**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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| ABRAHAM KOROTKI, SALEENA KOROTKI, RESERVES DEVELOPMENT, LLC, STL DEVELOPMENT LLC, ST2K, LLC, THE RESERVES RESORT, SPA & COUNTRY CLUB, LLC, and THE RESERVES MANAGEMENT, LLC, | ) | |
| Plaintiffs, | ) | |
| v. | ) | C.A. No. N15C-07-164 CCLD WCC |
| HILLER & ARBAN, LLC, ADAM HILLER, ESQ., BRIAN ARBAN, ESQ., SCHWARTZ & SCHWARTZ, ATTORNEYS AT LAW, P.A., and STEVEN SCHWARTZ, ESQ., | ) | |
| Defendants. | ) | |

Submitted: January 23, 2017
Decided: May 23, 2017

**Defendant Brian Arban's Motion for Summary Judgment – GRANTED**
**Defendants Hiller & Arban, LLC and Adam Hiller's Motion for Summary Judgment –DENIED**
**Defendants Hiller & Arban, LLC and Adam Hiller's Motion for Summary Judgment Based on the Doctrines of Unclean Hands and *In Pari Delicto* – DENIED**
**Defendants Schwartz & Schwartz, Attorneys at Law, P.A. and Steven Schwartz's Motion for Partial Summary Judgment – DENIED**
**Defendants Schwartz & Schwartz, Attorneys at Law, P.A. and Steven Schwartz's Motion for Summary Judgment – GRANTED IN PART, DENIED IN PART**
**Defendants Schwartz & Schwartz, Attorneys at Law, P.A. and Steven Schwartz's Motion for Summary Judgment Based on Their Motion in *Limine* to Exclude Plaintiffs' Expert – DENIED**

**OPINION**

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**CARPENTER, J.**

This is a malpractice action relating to legal advice and services rendered in connection with a complex bankruptcy matter by two Delaware law firms and their attorneys: (1) Hiller & Arban, LLC (the "Hiller Firm"), Adam Hiller, Esquire ("Mr. Hiller"), and Brian Arban, Esquire ("Mr. Arban") (collectively, the "Hiller Defendants"); and (2) Schwartz & Schwartz, Attorneys at Law, P.A. (the "Schwartz Firm") and Steven Schwartz, Esquire ("Mr. Schwartz") (together, the "Schwartz Defendants"). Before the Court are a number of Motions for Summary Judgment filed on behalf of both sets of Defendants. With regard to the Motion filed by Mr. Arban, summary judgment is GRANTED. The remaining motions of the Hiller Defendants are DENIED. The Schwartz Defendants' motions are DENIED IN PART and GRANTED IN PART.

## I. FACTS

The instant litigation was filed in July 2015 on behalf of Abraham Korotki ("Mr. Korotki"), Saleena Korotki ("Saleena"), Reserves Development, LLC, The Reserves Resort, Spa & Country Club, LLC, The Reserves Management, LLC (collectively, "Reserve Entities"), STL Development LLC ("STL"), and ST2K, LLC ("ST2K") (together, "Plaintiffs"). At all relevant times, Mr. Korotki was the

sole member of the Reserves Entities and his wife, Saleena, was the sole member of STL and ST2K.[1]

In 1998, Mr. Korotki began developing a 185-lot residential real estate community in Sussex County: The Reserves Resort, Spa & Country Club ("Reserves"). Mr. Korotki transferred the land to Reserves Resort, Spa & Country Club, LLC ("Resort") in August 2001.[2] Reserves Management, LLC ("Management") was the entity through which the community's grounds and common areas were managed and maintained. Reserves Development, LLC ("Development") was created as a "tax device" used in the conveyance of certain lots within the Reserves.[3] All of the Reserves Entities were wholly-owned and controlled by Mr. Korotki.

Beginning in 2004, the lots within the Reserves were sold to various third party builders and developers.[4] Several disputes arose from these transactions,

[1] Compl. ¶¶ 4-11. Although it appears that, from and after 2008, Korotki had power of attorney over STL, which gave him "the ability to manage" STL. Pls.' Answ. Br. in Opp'n to Hiller Defs.' Mots. for Summ. J. at 4 n.8.
[2] Compl. ¶¶ 52-53.
[3] Pls.' Answ. Br. in Opp'n to Hiller Defs.' Mots. for Summ. J. at 3.
[4] Compl. ¶ 63. "Construction of the Reserves…was intended to be completed in four phases. Mr. Korotki completed the infrastructure…in Phase 1 of the Reserves Development and sold most of the lots within Phase 1 to homebuyers." *Id.* ¶ 62. Then, in March 2004, the lots comprising Phase 2 and certain lots in Phase 3 of the Reserves were sold, respectively, to residential home builders Stover Homes LLC and Cristal Properties LLC. *Id.* ¶¶ 64-66 ("Before closing, Cristal Properties assigned its rights and obligations under the agreement of sale to Bella Via, LLC ("Bella Via"), a company that was formed by certain of Cristal Properties' principals."). In April 2005, "Reserves sold 17 unimproved lots in Phase 3 to R.T. Properties LLC for $4,250,000.00, which subsequently transferred the lots to four of its affiliates: Mountain

and, by 2007, Plaintiffs were involved in a "multiplicity of litigation."[5] Mr. Korotki initiated a number of lawsuits in Delaware state courts, on behalf of himself and certain of plaintiff entities, alleging fraudulent conduct and "breaches of contract by various purchasers and/or their successors and assigns, among others."[6]

It appears that, sometime in 2007, a dispute arose relating, in part, to two letters of credit issued by Wilmington Trust Company, which Resort posted and Mr. Korotki personally guaranteed in reliance on one purchaser's alleged representation that they would pay their share of bonding costs. The letters of credit were initially supported by $2.5 million in cash, but Wilmington Trust later accepted a mortgage from Resort encumbering 22 lots at the Reserves as replacement collateral for the $2.5 million.

The Schwartz Defendants were retained in November 2007 to represent Mr. Korotki and certain of the plaintiff entities in connection with matters surrounding the Reserves.[7] While Mr. Schwartz served primarily as litigation counsel in this regard, he also performed various transactional services including effectuating the conversions of certain entities into limited liability companies and preparing by-laws, corporate minutes, and deeds. In June 2008, Mr. Korotki also sought the

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Range, LLC, Fountain, LLC, Waterscape, LLC and Wind Chop, LLC (collectively, "RT Properties")." *Id*. ¶ 70.

[5] *Id*. ¶¶ 1, 71-87.

[6] *Id*. ¶ 71.

[7] *Id*. ¶ 25.

advice and counsel of Mr. Hiller, who allegedly "held himself out to the public as a bankruptcy specialist."[8]

In November 2008, as a result of the disputes and proliferation of litigation surrounding the Reserves, Mr. Korotki, "upon the advice and counsel of the Schwartz Defendants and the Hiller Defendants," retained the law firm of Offit Kurman, P.A. ("Offit Kurman")[9] to represent him, his entities, and Saleena in "creating and implementing an 'asset protection plan.'"[10] Hiller and Schwartz allegedly participated with Offit Kurman attorneys to plan and cause the transfer of Mr. Korotki's interest in substantially all unencumbered lots at the Reserves to his wife, Saleena ("Asset Protection Plan").[11] Mr. Hiller and Mr. Schwartz allegedly received copies of the Asset Protection Plan, once finalized, from Offit Kurman.

Pursuant to the Asset Protection Plan:

> a. On December 1, 2008, STL was created and 100 shares of STL's common stock were issued to Reserves;
> b. On December 2, 2008, Reserves transferred the STL stock to Mr. Korotki;
> c. On December 3, 2008, Reserves deeded 69 lots to STL (the "69 Lots"); and
> d. On January16, 2009, Mr. Korotki's stock in STL was transferred to Saleena….

[8] *Id*. ¶ 14 ("On its website, the Hiller Firm advertised that Attorney Hiller represents clients 'in a multitude of roles in a bankruptcy and insolvency capacity,' with his practice primarily consisting of Chapter 11 debtor representation, but also 'other parties' in bankruptcy cases...'").
[9] Plaintiffs have also pursued a legal malpractice action against Offit Kurman and several of its attorneys, which is pending in Philadelphia County. Pls' Answ. Br. in Opp'n to Schwartz Defs.' Mots. for Summ. J. at 8 n.28.
[10] Compl. ¶ 88.
[11] *Id*. ¶ 89.

