchner center on three events: (1) Kirchner's alleged lie to Fink that the judge presiding over Fink's state court suit to enforce the settlement agreement with ALSI told the parties to go to arbitration instead of litigating in court; (2) Kirchner's alleged alteration to an email presented to the arbitrator and his alleged lies about his involvement; and (3) these two lies caused Fink to lose his claims against ALSI, thwart another settlement with ALSI, and were intended to milk Fink for unnecessary and exorbitant attorney's fees.

An essential element of Fink's legal malpractice[3], breach of fiduciary duty[4], fraud[5], and

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[3]Only where the attorney breaches his duty is he answerable in damages for losses which are proximately caused by his negligence. *Lamb v. Barbour*, 455 A.2d 1122, 1125 (N.J. Super. Ct. App. Div. 1982), *cert. denied*, 93 N.J. 297 (1983) (citations

fraudulent concealment and spoliation[6] claims is causation – that the alleged harms caused Fink his damages. Fink has not demonstrated that he can meet this essential element for any of his claims.

According to Fink, he chose to discontinue his state court suit to enforce the settlement with ALSI in favor of binding arbitration because Kirchner told him that the state court judge presiding over his state court action strongly suggested that the matter should

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omitted).

[4]A fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship. *McKelvey v. Pierce*, 800 A.2d 840, 859 (N.J. 2002) (citations omitted).

[5]The five elements of common law fraud are: (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. *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 367 (N.J. 1997).

[6]The tort of fraudulent concealment may be invoked as a remedy for spoliation where the following elements exist: (1) That the defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation; (2) That the evidence was material to the litigation; (3) That plaintiff could not reasonably have obtained access to the evidence from another source; (4) That defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation; and (5) That plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed. *Rosenblit v. Zimmerman*, 766 A.2d 749, 758 (N.J. 2001).

be resolved in mediation or arbitration. Fink contends that the state court judge never suggested that Fink should consider an alternative dispute resolution, and that Kirchner lied that it was the state court judge's direction, because Kirchner knew that Fink would not agree to arbitration otherwise. Fink claims that this lie cost him hundreds of thousands more in attorney's fees due to the redundancy of what had already been accomplished in the state court action.

Fink also claims that concurrent with this state court suit, he was engaging in settlement negotiations with ALSI, which had not yet filed for bankruptcy and was worth $58 million dollars. When Kirchner submitted the altered email to the arbitrator, Fink claims that ALSI was still solvent. But, when the arbitrator noted the altered email during the arbitration proceedings, Fink claims that he lost credibility with the arbitrator, and it also destroyed his settlement talks with ALSI because ALSI saw this development as a benefit to its opposition to Fink's claims. Soon thereafter ALSI filed for bankruptcy, causing Fink to lose any hope of obtaining any additional settlement money from ALSI.

Fink further contends that Kirchner's lie about the state court judge's suggestion that Fink's case should be arbitrated is proved by billing records that do not corroborate Kirchner's statements that the judge spoke with the parties' attorneys in her robing room during Fink's two days of testimony. Fink also contends that secretly tape-recorded conversations between Fink and Kirchner proves that Kirchner

intentionally altered the email, rather than it simply being a clerical error as Kirchner claimed to the arbitrator.

Fink claims that Kirchner's first lie is legal malpractice that set off a series of events that damaged him, including unnecessary attorney's fees and the loss of a settlement with ALSI. Fink further claims that Kirchner's second lie destroyed his credibility in the arbitration, resulting in the loss of another settlement attempt with ALSI, as well as an unfavorable decision by the arbitrator.

Even if the Court accepts as true that Kirchner lied about the impetus for arbitration and altered an email submitted to arbitration, Fink's claimed damages as a result of Kirchner's actions are too attenuated to be directly linked.

Fink states that he accepted Kirchner's advice to proceed with arbitration because he did not want to inflame the judge, and because Kirchner represented that arbitration would be less costly. Even if the judge had not suggested arbitration, there is no evidence that Kirchner purposely advised that Fink go to arbitration so that he could generate excessive attorney's fees. It is unknown how costly Fink's state court proceeding could have become had he declined Kirchner's advice, and there are no guarantees about how less costly an arbitration may be.

At the same time, there are numerous unknown variables as to why Fink's settlement talks with ALSI

stalled. Simply because ALSI may have had a valuation of $58 million does not ensure that whichever path Fink ultimately chose – state court, arbitration, or settlement – it would have resulted in a check in Fink's hand. Indeed, Fink had instituted the state court action because ALSI had allegedly breached a prior settlement with Fink and failed to pay him all of the agreed-upon settlement amount.

