TAX COURT OF NEW JERSEY

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NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE TAX COURT COMMITTEE ON OPINIONS

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Re: Berkeley Heights Township v. Connell Corporate Center I, LLC
Docket Nos. 009767-2011, 003453-2013, 003237-2014

-and-

Berkeley Heights Township v. The Connell Company
Docket Nos. 009765-2011, 003456-2013, 003168-2014

Dear Mr. Ferruggia and Mr. Allen:

This letter constitutes the court's opinion with respect to defendants', Connell Corporate Center I, LLC and The Connell Company (collectively referred to as "defendants"), motion for reconsideration of the court's April 18, 2016 opinion and Order denying defendants' motion for a protective order barring discovery of an Appraisal Report dated September 24, 2014 and quashing the duces tecum portion of plaintiff's Notice of Deposition (the "motion for reconsideration").

For the reasons set forth below, defendants' motion for reconsideration is denied, in part, and granted, in part.

I. Findings of Fact & Procedural History

For the purpose of providing context, the court will include a brief statement of facts. A full statement of facts can be found in the court's April 18, 2016 opinion.

The mutual exchange of trial-ready appraisal reports in these matters was initially scheduled for September 25, 2015, with trial commencing on January 14, 2016 and continuing on January 15, 2016. On September 18, 2015, defendants' counsel requested a thirty (30) day adjournment of the exchange date of the trial-ready appraisal reports and the trial dates. The court adjourned the exchange date for the trial-ready appraisal reports to October 30, 2015, and adjourned the trial to February 19, 23, and 24, 2016.

On February 2, 2016, the court conducted a telephone conference with counsel for plaintiff and defendants to address their mutual request to adjourn the February 2016 trial dates. During the telephone conference counsel advised the court that depositions must be conducted prior to commencement of trial. Accordingly, the court adjourned the February 2016 trial dates, assigned new trial dates of April 18, 20 and 21, 2016, and ordered depositions to be completed by March 24, 2016. On February 3, 2016, in furtherance of the court's instructions, plaintiff's counsel uploaded a letter to the case jackets in these matters confirming the details of the telephone conference call and the court's order to complete all depositions by March 24, 2016.

On or about February 25, 2016, pursuant to R. 4:14-7, plaintiff's counsel served a notice to take oral deposition of defendants' Chief Financial Officer or other person in charge of records and accounting. The deposition notice included a duces tecum demand for the production of "[c]opies of any and all appraisal reports prepared from 2008 to 2015 with regard

to the subject properties." The oral deposition and document production was to take place on March 14, 2016 in defendants' counsel's office.

By letter dated March 9, 2016 defendants' counsel advised plaintiff's counsel that defendants have "no documents responsive to the duces tecum in your notice. Please advise me as soon as possible if you still wish to proceed with a deposition of the Chief Financial Officer." The oral deposition was apparently postponed due to a scheduling conflict and no new date was assigned.

Thereafter, by letter dated March 30, 2016, defendants' counsel advised plaintiff's counsel that he was in possession of a "leased fee appraisal dated September 24, 2014, with a value date of September 4, 2014 that was performed with respect to 200 Connell Drive in connection with refinancing and is addressed to the mortgagee" (the "2014 Appraisal Report"). The letter further stated that "the appraiser who did the report is neither" plaintiff's expert, nor defendants' expert, nor anyone from either of their respective appraisal firms and therefore, "[i]t is [defendants] position that the report is not discoverable."

In response, on April 5, 2016 plaintiff's counsel submitted a letter to the court addressing defendants' production of the 2014 Appraisal Report. The court scheduled a telephone conference with counsel for plaintiff and defendants to address this matter. During the telephone conference call the court advised defendants' counsel that if he wished to seek relief from the duces tecum portion of plaintiff's deposition notice, he must file a motion, on short notice, for a protective order and to quash the duces tecum portion of the deposition notice. The court established a schedule for submission of the motion, briefs, reply briefs, and oral argument.

On April 8, 2016, defendants' counsel filed a motion, on short notice, seeking entry of a protective order, under R. 4:10-3, barring discovery of the 2014 Appraisal Report.

On April 18, 2016, the court heard oral argument on defendants' motion for entry of a protective order. Following oral argument, the court rendered an oral opinion pinpointing the reasons it was denying defendants' motion for entry of a protective order under R. 4:10-3 and entered an Order. In addition, the court adjourned the April 18, 20 and 21, 2016 trial dates to afford defendants' counsel the opportunity to submit this motion for reconsideration.