> e. Additionally, all other real property owned by Mr. Korotki, as well as all of his personal property, were transferred to Saleena…at or about the time of the stock transfer to her, and Mr. Korotki directed his attorneys in writing to "pay over, distribute and convey any and all monies received on my behalf and those of the above corporations [Resort] [and Management] to Saleena …."[12]

Saleena was neither a party to any of the pending suits, nor did she face potential liability under the letters of credit.[13] As of 2008, all bills relating to the Reserves were paid by Saleena or STL. While Saleena apparently owned STL, Mr. Korotki almost immediately obtained power of attorney over STL, which allowed him to manage the entity.[14]

In 2010, Wilmington Trust demanded payment from Mr. Korotki and Resort in connection with the letters of credit. When no payment was made, Wilmington Trust initiated proceedings in the Delaware Superior Court seeking reimbursement. Wilmington Trust's rights were eventually assigned to USAP, a subsidiary of Republic Financial. On February 23, 2012, USAP obtained a judgment against Resort and Mr. Korotki in the amount of $2,216,233 plus interest, costs, and attorneys' fees.[15] Upon Defendants' advice, Resort deeded 14 additional lots at the Reserves to STL on May 16, 2012, leaving STL and Saleena with a total of 83

[12] *Id*. ¶ 90 (a)-(e).
[13] *Id*. ¶¶ 91-92 ("Plan ensured that no creditor of Mr. Korotki or Reserves could look to the 69 Lots to satisfy their indebtedness, without first uncovering and then unwinding through judicial process the transfer to Saleena.").
[14] Pls.' Answ. Br. in Opp'n to Hiller Defs.' Mots. for Summ. J. at 4 n.8.
[15] Compl. ¶ 96.

unencumbered lots and Resort with the 22 lots encumbered by the mortgage held by USAP.[16]

In a "series of telephonic meetings that took place in Philadelphia and elsewhere throughout the latter part of 2012," Defendants allegedly advised Mr. Korotki that both he and Resort should file for bankruptcy relief under Chapter 11 of the United States Bankruptcy Code.[17] Defendants purportedly assured Mr. Korotki that pursuing this course of action would allow him and Resort to remain "debtors-in-possession" and thereby "retain possession and control of their assets, business and property" and "continue to prosecute their pending state court litigations."[18] Defendants apparently rendered such advice "even though as a result of the Asset Protection Plan that the Offit [Kurman attorneys] had implemented, Mr. Korotki was 'judgment proof.'"[19]

It was agreed that Hiller would be designated counsel of record in the bankruptcies, and that Schwartz and the Offit Kurman attorneys would seek appointment as special litigation counsel once the Chapter 11 petitions were filed in order to continue prosecuting the Delaware state court actions.[20] Before filing for bankruptcy, and allegedly at Defendants' direction, Mr. Korotki borrowed

[16] *Id*. ¶ 97.
[17] *Id*. ¶¶ 1, 98.
[18] *Id*. ¶¶ 102-03.
[19] *Id*. ¶ 104.
[20] *Id*. ¶¶ 106-08.

$600,000, $400,000 of which he paid to Mr. Schwartz and $175,000 to Offit Kurman, to retain the attorneys' representation in the pending litigation.[21]

Pursuant to the parties' discussions, Hiller filed the Chapter 11 petitions in the United States Bankruptcy Court in the District of Delaware on behalf of Mr. Korotki and Resort on December 10, 2012, and a Joint Plan of Reorganization ("Reorganization Plan") and Disclosure Statement the following day.[22] Upon later review by the Bankruptcy Court, the cases were converted from Chapter 11 to Chapter 7.[23] As a result, a Chapter 7 Trustee was appointed in July 2013 to take possession of "all of the assets forming the bankruptcy estates" of Mr. Korotki and Resort, including Korotki's interest in Management and the state court litigations, "for liquidation and distribution to creditors."[24]

According to Plaintiffs, the bankruptcy filings were "doomed from conception and non-confirmable as a matter of law."[25] Specifically, Plaintiffs allege the Reorganization Plan proposed to establish a liquidating trust consisting of "effectively one asset," the state court claims, even though "potential recoveries from a lawsuit, notwithstanding their expected value, are insufficient to create a

[21] *Id.* ¶ 109 (providing Mr. Korotki borrowed the funds "on his and/or his affiliates' credit cards and lines of credit").
[22] *Id*. ¶¶ 111-15.
[23] *Id*. ¶¶ 127-29.
[24] *Id*. ¶¶ 128-29.
[25] *Id*. ¶ 123. According to Plaintiffs, "[t]hese filings were the joint strategy and work product of all Defendants." *Id*. ¶ 115. Although, from the record, it appears Schwartz's role was limited to preparing portions of the Disclosure Statement referring to the pending state court litigations.

reasonable likelihood of rehabilitation for purposes of successfully prosecuting a Chapter 11 bankruptcy," which Defendants allegedly "knew or should have known" beforehand. [26] The Plan also provided that the costs of litigation would be funded by the trust's assets, *i.e.*, any proceeds of the litigation. "In substance, Defendants' Reorganization Plan required the creditors to fund the prosecution of the…Claims." Additionally, according to Plaintiffs, the Disclosure Statement "conceded that a Chapter 7 liquidation was the only realistic alternative to the Reorganization Plan (which was *per se* non-confirmable) and further conceded, prophetically, that a Chapter 7 Trustee would 'settle quickly, even for nominal values, without realizing the true value of the…Claims."[27]

Further, "pursuant to the… Plan and in violation of the absolute priority rule, Mr. Korotki would retain all of his equity and interest in [Resort], Management and Development, and their assets"[28] and Saleena, STL, and ST2K would purportedly be able to "retain their interest in the 90 unencumbered lots in…Reserves…that had previously been owned by Mr. Korotki and [Resort]."[29] However, as a result of the conversion and the timing of the bankruptcy filings less than four years from certain asset protection transactions, Plaintiffs faced the

[26] *Id*. ¶¶ 116-18.
[27] *Id*. ¶ 126.
[28] *Id*. ¶¶ 120-21 ("Mr. Korotki would thus retain, among other things, Management's valuable rights to the $80,000.00 per lot payment pursuant to the Declaration, as amended, its interest in the CCL Claims and the six townhome lots at the Reserves Development it owned.").
[29] *Id*. ¶ 122.

possibility of losing 69 of the Reserves lots to the bankruptcy estate should the Trustee pursue a fraudulent conveyance action.[30] These circumstances allegedly left Plaintiffs no choice but to accept the Trustee's proposed settlement, under which: "(i) they released all claims they had, and the right to collect" on those claims, and "(ii) the lots that they owned, including but not limited to the 90 lots owned by STL and ST2K, would be sold as part of a sale, from which Plaintiffs would be entitled to a fractional payment of the proceeds "instead of the[] actual value."[31]

As a result of the foregoing, Plaintiffs commenced litigation in this Court on July 20, 2015.[32] Count I, asserting legal malpractice, is the only claim currently remaining in the lawsuit.[33] Plaintiffs allege that "Defendants breached their duty of care and otherwise deviated from acceptable professional standards by:" (1) advising Mr. Korotki to file a personal bankruptcy, despite the fact that his Asset

[30] *Id*. ¶¶ 132-33.
[31] *Id*. ¶ 134. Plaintiffs claim that, as a result of the bankruptcy outcome, the defendants against whom litigation was pending "ultimately received a double recovery against the [Plaintiffs]…because they not only received releases in their favor of the…Claims, they also received distributions from the sale of the lots as purported 'creditors.'" *Id*. ¶ 135.
[32] "[T]he Chapter 7 Trustee abandoned the legal malpractice claims asserted herein to Mr. Korotki, Reserves and Management. The Chapter 7 Trustee's Settlement specifically excluded, and did not release, the claims for legal malpractice asserted herein by Saleena Korotki, Development, STL and ST2K." *Id*. ¶ 136.
[33] The Court dismissed Counts II-IV of the Complaint by oral ruling on February 24, 2016 at the hearing on Defendants' respective motions to dismiss and for judgment on the pleadings. *See* D.I. 99. Per this Court's Memorandum Opinion, issued in July 2016, Count V was also dismissed. *See Korotki v. Hiller & Arban, LLC*, 2016 WL 3637382 (Del. Super. Ct. July 1, 2016).

