FOX HILLS CONDOMINIUM ASSOCIATION, INC., Plaintiff, v. BARBARA APPELBAUM, PAUL KARDOS, AND ALAN ROTHSTEIN Defendants.	SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION: MORRIS COUNTY DOCKET NO. C-130-17

DEFENDANT ALAN B. ROTHSTEIN'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS IN HIS FAVOR PURSUANT TO RULE 1:4-8 AND N.J.S.A. 2A:15-59.1

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PRELIMINARY STATEMENT

Given the undisputable fact that the within action was dismissed **with prejudice** a little more than a month after it was filed on the multiple bases that this Court had no jurisdiction over the matter, that the plaintiff lacked standing to pursue the action, that the claimed breach of the Master Deed never existed and the facts complained of never stated a cause of action, one would be hard-pressed to envision a better textbook example of a frivolous Order to Show Cause and Verified Complaint. It is not as if there was a single flaw that was fatal to plaintiff's pleadings – these multiple flaws were so evident that plaintiff's counsel, Ansell Grimm & Aaron, P.C. ("Ansell Grimm"), and plaintiff Fox Hills at Rockaway Condominium Association, Inc. (the "Association") knew or should have known that pursuing their claims was patently frivolous.

Indeed, even if Ansell Grimm and the Association were somehow ignorant of how patently frivolous their claims were prior to filing their action, counsel for defendant Alan Rothstein, Esq., ("Rothstein") articulated in writing to Ansell Grimm the numerous, fatal flaws that rendered the Order to Show Cause and Verified Complaint to be frivolous and demanded their voluntary dismissal long before the February 15, 2018 hearing. Both Ansell Grimm and the Association completely ignored Mr. Rothstein's admonition that their papers were frivolous, exposing them both to liability under Rule 1:4-8 and N.J.S.A. 2A:15-59.1, respectively and, instead, they continued to aggressively pursue the action.

Although litigants often seek an award of attorneys' fees and costs for allegedly frivolous litigation under circumstances that are questionable, the sheer number of fundamental defects in the Association's pleadings in this action and the seriousness of the disproven allegations plainly and equitably warrants the award of attorneys' fees and costs in Mr. Rothstein's favor. Therefore, the Court should grant Mr. Rothstein's application for an award of attorneys' fees and costs.

FACTS AND PROCEDURAL HISTORY

A. The Association's Verified Complaint and Order to Show Cause

Between December 6, 2017 and December 8, 2017, Mr. Rothstein, his two co-defendants, and twenty-three other condominium unit owners engaged in a private group email conversation concerning Board President Gloria Stahl ("Stahl"). See the accompanying Certification of Michael A. Saffer, Esq. (the "*Saffer* Cert."), Exhibit G. The actual content of that email conversation is captured by the Court's decision in this matter. See id., Exhibit I at T14:6 to 15:25.

One month later, on January 8, 2018, the Association served Mr. Rothstein with a signed Order to Show Cause and a Verified Complaint alleging that he and his two co-defendants in the group email conversation conspired to murder the Board president. Id., Exhibit A. The single civil cause of action in the Verified Complaint alleged a breach of the Master Deed "nuisance" provision, for which the Association sought a judgment declaring the breach, prohibiting Mr. Rothstein and his co-defendants from continuing the murder conspiracy, entering a criminal restraining order and awarding the Association attorneys' fees and costs. Ibid. Neither Ms. Stahl nor any other Association member was a plaintiff in the action. See ibid.

The Order to Show Cause sought as preliminary injunctive relief a criminal restraining order barring Mr. Rothstein and his co-defendants from coming within a certain distance of the Board members. See id., Exhibit A.

B. Rothstein's Frivolous Litigation "Notice and Demand" Letter

On January 17, 2018, Mr. Rothstein's counsel served the Association's counsel, David J. Byrne, Esq. of Ansell Grimm, by email and Lawyers Service, with a 6-page frivolous litigation "notice and demand" letter (the "Letter") demanding that he dismiss both the Order to Show Cause

and Verified Complaint because they clearly violated Rule 1:4-8 and N.J.S.A. 2A:15-59.1. Id., Exhibit B.

The Letter advised Ansell Grimm, in highly specific detail that: (1) the sworn allegations in the Verified Complaint that Mr. Rothstein and his co-defendants engaged in a criminal conspiracy had no evidentiary support and were a gross distortion of the subject private email conversation; (2) there was no legal basis for a claim that a unit owner breaches the Master Deed "nuisance" provision by engaging in a private email conversation; and (3) the Chancery Division, General Equity Part, had no jurisdiction to enter a criminal restraining order under the Prevention of Domestic Violence Act ("PDVA"), N.J.S.A. 2C:25-28 and Smith v. Moore, 298 N.J. Super. 121 (App. Div. 1997). See id. ¶4 & Exhibit B at 2-6.

In accordance with the "safe-harbor" provision of Rule 1:4-8, the Letter further advised Mr. Byrne that he had 28 days to withdraw the Verified Complaint. Id. at 6. Because the Order to Show Cause hearing was scheduled for February 2, 2018, less than 28 days later, the Letter also advised Ansell Grimm, in accordance with Rule 1:4-8, that the firm had the option to adjourn the hearing and, that if it did not, Ansell Grimm was deemed to have waived the balance of the period. Ibid. In any event, the Court adjourned the Order to Show Cause at the request of Mr. Rothstein's counsel and with consent of Mr. Byrne, to February 15.

Ansell Grimm ignored the Letter and did not withdraw the Order to Show Cause and Verified Complaint within 28 days of being served with the Letter, *i.e.*, by February 14, 2018, or at any time. Id. ¶5.

On January 31, 2018, Mr. Rothstein (and co-defendant Barbara Appelbaum) moved to dismiss the Verified Complaint, with prejudice, in lieu of answer, returnable February 16, 2018.

C. The Association's Failure to Cite or Address Any Legal Authority

Despite having been apprised by the Letter and by Mr. Rothstein's brief in opposition to the Order to Show Cause that the Chancery Division had no jurisdiction to enter the restraining order under the PDVA and Smith v. Moore, the Association's reply brief in further support of the Order to Show Cause never addressed those authorities, but, instead, set forth nothing more than the general notion that a Chancery court has flexible remedies. Id., Exhibit C at 2-3. Moreover, neither the Association's moving brief nor its reply brief in support of the restraining order ever addressed or provided any authority for the position that a private email conversation in cyberspace could possibly constitute a "nuisance" under the Master Deed language or at common law, such that it would have settled legal rights and a reasonable chance of success on the merits. Id., Exhibits C. Mr. Rothstein's Letter and opposition brief both specifically identified the patent and fatal deficiencies in the Association's pleadings. Id., Exhibits B & C. Instead, the Association's reply brief resorted to deleting critical, dispositive language from the "nuisance" provision by tactical use of ellipses. Id., Exhibit C at 3.

