COMPASSIONATE CARE HOSPICE GROUP, LTD., an Illinois corporation, and **COMPASSIONATE CARE HOSPICE OF CLIFTON, LLC**, *Plaintiffs*, - *vs.* - **COMPENSATION SOLUTIONS INCORPORATED**, a New Jersey corporation, and **STEVEN POLITIS**, *Defendants*.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : PASSAIC COUNTY CIVIL ACTION NO. L-5607-10

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND FOR OTHER RELIEF

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PRELIMINARY STATEMENT

Plaintiffs Compassionate Care Hospice Group, Ltd. and Compassionate Care Hospice Of Clifton, LLC (collectively "CCH") submit this memorandum of law in opposition to defendants' motion for an order seeking to dismiss the First Count (embezzlement), Seventh Count (breach of fiduciary duty), Eighth Count (conversion) and Tenth Count (fraudulent contracting of debt or incurring of demand) of the Amended Complaint, to strike defendants Steven Politis ("Politis") and Compensation Solutions, Inc. ("CSI") from the caption, and to substitute Compensation Solutions ASO, Inc. in place of CSI as a defendant in the action. As set forth below, the Court should deny this motion.

Defendants' motion is made pursuant to Rule 4:6-2(e), dismissal for failure to state a cause of action. The standard under which motions to dismiss are considered is well-established: All reasonable inferences must be drawn in favor of the non-moving party, and the complaint is construed liberally in favor of finding a valid cause of action. Defendants' motion fails to demonstrate that any of the causes of action pled by CCH fails to meet the low threshold of notice pleading. In addition, their alternative grounds for dismissal on a summary judgment standard is both defective for failure to file a statement of undisputed facts and fatally premature given the extent of factual disagreement on material issues. Finally, defendants' attempt to extract defendant Politis from the case despite the explicit allegations of his personal role in the unauthorized removal of over half a million dollars from plaintiffs' bank account, as well as his actions in deceiving plaintiffs and creating a fraudulent "record" of "notice" of that defalcation has no basis in law. Accordingly, defendants' motion to dismiss should be denied.

Because of the procedural posture of this motion as well as the multiplicity of moving papers already presented to the Court involving the same facts, this memorandum of law does

not include a separate Statement of Facts. Relevant allegations from the Amended Complaint, which are presumed on a motion to dismiss under Rule 4:6-2(e) as true, are set forth as appropriate in the Legal Argument section.

LEGAL ARGUMENT

I. UNDER NEW JERSEY LAW, MOTIONS TO DISMISS ARE RARELY TO BE GRANTED AND DEFENDANTS' SUMMARY JUDGMENT MOTION IS BOTH PROCEDURALLY DEFECTIVE AND PREMATURE

Defendants have moved to dismiss CCH's First Count, Seventh Count, Eighth Count and Tenth Count pursuant to Rule 4:6-2(e) for failure to state a cause of action. The standard under which motions to dismiss are considered is well-established. All reasonable inferences must be drawn in favor of the non-moving party and the complaint is construed liberally in favor of finding a valid cause of action. *NCP Litig. Trust v. KPMG LLP*, 187 N.J. 353, 365 (2006).

> [A] reviewing court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary. At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforesaid principles should be one that is at once painstaking and undertaken with a generous and hospital approach. .

Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). In applying this test, a court treats the plaintiff's version of the facts as set forth in the complaint as uncontradicted and afford the complaint all legitimate inferences. *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 166 (2005). "Courts should grant these motions with caution and in the 'rarest of circumstances.'" *Ballinger v. Delaware River Port Auth.*, 311 N.J.Super. 317, 322 (App.

Div.1998), quoting *Printing Mart,* 116 N.J. at 772. See, *Lieberman v. Port Authority of New York and New Jersey*, 132 N.J. 76, 79 ("every reasonable inference is afforded the plaintiff and the motion is granted only in rare instances and ordinarily without prejudice").