Protection Plan essentially rendered him "judgment proof" from creditors; (2) failing to advise Korotki that, by filing a personal bankruptcy, his retained ownership interest in Management would become a part of the bankruptcy estate and therefore subject to the control of a Chapter 7 Trustee; (3) "[f]iling misguided Chapter 11 bankruptcy petitions" on behalf of Mr. Korotki and Resort, when Defendants knew or should have known Mr. Korotki and Resort "had no chance of reorganizing;" (4) failing to timely and adequately investigate and advise Mr. Korotki and Resort "of the potential pitfalls of filing for bankruptcy, including the total loss and control of valuable lawsuits and…Development itself;" (5) "[m]istiming the filing of the Chapter 11…Petitions and thereby exposing the transfers made pursuant to the Asset Protection Plan to the Chapter 7 Trustee's avoidance powers;" and (6) "[c]reating and proposing" a plan of reorganization that was "ill-conceived, non-confirmable as a matter of law, and destined for total failure," all of which Defendants knew or should have known before filing the petitions and Reorganization Plan.[34]

The Hiller and Schwartz Defendants have filed motions pursuant to Superior Court Civil Rule 56, asserting various theories under which they claim they are entitled to summary judgment. Both sets of Defendants joined in supporting each other's motions. This is the Court's decision on those motions.

[34] Compl. ¶ 144.

## II. STANDARD OF REVIEW

In reviewing a motion for summary judgment pursuant to Rule 56, the Court must determine whether any genuine issues of material fact exist.[35] Specifically, the moving party bears the burden of showing that there are no genuine issues of material fact so that it is entitled to judgment as a matter of law.[36] In deciding a motion for summary judgment, the Court must view the record and any inferences in a light most favorable to the non-moving party.[37] Therefore, the Court will deny summary judgment if it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate.[38]

## III. DISCUSSION

To establish a claim of legal malpractice, a "client must prove the employment of the attorney and the attorney's neglect of a reasonable duty, as well as the fact that such negligence resulted in and was the proximate cause of loss to the client."[39] Both Defendants move for summary judgment, contending Plaintiffs have failed to adequately establish the elements required to succeed in an action for legal malpractice. The Court will first address the arguments presented in the Hiller

[35] *See* Super. Ct. Civ. R. 56(c); *Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).
[36] *See Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[37] *See Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[38] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. 1962), *rev'd in part* and *aff'd in part*, 208 A.2d 495 (Del. 1965).
[39] *See Dickerson v. Murray*, 2016 WL 1613286, at *2 (Del. Super. Ct. Mar. 24, 2016), *reargument denied*, 2016 WL 2620295 (Del. Super. Ct. Apr. 21, 2016).

Defendants' Motions, before turning to the Motions filed by the Schwartz Defendants.

## A. Hiller Defendants

### 1. *Mr. Arban's Motion for Summary Judgment*

Mr. Arban has filed a separate motion for summary judgment arguing that Plaintiffs have failed to satisfy the second element of a legal malpractice claim: neglect of a professional duty.

Notably, the pleadings filed in this matter make hardly any mention of Mr. Arban.[40] To the contrary, the record makes clear that Plaintiffs sought the legal counsel of *Mr. Hiller* in connection with the bankruptcies. Following discovery, it appears Mr. Arban's involvement in the matter was limited to domesticating a $1.3 million judgment, a task he performed at Mr. Hiller's direction while Hiller was away on vacation. Plaintiffs' only ground for seeking to hold Mr. Arban liable for malpractice is essentially that the judgment he domesticated, which was in the Development's favor, was later assigned to Resort and became a part of the bankruptcy assets.[41]

Even if Arban's narrow role in the case was enough to expose him to liability for malpractice, which the Court does not believe it does, Plaintiffs have

[40] Aside from the portion introducing the Defendants, Arban does not appear to be specifically referred to at any point in the Complaint, nor is he mentioned in the statement of facts set forth in Plaintiffs' answering brief.

[41] Nothing has been produced as to the extent of Arban's role, if any, in so far as the *assignment* of the judgment, following domestication, is concerned.

adduced no expert testimony opining on the matter. "It is well-established in Delaware that expert testimony is necessary to support a claim of legal malpractice."[42] Plaintiffs attempt to rely on the exception to this general rule, which applies "when the professional's mistake is so apparent that a layman, exercising his common sense, is perfectly competent to determine whether there was negligence."[43] This exception is a narrow one, however, and Plaintiffs have not convinced the Court that it should apply here, in the context of complicated bankruptcy proceedings.[44] It appears that, at most, Plaintiffs are attempting to hold Mr. Arban liable simply because of his association with Mr. Hiller. This is insufficient and, as a result, Mr. Arban's Motion for Summary Judgment will be granted.

**2. *Motion for Summary Judgment***

The arguments advanced in support of the Hiller Defendants' Motion for Summary Judgment can be grouped as follows: failure to establish an attorney-client relationship, lack of requisite causation testimony, collateral estoppel, and lack of expert testimony relating to sale of Reserves following bankruptcy.

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[42] *Dickerson*, 2016 WL 1613286, at *2.
[43] *See Middlebrook v. Ayres*, 2004 WL 1284207, at *5 (Del. Super. Ct. June 9, 2004), *aff'd*, 867 A.2d 902 (Del. 2005).
[44] Plaintiffs address their failure to proffer expert testimony regarding Mr. Arban in a single paragraph on the last page of their answering brief and minimal, if any, argument was made at the hearing to supplement Plaintiffs' position on the matter.

### i. Attorney-client relationship

The Hiller Defendants first argue the claims of Saleena and her entities, STL and ST2K, and the claims of Management and Development must fail because no attorney-client relationship existed between these Plaintiffs and the Hiller Firm.

In order to bring a legal malpractice action, a "plaintiff…must plead and prove the existence of an attorney-client relationship."[45] "Whether an attorney-client relationship exists depends on the facts and circumstances of a particular case," with the "most significant fact or circumstance" being "whether the attorney and client entered into an express agreement for legal services."[46] Absent an express agreement, a lawyer-client relationship may still be inferred "from the conduct of the parties."[47] Under such circumstances, "there would have to be, at the very least, a preexisting relationship that would create a reasonable expectation on the 'client's' part that the attorney was representing his [or her] interests, and reliance by the client upon that expectation."[48] An attorney will only be found to owe a duty to a non-client where "the complaining party can show there was fraud

[45] *See Farmers Bank of Willards v. Becker*, 2011 WL 3925428, at *3-4 (Del. Super. Ct. Aug. 19, 2011) (quoting *Milner v. Anders*, 2001 WL 637394, at *4 (D. Del. May 10, 2001)).
[46] *See id. See also SBC Interactive, Inc. v. Corp. Media P'rs*, 1997 WL 770715, at *4 (Del. Ch. Dec. 9, 1997) ("[W]hether an attorney-client relationship arises depends upon the facts and circumstances of the case. Normally the most critical fact or circumstance is a formal agreement that the attorney giving the advice is or will be the lawyer for the party involved. No such agreement existed here.").
[47] *See In re Berl*, 540 A.2d 410, 414 (Del. 1988) (citing *Connelly v. Wolf, Block, Schorr, & Solis-Cohen*, 463 F. Supp. 914, 919 (E.D. Pa.1978)); *Farmers Bank of Willards*, 2011 WL 3925428, at *3-4 (citing *Connelly*, 463 F. Supp. at 919).
[48] *See SBC Interactive, Inc.*, 1997 WL 770715, at *4.

or collusion on the part of the attorney, privity of contract with the attorney or that they were an intended beneficiary of the attorney's services."[49]

There is no documentation in the record evidencing that a formal agreement for legal services existed between the Hiller Defendants and Saleena or either of her entities. There appears to be two written engagement agreements. The first is dated August 2011 indicating that Hiller agreed to represent Management and Development, in addition to Korotki and Resort. The second, dated November 2012, reflects an agreement whereby Hiller would provide legal services for Mr. Korotki and Resort *alone*.

Plaintiffs do not appear to dispute the absence of express engagement agreements documenting that an attorney-client relationship existed between Mr. Hiller and every Plaintiff. Instead Plaintiffs argue that an attorney-client relationship may be inferred from the conduct of the parties. According to Plaintiffs, there is a "lengthy factual history" showing that the Korotkis and their "family of entities" relied on Hiller's legal advice in connection with "the development of the Reserves" over the course of several years.[50]

At the outset, the Court will not grant the Motion to the extent it attempts to exclude Management and Development. The record demonstrates that Hiller

[49] *See Farmers Bank of Willards*, 2011 WL 3925428, at *3-4 (quoting *Nichols v. Twilley, Street & Braverman, P.A.*, 1991 WL 226777, at *2 (D. Del. Oct. 3, 1991)). "The Court will not, however, extend an attorney's duty to a third-party when an adversarial relationship exists between the parties." *Id.*

[50] Pls.' Answ. Br. in Opp'n to Hiller Defs.' Mots. for Summ. J. at 40.

continuously represented Mr. Korotki from 2008-2012, in addition to each of the Reserves Entities at some point or another throughout the relevant time period. It is undisputed that the Reserve Entities are related and that all three were solely owned and controlled by Mr. Korotki. Hiller thus presumably understood Mr. Korotki's interest in the entities and how each could be impacted as a result of the bankruptcy.