With regard to the arbitration, even accepting as true that Kirchner intentionally altered the email, as the Court found in its prior Opinion, that fact did not affect the arbitrator's decision – as confirmed by the arbitrator himself. To the extent that Fink claims that the altered email also blew up any settlement with ALSI while it still remained solvent, that premise fails for the same reason as the settlement talks during the state court proceedings.

In short, even if Kirchner lied about the judge's suggestion that Fink should arbitrate his claims,[7] and

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[7]Fink's proofs in this regard are threadbare. The two attorneys involved in the state court action to enforce Fink's purported settlement agreement with ALSI – Kirchner and ALSI's counsel – both testified that the state court judge recommended arbitration instead of continuing the state court action. That Kircher's billing records do not specifically identify that conversation, or that Kirchner cannot now recall the exact time that conversation took place in May 2007, does not prove Fink's belief that Kirchner lied about the judge's recommendation. Fink takes issue with the fact that the transcripts of the court hearings do not include the judge's request to meet with counsel in her robing room, and that 25 minutes is insufficient to support Kirchner's billing records that provide for "rest of the day"

even if Kirchner submitted an altered document to the arbitrator,[8] Fink has not shown how those actions caused him to pay more legal fees than he otherwise would have incurred, or caused his settlement with ALSI to fall through.[9] These failures are fatal to Fink's

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settlement talks and a conference with the judge. These contentions are unpersuasive. Transcripts often do not record off-the-record comments by a judge or the parties, including the judge's request to hold an off-the-record meeting with the lawyers in her chambers. Fink's premise – shown through his E-Z Pass record - that the 25 minutes between the end of court and his departure from the courthouse was not enough time for the lawyers to meet with the judge, or constitute the "rest of the day" for billing purposes, is Fink's own unsupported perception.

[8]As for the secret recordings, the excerpts from Fink's recordings of several of his conversations with Kirchner are somewhat ambiguous. While it appears from the recordings that Kirchner admitted to editing a document for strategic reasons, what the document was and why the alteration helped is unclear. Defendants argue the reference could be any number of documents created as part of the litigation and, perhaps tellingly, Fink has provided only a few small pieces of his and Kirchner's conversations that occurred on October 6, 13, and 29, 2008, without the benefit of a broader context for each excerpt. The pieces of their conversations Fink does provide do not specifically and directly show Fink asked Kirchner about the altered email.

[9]In his briefing, Fink takes issue with several iterations of the same email produced in discovery, including the presence or absence of his email address "banner," and different handwriting on an exhibit tab when the change in handwriting in a series of exhibits does not make sense. He also explains how easy it is to alter such an email. These differences, and the ease in which they can be done, Fink argues, shows that Kirchner changed the email and has manufactured the same document as a cover-up for his lies. Again, even if we assume, as we do, the submission of an

claims.

Fink has the burden of proving his fraud, breach of fiduciary duty, and spoliation claims, in addition to the previously dismissed, but currently reconsidered, malpractice claims. Each of these claims requires sufficient evidence to demonstrate that Fink was harmed by those alleged events. The Court does not discount the serious accusation that a lawyer lied to his client and intentionally submitted an altered document to a tribunal, but the record contains only suspicion, innuendo, hypothesis, and unsupported suppositions rather than any material issues of disputed fact.

CONCLUSION

The Court has reconsidered Fink's legal malpractice claim now that discovery is complete, as requested by Fink, but the Court finds its decision to grant summary judgment in defendants' favor on that claim remains unchanged. The Court also finds that defendants are entitled to summary judgment on the remaining claims in Fink's complaint for fraud, breach of fiduciary duty, concealment of evidence and tampering with evidence. Other than presenting his own beliefs, Fink has not demonstrated through competent evidence that Kirchner's alleged deceit was motivated by his desire to charge Fink with unnecessary and excessive fees, and caused Fink to lose his claims against ALSI or a settlement with

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altered email, Fink fails to present a triable issue of causation.

ALSI. Absent an ability to prove this essential element of each of his claims, Defendants are entitled to summary judgment.

An appropriate Order will be entered.

Date: December 20, 2016
At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN W. FINK,
Plaintiff,

v.

J. PHILIP KIRCHNER, and
FLASTER/GREENBERG P.C.,
Defendants.

Civil Action No. 12-4125
(NLH)(KMW)

ORDER

For the reasons expressed in the Court's Opinion filed today,

IT IS on this 5th day of April, 2016

ORDERED that defendants' motion for summary judgment [159] be, and the same hereby is, GRANTED IN PART AND DENIED IN PART; and it is further

ORDERED that plaintiff's cross-motion "to (A) dismiss defts' summary judgment motion or (B) stay defts' summary judgment motion or (C) grant pltf's

request for additional time to file his opposition to defts' summary judgment motion" [167] be, and the same hereby is, GRANTED IN PART AND DENIED IN PART.

