NO. 18-399

In the Supreme Court of the United States

In re John W. Fink

JOHN W. FINK, Petitioner,

v.

J. PHILIP KIRCHNER & FLASTER/GREENBERG, PC, Respondents.

REPLY BRIEF FOR THE PETITIONER ON PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I am requesting the U.S. Supreme Court, the court of last resort, to review this petition even though it focuses on various types of judicial errors – an area this court usually does not address – by a district court when it granted summary judgment under Federal Rule of Civil Procedure 56. In this instance, the errors – such as the court independently introducing grounds and alleged undisputed facts *without* prior notification (5 examples presented below) – are so numerous (14 examples in total presented below), fundamental and pervasive so as to constitute overwhelming proof that the lower courts improperly denied me of my constitutional right to trial by jury. In addition, the district court ignored grounds and evidence supporting my claims, as well as ignored the Respondents' own contradictory statements and testimony.

The court of appeals affirmed the district court's decision "[f]or substantially the reasons provided by the District Court." (App. p. 9a.) Its brief, one-paragraph analysis consists solely of quotes from the district court opinion.

Therefore, the questions for this court are as follows:

- Because of the numerous, fundamental and pervasive errors and omissions committed by the district court, and because the court of appeals affirmed the district court's decision for substantially the same reasons, did the court of appeals abdicated its responsibility to

conduct a plenary review as required and thereby improperly deny me of my constitutional right to trial by jury?

- Because of the numerous, fundamental, pervasive errors and omissions committed by both lower courts, did they improperly deny me of my constitutional right to trial by jury?

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INTRODUCTION

My petition focused on 14 examples of the district court's fundamental and pervasive judicial errors under Rule 56, five of which consisted of the court independently introducing grounds and alleged undisputed facts *without* prior notification. My petition also presented grounds and evidence supporting my claims that both lower courts ignored, as well the Respondents' own self-contradictory statements and false testimony. Together, they support my contention that I have been improperly denied my constitutional right to trial by jury.

Unable to refute by petition as written, Respondents reverted to the same successful strategy they employed in opposing my appeal: they rewrite my case, ignoring almost all of the evidence and arguments contained in it, without providing any explanation or justification for doing so. Despite their rewrite, Respondents' opposition still fails to effectively oppose my petition.

As I show below, Respondents repeatedly cite findings in the December 20, 2016 District Court Opinion to support their arguments, thereby eliminating the need for them to provide any independent supporting evidence, statute, or case law. In essence, Respondents, in an effort to argue that the district court did not error in rendering its decision, used erroneous findings by the court as support – a blatant use of circular logic which fatally flaws their opposition.

Importantly, for the first time Respondents admit (though probably unintentionally) that at least one dispute of a material fact exists in my fraud claim. (Opposition Brief, p. 10-11; *also see* Section C, herein.)

Also, in order to challenge my fiduciary duty claim, Respondents introduce a seemingly new argument which they had not used in their underlying motions for summary judgment. However, unmentioned by them, the district court has already rejected this argument.

For all the forgoing reasons and the additional ones detailed below, my petition to remand the matter back for trial in the district court should be granted.

ARGUMENTS

A. Respondents Rewrite the Questions Presented and Eliminate Any Mention of the Constitutional Provision Involved.

Respondents reduced the Questions Presented (repeated herein for ease of review) to only one – whether the third Circuit of Appeal "erred in affirming the United States District Court's decisions" – and deleted (i) any reference to the numerous, fundamental and pervasive errors made by the district court and the court of appeals in rendering their decisions and (ii) that, as a result, both courts deprived me of my constitutional right to a trial by jury. They also eliminated the constitutional provision involved – U.S. Constitution,

Amendment VII. Significantly, Respondents provided neither a basis, nor an explanation, for these rewrites. As such, this court should ignore them.

B. Respondents Incorrectly State My Petition Lacks any Legal or Factual Justification.

Respondents allege that my petition "is devoid of any legal or factual basis to disturb the District Court's original ruling." (Opposition, p. 5.) However, they do so without addressing almost any of the 14 examples of fundamental and pervasive errors I presented in my petition. (*Id.*) As such, almost all of these Rule 56 errors stand unchallenged. Significantly, as to the 5 examples which allege the district court independently introducing grounds and alleged undisputed facts *without* prior notification to the parties, Respondents did not dispute any of them.