Nor will the Court grant the Motion with respect to Saleena and her entities, though it admits its decision was more difficult in this regard. Plaintiffs' argument is not a strong one insofar as they attempt to convince the Court that a formal attorney-client relationship existed between the Hiller Defendants and Saleena or her entities. Indeed, Plaintiffs' claim that Mr. Hiller, in representing the Reserves Entities, "concomitantly" and "by *de facto*" represented the interests of Saleena and her entities is logically unpersuasive.

That said, Mr. Hiller allegedly participated in advising Plaintiffs with respect to the Asset Protection Plan in 2008. Saleena and STL assumed significant roles in connection with the asset protection transactions: STL was formed to facilitate the transfer, Mr. Korotki's assets were transferred to STL and Saleena, and it was agreed that any monies received by the Defendants on Mr. Korotki's behalf would be conveyed to Saleena. There is no record of Saleena or STL having separate independent counsel, and while action may have been taken in an

attempt to protect assets, Saleena and her entities were merely a conduit for Mr. Korotki's actions. From 2008 forward, it appears STL and Saleena paid most of the Defendants' legal bills. Given Hiller's apparent familiarity with and participation in the structuring of Mr. Korotki's personal and corporate affairs, it is reasonable to infer that he owed some duty to Saleena and her entities in recommending and filing the bankruptcy petitions, given the potential impact this course of action could and would have on all Plaintiffs. Hiller cannot hide behind the lack of a formal representation agreement since he was not only aware of, but participated in, the restructuring of Korotki's assets. Hiller was clearly aware that Mr. Korotki was the one controlling the decisions with respect to the merging of these assets. It appears Saleena was simply used as a shield in order to protect those assets from Mr. Korotki's creditors. Viewing the foregoing facts in Plaintiffs' favor, summary judgment must be denied.

**ii. Lack of requisite causation testimony**

Plaintiffs have retained Jeffrey Kurtzman, Esquire ("Mr. Kurtzman"), as an expert in this matter. Since Mr. Kurtzman is a member of the bars of Pennsylvania, New Jersey, and New York, but not Delaware, Plaintiffs have also retained James Huggett, Esquire, ("Mr. Huggett") as a bridging expert. The Hiller Defendants do not dispute Mr. Kurtzman's competency to testify as to the standard

of care with regard to Mr. Hiller. Rather, they take the position that he is incapable of providing a causation opinion consistent with Delaware law.

The causation standard applied in Delaware is the "but for" test.[51] Plaintiffs cite case law indicating that New Jersey courts apply the "substantial factor" standard of causation in malpractice cases.[52] While this may be true, Kurtzman's testimony reflects that he employed "but for" language throughout the course of his deposition. Never once does he appear to have proclaimed to apply the substantial factor test in his testimony. Ultimately, the Court finds Plaintiffs have met their burden to proffer standard of care testimony, along with bridging testimony where needed. This rationale likewise applies to the Hiller Defendants' alternative argument concerning Plaintiffs' alleged failure to provide requisite causation testimony with regard to the Reorganization Plan.

**iii. Collateral estoppel**

Next, the Hiller Defendants argue that Plaintiffs are collaterally estopped from claiming damages based on the Reorganization Plan and alleged loss of the state court litigations. "The doctrine of collateral estoppel precludes a redetermination of facts actually litigated and determined in a prior proceeding."[53]

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[51] *See, e.g., Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991).
[52] *See Giordano v. Bogart, Keane, Ryan & Hamill, L.L.C.*, 2015 WL 1034228, at *4 (N.J. Super. Ct. App. Div. Mar. 11, 2015).
[53] *Belfint, Lyons, & Shuman v. Potts Welding & Boiler Repair, Co.*, 2006 WL 2788188, at *3 (Del. Super. Ct. Aug. 28, 2006) (citing *James v. Tandy Corp.*, 1984 WL 8256, at *4 (Del. Ch. Nov. 1, 1984)). *See also Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62,

A party raising collateral estoppel bears "the burden of showing that the issue whose relitigation he seeks to foreclose was *actually decided* in the first proceeding."[54] Thus, the test applied for purposes of collateral estoppel requires: "(1) a question of fact essential to the judgment (2) be litigated and (3) determined (4) by a valid and final judgment."[55]

The Hiller Defendants argue Plaintiffs should be precluded from seeking damages as a result of the failed Reorganization Plan Mr. Hiller prepared and filed with the bankruptcy court because Judge Gross's conversion order makes no specific mention of the Reorganization Plan. They further assert that Plaintiffs must be collaterally estopped from claiming damages related to the alleged loss of state court litigations because the bankruptcy court already determined, in its order approving settlement, that the lawsuits were not worth pursuing outside of settlement.

Plaintiffs respond that collateral estoppel does not bar its claims because the bankruptcy court orders were not "final judgments." A "final judgment" is generally defined as one that "determines the merits of the controversy or defines

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89-90 (Del. Ch. 2013) ("[A] judgment in one cause of action is conclusive in a subsequent and different cause of action as to a question of fact actually litigated by the parties and determined in the first action." (quoting *E.B.R. Corp. v. PSL Air Lease Corp.*, 313 A.2d 893, 894-95 (Del.1973))).

[54] *See CompuCom Sys., Inc. v. Getronics Fin. Hldgs. B.V.*, 2012 WL 4963314, at *2 (D. Del. Oct. 16, 2012) (emphasis added) (quoting *Proctor v. Delaware*, 931 A.2d 437, 2007 WL 2229013 (Del. Aug. 2, 2007)).

[55] *See HealthTrio, Inc. v. Margules*, 2007 WL 544156, at *9 (Del. Super. Ct. Jan. 16, 2007) (quoting *Taylor v. State*, 402 A.2d 373 (Del.1979)).

the rights of the parties and leaves nothing for future determination or consideration."[56] It appears that, "[i]n bankruptcy cases, finality is construed more broadly than for other types of civil cases."[57] Plaintiffs have cited no controlling authority tending to support their position that the bankruptcy court orders here were not "final judgments." To the contrary, there is Delaware case law recognizing that "the Third Circuit has held that an order converting a Chapter 13 case to Chapter 7 is final and appealable" and that "several courts have…[found] that an order granting a motion to convert a case from Chapter 13 to Chapter 7 is final because it denies the debtor the substantive right to reorganize under Chapter 13 and forces the debtor into liquidation."[58] Delaware courts have also recognized that bankruptcy court orders approving settlement agreements are considered "final orders."[59] As a result, the Court is not persuaded by Plaintiffs' assertion that the bankruptcy court orders converting the case from Chapter 11 to Chapter 7 and approving the settlement agreement did not constitute "valid and final judgments" for purposes of collateral estoppel.[60]

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[56] *Tyson Foods, Inc. v. Aetos Corp*., 809 A.2d 575, 579 (Del. 2002).
[57] *See In re Culp*, 550 B.R. 683, 692 (D. Del. 2015) (citing *In re Marvel Entm't Group, Inc*., 140 F.3d 463, 470 (3d Cir.1998)).
[58] *See id.* (citations omitted).
[59] *See In re W.R. Grace & Co*., 475 B.R. 34, 74 n.27 (D. Del. 2012) ("A bankruptcy court's approval of a settlement agreement is considered a final order.") (citing *In re Nutraquest, Inc*., 434 F.3d 639, 643 (3d Cir.2006)), *aff'd sub nom, In re WR Grace & Co*., 729 F.3d 332 (3d Cir. 2013).
[60] *See In re Culp*, 550 B.R. at 693 ("[T]he Conversion Order leaves additional work to be done by the Bankruptcy Court—as further proceedings are contemplated before the Chapter 7 case comes

Plaintiffs also argue that the appropriateness of the Reorganization Plan and value of the state court litigations have not been "actually litigated." With regard to the conversion proceedings, Plaintiff contends the Reorganization Plan was abandoned before the bankruptcy court's order was entered and Judge Gross, having been advised as such, allegedly did not even consider the Plan. Having reviewed Judge Gross's opinion, it is unclear to the Court to what extent the Plan was reviewed in connection with the Judge's decision to convert the case to Chapter 7. Judge Gross cited the factors for consideration in determining whether the appointment of a trustee is appropriate: "(1) the trustworthiness of the debtor; (2) the debtor's past and present performance and prospects for…rehabilitation; (3) the confidence or lack thereof of the business community and of creditors in…present management; and (4) the benefits derived by the appointment of a trustee, balanced against the cost of…appointment."[61] According to Judge Gross, "[a]pplication of each of these factors weigh[ed] heavily in favor of conversion."[62] In addition to noting the "absence of rehabilitation" and that "Debtors are plagued by mismanagement," Judge Gross emphasized that the "decision to convert these

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to an end—but still the Conversion Order is also 'a final adjudication of the debtor's bankruptcy status that subjects the debtor's assets to involuntary liquidation.'") (quoting *In re McGinnis*, 296 F.3d 730 (8th Cir.2002)).