On the motion to dismiss, the Association likewise never provided any authority for the position that a private email conversation in cyberspace could possibly constitute a "nuisance" under the Master Deed language (requiring an activity to be "in or upon the common elements on in any unit") and under settled "nuisance" common law illuminating the type of activity proscribed by that provision. Id., Exhibit D at 1-7. As it did in its reply brief on the Order to Show Cause, the Association again resorted to deleting the same critical language from the "nuisance" provision by the tactical use of ellipses. Id. at 2-3. In addition, the Association's brief never explained the extreme discrepancy between its allegations of a conspiracy to commit murder in its Verified

Complaint, and the actual text of the group email conversation. Id. at 1-7. Mr. Rothstein's Letter, and his moving and reply briefs all identified these patent deficiencies. Id., Exhibits B & E.

D. Defendants Verify the Lawsuit Was Filed Without Required Authorization

On February 6, 2018, on behalf of all defendants, Robyn Valle, Esq., counsel for co-defendant Ms. Appelbaum, demanded that Mr. Byrne immediately produce the Board resolution or written document required by Billig v. Buckingham Towers Condominium Association I, Inc., 287 N.J. Super. 551, 564-65 (App. Div. 1996), authorizing Ansell Grimm to file this action against Mr. Rothstein and his co-defendants. See the accompanying Certification of Robyn Valle, Esq., ¶2 Exhibit A. Mr. Byrne never responded to Mr. Valle's email, nor did he ever produce the Board resolution or other document authorizing him to file this lawsuit. Id. ¶3. By way of supplemental letter dated February 12, 2018, Ms. Valle advised the court that no Board resolution had been produced and Billig required dismissal of the Order to Show Cause for lack of authorization of the lawsuit. Id., ¶4 Exhibit B.

E. The Association Board's Notice Indicates That This Action Was Filed for Wholly Improper Purposes

On February 12, 2018, shortly prior to the return date for the Order to Show Cause and Motions to Dismiss, the Association's Board posted a Notice on the bulletin boards in the Fox Hills condominiums revealing its true intent in filing the Verified Complaint:

NOTICE

Update on Association's Complaint Against 3 Homeowners

> As discussed at the Town Hall Meeting on February 5th, the Board has filed a Complaint against 3 homeowners for use and distribution of email language threatening a Board Member. **It took this action in order to send a clear message** that cyber-bullying will not be tolerated in our community. We are entitled to live at Fox Hills in a safe and harmonious environment.

. . . .

Your Board of Directors
February 12, 2018

[Certification of Alan B. Rothstein, Exhibit A (emphasis added).]

F. The Association's Failure to Support its Position at Oral Argument

On February 15, 2018, the Honorable Robert J. Brennan, P.J. Ch., heard argument on both the Order to Show Cause and the Motions to Dismiss with prejudice. Orally arguing the Order to Show Cause, the Association's counsel pointed only to "the stuff that goes on in -- in the world" concerning violence that occurs. *Saffer* Cert., Exhibit I at T4:23 to 5:9. The Court confirmed that his client went to the police and queried counsel whether this was a police matter. T5:18-22. Ansell Grimm asserted that it was not a police matter because there are "civil matters" and "regular free people have the right to get -- have the right to have judges issue orders and deal with things that happen on a day-to-day basis," to which the Court rightly responded: "If they have a legal basis, they do." T5:23 to 6:6.

Ansell Grimm further urged that it did not know why the "Court would allow this stuff to take place" and that absent relief, it would allow people to make threats and do "all the things going on" around the country. T7:13-20. Ansell Grimm ended his opening argument, "maybe we win, maybe we lose" and that once a suit was filed it made sense for parties to be kept separate from one another. T7:21 to 8:4. On rebuttal, Ansell Grimm argued that the Court had jurisdiction because "a condominium has the right to get people to not do things and get people to do things" and used a strawman argument about prohibiting a unit owner from barbequing steaks in his unit. T12:6-9.

Ansell Grimm's arguments opposing the Motions to Dismiss focused on the Association's standing. See T30:21-32:11. Counsel concluded its argument acknowledging that Mr. Rothstein's

arguments were "reasonable" and that the Court's "ruling with respect to the order to show cause is -- is reasonable, you know, it makes a lot of sense," and then backtracked to note the Association "could lose," but it had standing. T33:4-20.

In sum, as with its briefing, at oral argument, Ansell Grimm provided no legal authority for its single claim Verified Complaint and Order to Show Cause.

G. The Court finds fundamental flaws in the Association's and Ansell Grimm's Order to Show Cause and Verified Complaint, resulting in their denial and dismissal with prejudice, respectively.

In two very well-reasoned, comprehensive oral opinions read on the record at the conclusion of oral argument, the Court: (1) denied the restraining order sought by the Association in the Order to Show Cause because the Association failed to meet any of the criteria for injunctive relief and (2) granted Mr. Rothstein's and Ms. Appelbaum's motions to dismiss the Verified Complaint, **with prejudice**, because that pleading was plagued by patent lack of jurisdictional, standing, and legal merit. Id., Exhibits H & I at T13:19 to 28:18, 33:23 to 43:8.

First, the Court denied the Order to Show Cause, holding that (1) it had no jurisdiction to adjudicate an alleged criminal matter and enter a restraining order, (2) the Association had no standing to pursue it, and (3) the Association was unlikely to succeed on the merits of its breach of Master Deed claim. See T13:19 to 28:18. The Court did not find any "legislation or precedent in New Jersey authorizing the Court to issue the injunctive relief sought in the present case" and found "no case law in which the Chancery Court has exercised its general equitable power to issue a restraining order of the kind sought by the [Association]." T18:12-18. The Court specifically noted that the Association failed to provide any authorities concerning jurisdiction to grant the restraining order, other than noting its flexible equitable power. T18:19-23. The Court also specifically identified the decision in Smith v. Moore as divesting it of jurisdiction. T19:2-18.

After noting that the Association should alert law enforcement if it actually felt there was actual danger, the Court concluded: "The Court simply has no jurisdiction based on statute or precedent to issue the restraining order sought by plaintiff based on the facts alleged here." T:20:7-18. The Court further held that it would not effectively adjudge that Defendants violated criminal law because it is a "long-established rule" that our courts "will not allow private plaintiffs to sue for injunctive relief to enforce state penal laws" and that there was a "complete absence of jurisdiction" in Chancery to do so, citing two high court cases. T21:2-18.[1]

The Court further determined that, on the merits of the relief sought, the Association failed to demonstrate a settled legal right underlying its claim and that it was unlikely the Association would succeed on the merits of its claim. T24:11 to 28:18. The subject email conversations were "not 'carried on in or upon the common elements or in any unit,'" quoting the Master Deed "nuisance" provision, and there was no interference "with any unit owner's peaceful possession and use of property." T24:11-6.