At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN W. FINK,
Plaintiff,

v.

J. PHILIP KIRCHNER, and
FLASTER/GREENBERG P.C.,
Defendants.

Civil Action No. 12-4125
(NLH)(KMW)

OPINION

APPEARANCES:

JOHN W. FINK
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APT. 2V
FOREST HILLS, NY 11375
Appearing pro se

ANTHONY LONGO
PATRICK B. MINTER
CHRISTOPHER J. CAREY
GRAHAM CURTIN, PA
4 HEADQUARTERS PLAZA

PO BOX 1991
MORRISTOWN, NJ 07962
On behalf of defendants

HILLMAN, District Judge

Presently before the Court is the motion of defendants for summary judgment in their favor on plaintiff's legal malpractice and other related claims. Also pending is plaintiff's motion seeking, essentially, the stay of defendants' summary judgment motion until the close of discovery, at which time plaintiff states he will file his opposition.[1] For the reasons expressed below, the parties' motions will be granted in part and denied in part.

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[1]Plaintiff argues that defendants' motion to dismiss filed at the inception of this case constitutes defendants' "first summary judgment motion," and that their attempt now to obtain summary judgment on the same three claims they tried to dismiss earlier is improper duplication. Plaintiff also argues that defendants cannot assert different legal arguments for the dismissal of his claims. Despite plaintiff's displeasure with defendants filing multiple motions, defendants' actions are not improper or injudicious. The procedural postures and legal standards for a motion to dismiss filed pursuant to Federal Rule Civil Procedure 12(b)(6) and a motion for summary judgment filed pursuant to Rule 56 are different, and each serves a discrete litigation purpose. Moreover, nothing in the Rules precludes a party from filing successive motions to dismiss or summary judgment motions, if justified by the circumstances of the case, *see* Fed. R. Civ. P. 56(a), and nothing in the Rules precludes a motion for summary judgment from being filed while discovery is ongoing, *see* Fed. R. Civ. P. 56(b), although the Rules provide relief for an opposing party to object to a pre-closed-discovery summary judgment motion, *see* Fed. R. Civ. P. 56(d).

BACKGROUND

Plaintiff, John Fink, now appearing pro se even though he began this case represented by counsel, is no stranger to this Court. The current matter is related to three other actions filed by plaintiff, all of which concern plaintiff's loan to Advanced Logic Systems, Inc. ("ALSI").[2] When deciding defendants' motion to dismiss in this case, the Court summarized plaintiff's claims, which are restated here for reference:

In 2001, Fink had been a financial consultant for ALSI, but he eventually entered into a series of credit agreements with ALSI to provide working capital to the company's operations. Plaintiff provided over $500,000 to ALSI, and in return, he received rights to purchase a certain amount of stock in ALSI. The financial condition of ALSI deteriorated, litigation between plaintiff and ALSI ensued in March 2003, and eventually the parties settled in March 2006. After paying only half of the million dollar settlement to plaintiff, ALSI filed for bankruptcy in 2008. In order to recoup the $60 million plaintiff believes he is owed, plaintiff attempted to collect the debt from EdgeLink, Inc., an entity plaintiff claimed was a

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[2] *Fink v. EdgeLink*, Civ. A. No. 09-5078 (D.N.J.); *In re Advanced Logic Systems, Inc.*, Civ. A. No. 12-4479 (D.N.J.); *Fink v. Bishop*, Civ. A. No. 13-3370 (D.N.J.). Fink was unmeritorious in all of these cases, and Fink appealed the Court's decisions. The Third Circuit Court of Appeals affirmed this Court in all three cases.

successor-in-interest to ALSI.[3] Plaintiff also sought to reopen ALSI's bankruptcy in order to allow the trustee to investigate what plaintiff contended was a theft of ALSI's missing assets.[4]

In this lawsuit, plaintiff has brought claims against the lawyer, J. Phillip Kirchner, and his law firm, Flaster/Greenberg, P.C., which represented plaintiff in his attempts to complete his settlement agreement with ALSI, and in plaintiff's efforts to enforce his rights under a warrant agreement to purchase shares of ALSI stock.[5] In defendants' efforts to assist plaintiff with his legal matters, plaintiff claims that Kirchner altered an email submitted to the arbitrator presiding over an arbitration between plaintiff and ALSI. Plaintiff claims that the arbitrator's decision was affected, to plaintiff's detriment, by the issues concerning the altered email. The altered email incident also lead to a New Jersey Disciplinary Review Board ethics complaint against Kirchner, in which plaintiff participated.