[61] *In re Reserves Resort, Spa & Country Club LLC*, 2013 WL 3523289, at *2 (Bankr. D. Del. July 12, 2013) (citing *In re Cajun Elec. Power Co–Op, Inc.*, 1991 B.R. 659, 661-62 (M.D.La.1995)).

[62] *See id.*

cases is in no small measure the result of Mr. Korotki's conduct."[63] Viewing the record in Plaintiffs' favor, the Court cannot conclude the confirmability of the Reorganization Plan had been "actually litigated" such that collateral estoppel would apply to bar the instant malpractice allegations.

As for the bankruptcy court order approving the settlement agreement, Plaintiffs argue collateral estoppel should not apply because the court did not determine the merits of the state court litigations or their value. After spending "considerable time" independently evaluating the claims and defenses asserted in the relevant state court litigation, the Chapter 7 Trustee determined that pursuing the claims would "cost considerably more than the amount of funds in the Estates, and…take several years to conclude."[64] As a result, the Trustee filed a motion for approval of settlement pursuant to Bankruptcy Rule 9019(a). In its motion, the Trustee informed the bankruptcy court that there was "no reasonable degree of certainty that pursuit of the claims and causes" would result in "a net benefit to the Estates over the cost of litigation."[65]

In exercising its sole discretion to approve a settlement, a bankruptcy court generally must determine whether the compromise is fair, reasonable, and in the

[63] *See id.* at *3. (citing Korotki's lack of credibility as a witness and his "absence of respect for Chapter 11's requirements by borrowing funds without the Court's approval and treating income as his own rather than accounting for such income and depositing it in the proper debtor-in-possession account").
[64] Hiller Defs.' Ex. 16, ¶ 29.
[65] *Id.*

best interests of the estate.[66] To approve a settlement under Bankruptcy Rule 9019(a), the court need only determine that the proposed settlement does not fall below the lowest point in the "range of reasonableness." [67] A court need not find that a proposed settlement reflects the "best possible" arrangement or that it allows the parties to maximize their recovery.[68] Rather, whether a settlement is within the "range of reasonableness" involves consideration of certain factors, which include the probability of success in litigation; the complexity of the litigation and related expense, inconvenience, or delay; and the interests of creditors.[69]

The bankruptcy court order cites only that there was "good and sufficient cause" to grant the Trustee's motion and approve the terms of settlement.[70] As discussed above, a bankruptcy court's decision to approve or reject a settlement offer involves consideration of a number of factors. While "probability of success" in the pending litigation may have been among the factors considered by the bankruptcy court in issuing its order, there is simply no basis upon which this Court can find that the merits or value of Plaintiffs' pending lawsuits has been

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[66] *See In re Key3Media Grp., Inc*., 336 B.R. 87, 92-93 (Bankr. D. Del. 2005) ("In determining whether to approve a settlement,'[t]he court is not supposed to have a 'mini-trial' on the merits, but should canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness.'" (quoting *In re Jasmine, Ltd*., 258 B.R. 119, 123 (D.N.J.2000))).
[67] *See id.*
[68] *See In re Coram Healthcare Corp*., 315 B.R. 321, 329-30 (Bankr. D. Del. 2004).
[69] *See id.* ("When determining whether to approve a settlement, the bankruptcy court should consider: (1) the probability of success in the litigation; (2) the complexity, expense, and delay of the litigation involved; (3) the possible difficulties in collection; and (4) the paramount interests of creditors.").
[70] Hiller Defs.' Ex. 17.

"actually litigated" such that collateral estoppel would apply to prevent their claim. While the Court finds that collateral estoppel would not preclude litigation over the value of Plaintiffs' pending lawsuits, that finding does not mean it is an appropriate measure of damages as will be discussed later in this Opinion.

**iv. Expert testimony concerning the Reserves**

It appears undisputed that, following the Chapter 7 sale of Reserves, Mr. Korotki received $4.8 million from the Trustee. Plaintiffs proffer the report of real estate expert and appraiser, Philip J. McGinnis ("Mr. McGinnis"), who opined that the market value of the Reserves land as of December 3, 2014 was $10.4 million. Accordingly, Plaintiffs seek the difference between these two figures as damages.

The Hiller Defendants contend that Mr. McGinnis simply "assumed the lots were saleable outside the bankruptcy process" and failed to testify "regarding the complex factors of real estate acquisition and development."[71] As a result, they argue Plaintiffs' claims for damages from the sale "fail as a matter of law" for failure to establish causation.[72]

Mr. McGinnis's expert report is based on his real estate appraisal of the Reserves development. Mr. McGinnis's report reflects the factors he considered in making his assessment, including: the real estate market in Sussex County (where Reserves is located), considering the neighborhood, local market analysis, as well

[71] Hiller Defs.' Mot. for Summ. J. at 31-32; Hiller Defs.' Reply Br. at 17.
[72] Hiller Defs.' Mot. for Summ. J. at 30-32.

as economic, social, governmental, and environmental forces; the costs associated with the project, *i.e.*, for site improvements, assessments, and taxes; a comprehensive analysis of the Reserves and surrounding residential subdivisions; county regulations, zoning requirements, and property tax rates; the value and "best use" of the lots; and the marketability of the entire project to a real estate developer at the time. Plaintiffs also seek to introduce the testimony of Mr. Korotki "in support of [their] damages relating to the bulk sale of the lots in the bankruptcy,"[73] citing the rule of law that an owner of real property can testify to its value.[74]

Still, the Hiller Defendants argue summary judgment is justified because Mr. McGinnis makes no mention of Mr. Korotki's mismanagement of the property, certain liens encumbering the land, or the costs associated with preparing the lots for sale. Defendants dispute Mr. Korotki's ability to fill in such gaps, arguing this is not a circumstance "where a lay person is testifying as to the value of his own personal property[,]" but rather an "attempt [] to put a number on sophisticated

[73] Pls.' Answ. Br. in Opp'n to Hiller Defs.' Mots. for Summ. J. at 58.
[74] *See, e.g., Cingular Penn., LLC v. Sussex Cty. Bd. of Adjustment*, 2007 WL 152548, at *8 (Del. Super. Ct. Jan. 19, 2007) (recognizing that "an owner of real property, by reason of that ownership, is presumed to have special knowledge as to its value and is therefore competent to testify in that respect"). *See also Cronin v. Bd. of Assessment Review*, 1992 WL 52181 (Del. Super. Feb. 26, 1992) ("Delaware law permits a property owner to give his opinion as to the value of his real estate.").

market and cost projections based on many factors part and parcel to a multi-million dollar real estate development project."[75]

The Court will not grant summary judgment that would exclude the testimony of Mr. McGinnis. Plaintiffs have presented relevant expert testimony and, while perhaps certain additional information would be helpful, the Hiller Defendants have cited no Delaware case law suggesting the additional testimony they desire is required in this case. Defendants are free to undermine the testimony of Mr. McGinnis during cross examination and raise the issues they assert here. But the arguments go to the weight of the testimony, not its admissibility. That said, the Court is not convinced at this juncture that the testimony of Mr. Korotki in this area is material, relevant or candidly appropriate based upon his background. As such, while the Court will not at this juncture exclude his testimony, before it may be introduced, the Court will require it to be heard outside of the presence of the jury so its admissibility can be determined. Frankly it seems unnecessary, but the Court is willing to give Plaintiffs the opportunity to convince it otherwise at trial. The Motion for Summary Judgment is therefore denied.

[75] Hiller Defs.' Reply Br. at 19-20.

### 3. *Motion for Summary Judgment Based on Doctrines of Unclean Hands and In Pari Delicto*

Finally, the Hiller Defendants argue summary judgment is warranted under the doctrines of unclean hands and *in pari delicto* as a result of Mr. Korotki's own inequitable conduct.