As to the few examples upon which Respondents did offer some opposition, Respondents either (i) ignored critical portions of the errors, (ii) applied fatal circular logic by citing the December 20, 2016 District Court Opinion, (iii) offered misleading/erroneous facts, or (iv) misstated the law.

In addition, Respondents failed to address most of the grounds and supporting evidence which the lower courts ignored. Examples include (i) the Respondents' flipflopping statements as to whether Kirchner advise to me proceed to arbitration; (ii)

Kirchner *coercing* me into accepting arbitration;[1] (iii) Kirchner sabotaging my arbitration case; (iv) Kirchner engineering the P-86 incident which sabotaged the February 2008 settlement;[2] (v) Kirchner's filing of overlapping legal actions; and (vi) the Respondents' spoliation efforts in this matter.[3] (Petition, p. 5-15, 18-22, 25-38.)

Also, Respondents, just as they did in their summary judgment papers, ignored most of the events (or absence of events) which support my claims.

As such, the preponderance of my petition is unopposed despite Respondents' fallacious assertion that my petition lacks any "legal or factual basis."

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[1] While not addressing Kirchner's coercion efforts or his lie about vengeful judges, Respondents did address my allegation that Kirchner lied about Judge McMaster recommending arbitration. (*See* Section C, herein.)

[2] In their first motion for summary judgment, Respondents addressed the February 2008 settlement, but omitted any discuss of its possible linkage to the P-86 incident. (DE 159-3, p. 38-39 of 44.) They alleged no such settlement had been "ongoing." *(Id.*, p. 39 of 44.)

Also, as I noted in my petition, Respondents did not address at all the February 2008 settlement in their appeal opposition brief. (Petition, p. 22.) They again do not oppose it in their petition opposition brief.

[3] Respondents did present a spoliation-claim opposition argument, but for the wrong incident. (*See* Section F, herein.)

C. Rebuttal to Respondents' Argument as to My Fraud Claim.

Respondents reduced my fraud claim to only three allegations: (i) that "the Honorable Jean McMaster, J.S.C., [] did not recommend that the parties go to arbitration," (ii) "that [I] never would have agreed to arbitration had [I] known Judge McMaster did not recommend it" and (iii) "Respondents fabricated Judge McMaster's recommendation in order to drum up their legal fees." (Opposition, p. 10.) Respondents concluded by asserting that "[b]ecause Petitioner's sole evidence in support of his claim for fraud is his own self-serving testimony, which is contradicted by the testimony of adversary counsel in the underlying matter, the District Court properly granted Respondents' motion for summary judgment to dismiss the Petitioner's claim of fraud." *(Id.*, p. 11.) Their line of reasoning fails for the following three reasons.

First, in essence it admits that I provided evidence (my statements) which supports my allegation that Judge McMaster did not recommend arbitration.[4] Respondents further allege that the "adversary counsel in the underlying matter [] contradicted" my statements. However, just their acknowledgment of the existence of such a dispute about a material fact – whether Judge McMaster recommended arbitration – precludes summary judgment since

[4] Respondents cited the December 20, 2016 Court Opinion but ignored my petition's related rebuttal, especially my rebuttal to the district court's description of my evidence as "threadbare." (Petition, p. 36-38.)

under Rule 56 a court must view all evidence in a light most favorable to me. Therefore, a court would have had no choice but to believe my statements and deny summary judgment.[5]

As for Respondents' implied argument that Kirchner's and Marek's testimony outweighs my testimony, that is fatally flawed because Rule 56 prohibits a court from weighing evidence. Besides, Marek's testimony is actually an affidavit and as such cannot be used as proof to grant summary judgment[6] and, as my petition shows, Kirchner is not a credible witness.

The lower courts finessed this pitfall by simply ignoring my statements. Respondents' oversight of not doing the same this time[7] dooms their argument and, as a result, leaves my fraud claim unchallenged.

Second, as I noted in my petition:

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[5] Respondents alleged no elements of a fraud claim exist, but this establishes two elements: Kirchner made a *material misrepresentation* of a past fact (the supposed recommendation by Judge McMaster) which *he knew to be false*. (Opposition, p. 10.)

[6] Respondents did not challenge my assertion that "Marek's testimony consisted only of his affidavit" or that affidavits cannot be used to resolve credibility in deciding summary judgment. *Blackburn & McCune, PLLC v. Pre-Paid Legal Servs* (citing Byrd, 847 S.W.2d at 216). (Petition, p. 37-38.)