The Court again repeated that it found no authority to issue the requested restraining order, nor did the Association provide any. T25:11-21. The Court also found no probable success on the merits because "the alleged conspiracy is nothing more than a poorly composed sarcastic joke in utter bad taste" and that ill-advised and inappropriate as the commentary was, "based on the context of the entire discussion," there was no immediate threat of harm. T25:24 to 26:12. The Court continued that it did "not find the alleged conspiracy to actually exist" in light of the actual context of the email conversation. T26:17-19. The Court observed that, contrary to the Association's allegation that defendant Paul Kardos assembled the conspirators, his opening email

[1]The Court also found that the Association had no standing to bring the action, a ground pressed by Ms. Appelbaum. T21:19 to 23:21.

merely started a conversation about recent Board election results and that he later agreed with another unit owner that no one should be talking about buying a gun or killing anyone even though he knew Mr. Rothstein and Ms. Appelbaum were joking. T26:20-27:5. As to Ms. Appelbaum's email comment, the Court observed that she then apologized. T27:6-11. And as to Mr. Rothstein's email comments, the Court "conclude[d] that **any reasonable person under the circumstances** would understand that that those comments are nothing more than satirical jokes" though in very poor taste. T27:12-27 (emphasis supplied).

The Court also specifically found that both the Association's allegation that Mr. Rothstein, as an attorney, knew how to plan and get away with murder and avoid arrest and that the conspiracy talk continued after the email conversation were "**completely without basis**." T27:18-24 (emphasis supplied). These were the very arguments that Mr. Rothstein's counsel asserted in the frivolous litigation Letter that Ansell Grimm and the Association completely ignored.

Second, the Court dismissed the Verified Complaint, with prejudice, holding that (1) the allegations concerning an email conversation did not and could never constitute a "nuisance" under the Master Deed as a matter of law because they were not carried on "in or upon the Common Elements or in any Unit," (2) the Court had no jurisdiction to enter the type of injunctive relief sought adjudicating alleged criminal conduct, (3) the Association had no standing, and (4) no set of pleadings could ever plead a "nuisance" based on the email conversation. See T33:23-43:8.

After outlining the relevant law, including settled nuisance law, the Court held that even assuming that all of the Association's allegation were true, it does not constitute a "nuisance" within the meaning of the Master Deed provision. T28:7-11. The email conversations were not "carried on in or upon the common elements or in any unit" and were "not making use of the unit or the common areas." T38:23 to 39:3. The Court noted that the pleadings said nothing of

interference with possession and use of property. T39:4-18. The Court denied the Association the ability to re-plead and took the "unusual step" of dismissing the Verified Complaint, with prejudice, because even assuming there was an email discussion about shooting the Board president,

> there is simply no way to take that conversation and fit it within the confines, even reading [the nuisance provision] broadly, which the Court isn't supposed to do, it's supposed to be narrowly construed, there is simply no way to take that conversation and fit it within [the nuisance provision] such that this would a violation of the master deed. . . . And the Court finds that **there is simply no set of pleadings that could ever bring this violation within the confines of [the nuisance provision]**.
>
> [T42:20 to 43:5 (emphasis added).]

Again, these were the very argument that Mr. Rothstein's counsel asserted in the frivolous litigation Letter that Ansell Grimm and the Association completely ignored.

The same day, the Court entered the Order granting Mr. Rothstein's and Ms. Appelbaum's Motions to Dismiss, with prejudice. *Saffer* Cert., Exhibit H. And on February 26, the Court entered the Order denying the Order to Show Cause and preliminary injunction. Ibid.[2]

H. The post-hearing Association Board Notice again indicates the lawsuit was filed for improper purposes.

On February 16, 2018, the day after the Court denied its Order to Show Cause and dismissed its Verified Complaint, with prejudice, the Association posted a second Notice on the bulletin boards in the Fox Hills community again identifying its intent in filing the Verified Complaint:

[2]The remaining defendant, Paul Kardos, filed an answer and counterclaims, but did not move or joint the motions to dismiss. The Court, thus, left resolution of the Verified Complaint as to Mr. Kardos to counsel to resolve. Id. T46:10 to 48:9.

Notice

Update on Association's Complaint Against 3 Homeowners

February 16, 2018

> Yesterday, Judge Robert J Brennan rejected the Association's attempt to subject the 3 homeowners to restraints. He also granted motions to dismiss for 2 of the 3 homeowners.
>
> While the Board is disappointed in these ruling, it stands by its decision to file this Complaint, **as an attempt to discourage future instances of cyber-harassment and bullying in our community.**
>
> . . . .
>
> Your Board of Directors
>
> [Rothstein Cert., Exhibit B (emphasis added).]

I. The Association and Ansell Grimm forced Mr. Rothstein to needlessly incur substantial attorneys' fees and costs.

Mr. Rothstein now moves, within 20 days of final judgment as to him, for frivolous litigation sanctions of reasonable attorneys' fees and costs against the Association and its law firm, Ansell Grimm, jointly and severally. Mr. Rothstein unnecessarily incurred significant reasonable attorneys' fees and costs of **$41,559.70**, consisting of $29,623.57 to oppose the Order to Show Cause and prevail on his Motion to Dismiss the Verified Complaint, with prejudice, and $11,612.85 to make this present motion for sanctions.

Mr. Rothstein is an 87-year old retired attorney who, at the time of his retirement as a New Jersey Deputy Attorney General in 1991, made approximately $55,000 per year. Rothstein Cert. ¶2. He survives on a small State pension of $38,000 per year plus social security. Ibid. The attorneys' fees and costs that he was forced to incur by this baseless lawsuit are a substantial financial burden. Ibid. Given Mr. Rothstein's history as a critic of the Association Board and Ms.

Stahl, it is his strong belief that the Association and Ansell Grimm filed this lawsuit to punish and silence him and his co-defendants. Id. ¶3.

LEGAL ARGUMENT

1. Mr. Rothstein satisfied the procedural requirements of Rule 1:4-8(b)(1)-(2) to recover his reasonable attorneys' fees and costs as a sanction against Ansell Grimm and the Association for filing and pursuing frivolous litigation.

To recover reasonable attorneys' fees and costs against a party under N.J.S.A. 2A:15-59.1 or its counsel under Rule 1:4-8 as a frivolous litigation sanction, the prevailing party must comply with the procedural requirements of Rule 1:4-8(b)(1). Ferolito v. Park Hill Ass'n, Inc., 408 N.J. Super. 401, 408 (App. Div.), certif. denied, 200 N.J. 502 (2009).