On May 9, 2016, defendants' counsel filed the motion for reconsideration of the court's April 18, 2016 opinion and Order.

On June 10, 2016, the court heard oral argument on the motion for reconsideration.

II. Conclusions of Law

A. Standard for Reconsideration

A motion for rehearing or reconsideration is governed by R. 4:49-2. See also R. 8:10. The rule provides, in part, that:

> a motion for rehearing or reconsideration seeking to alter or amend a judgment or order. . . shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred. . .
>
> [R. 4:49-2.]

A motion for reconsideration must be supported by "a statement 'of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.' The basis to such a motion, thus, focuses upon what was before the court in the first instance." Lahue v. Pio Costa, 263 N.J. Super. 575, 598 (App. Div. 1993) (citations omitted).

A motion for rehearing or reconsideration is granted sparingly. Nonetheless, reconsideration "is a matter within the sound discretion of the Court, to be exercised in the interest of justice." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

Reconsideration should not be used as a vehicle to reiterate the merits of or "reargue a motion." Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div.), certif. denied, 195 N.J. 521 (2008). A motion for reconsideration will be granted "only for those cases which fall into that narrow corridor in which either: (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence . . ." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). See also Fusco v. Bd. of Educ. of the City of Newark, 349 N.J. Super. 455, 462 (App. Div.), certif. denied, 174 N.J. 544 (2002). A motion for reconsideration is not fitting because a litigant has expressed dissatisfaction with the court's decision, the appropriate setting for such arguments are on appeal. D'Atria, supra, 242 N.J. Super. at 401. Although a motion for reconsideration should be narrowly construed, a court may "in the interest of justice" consider any "evidence" that the litigant claims is "new or additional . . . which it could not have provided" during the initial hearing. Id. at 401. However, consideration of such evidence is in the court's "sound discretion." Ibid. "[R]epetitive bites at the apple" should not be tolerated or "the core will swiftly sour." Ibid. Accordingly, a court must "be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration." Id. at 402.

In the motion for reconsideration defendants argue that the court "failed to take into account" two "key factors": (1) that the trial-ready appraisal reports prepared by plaintiff and defendants' experts were exchanged on January 29, 2016, approximately 27 days prior to plaintiff's deposition notice and duces tecum demand; and (2) Standard Tax Court Interrogatories were served upon defendants by plaintiff, and defendants provided certified answers to those interrogatories prior to the exchange of the trial-ready appraisal reports.

Additionally, defendants contend, for the first time in the motion for reconsideration, that the court should have permitted them to furnish the 2014 Appraisal Report in a redacted form, omitting the author's conclusions of value.

Conversely, plaintiff argues that defendants' counsel's motion is devoid of any new facts, evidence or law supporting the protective relief sought by defendants. Plaintiff asserts that the two "key factors" raised in the motion for reconsideration were carefully examined, and rejected by the court on their merits. Finally, plaintiff maintains that the third argument, first raised by defendants in the motion for reconsideration, must be rejected by the court because it was not addressed in the initial motion and does not amount to new evidence. Thus, plaintiff maintains that defendants have failed to meet the threshold standards for reconsideration under R. 4:49-2.

B. April 18, 2016 Opinion

Without restating in its entirety the court's April 18, 2016 opinion, the court will briefly address the substance of the arguments presented to the court and the court's conclusions.

Defendants' counsel presented five arguments to the court in support of their motion for a protective order, three of which focused upon relevancy. Defendants' counsel argued that: (1) the 2014 Appraisal Report was not relevant and amounted to nothing "more than a fishing expedition by plaintiff"; and (2) the 2014 Appraisal Report relates to a valuation date eleven months after the latest valuation date involved in the instant matter and therefore, was "irrelevant to the issue of value" before the court; and (3) the 2014 Appraisal Report employed a leased fee analysis, which is a valuation approach not endorsed for use in the Tax Court and therefore, "has absolutely no relevance. . . to the present appeal"; and (4) the production of appraisal reports is limited by Standard Tax Court Interrogatories absent a showing of special need or exceptional circumstances; and (5) the 2014 Appraisal Report would not be admissible at trial. Defendants'

counsel asserted that because plaintiff "has already prepared and exchanged a trial ready appraisal report" plaintiff's counsel failed to make a showing of "special need" or "exceptional circumstances" warranting discovery of the 2014 Appraisal Report under R. 4:10-2; and because the 2014 Appraisal Report was not relied upon by plaintiff's expert and the report preparer is not being called to testify, it is inadmissible at trial.