[7] Respondents ignored my statements in their appeal opposition brief. (Appeal Opposition.)

> My case centers on the Respondents' fraudulent effort to increase their billings at my expense and the resulting damage these efforts inflicted on me. The billing-related damages, in the hundreds of thousands of dollars, include needless duplicative legal actions initiated by the Respondents, Kirchner's coercive efforts to force me into terminating a plenary hearing and replacing it with an arbitration, and his fatal sabotage of my arbitration case (the arbitration by itself cost me more than $150,000). Other damages include the P-86 incident engineered by Kirchner which resulted in the ALSI Defendants reneging on my 2008 settlement and thereby damaged me financially in the millions of dollars.

(Petition, p. 18.)

Respondents do not dispute the vast bulk of these grounds for my fraud claim.

Third, Respondents' allegation that my only evidence of fraud consists of my "own self-serving testimony" fails for two reasons:

- Respondents ignored the plenary hearing transcript that disputes the existence of the supposed chambers meeting at which the judge allegedly recommended arbitration. No meeting means no judge's recommendation.

- Respondents ignored physical evidence that disputes Kirchner's testimony as to certain key events of that day which he alleged flowed from the chambers-meeting discussions. Viewed in my favor, Kirchner's lies about these events mean no meeting; no meeting means no judge's recommendation.

For the above three reasons, the lower courts should not have granted summary judgment on my fraud claim, nor affirmed it.

D. Rebuttal to Respondents' Argument as to My Fiduciary Duty Claim.

The Respondents' brief did not mention, much less address, a single fact or ground supporting my fiduciary duty claim, such as Kirchner (i) filing overlapping legal actions; (ii) coercing me to accept the arbitration; (iii) sabotaging my arbitration case; or (iv) derailing my February 2008 settlement[8] by engineering the P-86 incident. Instead, Respondents argued that the law precludes my fiduciary duty claim.

Respondents asserted that "[b]ecause claims of professional negligence and breach of fiduciary duty require identical proofs, they are treated as one cause of action." (Opposition, p. 6.) They then cite the December 20, 2016 District Opinion and a New

[8] *See* Footnote 2, herein. As noted there, Respondents addressed the February 2008 settlement in their first motion for summary judgment as an incident supporting my fiduciary duty claim, but, tellingly, do not do so now.

Jersey legal malpractice appeal opinion as proof that the joint malpractice and fiduciary duty claims "fail as a matter of law." (*Id.*) Importantly, *if* this court rejects Respondents' joint-claims argument, then their argument that my *fiduciary claim* is barred as a matter of law fails because (i) the citation from the December 20, 2016 Court Opinion only applies to the *legal malpractice claim* since it relies on the April 5, 2016 opinion and that decision only granted summary judgment on my legal malpractice claim, and (ii) the legal malpractice appeal opinion they proffer did not involve a *fiduciary duty claim*.

As to Respondents' allegation about joint claims, not only did Respondents fail to cite a single statute or precedent to support it, this is not the first time that the Respondents have attempted this argument. Respondents are now attempting to take a second bite of the same apple but do so without revealing that they had previously *lost* this argument.

In an October 15, 2012 motion to dismiss, Respondents argued as follows: "Plaintiff's cause of action for breach of fiduciary duty (Count II) and fraud (Count V) are subsumed within his legal malpractice claim (Count I)," and, therefore, "duplicative" (which they now reference as "joint")[9] (DE 8-1, p. 16.) The district court rejected this argument:

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[9] The Respondents argued these claims separately in their first motion for summary judgment; tellingly, they did not proffer this joint-claims argument then. (DE 159-3, p. 11-14 and 26-34, of 44.).)

> With regard to defendants' first argument, even though some allegations may overlap, if the facts to support claims of fraud and breach of fiduciary duty are pleaded properly, they may state separate, non-duplicative claims from a legal malpractice claim.

(Reply App. p. 8ra.)

The district court cited the following:

> "Stated plainly, an attorney who intentionally violates the duty of loyalty owed to a client commits a more egregious offense than one who negligently breaches the duty of care." *Packard-Bamberger & Co., Inc. v. Collier*, 771 A.2d 1194, 1203 (N.J. 2001) (explaining that a "client's claim concerning the defendant-attorney's breach of a fiduciary duty may arise in the legal malpractice context").

(Reply App. p. 9ra.)