The prevailing party must have served a "written notice and demand" letter on the adversary that satisfies the requirements of Rule 1:4-8(b)(1). Toll Bros. v. Twp. of W. Windsor, 190 N.J. 61, 69 (2007); Ferolito, 408 N.J. Super. at 408. That letter must:

> (i) state that the paper is believed to violate the provisions of this rule, (ii) set forth the basis for that belief with specificity, (iii) include a demand that the paper be withdrawn, and (iv) give notice, except as otherwise provided herein, that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within 28 days of service of the written demand. If, however, the subject of the application for sanctions is a motion whose return date precedes the expiration of the 28-day period, the demand shall give the movant the option of either consenting to an adjournment of the return date or waiving the balance of the 28-day period then remaining. A movant who does not request an adjournment of the return date as provided herein shall be deemed to have elected the waiver.
>
> [R. 1:4-8(b)(1).]

The non-prevailing party must not have withdrawn the allegedly frivolous paper within the 28-day time period or other applicable time period. Ibid. The foregoing must be detailed in a certification accompanying the motion. Ibid.

The prevailing party must move for sanctions within 20 days of the entry of final judgment. R. 1:4-8(b)(2); In re Farnkopf, 363 N.J. Super. 382, 397-98 (App. Div. 2003). The court may award to the prevailing party "the reasonable expenses and attorneys' fees incurred" in making the motion. R. 1:4-8(b)(2).

Here, Mr. Rothstein satisfies all prerequisites under Rule 1:4-8(b)(1) to recover his reasonable attorneys' fees and costs against the Association and its law firm for their frivolous litigation. On January 17, 2018, counsel for Mr. Rothstein served the Association's counsel with the Letter, a 6-page, detailed "written notice and demand" that the Association withdraw and dismiss both the Order to Show Cause and Verified Complaint. See *Saffer* Cert., Exhibit B. The Letter strictly complied with the requirements of Rule 1:4-8(b)(1).

First, the Letter stated that the Order to Show Cause and Verified Complaint violated Rule 1:4-8. *Saffer* Cert., Exhibit B at 1-2; R. 1:4-8(b)(1)(i). Second, the Letter advised Mr. Byrne, in great detail, that (a) the allegations in the Verified Complaint were gross distortions of the subject email conversation, (b) the Verified Complaint was improperly verified "upon information and belief," (c) there was no basis in law for a private email conversation to constitute a breach of the Master Deed "nuisance" provision, (d) there was, thus, no settled legal right entitling the Association to a preliminary injunction, and (e) the Chancery Division, General Equity Part, had no jurisdiction to enter a restraining order premised on alleged criminal conduct. *Saffer* Cert., Exhibit B at 2-6; R. 1:4-8(b)(1)(ii). Third, the Letter demanded that both the Order to Show Cause and Verified Complaint be withdrawn. *Saffer* Cert., Exhibit B at 6; R. 1:4-8(b)(1)(iii). Last, the Letter advised Mr. Byrne that if the Verified Complaint was not withdrawn within 28 days, Mr. Rothstein would move for sanctions within a reasonable time. *Saffer* Cert., Exhibit B at 6; R. 1:4-8(b)(1)(iv). The Letter further advised Mr. Byrne that because the return date of the Order to Show

Cause was prior to expiration of the 28-day period, he had the option to either consent to adjourn or would be deemed to have waived the balance of the period. *Saffer* Cert., Exhibit B at 6; R. 1:4-8(b)(1)(iv).[3] Mr. Byrne did not withdraw the Verified Complaint or Order to Show Cause within the 28-day "safe-harbor" period or at all. *Saffer* Cert. ¶5.

The foregoing is all set forth in the *Saffer* Certification and Exhibits annexed thereto that accompany this motion for frivolous litigation sanctions. See *Saffer* Cert. ¶¶1-29; R. 1:4-8(b)(1). Mr. Rothstein makes this motion for sanctions within 20 days of the "final judgment" entered on February 15, 2018, which disposed of the Association's claim against him. R. 1:4-8(b)(2); Farnkopf, 363 N.J. Super. at 397-98.

Accordingly, Mr. Rothstein satisfied all of the procedural prerequisites to recover his reasonable attorneys' fees and costs, including reasonable attorneys' fees and costs incurred in making this motion, as a sanction against both the Association and its law firm, Ansell Grimm, for their frivolous Verified Complaint and Order to Show Cause. R. 1:4-8(b)(1)-(2); Toll Bros., 190 N.J. at 69; Ferolito, 408 N.J. Super. at 408.

2. The Court should award Mr. Rothstein his reasonable attorneys' fees and costs as a sanction against the law firm of Ansell Grimm under Rule 1:4-8 and against the Association under N.J.S.A. 2A:15-59.1.

A. Applicable frivolous litigation law.

Based on the multiple, fatal defects in the Order to Show Cause and Verified Complaint that resulted in their dismissal, with prejudice, there is no doubt that they present a classic example of frivolous litigation. The Court should award Mr. Rothstein his reasonable attorneys' fees and costs as a sanction against Ansell Grimm under Rule 1:4-8 and against the Association under N.J.S.A. 2A:15-59.1, to both deter such frivolous, irresponsible litigation and equitably

[3]In any event, the Order to Show Cause hearing was adjourned to after the 28-day period had expired.

compensate Mr. Rothstein who was forced to incur significant attorneys' fees and costs to defend a matter that could have been addressed with a simple phone call.

"The responsibility for the payment of counsel fees may . . . be shifted when a party has filed a frivolous pleading. Both Rule 1:4-8 and N.J.S.A. 2A:15–59.1 permit such awards in appropriate circumstances." Farnkopf, 363 N.J. Super. at 397. The objective of the Rule and statute is to ensure counsel and its client "Stop, Think, Investigate and Research" before filing a lawsuit. Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987). "While Rule 1:4-8 creates only attorney liability for frivolous pleadings, N.J.S.A. 2A:15-59.1 extends only to parties." Ibid.; see also Toll Bros., 190 N.J. at 67-69.

Under Rule 1:4-8, a "court may impose sanctions upon an attorney if the attorney files a frivolous pleading . . . and fails to withdraw the paper within twenty-eight days of service of a demand for its withdrawal." McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011) (quoting United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 389 (App. Div.), certif. denied, 200 N.J. 367 (2009)). Rule 1:4-8 provides, in relevant part:

> (a) Effect of Signing, Filing or Advocating a Paper. The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney . . . certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims . . . and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

> (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support[.]