The doctrine of unclean hands is a rule of public policy designed to "'protect the public and the Court against misuse by persons who, because of their conduct, have forfeited the right to have their claims considered.'"[76] "The question raised by a plea of unclean hands is whether the plaintiff's conduct is so offensive to the integrity of the court that [plaintiff's] claims should be denied, regardless of their merit."[77] The unclean hands defense has been described as "purely equitable" in nature and "generally inappropriate" where legal remedies are sought.[78]

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[76] *See Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *9 n.26 (Del. Super. Ct. Apr. 16, 2014) (quoting *Gallagher v. Holcomb & Salter*, 1991 WL 158969, at *4 (Del. Ch. Aug. 16, 1991), *aff'd sub nom. New Castle Ins., Ltd. v. Gallagher*, 692 A.2d 414 (Del. 1997)).

[77] *Gallagher*, 1991 WL 158969, at *4 (citing *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 213 (Del. Ch. 1976)).

[78] *See USH Ventures v. Glob. Telesystems Grp., Inc.*, 796 A.2d 7, 20 n.16 (Del. Super. Ct. 2000) (noting the use of such defenses in courts of law may cause "adaptability problems"). *See also Lehman Bros. Hldgs., Inc. v. Spanish Broad. Sys., Inc.*, 2014 WL 718430, at *7 n.47 (Del. Ch. Feb. 25, 2014) ("[T]he 'unclean hands' doctrine bars equitable, but not legal, relief.") (citing *USH Ventures*, 796 A.2d at 20 n.16 and *In re Estate of Tinley*, 2007 WL 2304831, at *1 (Del. Ch. July 19, 2007)), *aff'd*, 105 A.3d 989 (Del. 2014); *U.S. Bank Nat. Ass'n v. Gunn*, 2012 WL 3642703, at *1 (Del. Super. Ct. July 30, 2012) (stating unclean hands "is only an affirmative defense to an equitable claim") (citing *Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998)). *But see Manufacturers & Traders Trust Co., Wilmington Sav. Fund Soc., FSB v. Washington House P'rs., LLC*, 2012 WL 1416003, at *4 (Del. Super. Ct. Mar. 22, 2012) ("While the unclean hands doctrine is generally an equitable defense available in the Court of Chancery, this Court is permitted to consider equitable defenses raised by parties.") (citing *USH Ventures*, 796 A.2d at 20).

Akin to the doctrine of unclean hands, *in pari delicto* is a defense by which a party may be precluded from recovering damages where such losses are "'substantially caused by activities the law forbade [that party] to engage in.'"[79] Latin for "in equal fault," *in pari delicto* allows the Court to decline to "extend aid to either of the parties to a criminal act or [to] listen to their complaints against each other" and instead "leave [the parties] where their own act has placed them."[80]

Hiller Defendants' unclean hands argument is premised on Mr. Korotki's "blatant disregard" for the "valid and enforceable judgment" entered against him and in favor of USAP by the Superior Court in June 2012.[81] Hiller Defendants cite *Nakahara v. NS 1991 American Trust*[82] as supporting that a party may be barred from obtaining relief according to the doctrine of unclean hands for "utter disregard of ongoing judicial proceedings."[83] In *Nakahara*, the Court of Chancery found, following trial, that unclean hands defeated the plaintiff trustees' entitlement to advancement of litigation costs because the trustees' substantial "self-help" withdrawals from the trust prior to trial were made in violation of a standstill contract and in bad faith "in the face of imminent litigation" "in a manner

[79] *Stewart v. Wilmington Tr. SP Services, Inc.*, 112 A.3d 271, 201–02 (Del.Ch.2015), *aff'd*, 126 A.3d 1115 (Del.2015).
[80] *See N.K.S. Distributors, Inc. v. Wheeler, Wolfenden & Dwares, P.A.*, 2014 WL 4793438, at *4 (Del. Super. Ct. Sept. 26, 2014).
[81] Hiller Defs.' Mot. for Summ. J. Based on the Doctrines of Unclean Hands and *In Pari Delicto* at 3, 6.
[82] 739 A.2d 770 (Del. Ch. 1998).
[83] *See id.* at 792.

designed to preempt any judicial determination regarding…the requested advancements."[84]

With regard to *in pari delicto*, the Hiller Defendants emphasize Mr. Korotki's conduct during the bankruptcy proceedings, as described by Judge Gross's order converting the bankruptcy. Judge Gross stated "[t]he Court's decision to convert these cases is *in no small measure the result of Mr. Korotki's conduct*."[85] Hiller Defendants also contend Korotki's Asset Protection Plan was in violation of Delaware's fraudulent transfer laws, thereby further supporting this Court's application of *in pari delicto*.[86]

First, the Court will not grant summary judgment according to the doctrine of unclean hands. The Complaint seeks only legal remedies and monetary damages in connection with the malpractice claim. As such, summary judgment based on the equitable doctrine of unclean hands would be inappropriate here. Summary judgment is likewise denied with regard to the Hiller Defendants' *in pari delicto* defense. The Court has a great deal of respect for Judge Gross and the opinions he renders. It too finds that the conduct of Mr. Korotki is concerning and his credibility is and will be a continuing issue in this litigation. That said, the Court must note that many of the acts Defendants point to as justifying the

[84] *See id*. at 772, 792-94.
[85] Hiller Defs.' Mot. for Summ. J. Based on the Doctrines of Unclean Hands and In Pari Delicto. at 7-8 (quoting *In re Reserves Resort, Spa & Country Club LLC*, 2013 WL 3523289, at *3 (emphasis added)).
[86] *See id*. at 10-11.

imposition of *in pari delicto* are ones which were performed with their advice and counsel. The *in pari delicto* doctrine is an extreme remedy that removes the rights of parties to seek relief from the Court for harms they allege to have occurred. As it strikes to the fundamental core of our judicial system, it should be employed only in the most extreme situations. Neither the comments of Judge Gross nor others made during the multitude of litigation involving Mr. Korotki rise to this extremely high bar. As such, the Motion will be denied.

## B. Schwartz Defendants

### 1. *Motion for Partial Summary Judgment*

In their Motion for Partial Summary Judgment, the Schwartz Defendants argue: (1) there was no attorney-client relationship with the non-debtor Plaintiffs, *i.e.*, Saleena, STL, ST2K, Management, and Development, in connection with the bankruptcy; and (2) Judge Silverman's February 2013 ruling adversely deciding Plaintiffs' Chancery claims prevents Plaintiffs from re-litigating their claim for damages here based on a related CCLD action.

#### i. Attorney-client relationship

Once again, the engagement letter produced in this matter makes no mention of Saleena or her entities. The letter does, however, expressly reflect an agreement by the Schwartz Defendants to represent Mr. Korotki and each of the Reserves

Entities.[87] An attorney-client relationship clearly existed between the Schwartz Defendants and Development and Management. Further, viewing the record in Plaintiffs' favor, it appears Mr. Schwartz represented various Reserves Entities in a host of litigation and transactional matters relevant to Plaintiffs' malpractice claims. Partial summary judgment is therefore denied with respect to Management and Development.

The Court will also deny the Motion as it relates to Saleena, STL, and ST2K. In 2008, Schwartz reviewed forms for Saleena including a will, advance health care directive, and durable power of attorney originally prepared by Maryland counsel and added a self-proving affidavit to the will to comply with Delaware law. Additionally, throughout 2008 to 2014, Mr. Schwartz prepared a number of deeds transferring Reserves lots to STL and ST2K. Schwartz served as litigation counsel for STL, drafted the by-laws for STL Development Corporation, and effectuated its conversion into an LLC. Before ST2K was converted to an LLC, Mr. Schwartz filed an amended Certificate of Incorporation designating himself ST2K's resident agent. Apparently these services were performed in connection with the Asset Protection Plan, and again, from 2008 forward, most legal bills were paid for by either Saleena or STL.

[87] Schwartz Defs.' App'x at A185.

Like Hiller, Schwartz cannot hide behind the lack of a formal representation agreement since he was actually involved in the asset restructuring and the bankruptcy decision and clearly was aware that, in spite of the transfer of assets to Saleena, the management and operation of all entities as conducted by Mr. Korotki. Viewing the record in Plaintiffs' favor, Mr. Schwartz was apparently very familiar with Mr. and Mrs. Korotki's entities, he assisted in facilitating Plaintiffs' asset protection planning objectives, and he, arguably, would have known how the bankruptcy filings could potentially impact these Plaintiffs and their assets. The Motion for Partial Summary Judgment on the basis of failure to establish an attorney-client relationship will thus be denied.