The district court decided that "Fink has pleaded *separate* claims for legal malpractice, fraud, and breach of fiduciary duty, and *all three* may proceed." [Emphasis Added.] (Reply App. p. 10ra.)

Without this alleged joint-claim argument, all evidence and arguments supporting my fiduciary

duty claim remain unchallenged and, therefore, constitutes grounds for this court to grant my petition. However, even if this court takes a contra view on Respondents' joint-claims argument, Respondents' fiduciary duty argument still fails *if* their argument that my legal malpractice claim is barred by law fails. I will now show it does fail.

E. Rebuttal to Respondents' Argument as to My Legal Malpractice Claim.

Respondents ignored the facts and evidence as pertains to my legal malpractice claim; they only argued my claim "must fail as a matter of law." (Opposition, p. 6.) Respondents argued that the December 20, 2016 opinion (again, fatally flawed circular reasoning) acts as a legal bar. Respondents also asserted that, "in order to advance claims for legal malpractice and breach of fiduciary duty, a plaintiff must serve a competent expert report."[10] (*Id.*, p. 7.)

Respondents' December 20, 2016 District Court Opinion citation just consists of that court's own synopsis of its April 5, 2016 opinion: allegedly I would not have been unable to collect payment from ALSI. (Opposition, p. 6.) However, as that district court noted in its April 5, 2016 District Court Opinion, the court had issued its opinion prior to my opposition submission even though my motion to stay the motion for summary judgment remained pending and discovery remained open. (Petition App. p. 46a.) As such, the cited finding rests solely

[10] The cited legal malpractice appeal opinion does not address nor involve a fiduciary duty claim.

on the Respondents' motion (i.e., prior to my opposition filing).

In my post-discovery opposition papers, I pointed out three fatal problems that either outrightly negate Respondents' unable-to-pay argument or lead to a disputed material fact which precludes summary judgment.

First, the argument ignores that I suffered damages from other parties (e.g., Respondents' legal fees and expenses). (DE p. 257, *Id.*, 29-30 of 99.)

Second, the argument incorrectly assumes valuations are immutable over *time* and that the latest valuation (i.e., the bankruptcy valuation) is the germane one. However, a bankruptcy filing does not necessarily mean the entity was always worthless, or even worthless as of the filing date (filing listed $5 million in ALSI assets). (DE p. 257, p. 25-28 of 99.) In this regard, Respondents did not address (i) how, given the $58 million valuation of ALSI as of September 13, 2007, a October 28, 2008 bankruptcy filing precluded any payment to me prior to the bankruptcy filing date (e.g., the February 2008 settlement with its $4 million upfront payment); (ii) why the bankruptcy valuation did not mention the ALSI 2007 business; (iii) why the value of ALSI dropped so precipitously in 2007-2008; (iv) how a supposedly worthless ALSI made settlement payments to me of over $400,000 ($52,500 paid in *July 2008*); etc. (*Id.*)

Third, Respondents did not engage a financial expert to address any of these financial questions, a

problem I do not face given my accounting and financial expertise. (*Id.*, 27-28 of 99.)

As to Respondents' erroneous conclusion that "a plaintiff must serve a competent expert report," they did not cite any statute, only one case: *Vort v. Hollander, et al.*, 257 N.J. Super. 56, 607 A.2d 1339 (App. Div. 1992). However, *Vort* does not apply here.

Vort, a lawyer, filed a lawsuit against the Hollanders (his former clients) for insufficient payment of legal fees; the Hollanders, in turn, countersued, claiming legal malpractice – even thought they had *won* their underlying cases – and fraud. (*See Vort*, 57-60.) The *Vort* district court judge *ordered* the Hollanders to file a legal expert report "in this kind of case," which the Hollanders failed to do. (*Id.*, 59-60.) Because they failed to file a report, the judge granted Vort summary judgment on the Hollander's counterclaim. (*Id.*, 60.)

Importantly, Respondents failed to show how *Vort* mirrors my case. Respondents did not cite any court order in this matter which required me to submit a legal expert report (none exists). Also, unlike the Hollanders, I did not prevail in my underlying cases.[11] Finally, my damages, such as the loss of the February 2008 settlement, are easy to recognize,

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[11] Respondents erroneously assert that my petition "ignores the fact that [I] actually prevailed in the arbitration on some of [my] claims." (Opposition, p. 8, Footnote 2.) However, Respondents do not state the claims, nor cite any evidence supporting their assertion.

unlike the Hollanders' alleged damages for the legal matters in which they prevailed.