"For purposes of imposing sanctions under Rule 1:4-8, an assertion is deemed 'frivolous' when 'no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.'" United Hearts, L.L.C., 407 N.J. Super. at 389 (quoting First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007)). The attorney must have a "reasonable and good faith belief in the claims being asserted" to avoid sanctions. In re Estate of Ehrlich, 427 N.J. Super. 64, 77 (App. Div. 2012) (citing First Atl. Fed. Credit Union, 391 N.J. Super. at 432). Where "'the pleading as a whole is frivolous or of a harassing nature,'" sanctions are appropriate. United Hearts, L.L.C., 407 N.J. Super. at 390 (quoting Iannone v. McHale, 245 N.J. Super. 17, 31 (App. Div. 1990)). "False allegations of fact" that "are made in bad faith, for the purpose of harassment, delay, or malicious injury," will "will justify a fee award." Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div.) (citing McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 561 (1993)), certif. denied, 162 N.J. 196 (1999).

Sanctions under the frivolous litigation statute, N.J.S.A. 2A:15-59.1 (the "Statute"), apply to parties only, not counsel. McKeown-Brand, 132 N.J. at 560. The Statute provides that a prevailing party may be awarded "all reasonable attorney fees" where the court finds that a complaint filed by a party "was frivolous." To find a Complaint frivolous, similar to Rule 1:4-8, the court must determine that either:

> (1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
>
> (2) The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any

> reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.
>
> [N.J.S.A. 2A:15-59.1(b)(1)-(2).]

Thus, a "claim is 'frivolous' within the meaning of the statute if filed or pursued 'in bad faith, solely for the purpose of harassment, delay or malicious injury,' N.J.S.A. 2A:15-59.1(b)(1), or if 'the nonprevailing party knew, or should have known, that the claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law,' N.J.S.A. 2A:15-59.1(b)(2)." Ferolito, 408 N.J. Super. at 407-08.

If the prevailing defendant alleges that there was no "reasonable basis in law or equity for the plaintiff's claim and the plaintiff is represented by an attorney," a frivolous litigation sanction is appropriate against the party only where the party acted in bad faith in bringing or pursuing the claim. Id. at 408. "If there is evidence of a client's determination to pursue a frivolous suit, the client may be liable under N.J.S.A. 2A:15-59.1." Rabinowitz v. Wahrenberger, 406 N.J. Super. 126, 136 (App. Div.), appeal dismissed, 200 N.J. 500 (2009).

The Rule and Statute serve the dual punitive and compensatory purposes "to deter frivolous litigation" and "to reimburse 'the party that has been victimized by the party bringing the frivolous litigation.'" Ferolito, 308 N.J. Super. at 411 (quoting Toll Bros., Inc., 190 N.J. at 67); see also Throckmorton v. Twp. of Egg Harbor, 267 N.J. Super. 14, 19 (App. Div. 1993) (explaining the purpose of the Statute is "to deter baseless litigation"). "The remedial sanction is a payment of 'reasonable counsel fees and litigation costs.'" Ferolito, 308 N.J. Super. at 407 (citing Toll Bros., Inc., 190 N.J. at 67).

"The decision to award counsel fees rests within the sound discretion of the trial court." Shore Orthopedic Grp., LLC v. Equitable Life Assur. Soc. of U.S., 397 N.J. Super. 614, 623 (App. Div. 2008) (citations and quotations omitted), aff'd, 199 N.J. 310 (2009). That award may include reasonable attorneys' fees and costs incurred by the prevailing party in presenting the sanctions motion. R. 1:4-8(b)(2).

In Port-O-San Corp. v. Teamsters Local Union No. 863 Welfare & Pension Funds, 363 N.J. Super. 431, 438 (App. Div. 2003), the Appellate Division reversed and remanded for an award of reasonable attorneys' fees and costs against the plaintiff's counsel (and possibly the plaintiff) for frivolous litigation where it was "clear that the complaint against [the defendant] lacked both factual and legal bases—deficiencies known to litigation counsel (and, perhaps, to [the plaintiff]) at the outset." Plaintiff's counsel knew the suit had no basis and was used as a means to pressure the defendant's client, circumstances the panel held indicated bad faith and an improper purpose. Id. at 439. Further, counsel sued the defendant "under specious theories of liability when the absence of such liability was manifest," in an effort to obtain concessions by the defendant's client. Ibid. The panel found "nothing objectively reasonable in asserting the claims against [the defendant] that were set forth in [the plaintiff]'s complaint against him," noting in particular the "the accusation of conversion" was "unconscionable" under the circumstances. Id. at 440. These facts constituted an unequivocal violation of Rule 1:4-8. The panel remanded only as to the liability of the plaintiff party for a determination as to whether it acted in bad faith or relied in good faith on its counsel. Id.

In Mucia v. Middlesex County, No. A-1564-14T3, 2018 WL 769421, at *1-2 (N.J. Super. Ct. App. Div. Feb. 8, 2018) (*Saffer* Cert., Exhibit G), the Appellate Division affirmed an award of attorneys' fees and costs against the plaintiffs' counsel under Rule 1:4-8, incurred in defending

against a frivolous verified complaint and order to show cause. The defendant had demanded withdrawal of the verified complaint, warning plaintiffs' counsel that it ignored the applicable statute and case law. Id. at *1. Thereafter, the court denied the requested restraints and granted the defendants' motion to dismiss under Rule 4:6-2(e). Id. at *2. The panel affirmed the sanctions, finding that the plaintiffs relied on an incorrect statute despite it being pointed out by defendants' counsel, "cited no authority to support" its argument, and failed to distinguish relevant and adverse case law. Id. at *4.

In Sjogren, Inc. v. Caterina Insurance Agency, 244 N.J. Super. 369, 376 (Ch. Div. 1990), the Chancery Division held that frivolous litigation sanctions were appropriate where the allegations in the Verified Complaint that the defendants conspired to conceal information from the plaintiff were "unsupportable." The defendants' attorney had advised the plaintiff's attorney that the allegations in the Verified Complaint "were false," but the plaintiff's attorney refused to dismiss the case. Id. at 371. It also appeared that the plaintiff filed the Verified Complaint for an improper purpose. Id. at 376. All of the facts learned through discovery were already known to the plaintiff prior to bringing the suit. Id. at 377. The plaintiff knew or should have known that the Verified Complaint had no reasonable basis in law or equity. Ibid.

Lastly, in Ibelli v. Maloof, 257 N.J. Super. 324, 333 (Ch. Div. 1992), the Chancery Division held that frivolous litigation sanctions were appropriate where a motion "was submitted on a distorted and misrepresented set of facts." When, however, "the distortion was corrected and the real facts presented," the "lack of basis for the motion" became so clear that the motion was withdrawn. Id. at 334. The court in Ibelli found persuasive the trial court's decision in Fagas v. Scott, 251 N.J. Super. 169, 189 (Law. Div. 1991), where it awarded sanctions for frivolous

litigation because the defendant's claims were "predicated on fabricated facts" that were "fabricated to fit an otherwise proper cause of action."