Faced with the daunting task of overcoming the law's disfavor of a motion to dismiss under R. 4:6-2(e), especially when applied to a fact-rich verified pleading such as the Amended Complaint, defendants have presented the Court with the alternative route of summary judgment—in a case where there has been no discovery whatsoever and where the record demonstrates that virtually every material allegation of fact by one side is disputed by the other.

Defendants, however, have avoided this inconvenient fact about the facts in this case by declining to comply with R. 4:46-2(a), which requires the submission of a written statement of material facts in specified format as part of a summary judgment motion. R. 4:46-2(a) provides in pertinent part:

> The motion for summary judgment shall be served with briefs, a statement of material facts and with or without supporting affidavits. The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation shall identify the document and shall specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on. A motion for summary judgment may be denied without prejudice for failure to file the required statement of material facts.

No statement of material statement of facts was filed with the instant motion, however and for this reason, the motion should be denied in its entirety.

It does not help defendants that they have sought to "finesse" the requirements of R.4:46-2(a) by presenting a summary judgment motion as an alternative to a motion to dismiss for failure to state a cause of action under R. 4:6-2(e). Every aspect of R. 4:46-2 still applies. Thus

in *Linneman v. Burlington County Board of Chosen Freeholders*, 2008 WL833976 (App. Div. 2008), the Appellate Division faulted the trial court's conversion of a R. 4:6-2(e) motion into a summary judgment motion when, *inter alia*, the movant failed to comply with R.4:46(a). Applying the standard of a motion to dismiss for failure to state a claim only, the Appellate Division reversed the dismissal and remanded the case. *Id.* at *7.

The Court should do the same here. This is not a mere technicality. Under R. 4:46 2(b), a party opposing a motion for summary judgment is required to "file a responding statement either admitting or disputing each of the facts in the movant's statement." Clearly, CCH cannot file any responding statement of material facts when defendants failed to submit a statement of material facts.

In addition to defendants' failure to comply with the procedural requirements on a motion for summary judgment, summary judgment is also inappropriate where material facts are within the exclusive knowledge of the moving party and discovery is incomplete. As defendants themselves have stated on page four of their own brief in opposition to CCH's pending motion for injunctive relief, dated March 22, 2011, "Not a single claim against [CIS] in Plaintiff's Amended Verified Complaint can be sustained . . . as the material facts are controverted . . ." In such a case, summary judgment is patently inappropriate. In *Velantzas v. Colgate-Palmolive Co., Inc.*, 109 N.J. 189, 193 (1988), for example, the Supreme Court reversed a grant of summary judgment, ruling that "when critical facts are peculiarly within the moving party's knowledge, it is especially inappropriate to grant summary judgment when discovery is incomplete." citing *Martin v. Educational Testing Serv., Inc.*, 179 N.J. Super. 317, 326 (Ch. Div.1981). *See also*, *Hermann Forwarding Co. v. Pappas Ins. Co.*, 273 N.J. Super. 54, 64 (App. Div. 1994) (summary

judgment not available where critical issues were undeveloped, pretrial discovery was incomplete, interrogatories unanswered and depositions were not begun).

For these reasons, defendants' motion should be treated as one to dismiss for failure to state a claim, which, as demonstrated below, they cannot sustain; the Court should ignore their summary judgment motion as non-compliant, or, in the alternative, dismiss it on the merits as premature.

II. DEFENDANTS' MOTION TO SUBSITUTE CIS FROM THE CASE AND REPLACE IT WITH ANOTHER PARTY SHOULD BE DENIED BECAUSE CSASO IS NOT A PARTY TO THE AGREEMENT THAT IS THE SUBJECT MATTER OF THE LITIGATION.

Defendants have also made a remarkable motion, asking this Court to strike defendant CCH—the party whose name is on the contract with CCH that is the subject of this action, and which has litigated this case since last fall—from this action, and substitute in its place a different entity, never mentioned before, called Compensation Solutions ASO, Inc. ("CSASO"). There is no conceivable justification for such a motion at this stage.