The court observes that as construed by applicable case law, a presumption of validity attaches to original tax assessments and judgments of the county boards of taxation. MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998); Riverview Gardens, Section One, Inc. v. North Arlington, 9 N.J. 167, 174-175 (1952); Aetna Life Insurance Co. v. Newark City, 10 N.J. 99, 105 (1952); Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985). Based on this presumption, the appealing party bears "the burden of proving that the assessment is erroneous." Pantasote Co., supra, 100 N.J. at 413 (citing Riverview Gardens, supra, 9 N.J. at 174). The presumption is not an evidentiary device functioning "as a mechanism to allocate the burden of proof. It is, rather, a construct that expresses the view that in tax matters it is to be presumed that governmental authority has been exercised correctly and in accordance with law." Pantasote Co., supra, 100 N.J. at 413 (quoting Powder Mill, I Assocs. v. Hamilton Township, 3 N.J. Tax 439 (Tax 1981)).

A litigant can only surmount this presumption of validity by introducing "cogent evidence" of true value. That is, evidence "definite, positive and certain in quality and quantity to overcome the presumption." Aetna Life Insurance Co., supra, 10 N.J. 99, 105 (1952). Thus, the appealing party shoulders the burden of presenting the court with credible evidence "sufficient to determine the value of the property under appeal, thereby establishing the existence of a debatable question as to the correctness of the assessment.'" West Colonial Enters, LLC v.

City of East Orange, 20 N.J. Tax 576, 579 (Tax 2003) (quoting Lenal Properties, Inc. v. City of Jersey City, 18 N.J. Tax 405, 408 (Tax 1999), aff'd, 18 N.J. Tax 658 (App. Div. 2000), certif. denied, 165 N.J. 488 (2000)). To afford litigants the opportunity to meet this burden, our court rules favor "broad pretrial discovery." Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535 (1996) (citing Jenkins v. Rainner 69 N.J. 50, 56 (1976)). See also Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 215-216 (App. Div. 1987).

In addressing defendants' arguments, the court acknowledged that a party may obtain information and material which "appears reasonably calculated to lead to the discovery of admissible evidence" pertaining to the cause of action. In re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 82 (2000). Our court rules afford litigants the right to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . ." R. 4:10-2(a). Although not explicitly defined in the court rules, "relevant evidence" is defined as "evidence having any tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. However, the relevancy of documents or other materials is not predicated upon its admissibility at trial, instead it is centered upon whether the information sought is "reasonably calculated to lead to admissible evidence respecting the cause of action or its defense." Pressler & Verniero, Current New Jersey Rules Governing the Courts, comment 1 on R. 4:10-2(a) (2016). Thus, disclosure of evidence which may be inadmissible at trial is required "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." R. 4:10-2(a). See also Irval Realty Inc. v. Board of Public Utility Commissioners, 115 N.J. Super. 338, 346 (App. Div. 1971), aff'd, 61 N.J. 366 (1972); Berrie v. Berrie, 188 N.J. Super. 274, 278 (Ch. Div. 1983). Information which bears even a remote

relevance to the subject matter of the cause of action is discoverable, but can be withheld by a demonstration of privilege. Payton, supra, 148 N.J. at 539.

The court concluded that although the 2014 Appraisal Report was completed on September 24, 2014, approximately 11 months after the October 1, 2013 valuation date, it nonetheless was prepared during a tax year at issue in this proceeding. Therefore, the factual information, property data and sources of data which were relied upon by the author of the 2014 Appraisal Report, including tenant and lease information and income and expense data were directly relevant to the subject matter of this action and were likely to lead to the discovery of admissible evidence. Moreover, because the 2014 tax year is at issue in this litigation and the report was completed in September 2014, it is likely that the 2014 Appraisal Report contains information about the subject property during a time period that is squarely relevant to this matter.