As set forth below, the Verified Complaint and Order to Show Cause brought by the Association, by and through its counsel, Ansell Grimm, had no reasonable basis in law or equity, were based on grossly distorted allegations on felony conduct, and were brought in bad faith to harass and maliciously injury Mr. Rothstein (and his co-defendants).

B. Ansell Grimm patently violated Rule 1:4-8 because it knew that the Verified Complaint and Order to Show Cause were based on false allegations of serious criminal conduct and did not have any reasonable basis in law or equity.

Ansell Grimm is liable for Mr. Rothstein's reasonable attorneys' fees and costs, under Rule 1:4-8(a)(2) and (3) because Ansell Grimm utterly failed to "Stop, Think, Investigate and Research" before filing this frivolous lawsuit that alleged Mr. Rothstein breached the Master Deed "nuisance" provision by conspiring to shoot the Board president and before seeking a restraining order by Order to Show Cause. Gaiardo, 835 F.2d at 482. Both the Verified Complaint and Order to Show Cause: (1) were predicated on "verified" allegations that were gross misrepresentations of the subject private email conversation, and (2) had no reasonable basis in law or equity.

i. Ansell Grimm filed very serious false allegations and continued to pursue them even after being alerted that such allegations were materially false.

The Verified Complaint had no "evidentiary support." See T26:17 to 27:24; R. 1:4-8(b)(3). Ansell Grimm filed a Verified Complaint that grossly misrepresented the content of the subject email conversation so as to accuse Mr. Rothstein and his co-defendants of conspiring to commit murder, a first degree felony. See N.J.S.A. 2C:5-2, -4. The Association alleged, in short, that in a group email to twenty-five unit owners, Mr. Kardos "assembled" the defendants to shoot the Board president, Mr. Rothstein and his co-defendants "conspired" to shoot her, that Mr. Rothstein knew how to plan and successfully execute a murder by virtue of his status as a retired attorney,

and "upon information and belief" the conspiracy efforts continued after the subject email conversation. *Saffer* Cert., Exhibit A ¶¶3-9.

The Association's allegations, however, conspicuously omitted crucial components and context of the email conversation that included Ms. Appelbaum's apology and statement that she did not mean it, that Mr. Kardos and another unit owner cautioned the group not to talk about guns and killing people even though they knew the comments were "not serious," and that the thrust of Mr. Rothstein's comments focused on the use of petitions to effectuate change in the Board leadership. Compare id. ¶¶3-9, with Exhibit G.

As such, the Court found that the alleged conspiracy did not "actually exist" and was "nothing more than a poorly composed sarcastic joke" in the actual context of the email conversation. T25:24 to 26:19. The Court correctly observed that Mr. Kardos's opening email benignly concerned the recent Board elections and that he and another unit owner expressly stated that no one should be joking in such a manner, even though he knew Mr. Rothstein and Ms. Appelbaum were "not serious" in their crude comments. T26:20 to 27:5. The Court found that "**any reasonable person** under the circumstances" would understand that Mr. Rothstein's comments were "nothing more than satirical jokes" in bad taste. T26:20 to 27:11 (emphasis added). Moreover, the allegation that Mr. Rothstein knew how to commit and get away with murder because he was a retired attorney and that conspiratorial efforts continued outside the email conversation was "**completely without basis**." T27:18-24 (emphasis supplied).

Mr. Rothstein's counsel brought these precise factual misrepresentations to Ansell Grimm's attention in the Letter and gave it an opportunity to withdraw them. *Saffer* Cert., Exhibit B at 2-3. Because the email conversation text is objectively verifiable, Ansell Grimm knew or should have known that the factual allegations had no evidentiary support. R. 1:4-8(a)(3). For

this same reason and because its Secretary verified the truth of the allegations, the Association knew or should have known that the allegations were gross factual misrepresentations. N.J.S.A. 2A:15-59.1(b)(2); see *Saffer* Cert., Exhibit A at 6 (verification page); R. 1:4-4(b), -7.

The type of factual misrepresentations here appear to be unparalleled in case law. However, factual distortions, even those of a lesser magnitude than present here, are held to constitute frivolous litigation. See Port-O-San Corp., 363 N.J. Super. at 438-40 (finding frivolous litigation where complaint that counsel and possibly plaintiff knew lacked factual basis and included unconscionable "accusation of conversion"); Sjogren, 244 N.J. Super. at 376 (finding frivolous litigation where allegations in verified complaint were "unsupportable" and plaintiff knew the same); Ibelli, 257 N.J. Super. at 333 (finding frivolous litigation where the motion "was submitted on a distorted and misrepresented set of facts"). This case is simply more egregious.

In short, the Verified Complaint was "not supported by any credible evidence" and the "pleading as a whole is frivolous" and "of a harassing nature." United Hearts, L.L.C., 407 N.J. Super. at 389-90. "False allegations" of serious criminal conduct, such as those here, are by definition malicious, and therefore, a fee award is justified. See Belfer, 322 N.J. Super. at 144; see also Jobes v. Evangelista, 369 N.J. Super. 384, 397 (App. Div.) (explaining "well settled that accusation of criminal conduct constitutes slander per se"), certif. denied, 180 N.J. 457 (2004).

ii. Ansell Grimm failed to accept the Court's patent lack of jurisdiction to enter the criminal restraining order sought despite being warned of the same.

Second, Ansell Grimm knew or should have known that its attempt to obtain a criminal restraining order in Chancery Division, General Equity Part, was not "warranted by existing law" and it did not make any good faith argument for extension of the law. R. 1:4-8(a)(2).

It is fundamental that a court have subject matter jurisdiction to adjudicate a controversy and that a law firm make a good faith effort to ascertain that a court has such jurisdiction before

initiating suit. See Gaiardo, 835 F.2d at 482 (explaining duty to "Stop, Think, Investigate and Research" before filing a lawsuit). Here, this Court lacked jurisdiction, *ab initio*, to grant the relief that Ansell Grimm sought in this action. This was not an instance of Ansell Grimm seeking relief in the wrong venue; as this Court held, this Court lacked jurisdiction over the subject matter of this action and, when Mr. Rothstein's counsel pointed that out to Ansell Grimm in the Letter and briefing, Ansell Grimm still refused to withdraw the Verified Complaint and Order to Show Cause. This circumstance plainly falls within the purview of Rule 1:4-8.

The Letter advised Ansell Grimm that the restraining order sought in the Order to Show had no reasonable basis in law or equity because the Chancery Division, General Equity Part, had no jurisdiction to issue it under the PDVA and Smith v. Moore, 298 N.J. Super. 121 (App. Div. 1997). *Saffer* Cert., Exhibit B at 5-6. Mr. Rothstein's opposition brief again advised of this binding law and further advised of the long-settled case law divesting the Chancery Division of jurisdiction to adjudicate a criminal matter. Id., Exhibit D at 6-9. Yet, Ansell Grimm never addressed those controlling authorities in its briefing. Id., Exhibit C.