As such, Respondents' malpractice claim argument fails and, in turn, sinks their argument against my fiduciary claim.

F. Rebuttal to Respondents' Argument as to My Spoliation Claim.

Respondents ignored my spoliation claim as presented. (Petition, p. 15 which cited DE 261, p. 31-32.) They do not address their production of a second version of P-86 as part of their effort to obfuscate Kirchner's culpability in the P-86 incident. (DE 261, p. 37.) Instead, Respondents argue only about the supposed lack of any damages from the P-86 incident itself, ignoring its damage to the February 2008 settlement.

Therefore, all my allegations supporting my spoliation claim remain unchallenged.

CONCLUSION

For all the above reasons, this court should grant my petition.

POSTSCRIPT: TYPOS IN PETITION

I identified a couple of minor typos in my petition. The corrections – neutral to my petition's word count – are as follows:

- Page 7: The first sentence in the first bullet point should read "Kirchner withholding evidence which proved ALSI tampered with its accounting data and reports despite Kirchner's repeated assurance that he would use it."

- Page 33: The tail end of the last sentence in paragraph 4 should read "the court failed to view evidence in my favor or impermissibly weighed evidence."

I apologize for any inconvenience they have or might cause.

Respectfully submitted,
John W. Fink
Pro Se
Petitioner

October 31, 2018

REPLY APPENDIX A

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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HILLMAN, District Judge

I. BACKGROUND

This case is related to two other actions previously pending before this Court, all arising out of plaintiff John Fink's loan to Advanced Logic Systems, Inc. ("ALSI"). 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. Fink 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 Fink and ALSI ensued in March 2003, and eventually the parties settled in March 2006. After paying only half of the million dollar settlement to Fink, ALSI filed for bankruptcy in 2008. In order to recoup the $60 million Fink believes he is owed, Fink attempted to collect the debt from EdgeLink, Inc., an entity Fink claimed was a successor-in-interest to ALSI.[1] Fink also sought to reopen ALSI's bankruptcy in order to allow the trustee to

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

investigate what Fink contended was a theft of ALSI's missing assets.[2]

In this lawsuit, Fink has brought claims against the lawyer, J. Phillip Kirchner, and his law firm, Flaster/Greenberg, P.C., that represented Fink in his attempts to complete his settlement agreement with ALSI, and in Fink's efforts to enforce his rights under a warrant agreement to purchase shares of ALSI stock.[3] In defendants' efforts to assist Fink with his legal matters, Fink claims that Kirchner altered an email submitted to the arbitrator presiding over an arbitration between Fink and ALSI. Fink claims that the arbitrator's decision was affected, to Fink's detriment, by the issues concerning the altered email. The altered email incident also lead to a still-pending New Jersey Disciplinary Review Board ethics complaint against Kirchner, in which 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 -

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

[3] 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.

totaling over $650,000 - Kirchner tried to extort money from Fink. Fink claims that when Kirchner was subpoenaed to testify in a case involving Fink and another law firm, Kirchner stated that he would only testify on Fink's behalf if Fink paid his outstanding bill to the firm.[4]

Based on these allegations, Fink claims that defendants have committed legal malpractice and fraud, breached their fiduciary duty, and inflicted intentional emotional distress on him.[5] Defendants moved to dismiss all of Fink's claims, but during briefing, defendants withdrew their motion to dismiss Fink's legal malpractice claim.[6] Fink has opposed defendants' motion.

II. DISCUSSION

A. Jurisdiction

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because there is

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

[5] Fink also asserted a claim for unjust enrichment, but he has withdrawn that claim.

[6] Defendants explain that they withdrew that portion of their motion because of the pending DRB ethics complaint proceedings. Defendants also state that they vigorously dispute Fink's allegations and reserve the right to contest the veracity of Fink's contentions.

complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000.

B. Standard for Motion to Dismiss

When considering a motion to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept all well-pleaded allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Evancho v. Fisher*, 423 F.3d 347, 351 (3d Cir. 2005). It is well settled that a pleading is sufficient if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under the liberal federal pleading rules, it is not necessary to plead evidence, and it is not necessary to plead all the facts that serve as a basis for the claim. *Bogosian v. Gulf Oil Corp.*, 562 F.2d 434, 446 (3d Cir. 1977). However, "[a]lthough the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings give defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 149-50 n.3 (1984) (quotation and citation omitted).