Defendants try to explain away the magnitude of what they are requesting by submitting testimony baldly stating averring that CCH "contracted with CSASO"—**an entity whose name appears nowhere in the Agreement that is the subject of these claims**. (Certification of Thomas J. Cioffe, ¶¶ 17, 25). Defendants acknowledging that "[t]he confusion as to the proper party may have been borne out of the Agreement, which defines the brand name 'Compensation Solutions' as "CSI" rather than 'CSASO'." Confusion is not the problem, however, and the issue is not merely one of "definition": **the Agreement does not make a single reference to CSASO**. On its face, the Agreement is between "Compensation Solutions," a defendant in this case, and plaintiffs.

Defendants' attempted substitution should not be permitted at this stage of the action, in which there has been no discovery or other opportunity for CCH to obtain objective information about CSI's corporate structure. Moreover, this litigation has been ongoing since November of last year—yet this is the first time defendants ever raised this issue, informally or otherwise, notwithstanding their repeating filing of papers in two different courts opposing various forms of relief sought against CSI by CCH without ever suggesting that CSI is the "wrong defendant." This fact itself raises a serious question about CSI's candor to the Court.

To their credit, defendants have by their submissions provided a basis for the Court to grant CCH leave to add CSASO as an additional defendant in this litigation. But there is certainly no ground for the existing corporate defendant to be dismissed and replaced with an entity that, for all CCH knows, is a shell devoid of assets or has other disabilities that make it a more favorable party for CSI's principals to put at risk than CSI itself. Neither CCH nor the Court should have to rely on affidavits by those most interested in such an outcome submitted by a party that has litigated for months in the name of the "wrong defendant." Accordingly, defendants' application to strike Compensation Solutions, Inc. as a defendant in this action should be denied.

III. THE AMENDED COMPLAINT ADEQUATELY STATES A CLAIM FOR BREACH OF FIDUCIARY DUTY BY ALL DEFENDANTS

A tort remedy may arise from a contractual relationship where the breaching party owes an independent duty imposed by law. *Saltiel v. GSI Consultants, Inc.*, 170 N.J. 297, 316 (2002). Here, as alleged in the Amended Verified Complaint, such a duty existed between CCH and the defendants, namely a fiduciary duty. Defendants seek to dismiss this claim, but, as demonstrated

below, the allegations here more than adequately make out a claim for the existence and breach of a fiduciary relationship by defendants.

Under New Jersey law,

> A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship. The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. Accordingly, the fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship.

McKelvey v. Pierce, 173 N.J. 26, 57 (2002) (internal citations omitted). To state a claim for the breach of a fiduciary duty, a plaintiff must allege: (1) a fiduciary relationship between the parties, (2) a breach of the duty imposed by that relationship, and (3) harm to the plaintiff. *Id.* Whether a fiduciary relationship exists between two parties is a fact-sensitive inquiry, and one not amenable determination based on generalizations about the relationship. "[T]he exact limits of the term 'fiduciary relation' are impossible of statement. Depending on the circumstances of the particular case or transaction, certain business, public or social relationships may or may not create or involve a fiduciary character." *F.G. v. MacDonell*, 150 N.J. at 563, *quoting* Bogert, *Trusts and Trustees* § 481 (1978). Thus in *Sunset Financial Resources, Inc. v. Redevelopment Group V, LLC*, 2006 WL 3675384 (D.N.J.2006), the court denied a motion to dismiss a fiduciary duty claim even while finding the credibility of the allegations that a fiduciary relationship existed because "[i]t would appear that Plaintiff can, with discovery, prove some set of facts in support of its claim that a fiduciary relationship exists, was breached and, therefore, that they are entitled to relief. As such, at this stage in the proceedings, the ... defendants' motion to dismiss ... will be denied." Considering that no discovery has taken place in this case and that so many

facts are controverted, this factor alone should be sufficient ground for the Court deny defendants' motion to dismiss the fiduciary duty claim.