At oral argument, Mr. Byrne likewise failed to address the authorities, instead stating that people have the right to get judges to issue orders to deal with things and that a condominium has the right to get people to not do things. T5:22 to 6:6, 12:6-9. In denying the restraining order, the Court specifically noted that Ansell Grimm "**did not provide authorities** concerning the Court's jurisdiction" to grant one. T18:19-23 (emphasis supplied). In accord with Mr. Rothstein's position, the Court found no statutory or case law authority allowing it to enter the restraining order sought, and specifically pointed to the PDVA and Smith v. Moore as divesting it of jurisdiction to do so. T17:1 to 20:18. The Court further found "**no question** as to the absence of

jurisdiction" to restrain an alleged criminal violation under the "**long-established rule**" preventing it from doing so. T21:2-15 (emphasis supplied).

Ansell Grimm's filing of this lawsuit wherein the Court lacked jurisdiction from the inception and Ansell Grimm's continued pursuit of this action after being advised that a lack of jurisdiction was fatal to the Verified Complaint and Order to Show Cause, without more, warrants an award of attorneys' fees and costs, pursuant to Rule 1:4-8, in Mr. Rothstein's favor.

iii. Ansell Grimm knew that its claim that Mr. Rothstein's conduct breached the "nuisance" provision of the Master Deed had absolutely no basis in law.

Ansell Grimm knew that both the Association's claim for breach of the Master Deed "nuisance" provision based on an email conversation was not warranted by existing law, nor did Ansell Grimm make any argument for extension of the law, instead brazenly deleting unfavorable language from the Master Deed in its briefing. R. 1:4-8(a)(2).

The Letter advised Ansell Grimm that the Verified Complaint for breach of the Master Deed "nuisance" provision based on a private group email conversation had no reasonable basis in law or equity, based on the express language of the provision and settled nuisance law. *Saffer* Cert., Exhibit B at 4-5. In neither its briefing nor its oral argument in opposition to Mr. Rothstein's motion to dismiss, did Ansell Grimm provide any legal authority even remotely suggesting that an email conversation could constitute a "nuisance" under a condominium provision or at common law. Id., Exhibit F at 2-3; T30:21 to 33:20. Instead, when faced with overwhelming contrary legal authority, Ansell Grimm's brief brazenly resorted to deleting from the nuisance provision the critical, dispositive language "in or upon the Common Elements or in any Unit" and "therein" by use of ellipses -- just as it did in its reply brief on the Order to Show Cause. *Saffer* Cert., Exhibit F at 2-3; Exhibit C at 3. Such conduct, in and of itself, supports frivolous litigation sanctions. See Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1355 (Fed. Cir. 2003) (affirming

Rule 11 sanction for counsel's use of ellipses in brief to omit directly relevant language that changed the meaning of quotation).

Based on the exact language that Ansell Grimm deleted in its briefs, the Court took the "unusual step" of dismissing the Verified Complaint with prejudice. T42:20 to 43:5. The Court held email conversations are not carried on "in or upon the common elements or in any unit," and also do not "interfere with any unit owner's peaceful possession and use of his or her property." T38:23 to 39:7. The Court rightly held that, while some comments in the email were inappropriate, "there was **simply no way** to take that [email] conversation and fit it within [the nuisance provision" and "no set of pleadings **could possibly ever** bring [the email conversation] within the confines of [the nuisance provision]." T42:19 to 43:5 (emphasis supplied).

In sum, the claim that Mr. Rothstein conspired to commit murder and that email conversation breached the Master Deed "nuisance" provision was "completely untenable" and Ansell Grimm never advanced any "rational argument" to support it. United Hearts, L.L.C., 407 N.J. Super. at 389. Like in Port-O-San Corp., 363 N.J. Super. at 438, it was clear that the Verified Complaint and Order to Show Cause here "lacked both factual and legal bases -- deficiencies known to litigation counsel . . . at the outset." There was nothing "objectively reasonable" in filing sworn allegations that Mr. Rothstein conspired to commit murder, a first degree felony, and that accusation is even more "unconscionable" than the accusation of conversion in Port-O-San Corp., 363 N.J. Super. at 440. Mr. Rothstein was sued under a highly "specious theor[y] of liability when the absence of such liability was manifest." Id. at 139. How much more "untenable" and "specious" could a claim be than one that is dismissed, **with prejudice**, on a Rule 4:6-2(e) motion to dismiss? See United Hearts, L.L.C., 407 N.J. Super. at 389 (holding "pleading cannot be deemed frivolous as a whole nor can an attorney be deemed to have litigated a matter in bad faith

where . . . the trial court denies summary judgment on at least one count in the complaint and allows the matter to proceed to trial"); Ibelli, 257 N.J. Super. at 333 (observing real facts made lack of basis for motion so clear that motion was withdrawn).

Ansell Grimm's conduct here is analogous to, but even worse than, the conduct of plaintiff's counsel in Mucia, 2018 WL 769421, at *4. Like the plaintiff's attorney in Mucia, Ansell Grimm "cited no authority to support" the restraining order and failed to distinguish directly adverse statutory and case law, despite the Letter warning of its existence. *Saffer* Cert., Exhibit B at 4-5; Exhibit C. Ansell Grimm used the "ostrich-like tactic of pretending that potentially dispositive authority" belying its contentions "does not exist." Gonzalez-Servin v. Ford Motor Co., 662 F.3d 931, 934 (7th Cir. 2011) (Posner, J.).

In sum, Ansell Grimm is liable for Mr. Rothstein's reasonable attorneys' fees and costs under Rule 1:4-8(a)(2) and (3) for bringing this egregiously frivolous litigation. "The remedial sanction is a payment of 'reasonable counsel fees and litigation costs.'" Ferolito, 308 N.J. Super. at 407 (citing Toll Bros., Inc., 190 N.J. at 67).

C. The Association brought the Verified Complaint and Order to Show Cause in bad faith and to cause malicious injury.

The Association is liable under N.J.S.A. 2A:15-59.1(b)(1) because there direct evidence that it brought the Verified Complaint and Order to Show Cause in bad faith against Mr. Rothstein and his co-defendants. Rabinowitz, 406 N.J. Super. at 136. This same evidence of bad faith also triggers the Association's liability under N.J.S.A. 2A:15-59.1(b)(2) for bringing a claim with no basis in law or equity, as set forth above. Ferolito, 408 N.J. Super. at 408.