Moreover, the court found a lack of support for defendants' argument that plaintiff must make a showing of "special need" or "exceptional circumstances" in order to obtain the 2014 Appraisal Report. R. 4:10-2(d) limits the scope of discovery, which is otherwise discoverable to "facts known and opinions held by experts" that are "acquired or developed in anticipation of litigation or for trial." R. 4:10-2(d) (emphasis added). For example, through interrogatories, a litigant is entitled to know the name and address of each expert witness expected to be called at trial, including a treating physician expected to testify, and the name of an expert who has conducted a physical or mental examination of an injured party, whether or not expected to testify. R. 4:10-2(d)(1). R. 4:10-2(d)(3) permits a litigant to "discover facts known or opinions held by an expert. . .who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only

upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means." R. 4:10-2(d)(3) (emphasis added).

Here, the 2014 Appraisal Report was not prepared by an individual identified by defendants or plaintiff as an expert or consultant. Instead, the report was prepared by an appraiser commissioned by defendants' mortgage lender, a non-party to the litigation, to enable defendants to refinance a mortgage loan on one of the properties that is the subject matter of this action. Therefore, the court concluded that the provisions of R. 4:10-2(d)(3) were not directly applicable to defendants' motion for a protective order because the 2014 Appraisal Report was not prepared by a party's expert or consultant in anticipation of litigation or in preparation for trial. Stated differently, the 2014 Appraisal Report is not an expression of the opinions held by an expert for plaintiff or defendants that is not expected to be called to testify at trial. R. 4:10-2(d)(3).

Although the court determined that the provisions of R. 4:10-2(d)(3) were not directly applicable, the court concluded the general approach expressed by the Rule should nonetheless be considered in the context of defendants' motion. That Rule suggests that, absent a showing of exceptional circumstances, discovery of an appraisal report prepared for a non-party to the litigation, employing facts, data and information that is markedly removed from the years at issue, should not be permitted. Here, the 2014 Appraisal Report was prepared for defendants' mortgage lender in September 2014 connection with a mortgage loan for one of the properties that is the subject matter of this tax appeal litigation. In this litigation, the court will be asked to determine the true market value of the subject property for the 2014 tax year. Therefore, the 2014 Appraisal Report likely contains records, data and information about the property for the

2013 and 2014 calendar years, which is not so far removed from the October 1, 2013 valuation date, that it may reasonably lead to the discovery of admissible evidence.

1. Exchange of trial-ready appraisal reports

In the motion for reconsideration, defendants' counsel asserts that the court failed to consider that trial-ready appraisal reports had been exchanged prior to service of plaintiff's deposition notice. However, defendants' counsel is mistaken. In the court's April 18, 2016 opinion, the court recognized not only that the 2014 Appraisal Report likely contains data and information about one of the properties that is the subject matter of these tax appeals during the 2013 and 2014 tax years, but also that the information contained in appraisal reports is routinely relied upon by this court in making a determination of the true market value of property. The court expressed that although the 2014 Appraisal Report "may not buttress the opinions of the experts in this matter, it may render factual information [upon which the experts opinions were premised inaccurate,] which is probative to issues which are to be tried in these appeals."

In rejecting defendants' motion for a protective order, the court observed that plaintiff and defendants remained very much engaged in the discovery process. On September 18, 2015, the court granted defendants' request to adjourn the trial date in these matters so that trial-ready appraisal reports could be completed, exchanged and discovery concluded. Thereafter, on February 2, 2016, the parties again contacted the court and advised that certain discovery remained open, more precisely, the depositions of key witnesses. Concluding that no prejudice would be suffered by the continued extension of discovery, on February 2, 2016, the court again adjourned the trial in this matter and ordered depositions be completed by March 24, 2016. Within the time parameters identified by the court for completion of discovery, plaintiff served defendants with a deposition notice, including a duces tecum demand for the production of

"[c]opies of any and all appraisal reports prepared from 2008 to 2015 with regard to the subject properties."

Pretrial discovery is not limited to a single document or request, "parties may obtain discovery by <u>one or more</u> of the following methods: Depositions upon oral examination. . .; written interrogatories; production of documents or things…." <u>R.</u> 4:10-1 (emphasis added). It was therefore, inconsequential to the court that defendants had furnished plaintiff with answers to interrogatories and exchanged trial-ready appraisal reports. Despite having responded to and completed certain discovery requests and discovery assignments, the parties continued to engage in pretrial discovery. It is well-settled that parties to a litigation are under a continuing obligation to make disclosure of newly discovered information which renders a prior response incomplete or inaccurate. <u>R.</u> 4:17-7. Thus, as of the date when plaintiff's deposition notice and duces tecum demand for the 2014 Appraisal Report was served, the parties continued to engage in pretrial discovery.