A district court, in weighing a motion to dismiss, asks " 'not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim.' " *Bell Atlantic v. Twombly*, 550 U.S. 544, 563 n.8 (2007)

(quoting *Scheuer v. Rhoades*, 416 U.S. 232, 236 (1974)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) ("Our decision in Twombly expounded the pleading standard for 'all civil actions' . . . ."); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) ("*Iqbal* . . . provides the final nail-in-the-coffin for the 'no set of facts' standard that applied to federal complaints before *Twombly*.").

Following the *Twombly/Iqbal* standard, the Third Circuit has instructed a two-part analysis in reviewing a complaint under Rule 12(b)(6). First, the factual and legal elements of a claim should be separated; a district court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. *Fowler*, 578 F.3d at 210 (citing *Iqbal*, 129 S. Ct. at 1950). Second, a district court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "'plausible claim for relief.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1950). A complaint must do more than allege the plaintiff's entitlement to relief. *Id.*; *see also Phillips v. Cnty. Of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (stating that the "Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: 'stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element. This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element"). A court need not credit either "bald assertions" or "legal conclusions" in a

complaint when deciding a motion to dismiss. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d Cir. 1997). The defendant bears the burden of showing that no claim has been presented. *Hedges v. U.S.*, 404 F.3d 744, 750 (3d Cir. 2005) (citing *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)).

Finally, a court in reviewing a Rule 12(b)(6) motion must only consider the facts alleged in the pleadings, the documents attached thereto as exhibits, and matters of judicial notice. *S. Cross Overseas Agencies, Inc. v. Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999). A court may consider, however, "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). If any other matters outside the pleadings are presented to the court, and the court does not exclude those matters, a Rule 12(b)(6) motion will be treated as a summary judgment motion pursuant to Rule 56. Fed. R. Civ. P. 12(b).

C. Analysis

Defendants argue that Fink's fraud and breach of fiduciary duty claims are duplicative of his legal malpractice claim and must be dismissed. Defendants also argue that Fink's alleged facts to not support an intentional infliction of emotional distress claim. Fink argues that both of defendants' arguments must be rejected.

With regard to defendants' first argument, even though some allegations may overlap, if the facts to support claims of fraud and breach of fiduciary duty are pleaded properly, they may state separate, non-duplicative claims from a legal malpractice claim. "Legal-malpractice suits are grounded in the tort of negligence," and at "the most fundamental level, the legal-malpractice action provides a remedy for negligent professional performance." *McGrogan v. Till*, 771 A.2d 1187, 1193 (N.J. 2001) (citations omitted).[7] In contrast, claims that a lawyer committed fraud[8] or knowingly violated a fiduciary duty[9] are intentional torts,

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[7] The elements of a cause of action for legal malpractice are (1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff. *McGrogan v. Till*, 771 A.2d 1187, 1193 (N.J. 2001) citation omitted).

[8] 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).

[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

separate from allegations concerning the lawyer's negligent deviation from the professional standard of care. *See Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 367 (N.J. 1997); *Stoecker v. Echevarria*, 975 A.2d 975, 988 (N.J. Super. Ct. App. Div. 2009) (rejecting defendant's argument that plaintiff's fraud claim is substantially indistinguishable from the legal malpractice claim because, "[t]o prevail on her fraud claim, plaintiff need not present proof that [defendant] deviated from the professional standard of care applicable to attorneys"). "Stated plainly, an attorney who intentionally violates the duty of loyalty owed to a client commits a more egregious offense than one who negligently breaches the duty of care." *Packard-Bamberger & Co., Inc. v. Collier*, 771 A.2d 1194, 1203 (N.J. 2001) (explaining that a "client's claim concerning the defendant-attorney's breach of a fiduciary duty may arise in the legal malpractice context").

In this case, Fink has lodged extensive and detailed allegations against Kirchner and his law firm. Some of his allegations concern Kirchner's deviation from the professional standard of care for attorneys. For example, Fink alleges that Kirchner failed to take certain depositions, fruitlessly pursued sanctions against ALSI, did legal work not approved by Fink, provided poor legal advice with regard to the arbitration, and submitted an altered document to the arbitrator. Other allegations relate to

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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).