**ii. Judge Silverman's February 2013 Opinion**

The Schwartz Defendants next assert that the doctrine of collateral estoppel applies to a significant portion of Plaintiffs' damages claim and prevents the re-litigation of factual issues decided in previous cases involving the Reserves. Once again, collateral estoppel will preclude an action where the party raising the doctrine is able to show "that the issue whose relitigation [it] seeks to foreclose was *actually decided* in the first proceeding."[88]

Among their allegedly "valuable" state court lawsuits, Plaintiffs include a complex commercial litigation action in which Mr. Korotki, the Reserves Entities,

[88] *See CompuCom Sys., Inc.*, 2012 WL 4963314, at *2 (emphasis added).

and STL sought compensatory and punitive damages from "numerous defendants, including 30 Lots, Bella Via, Cristal Properties, RT Properties, Severn and Sussex County," for their "fraud and tortious conduct in connection with…Wilmington trust letters of credit,…[a] foreclosure sale and their conversion of…constructive trust monies." [89] Plaintiffs claim this action "was being prosecuted by the Schwartz and Offit Firms" and that "Schwartz and Hiller valued the…claims as being worth in excess of $30,000,000.00."[90]

It appears that the CCLD case was filed in 2010 and consolidated with a Chancery case filed in 2008, both of which were then assigned to Judge Silverman. It was decided that the CCLD claims would be put aside until Judge Silverman, sitting as Vice Chancellor, ruled on the equitable claims. The Chancery trial took place over the course of five days in January 2012 and Judge Silverman issued his opinion on February 28, 2013.[91] Plaintiffs appealed Judge Silverman's decision, but while that appeal was pending, the bankruptcy Trustee allegedly "usurped and settled" both the Chancery and CCLD cases.[92]

According to the Schwartz Defendants, collateral estoppel applies to limit Plaintiffs' damages because Judge Silverman's February 2013 decision is binding upon Plaintiffs and eliminates their claims for damages arising from the companion

[89] Compl. ¶ 112.
[90] *Id*.
[91] *Reserves Dev. Corp. v. 30 Lots, LLC*, 2013 WL 775402 (Del. Ch. Feb. 28, 2013).
[92] Pls.' Answ. Br. in Opp'n to Schwartz Defs.' Mots. for Summ. J. at 75.

CCLD case. In his 2013 opinion, Judge Silverman frames the dispute as one of several arising from the sale of "30 undeveloped [Reserves] lots to Bella Via, LLC."[93] Judge Silverman acknowledged that many of the claims presented in the matter were "not new, having been heard here or elsewhere" given that the failed Reserves project had, by that time, already "precipitated several opinions." [94] The Court ultimately found:

> In sum, the following post-trial issues are barred under *res judicata:* (1) Esham and 30 Lots's common law fraud liability; (2) Esham, Buchanan, 30 Lots and Severn's liability under equitable estoppel and/or unjust enrichment; (3) whether the "friendly foreclosure" was collusive and lead to a fraudulent transfer; (4) 30 Lots' successor liability; (5) Order remaining CTA funds be paid towards Bella Via's 42.25% infrastructure obligation; and (6) whether the mortgage between 30 Lots and its principals constituted a fraudulent transfer. The court further holds that: Bella Via did not fraudulently induce the County into calling Plaintiffs' letters of credit; the "sidewalk" and/or "bike path" connected to the roadway is part of the County's bonding; The Reserves is not required to bond Phase IV so long as lots are not transferred; and, the 10% retainage for roads is equitable.[95]

As will be discussed later in this Opinion, the basic premise of Plaintiffs' claim is that, but for the bankruptcy proceeding, Judge Silverman's Opinion would have been overturned on appeal and because Mr. Schwartz believed the value of a pending companion case was over 30 million dollars, Mr. Korotki should be able

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[93] *Reserves Dev. Corp. v. 30 Lots, LLC*, 2013 WL 775402, at *1 ("The [Reserves] project became a debacle, spurring more than 10 cases in the Court of Chancery and Superior Court, plus several appeals to Delaware's Supreme Court. The project has also precipitated several bankruptcies….").

[94] *Id*. ("It has been said that The Reserves and Bella Via's principals are "hard-headed, aggressive business persons" who 'lack mutual respect.' Be that as it may, this resolves more of the long-standing disputes.")

[95] *Id*. at *15.

to recover damages in that amount. While the Court appreciates Plaintiffs' confidence in the psychic ability of his counsel, until ruled otherwise, he and his counsel are bound by the decisions that have been made in litigation. Judge Silverman's rulings are the law of the case and, despite Schwartz's visions of grandeur regarding the related CCLD litigation's potential value and the likelihood that Judge Silverman's ruling would be overturned, those decisions remain and will collaterally estop Plaintiffs from arguing otherwise. In any event, the Court will not allow Plaintiffs to place into evidence a speculative and unsupported assertion of counsel as to the value of this litigation. Plaintiffs are restrained by the Court's prior rulings, they proffer no reliable valuation of the litigation, and this Court will not allow counsel to relitigate issues addressed in the February 2013 ruling of Judge Silverman.

**2. *Motion for Summary Judgment***

The Schwartz Defendants also contend summary judgment is warranted on the grounds that: (1) they did not owe a duty of care to Plaintiffs to advise them with respect to the bankruptcy; (2) Schwartz's alleged negligence was not the cause of Plaintiffs' damages; (3) Plaintiffs' damages claims are too speculative; and (4) the doctrines of unclean hands and *in pari delicto* bar Plaintiffs' claims.

### i. Duty of care in context of the bankruptcy

First, the Schwartz Defendants argue they owed no duty to Plaintiffs with respect to advising on issues relating to the bankruptcy because the engagement letter limited the scope of representation to litigation matters and Schwartz did not otherwise assume a duty. It appears from the record and engagement letters produced that Schwartz was retained to represent Mr. Korotki and the Reserves Entities in certain pending commercial litigation matters. It also appears Mr. Schwartz formerly practiced bankruptcy law at some prior point in time, and that Mr. Korotki became aware of this fact. However, the depositions and correspondence demonstrate that Schwartz cautioned Mr. Korotki that he now lacked familiarity with bankruptcy law and that he was "no expert" in the field, Schwartz referred him to a bankruptcy attorney to discuss the topic further, and that Mr. Korotki subsequently took this advice and sought the counsel of Mr. Hiller, a bankruptcy specialist.[96]

Despite these facts, it appears to the Court that part of Plaintiffs' claim is that Defendants were negligent in *failing to advise* Mr. Korotki of the impact filing for bankruptcy would have on certain pending state court litigation and the Reserves land development at the center of that litigation. Even if Mr. Schwartz was retained primarily to provide litigation services, he arguably owed a duty to

[96] Schwartz Defs.' App'x A13-14, A22, A144-45, A147-49.

inform Mr. Korotki of the potential impact filing for bankruptcy could have on his pending lawsuits and his property rights at the Reserves. This conclusion is strengthened by the fact that Mr. Schwartz allegedly participated in the preparation of certain documents in connection with the bankruptcy filings. In particular, Schwartz corresponded with Mr. Hiller, drafted a portion of the bankruptcy petition's Disclosure Statement describing the various state court lawsuits in which he was representing Mr. Korotki, and prepared an agreement among Mr. Korotki and the Reserves Entities, which acknowledged that the bankruptcy was in Mr. Korotki's and Resort's "best interests." Mr. Schwartz owed a duty of care in advising Plaintiffs about the effect the bankruptcy could have on the litigation in which he was providing representation and on the ownership and management of the Reserves development . Thus, summary judgment will be denied.

**ii. Causation**

The Schwartz Defendants next assert that Plaintiffs have adduced no proof that Schwartz's alleged negligence was the proximate cause of Plaintiffs' damages. To establish causation, a plaintiff must prove that "a reasonable connection" exists "between the negligent act or omission of the defendant and the injury which the plaintiff has suffered."[97] "[T]here may be more than one proximate cause of an

[97] *See Culver*, 588 A.2d at 1097.

injury."[98] Delaware's "'time-honored definition of proximate cause' has been the 'but for' rule."[99] "Most simply stated, proximate cause is [defined in Delaware as] that direct cause without which the [injury] would not have occurred."[100]

The Schwartz Defendants argue it was the conversion of the bankruptcies from Chapter 11 to Chapter 7 which deprived Mr. Korotki of his debtor-in-possession status and control of his pending lawsuits. In other words, "had Korotki's Chapter 11…case not been converted to Chapter 7 by the bankruptcy court, Korotki would have prosecuted his pending lawsuits and remained in control of his various entities." [101] Because Mr. Korotki has set forth no evidence that, had the case continued as Chapter 11, he would have been damaged, or that Schwartz proximately caused the conversion, the Schwartz Defendants insist Plaintiffs' malpractice claim must fail. Plaintiffs respond that this argument relies on a constricted reading of their claims and that the Complaint more broadly alleges that their harm was caused by the Defendants advice to file for bankruptcy in the first place. According to Plaintiffs, the conversion was "ordained" from the outset and should have been foreseen by Defendants.