2. <u>Limitations of discovery</u>

Defendants' counsel asserts in its motion for reconsideration that the court failed to address the "limit as to which appraisals are required to be produced in discovery" under questions 17 and 18 of the Tax Court Standard Interrogatories to be Served on Taxpayer. In his April 8, 2016 letter brief in support of the motion for a protective order, defendants' counsel argued that production of prior appraisal reports is confined to the Tax Court Standard Interrogatories to be Served on Taxpayer. Defendants' counsel argued that absent plaintiff showing "special need," defendant was not required to produce the 2014 Appraisal Report. In support of his position, defendants' counsel cited, quoted and attached four unreported Tax Court decisions.

It is well settled that "[n]o unpublished opinion shall constitute precedent or be binding upon any court." R. 1:36-3. Thus, the opinions cited by defendants' counsel were not authority, binding the court in this matter. Nevertheless, the court reviewed and analyzed each of the opinions offered by defendants' counsel, and during oral argument raised salient features of each opinion which distinguished those cases from the instant matter. The court concluded that the material facts upon which each of those opinions were premised were disparate from the facts in the instant matter. Therefore, the court accorded those opinions no weight.

Importantly however, the court concluded that no showing of "exceptional circumstances" was required by plaintiff because the 2014 Appraisal Report did not constitute "facts known or opinions held by an expert. . .who has been retained or specially employed by another party in anticipation of litigation or preparation of trial and who is not expected to be called as a witness at trial. . ." R. 4:10-2(d)(3) (emphasis added). Here, the author of the 2014 Appraisal Report was not identified by plaintiff or defendant as an expert or consultant in this matter. Moreover, the 2014 Appraisal Report was commissioned and prepared for defendants' mortgage lender, a non-party to the litigation in contemplation of defendants' mortgage loan refinancing, and not for purposes of this, or any other anticipated litigation. Nonetheless, the court applied the general principles of R. 4:10-2(d) to the matter, concluding that when an appraisal report is prepared for a non-party to the litigation, utilizing data and information about the property which is markedly removed from the years at issue, disclosure should not be required. However, because here the court will be asked to determine the true market value of the subject property as of October 1, 2013, the 2014 Appraisal Report likely contains records, data and information about the property for the 2013 and 2014 calendar years, which may reasonably lead to the discovery of admissible evidence.

Moreover, it is important to note that although the Standard Interrogatories to be Served on Taxpayer are prescribed by the Tax Court under R. 8:6-1(a)(5), they do not express the limitations or boundaries of permissible pretrial discovery. Contrary to the provisions of R. 8:6-1(a)(4), which provides that discovery in matters assigned to the small claims track, "shall be limited to the property record card. . . inspection. . . a closing statement. . . [and] the costs of improvements," no such restrictions or limitations exist under R. 8:6-1(a)(5) (emphasis added). Even when our court rules have limited the form and scope of interrogatories for certain causes of action, additional discovery is still permitted. See R. 4:17-1(b)(1); R. 4:17-6. The Standard Interrogatories to be Served on Taxpayer are one, amongst many, discovery tools, designed to procure relevant and probative information from a taxpayer relative to a pending tax appeal matter. However, they are not the solitary mechanism for securing discovery and are certainly not intended as a barrier to additional discovery. Discovery may be obtained by "[d]epositions upon oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions." R. 4:10-1. Interrogatories are not intended to express the "outermost limit to which. . .discovery proceedings may extend. . ." Kellam v. Feliciano, 376 N.J. Super. 580, 588 (App. Div. 2005). When analyzing, interpreting and applying our court rules, as they impact and affect discovery matters, we must be conscious that:

> Procedural rules should not in themselves be the source of any extensive litigation; they should be subordinated to their true role, i.e., simply a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits.
>
> [Tumarkin v. Friedman, 17 N.J. Super. 20, 26-27 (App. Div. 1951), certif. denied, 9 N.J. 287 (1952) (citing Vanderbilt, The

> New Rules of the Supreme Court on Appellate Procedure, 2 Rutgers L. Rev. 1, 18 (1948)).]