First, as set forth above, the Association **verified** allegations that had no evidentiary basis and were gross distortions of the email conversation. These were not benign allegations that turned out to be false; to the contrary, the Association alleged that Mr. Rothstein committed a first degree

felony. This is clear, *per se* evidence of the Association's bad faith and intent to cause malicious injury to Mr. Rothstein. See Sjogren, 244 N.J. Super. at 377; Fagas, 251 N.J. Super. at 189; see also Port-O-San Corp., 363 N.J. Super. at 440 (remanding to determine plaintiff party's knowledge of frivolousness of accusation of conversion).

Second, the Association Board announced in a February 12, 2018 Notice concerning the lawsuit that: "It took this action **in order to send a clear message**" about (alleged) cyberbullying at Fox Hills. Rothstein Cert., Exhibit A (emphasis supplied). It reiterated this intent in a second Notice posted the day after the hearing in this matter. Id., Exhibit B. This is rare, direct evidence of bad faith. Lawsuits—especially those alleging that a person conspired to commit murder—are not used as devices to "send a message" to the target defendant. See Port-O-San Corp., 363 N.J. Super. at 439-40 (holding litigation was brought in bad faith where admission suit brought to pressure party). Of course, the Master Deed "nuisance" provision has nothing to do with "cyberbullying" and "cyber-harassment." See T41:6-16 (explaining no relevant provision exists in the Master Deed). Therefore, there is no conceivable good faith reasonable basis on which the Association could possibly assert that it brought a claim for breach of the "nuisance" provision.[4]

Lastly, the Association filed the lawsuit without complying with the longstanding requirement that the decision to file suit against a unit owner must be "properly memorialized." Billig v. Buckingham Towers Condominium Association I, Inc., 287 N.J. Super. 551, 564-65 (App. Div. 1996). Despite co-counsel's demand on behalf of defendants, Ansell Grimm failed to

[4]Notably, the criminal "cyber-harassment" statute requires a communication be made "with the purpose to harass another." N.J.S.A. 2C:33-4.1(a). A private group email that did not include the Board president and in which neither Mr. Rothstein nor any other participant professed any conscious objective that it be sent to the Board president, cannot constitute harassment or cyber-harassment as a matter of law. See State v. Burkert, 444 N.J. Super. 591, 600-06 (App. Div. 2016), aff'd, 231 N.J. 257 (2017); State v. Castagna, 387 N.J. Super. 598, 606 (App. Div. 2006). The Board's professed intent, thus, had no reasonable basis in any other law.

produce any document memorializing the Board's alleged decision to sue the Mr. Rothstein and his co-defendants. Valle Cert., Exhibits A and B. This very case proves the wisdom of the Billig requirements:

> Irrespective of the precise form that authorization takes, we think it evident that the decision to engage in litigation, whether foreclosure or the assertion of affirmative claims against a unit owner or a third party, must be a collective decision of the board. Litigation ought to be a last resort, not a first one. It is expensive, it is burdensome, and when it involves a claim against a unit owner, it may well be counter-productive to the harmony and commonality required for successful community living. Clearly, before the unit owners can be burdened with the financial onus and other burdens of litigation, they must be assured that their elected board has made reasonable efforts otherwise to resolve the dispute, that the members of the board, with as full a briefing as possible, have made a collective decision, and **that the decision is properly memorialized**. Nothing less is required of both public and private corporations.
>
> [Id. at 564-65 (citations omitted) (emphasis supplied)]

The Board clearly never properly considered and memorialized the decision to bring this lawsuit, which was almost certainly brought at the sole behest of the Board president in an effort to silence Mr. Rothstein and his co-defendants, who have been dissenting members in the Association. See Rothstein Cert. ¶3.

In sum, the Association is liable because there is evidence of its "determination to pursue a frivolous suit." Rabinowitz, 406 N.J. Super. at 136. The Association is jointly and severally liable with Ansell Grimm for Mr. Rothstein's reasonable attorneys' fees and costs under N.J.S.A. 2A:15-59.1(b)(1) and (2) for bringing this egregiously frivolous litigation in utter bad faith. "The remedial sanction is a payment of 'reasonable counsel fees and litigation costs.'" Ferolito, 308 N.J. Super. at 407 (citing Toll Bros., Inc., 190 N.J. at 67).

3. The Court should award reasonable attorneys' fees and costs to both deter such frivolous and dangerous litigation, and to equitably compensate Mr. Rothstein.

An award of Mr. Rothstein's reasonable attorneys' fees and costs is the particularly appropriate sanction here to accomplish the Rule's and Statute's goals of both deterring completely baseless litigation and compensating the victim thereof, Mr. Rothstein. See R. 1:4-8(d)(2); N.J.S.A. 2A:15-59.1(a)(1); Ferolito, 308 N.J. Super. at 411.

It is clear that in light of Mr. Rothstein's prior history of outspokenness against Ms. Stahl's leadership and the Board's actions, the present lawsuit was meant to punish Mr. Rothstein (and his co-defendant dissenters) at the first opportunity by forcing Mr. Rothstein to incur substantial attorneys' fees and defend against restraints that would, as a practical matter, silence him. See Rothstein Cert. ¶3. Mr. Rothstein, an 87-year old retired Deputy Attorney General who made approximately $56,000 per year when he retired in 1991, should not have to face financial distress due to the Association's and Ansell Grimm's frivolous lawsuit baselessly accusing him of committing a first degree felony. See id. ¶2.

In contrast, the Association is comprised of 677 units, meaning that a full attorneys' fee and cost award here against it would effectively cost each non-defendant unit owner no more than $60. The Association Board and its law firm can answer to the unit owners for this added expense. Furthermore, Ansell Grimm is a medium-sized law firm that is ultimately responsible for its decision to recommend, file, and pursue this frivolous litigation, and all without written authorization to do so. See R. 1:4-8(b)(3).

To serve the purpose of the Rule and Statute, as well as justice and equity, the Court should award Mr. Rothstein his reasonable attorneys' fees and costs, which currently total $11,612.85, and will be supplemented by fees incurred in reply and any oral argument.

CONCLUSION

For the foregoing reasons, this Court should find that the Order to Show Cause and Verified Complaint were frivolous within the meaning of Rule 1:4-8 and N.J.S.A. 2A:15-59.1. The Court should award Mr. Rothstein his reasonable attorneys' fees and costs in the total amount of **$41,559.70**, consisting of $29,623.57 in defense of the underlying matter and $11,612.85, plus any supplemental attorneys' fees and costs incurred in making and prevailing on this motion, under Rule 1:4-8(b)(2), to be paid by the Association and its law firm of Ansell Grimm, jointly and severally, or in a proportion deemed appropriate by this Court.

Respectfully submitted,

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Attorneys for Defendant Alan Rothstein

Dated: March 6, 2018

By: _____
MICHAEL A. SAFFER

#1326303