Kirchner's and the firm's alleged intentional conduct to defraud Fink and breach their fiduciary duty to Fink. For example, Fink alleges that, having paid $500,000 in legal fees and costs, and still owing over $150,000, Kirchner and the firm had a considerable financial incentive to continue Fink's litigation, rather than to work to prove that ALSI breached the settlement agreement or to make real efforts to consummate the settlement with ALSI. Fink also alleges that Kirchner attempted to extort money from Fink by threatening not to testify in a subpoenaed deposition in a separate matter between Fink and another law firm. Accepting these allegations, as well as all the other allegations in the detailed complaint, as true, Fink has pleaded separate claims for legal malpractice, fraud, and breach of fiduciary duty, and all three may proceed.

With regard to defendants' second argument, that Fink's intentional infliction of emotional distress claim is not maintainable under Fink's alleged facts, the Court finds that Fink's factual allegations in the complaint are not sufficient to show that he has a "'plausible claim for relief.'" *Fowler*, 578 F.3d at 210 Id. (quoting *Iqbal*, 129 S. Ct. at 1950).

The elements of the common law cause of action for intentional infliction of emotional distress were set forth in *Buckley v. Trenton Saving Fund Society*, 111 N.J. 355 (1988):

> First, plaintiff must prove that defendant acted intentionally or recklessly.

> Defendant must intend both to do the act and to produce emotional distress, or he must act recklessly in deliberate disregard of a high degree of probability that emotional distress will follow. Second, defendant's conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Third, plaintiff must prove defendant's conduct was a proximate cause of plaintiff's emotional distress. Fourth, the emotional distress suffered by plaintiff must be so severe that no reasonable person could be expected to endure it.

DiClemente v. Jennings, 2012 WL 5629659, *8 (N.J. Super. Ct. App. Div. Nov. 16, 2012) (quoting Buckley) (internal citations and quotations omitted).

Here, Fink alleges that Kirchner's altering of legal documents submitted to the court, his questioning of Fink's character before the court, and his threatening to not testify truthfully at a deposition in a separate matter in an attempt to extort payment from Fink, all caused him severe mental anguish and emotional distress. If accepted as true, these claims may perhaps satisfy the first and second elements of an IIED claim. What is lacking, however, are facts to support Fink's conclusion that he suffered "severe mental anguish and emotional distress."

To prove a claim for intentional infliction of emotional distress, a plaintiff's burden of proof must meet an "elevated threshold" that is satisfied only in extreme cases. *Griffin v. Tops Appliance City, Inc.*, 766 A.2d 292, 296 (N.J. Super. Ct. App. Div. 2001), *cert. denied*, 209 N.J. 100 (2012). Moreover, the severity of the emotional distress raises questions of both law and fact, where the court decides as a matter of law whether such emotional distress can be found, and the jury decides whether it has in fact been proved. *Buckley*, 544 A.2d at 864.

As to the nature of what constitutes emotional distress "so severe that no reasonable person could be expected to endure it," courts have found that being embarrassed, a "nervous wreck," disappointed, stressed, and suffering from headaches, resentment, loss of sleep, and anxiety, to not be sufficiently severe. *See id.* (citing cases). Additionally, if a person cannot show treatment for emotional distress or an impact on the ability to function in daily life, that also weighs against a finding of severe emotional distress. *See, e.g., Turner v. Wong*, 832 A.2d 340, 348 (N.J. Super. Ct. App. Div. 2003) (citing *Aly v. Garcia*, 754 A.2d 1232 (App. Div. 2000), *cert. denied*, 167 N.J. 87 (2001)) (explaining that the "emotional distress must be sufficiently substantial to result in either physical illness or serious psychological sequelae").

Fink has failed to plead in his complaint any facts to describe the nature of the emotional distress he has allegedly suffered. Without such facts to

differentiate from his legal conclusion that he has suffered from severe emotional distress, the Court cannot assess whether he has properly stated the fourth element of a claim for IIED. *See Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (explaining that stating a claim requires a complaint with enough factual matter (taken as true) to suggest the required element). Accordingly, Fink's IIED claim must be dismissed.[10]

IV. CONCLUSION

For the reasons expressed above, defendants' motion to dismiss shall be granted as to Fink's intentional infliction of emotional distress claim, and denied on all other bases. An appropriate Order will be entered.

Date: May 8, 2013
At Camden, New Jersey

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

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[10] The Court notes that beyond a cause of action for emotional distress, New Jersey courts have long recognized emotional distress damages as a component of various intentional torts and breach of contract claims. *Tarr v. Ciasulli*, 853 A.2d 921, 925 (N.J. 2004).