Here, the court observed during oral argument that three of the cases cited by defendants' counsel focused on Interrogatory question 18 of the Standard Interrogatories to be Served on Taxpayer. That Interrogatory question requires production of appraisal reports "covering the subject property or any portion thereof" if the report was authored by the "expert" identified in the answer to Interrogatory question 17 "during or with respect to the year of appeal or either of the preceding two years. . ." However, the court contrasted the narrow focus of the information under Interrogatory question 18 with the broad spectrum of information sought under Interrogatory question 20, which requires the taxpayer to:

> Attach a copy of or describe in detail each document of which you have knowledge and which relates to or bears upon the subject matter of this appeal. . . Include in such description the following: the date of the document; the nature of the document (e.g. letter, appraisal, memorandum, photograph, contract); the name and address of the person who prepared the document. . ." (emphasis added).

The court interpreted Interrogatory question 20 as a demand for documents which the parties have knowledge of and has bearing upon the subject matter of the litigation. More precisely, the court highlighted that Interrogatory question 20 seeks, in part, appraisal reports relating to or bearing upon the subject matter of the tax appeal. Thus, an obligation to furnish an appraisal report which may not arise under Interrogatory question 18 can nevertheless surface in response to Interrogatory 20.

Defendants' counsel and plaintiff's counsel agree that the 2014 Appraisal Report was not authored by an individual identified as an expert in Interrogatory question 17. Thus, defendants' obligation to furnish the 2014 Appraisal Report in response to Interrogatory question 18 was not triggered. However, defendants had a continuing obligation to furnish the 2014 Appraisal

Report to plaintiff in response to Interrogatory question 20 when they became aware of it. R. 4:17-7.

Nonetheless, on February 25, 2016, plaintiff served a notice to take oral deposition of defendants' Chief Financial Officer, along with a duces tecum demand for the production of "[c]opies of any and all appraisal reports prepared from 2008 to 2015 with regard to the subject properties." In reviewing that discovery demand, the court concluded the 2014 Appraisal Report was not an "opinion[] held by experts" that was "acquired or developed in anticipation of litigation or for trial" under R. 4:10-2(d) because the author of the 2014 Appraisal Report was not either party's expert, and the report was not prepared or developed in anticipation of litigation or for trial. Moreover, because the author of the 2014 Appraisal Report was not "retained or specially employed by another party in anticipation of litigation or preparation for trial" no showing of special or exceptional circumstances was required. R. 4:10-2(d)(3). However, because the court will be called upon to determine the true market value of the property as of October 1, 2013, for the 2014 tax year, the court concluded that the 2014 Appraisal Report likely contains records, data and information about the property which may reasonably lead to the discovery of admissible evidence.

3. Redaction of the 2014 Appraisal Report

Defendants' counsel argues that if the court deems the financial and property data contained in the 2014 Appraisal Report as relevant, and reasonably likely to lead to the discovery of admissible evidence, the conclusions of value reached by the report's author are not relevant. Correspondingly, defendants' counsel contends that they are not reasonably likely to lead to the discovery of admissible evidence. Thus, defendants' counsel requests they be "allowed to

redact" those portions of the 2014 Appraisal Report which relate to the "valuation of the subject property."

Plaintiff charges that defendants did not present this argument in support of the motion for a protective order and therefore, should be precluded from asserting it before the court in the motion for reconsideration. Moreover, plaintiff asserts that defendants have not demonstrated "annoyance, embarrassment, oppression, or undue burden or expense" associated with production of the 2014 Appraisal Report hence, plaintiff argues that application of a protective order under R. 4:10-3 is misplaced.

As the court highlighted in its April 18, 2016 opinion, the arguments raised by defendants in support of the motion for a protective order and to bar discovery of the 2014 Appraisal Report centered upon issues of relevancy and the admissibility of the report at trial. Defendants did not present any argument that production of the 2014 Appraisal Report would be burdensome, harassing, involved trade secrets or sought confidential materials. Thus, the focus of the court's opinion concentrated upon issues of privilege, relevancy, special need, exceptional circumstances and admissibility. In addressing the issue of relevancy, the court concluded that "the data and information about the subject property [included in the 2014 Appraisal Report], including its tenants and rental revenues upon which the 'leased fee' analysis is predicated is directly relevant to the subject matter of this action." However, candidly, the court did not consider the relevancy of the author's conclusions or opinions of value for the property and whether those opinions are reasonably likely to lead to the discovery of admissible evidence.