The Court does not accept Schwartz's effort here to shift blame to bankruptcy counsel as if he had no involvement in the decisions that allegedly

[98] *Id*. (citing *McKeon v. Goldstein*, 164 A.2d 260, 262 (Del. 1960)).
[99] *See id.*
[100] *Id.*
[101] Schwartz Defs.' Mot. for Summ. J. at 18.

caused the losses claimed in this litigation. While the facts may play out differently at trial, it appears to the Court that Schwartz was Plaintiffs' main counsel at least with regard to his Sussex County development endeavors. The Court must assume the decision to file bankruptcy was not made lightly and that Mr. Korotki, who also apparently holds a law degree, first fully explored the option with all counsel. In fact, it appears it was Schwartz who suggested the idea of bankruptcy and referred Mr. Korotki to Hiller. While Schwartz may not have "caused" the conversion from Chapter 11 to 7, it appears he was instrumental in making the initial decisions that contributed to the results complained of in this litigation. Those decisions are the core of Plaintiffs' Complaint and the Chapter 7 conversion is simply the result of those decisions. At this juncture there are clearly disputed facts that prevent granting summary judgment.

**iii. Damages**

The parties do not appear to dispute that, in order to succeed on their malpractice claims as plead, Plaintiffs must prove that they would have been in a better position had bankruptcy not been filed. The Schwartz Defendants maintain, however, that Plaintiffs' allegations that they would have been able to (1) prosecute and collect damages from their pre-bankruptcy lawsuits and (2) receive more money from the sale of the Reserves lots than was received through settlement are too speculative to warrant relief.

a. Lawsuits

With regard to the lawsuits, the Schwartz Defendants argue the only way Plaintiffs may prove that they would be in a better position had they not filed bankruptcy is to show that they would have been successful in each of their pre-bankruptcy cases, including the amount of money they would have been awarded in each.[102] However, according to the Schwartz Defendants, this "case within a case" method of proving legal malpractice is not available to Plaintiffs because there is no negligence asserted in connection with the pre-bankruptcy litigation.[103] Schwartz Defendants maintain Plaintiffs' damages claim ultimately amounts to pure guesswork. [104]

The Schwartz Defendants cite *Britestarr Homes, Inc. v. Piper Rudnick LLP*[105] and *Vandevender v. Thierolf*[106] in support of their position that Plaintiffs' damages with respect to the lawsuits are too speculative. In *Britestarr Homes, Inc*., the plaintiff brought a number of claims against defendant law firm arising out of bankruptcy filings, including professional malpractice. Even assuming the firm committed errors in its representation, the Second Circuit found plaintiff's claim for lost profits damages relating to a power plant that was to have been built on the plaintiff's property could not stand because the amount claimed was

[102] *Id*. at 21.
[103] *Id*.
[104] Schwartz Defs.' Reply Br. in Support of Mot. for Summ. J. at 8.
[105] 265 Fed. Appx. 413 (2d Cir. Dec. 4, 2007).
[106] 18 P.3d 473 (Or. Ct. App. 2001).

premised on "improperly speculative assumptions," like that the plant project "would have a developer, that it would have been permitted, obtained financing and been constructed, thereby generating cash flows to [plaintiffs] as contemplated."[107] In *Vandevender*, an Oregon Appellate Court affirmed the lower court's directed verdict for the defendant attorney because the plaintiffs failed to show that they would have achieved better results had they not followed their attorney's recommendation to file bankruptcy.

Like in *Britestarr Homes, Inc*., Schwartz Defendants contend Plaintiffs' claim for damages based on lost opportunity to litigate the pending lawsuits is too speculative because it relies on a number of assumptions, including that Mr. Korotki could even fund the litigation given that, prior to the bankruptcy, there was a $2.2 million judgment outstanding against Mr. Korotki and Resort, creditors had started to pursue discovery in aid of execution on the judgment, and creditors had discovered his asset transfers and would imminently set out to recover the funds and property fraudulently transferred.[108] Further, the Schwartz Defendants argue *Vandevender*'s reasoning is applicable given the slim likelihood of success in the pending cases. In support of this assertion, they cite Judge Silverman's Chancery

[107] *Britestarr Homes, Inc.*, 256 F. App'x at 415 (rejecting experts assumptions, which included that "a hypothetical power plant developer would have secured $1 billion in debt and equity financing in time to start construction in December 2003; that the debt financing would have entailed a loan of $740 million at 7.25% interest; and that the developer would have entered into a construction contract for the plant").
[108] Schwartz Defs.' Mot. for Summ. J at 22.

opinion and its impact on the CCLD case, Judge Gross's comment in the conversion order that Mr. Korotki had not been successful in many of his cases, and the fact that the Trustee spent over 92 hours reviewing the pending litigation before concluding the cases were not worth pursuing.

Plaintiffs respond that the record reflects Mr. Korotki had every intention of prosecuting the lawsuits, and that the engagement letter and significant retainer payment made to Mr. Schwartz on the eve of the bankruptcy in anticipation of the litigation going forward supports as much. Plaintiffs further argue that, unlike in the cases cited by Defendants, their alleged harm is not speculative in light of Schwartz's July 30, 2013 letter to the Trustee valuing the CCLD cases at $30,000,000 and another case at $12,000,000.

The Court finds that the claims seeking recovery based on the potential success of pending lawsuits are purely based on unreliable speculation and the Court will grant Defendants' Motion as to this element of the alleged damages. As counsel is well aware, the results of litigation are unpredictable, with many factors potentially affecting an outcome. The Court agrees with Defendants that counsel's prediction as to the possible outcomes is an experienced guess at best and puffing at worst. It appears that the disputes in these cases were highly contested and there was significant uncertainty as to the result. Not only were there legal uncertainties but the controversial conduct of Mr. Korotki would make success far from certain.

Simply put, the Court will not allow Plaintiffs to claim damages based upon the speculative and unproven success of pending litigation.

b. Reserves Property

The Schwartz Defendants also argue that Plaintiffs' claim that they would have received more money for the Reserves lots than they did through the settlement is too speculative to warrant relief. They again cite *Britestarr Homes, Inc.*, in which the Second Circuit found:

> As to the difference between the value of Britestarr's property in bankruptcy (according to its plan of reorganization) and its value outside of bankruptcy: The reorganization plan is a means of satisfying Britestarr's creditors after it had become insolvent; it is not a measure of the market value of Britestarr's property. Thus, Britestarr failed to create a triable issue of fact with regard to its claim for damage to the value of its property as a result of the bankruptcy proceeding.[109]

Plaintiffs respond that their case is distinguishable and that their damages are far from speculative, given that they have proffered expert testimony as to the value of the lots. Defendants contend that, even taking the report of Plaintiffs' real estate expert as true, the fact remains that "there was no buyer willing to pay what the Korotki's believe the Reserves were worth."[110]

Ultimately, the Court is satisfied at this juncture with the specificity of Plaintiffs' claim for damages based on the sale of Reserves lots. As indicated above in relation to the Hiller Defendants' Motion, Defendants may pursue their

[109] *Britestarr Homes, Inc.*, 256 F. App'x at 414.
[110] Schwartz Defs.' Reply Br. in Support of Mot. for Summ. J. at 10.

perceived flaws in Plaintiffs' expert testimony on cross examination and allow the jury to weigh the testimony accordingly. Defendants' contentions do not, however, justify summary judgment at this stage. The Motion for Summary Judgment is therefore denied as to this element of Plaintiffs' damages claim..

**iv. Unclean hands and *in pari delicto***

The Motion for Summary Judgment based on the doctrines of *in pari delicto* and unclean hands is denied for the same reasons articulated with regard to the Hiller Defendants' Motion.

**3. *Motion for Summary Judgment Based On Motion in Limine***

The Schwartz Defendants' final motion is based on their Motion in Limine to exclude Plaintiffs' liability experts. As the Court rejected that Motion, in its corresponding letter opinion, the Motion for Summary Judgment on that basis is likewise DENIED.

## IV. CONCLUSION

The conclusion rendered by this Opinion is that Plaintiffs' claims of malpractice against Mr. Hiller and Mr. Schwartz and their law firms may proceed. However, the issue of the damages they suffered by the alleged improper advice will be limited to the development property losses that resulted from the bankruptcy proceeding. If the jury believes Plaintiffs' experts, the losses are not an insignificant amount. The claim for damages based on the potential value of

pending litigation, however, is simply too speculative and must be foreclosed along with the claims against Mr. Arban.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.