Here the pleadings describe an independent duty imposed by law regarding which the contract between the parties is utterly silent: the unique and extraordinary trust placed in CSI by CCH in the provision to CSI and its employees of what amounted to unlimited impoundment privileges from CCH's bank account. That defendants do not acknowledge the legal significance of the trust bestowed on them by CCH does much to explain their conduct, but as demonstrated below that misapprehension is not a basis for dismissal of this claim—quite to the contrary.

Contrary to defendants' arguments, the fact that there is a contract between or among parties does not mean there cannot be a fiduciary relationship between or among the same parties as well. For example, in *Interactive Logistics, Inc. v. Answerthink, Inc.*, 2001 WL 1825982 (D.N.J.2001), the plaintiff retained the defendant pursuant to not one but three separate written agreements that governed consulting, logistical, warehousing and shipping services to various companies. Plaintiff sued and included a claim for breach of fiduciary duty. Despite the extensively documented contractual relationship between the parties, the court denied defendant's motion to dismiss, based largely on the defendant's superior level of expertise with respect to the general subject matter of the business relationship:

> This Court concludes that the plaintiff's allegations in this case sufficiently indicate a trusting relationship between plaintiff and defendant in the development of computer and technological systems for plaintiff's benefit and a subsequent breach of that trust and, therefore, does not point so overwhelmingly in defendant's favor such that dismissal of the claim for breach of fiduciary duty is required.

2001 WL 1825982 at *7-8. Here, too, CCH alleges that it reposed faith, confidence and trust in defendant as CCH's payroll service provider and relied on defendant CSI to act on CCH's behalf and in its interest in executing its duties with respect to making withholding payments from

funds it impounded, duties which implicate CCH's own fiduciary duties to its employees, and that these duties were breached. (Amended Complaint, ¶ 146).

Moreover, for a fiduciary relationship to exist, there is no requirement that there be a sort of "ward and guardian" imbalance of power or capacity among the parties. In *Interactive Logistics*, for example, just discussed, the parties were, as here, both sophisticated commercial entities who entered into contracts with each other at arms' length. Similarly, in *Big M, Inc. v. Dryden Advisory Group*, 2009 WL 1905106 (D.N.J.2009), the plaintiff brought an action against a tax consultant for both breach of contract and breach of fiduciary duty. The court found that the defendant breached its fiduciary duties by failing to disclose potential tax liabilities discovered in a refund review agreed to under the contract. In another key case, relied on by the court in *Interactive Logistics*, the District of New Jersey ruled that a claim of fiduciary breach was stated by the client of an accounting firm that provided comfort letters on which its client relied and where the firm allegedly "failed to perform to the appropriate professional standard of care." *In re Cendant Corp. Securities Litigation*, 139 F.Supp.2d 585, 610 (D.N.J. 2001). Notably, the *Cendant* court noted that a fiduciary relationship may be found merely where the professional "manages the assets of business of a client"—which is exactly what CSI did for CCH with respect to both its assets (i.e., its bank account) and its payroll tax responsibilities. *Id.* at 609, *quoting* M. Thomas Arnold, *Breach of Fiduciary Duty*, 506 PLI/Lit. 341 at 350.

Ultimately, the key to a fiduciary duty claim, as set forth *Bohlinger v. Ward & Co.*, 34 N.J. Super. 583, 591 (App.Div.1955), is that one is forbidden from "taking an unfair personal advantage of the opportunities of his position in the use of things entrusted to him." It is hard to imagine a grosser example of just this than what CSI is alleged to have done here. CSI requested something not provided by its contractual relationship: privileged access to CCH's bank account to facilitate the making payments to third parties for CCH's benefit. Once getting that access—

once establishing a relationship of special trust and a legally-protected expectation of loyalty with respect to that privilege—CSI abused that trust by secretly appropriating over half a million dollars for itself.