This court is mindful that the rules of discovery are to be liberally construed, favoring litigants' rights to "broad pretrial discovery." Payton, supra, 148 N.J. at 535 (citing Jenkins, supra, 69 N.J. at 56). Discovery is permitted of "any matter, not privileged, which is relevant to

the subject matter involved in the pending action," R. 4:10-2(a), or which "appears reasonably calculated to lead to the discovery of admissible evidence." In re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 82 (2000). However, meandering expeditions which seek irrelevant, oppressive or burdensome discovery are not permitted. See Cain v. Merck & Co., Inc., 415 N.J. Super. 319, 332 (App. Div. 2010); Gensollen v. Pareja, 416 N.J. Super. 585, 591 (App. Div. 2010).

The court's analysis begins with the principle that all property, in a taxing district, shall be assessed under uniform rules and according to the same standard of value. N.J. Const. art. VIII, § 1, para. 1(a). Moreover, a property's true or fair market value as of the assessment date, shall be the basis for the assessment of taxes. N.J. Const. art. IV, § 7, para. 12. See also Kearny v. Div. of Tax Appeals, 137 N.J.L. 634, 635 (Sup. Ct. 1948); N.J.S.A. 54:4-2.25; N.J.S.A. 54:4-23. The implementing legislation requires "[a]ll real property. . .be assessed according to the same standard of value, which shall be the true value of such real property. . ." N.J.S.A. 54:4-2.25. Stated succinctly, in New Jersey, "it is the fee simple interest which is assessed for property tax purposes." Harclay House v. East Orange City, 18 N.J. Tax 564, 569 (Tax 2000).

A leased fee appraisal report values the "ownership interest held by the lessor, which includes the right to the contract rent specified in the lease plus the reversionary right when the lease expires." Appraisal Institute, The Appraisal of Real Estate 72 (14th ed 2013). However, because the leased fee approach is materially influenced by the leasehold interest and the stream of rental income, it is often not a reliable indicator of true or fair market value. A "leased fee. . . [valuation is] of dubious usefulness. The remaining term of a lease, the creditworthiness of the tenants, the influence of atypical lease clauses and stipulations, and other factors can affect the value. . . causing the sum to be less than or greater than the value of the fee simple estate." Id. at

505. Because a leased fee approach to value does not always represent the value of the fee simple interest, this court has rejected conclusions of value premised upon the leased fee interest in property. Marina Dist. Development Co., LLC v. City of Atlantic City, 27 N.J. Tax 469, 488 (Tax 2013), aff'd 28 N.J. Tax 568 (App. Div. 2015), certif. denied, 223 N.J. 354 (2015); Pine Plaza Associates, L.L.C. v. Hanover Twp., 16 N.J. Tax 194, 199 (Tax 1996); Harclay House, supra, 18 N.J. Tax 564; International Flavors & Fragrances, Inc. v. Union Beach Borough, 21 N.J. Tax 403, 423 (Tax 2004). Here, the author of the 2014 Appraisal Report valued the leased fee interest of the property and not the fee simple interest. Thus, the conclusions of value stated in the 2014 Appraisal Report may not represent the true or fair market value of the property as of the assessment date, as required under N.J.S.A. 54:4-2.25.

Moreover, the 2014 Appraisal Report was prepared to facilitate defendants mortgage loan refinancing, not in anticipation of this tax appeal litigation. The author of the 2014 Appraisal Report was not retained, nor identified by plaintiff or defendant as an expert on the issue of property valuation in these matters.

Therefore, the court concludes that although the facts, data and information about the property contained in the 2014 Appraisal Report may be relevant to and probative of the issue of value of the property in this tax appeal proceeding, the author's conclusions of value using a lease fee approach are not. The author's opinions and conclusions of value are not likely to lead to the discovery of admissible evidence. Accordingly, the court grants defendants' motion for reconsideration, in part, permitting defendants to redact those portions of the 2014 Appraisal Report which relate to the author's opinions or conclusions of value of the property.

III. Conclusion

For the above stated reasons, the court denies, in part, defendants' motion for reconsideration for entry of a protective order, and grants, in part, defendants' motion for reconsideration to redact those portions of the 2014 Appraisal Report which relate to the author's opinions or conclusions of value of the property.

An Order reflecting this opinion will be simultaneously entered herewith.

Very truly yours,

/s/Hon. Joshua D. Novin, J.T.C.