Plaintiff also claims that the arbitrator's

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[3]Judgment was entered in EdgeLink's favor on summary judgment. (*See Fink v. EdgeLink*, Civ. A. No. 09-5078 (D.N.J.).)

[4]This Court denied Fink's appeal of the bankruptcy court's order denying his request to reopen ALSI's bankruptcy. (*See In re Advanced Logic Systems, Inc.*, Civ. A. No. 12-4479 (D.N.J.).)

[5]Fink also claims that defendants assisted in his appeal of the summary judgment entered in favor of AFFLINK, which was an entity Fink sued along with ALSI in his 2003 lawsuit.

decision revealed to him that defendants were not working in plaintiff's best interests, but instead defendants were acting in the interests of the firm to maximize billing. Relatedly, plaintiff claims that in defendants' attempts to collect payment for their legal fees - totaling over $650,000 - Kirchner tried to extort money from plaintiff. Plaintiff claims that when Kirchner was subpoenaed to testify in a case involving plaintiff and another law firm, Kirchner stated that he would only testify on plaintiff's behalf if plaintiff paid his outstanding bill to the firm.[6] Based on these allegations, plaintiff claims that defendants have committed legal malpractice and fraud, and breached their fiduciary duty.[7]

Defendants have moved for summary judgment in their favor on all of plaintiff's claims. Plaintiff has opposed defendants' motion, primarily on the basis that discovery should be completed prior to the Court's resolution of defendants' motion.

DISCUSSION

A. Jurisdiction

This Court has jurisdiction over this matter

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[6]Fink's complaint contains passages of what Fink claims are transcriptions of secretly recorded conversations between Fink and Kirchner.

[7]In resolving defendants' motion to dismiss, the Court allowed all of plaintiff's claims to proceed, except for his intentional infliction of emotional distress claim.

pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000.

B. Standard for Summary Judgment

Summary judgment is appropriate where the Court is satisfied that the materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, or interrogatory answers, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986); Fed. R. Civ. P. 56(a).

An issue is "genuine" if it is supported by evidence such that a reasonable jury could return a verdict in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if, under the governing substantive law, a dispute about the fact might affect the outcome of the suit. *Id.* In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence "is to be believed and all justifiable inferences are to be drawn in his favor." *Marino v. Industrial Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004)(quoting *Anderson*, 477 U.S. at 255). Initially, the moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met this

burden, the nonmoving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.* Thus, to withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and affirmative evidence that contradict those offered by the moving party. *Anderson*, 477 U.S. at 256-57. A party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements. *Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001).

C. Analysis

Defendants argue that plaintiff's legal malpractice claim fails for two reasons. First, defendants argue that no facts support a claim that the altered email affected the outcome of the arbitration. Second, defendants contend that plaintiff cannot prove any damages relating to the outcome of the arbitration. The Court agrees with defendants on both points.

Proximate cause is an essential element of a legal malpractice claim. *Atl. Research Corp. v. Robertson, Freilich, Bruno & Cohen, L.L.C.*, No. A-2286-13T4, 2015 WL 10322006, at *9 (N.J. Super. Ct. App. Div. Feb. 22, 2016) (citing *Jerista v. Murray*, 883 A.2d 350, 359 (N.J. 2005)). The test of proximate cause is satisfied where the negligent conduct is a substantial contributing factor in causing the loss. *Lamb v. Barbour*, 455 A.2d 1122, 1125 (N.J. Super. Ct. App. Div. 1982), *cert. denied*, 93 N.J. 297 (1983)

(citations omitted). The burden of proof is on the client, and it must be carried by the presentation of competent credible evidence which proves material facts - it cannot be satisfied by conjecture, surmise or suspicion. *Id.* Moreover, only where the attorney breaches his duty is he answerable in damages for losses which are proximately caused by his negligence. *Id.*

Three years after the arbitration decision, plaintiff, through counsel, filed a motion to reopen the arbitration.[8] In his motion to reopen, plaintiff argued that the decision of the arbitrator, Judge Serpentelli, "made explicit reference to the altered email in a manner reflecting adversely on Plaintiff's credibility, [and] it is only reasonable that the Plaintiff have an opportunity to submit evidence not available at the time of the arbitration which would conclusively prove Plaintiff's noninvolvement with the alteration of the exhibit and should lead to a different result in the Arbitrator's weighing of the evidence." (Docket No. 159-25 at 4.) Plaintiff requested that he "should be given the opportunity to demonstrate his blamelessness in connection with the email alteration so as to dispel the manner in which this incident reflected adversely on the Plaintiff in the decision of this case." (*Id.* at 2.)

Judge Serpentelli rejected plaintiff's motion to reopen, explaining:

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[8]The arbitrator, Judge Serpentelli, issued his decision on July 2, 2008. Plaintiff filed his motion to reopen on May 2, 2011.

> I am thoroughly satisfied that the alteration of Exhibit P- 86 and the passing comment made to that document at page 25 of the Arbitrator's Decision was of no significance in the result reached by the Arbitrator. As to the altered document, the Arbitrator reached no conclusion regarding who changed it. Therefore, it cannot be assumed that the fact of the alteration caused a negative credibility inference with regard to the plaintiff. In any event, the decision was based on the overarching failure of the plaintiff to carry the burden of proof which was unaffected by the circumstance upon which the motion to reopen was based.

(Docket No. 159-26 at 2.)

The arbitrator's denial of plaintiff's motion to reopen the arbitration is fatal to plaintiff's legal malpractice claim. Even if Kirchner altered the email as plaintiff claims, the arbitrator did not place any significance on the email in his decision. Plaintiff may wholeheartedly believe that the arbitrator's decision was affected by the implication that he was involved in the alteration of an email. Plaintiff cannot, however, provide any facts to dispute the arbitrator's own words to the contrary. No amount of discovery will change that result.

Additionally, ALSI's bankruptcy, as well as

plaintiff's three failed lawsuits to recoup money from ALSI or its purported successors and related parties, all demonstrate that even if plaintiff received the arbitration decision he desired, he would not have been able to collect on that arbitration award. Consequently, because no amount of additional discovery would change this outcome, the Court finds that defendants are entitled to summary judgment on plaintiff's claim of legal malpractice arising out of the arbitration.

Defendants have also moved for summary judgment on plaintiff's breach of fiduciary duty and fraud claims related to plaintiff's claims that they tried to extort exorbitant attorneys' fees by intentionally pursuing certain litigation tactics. Defendants argue that the chronology and content of their representation of plaintiff shows no facts support a finding that they breached their fiduciary duties[9] to plaintiff, or committed fraud.[10]

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[9]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. The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. Accordingly, the fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship. *McKelvey v. Pierce*, 800 A.2d 840, 859 (N.J. 2002) (citations omitted).

[10]The five elements of common-law fraud are: (1) a material misrepresentation of a presently existing or past fact; (2)

Although close to completion, discovery is still ongoing, and plaintiff has argued that he is unable to present his opposition to defendants' motion without completed discovery. Thus, defendants' motion for summary judgment is substantively unopposed by plaintiff.

Federal Civil Procedure Rule 56(d) addresses the situation when a nonmovant cannot present facts essential to justify his opposition to a summary judgment motion. In that situation, a court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order. Fed. R. Civ. P. 56(d).

Because the Court would like to consider plaintiff's proffered evidence in support his breach of fiduciary duty and fraud claims in order to fully consider the merits of defendants' summary judgment motion, and because discovery will be completed in a few weeks, the Court will deny defendants' motion as it relates to the breach of fiduciary duty and fraud claims. The Magistrate Judge's most recent discovery order directed that dispositive motions shall be filed with the Clerk of the Court no later than April 22, 2016. (Docket No. 215.) Accordingly, defendants shall refile their summary judgment motion as to plaintiff's

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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. *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 367 (N.J. 1997).

breach of fiduciary duty and fraud claims,[11] and plaintiff's opposition, and defendants' reply, shall be due in accordance with the Local Rules. *See* Local Civ. R. 7.1 and 78.1(a).

CONCLUSION

For the reasons expressed above, defendants are entitled to summary judgment in their favor on plaintiff's legal malpractice claims. Defendants' motion for summary judgment as to plaintiff's breach of fiduciary duty and fraud claims will be denied without prejudice. The parties are directed to comply with the Magistrate Judge's most recent discovery order and the Local Rules with regard to the filing of subsequent dispositive motions.

An appropriate Order will be entered.

Date: April 5, 2016
At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

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[11]So as to not waste defendants' resources, defendants may simply refile their current motion, edited to remove their argument as to plaintiff's legal malpractice claims. Defendants are not precluded, however, from filing an updated or supplemented version of their motion as to plaintiff's breach of fiduciary duty and fraud claims if they wish to.