In addition, the Amended Complaint specifically alleges that the impoundment privilege was never authorized nor contemplated by CCH as a method by which CSI could extract penalties or extraordinary fees and charges. Indeed, the allegations are that CCH was forbidden from removing even a cent, however routine, without advance notice or approval. Yet, as the allegations state, neither notice nor approval were present when CSI abused CCH's trust and raided CCH's bank account. (Amended Complaint, ¶¶ 29-39). Again, this is the very definition of a trustee "taking an unfair personal advantage of the opportunities of his position in the use of things entrusted to him."

All this is alleged in the Amended Complaint, and clearly adds up to a claim to a breach of fiduciary duty. Moreover, beyond common law concepts of fiduciary duty, there is an additional basis for this Court, certainly at this stage, to find that CCH has stated a claim for breach of fiduciary duty. The law is well established that reliance on an agent does not constitute reasonable cause to abate tax penalties, "even when the agent embezzles a company's tax payments." See, e.g., *Pediatric Affiliates, P.A. v. United States*, 05-3108 (MLC), 2006 WL 454374 (D.N.J. Feb. 23, 2006). There can be no question that CSI had not only a contractual duty to see to the satisfaction of CCH's tax liabilities, but a fiduciary one that was only magnified by CCH's extension of special trust in CSI via the bank impoundment privilege. *See*, *In re AAPEX Sys., Inc.*, 273 B.R. 19, 27 (Bankr. W.D.N.Y. 1999) (special statutory trust exists on money designated for payment of federal withholding taxes). By diverting CCH's funds earmarked for payroll taxes to its own use, as alleged, defendants have exposed CCH to liability under the tax laws for failing to make timely, or in some cases possibly any, required payments

with respect to withheld taxes and clearly breached CSI's duty as a tax fiduciary to CCH. This alone establishes a prima facie claim for breach of fiduciary duty.

Finally, defendants have urged dismissal of the fiduciary breach claim as against defendant Politis, whose liability is alleged, as they surmise, under the participation theory of personal liability in cases involving tortuous conduct of corporate officers. *See*, *Saltiel v. GSI Consultants, Inc.*, *supra*, 170 at 304. Under the participation theory, an individual is personally liable for all torts he commits, even acting in his or her official capacity as an officer (not necessarily a statutory corporate officer) or agent of a corporation; it is of no consequence that the corporation may also be liable. *Id.*; *Metuchen Sav. Bank v. Peirini*, 377 N.J.Super. 154, 161-62 (2005). Corporate officials are liable for their torts even though their acts were performed for the benefit of the corporation and without profit to them personally. *Id.* All that is required is that official "is sufficiently involved in the commission of the tort[;] . . . that the corporation owed a duty of care to the victim[; and that] the duty was delegated to the officer and the officer breached the duty of care by his own conduct." *Saltiel v. GSI Consultants, Inc.*, *supra*, 170 N.J. at 304.

Defendants pretend to be at sea over the Amended Complaint's use of the undifferentiated term "defendants" in certain places, but this is a completely acceptable practice under notice pleading. There has, after all, been no discovery here, and the precise facts of who did what are not available to plaintiffs. But while this form of pleading is more than adequate to survive a motion under R. 4:6-2(e), defendants' claim to be perplexed about what defendant Politis is alleged to have done wrong, and why he should be answerable for it personally, cannot be taken seriously when juxtaposed with the following allegations from the Amended Complaint:

> 78. Shortly after his Friday, November 5, 2010 letter, on November 10, 2010, defendant Politis sent an email to the official email address of CCH's chief executive officer.

79. One was a letter, labeled "via email only," stating that it enclosed the second attachment, "the attached back-billing which shall be immediately impounded." The transmittal email and the two attachments are ("the November 10 email") hereto as Exhibit G.

80. The second PDF attachment to the email indicated that defendants were about to impound over half a million dollars from CCH's bank account, almost all in purported satisfaction of the BOR Provision.

81. Unlike every other Impound Statement sent from defendant CSI to CCH, the November 10 email was transmitted by Politis, contrary to CSI's regular practice of having its chief financial offer transmit each advice of impoundment by email.

82. The November 10 email was also not sent or copied to a single one of the regular recipients at CCH of impoundment advices, one of which was CCH's own general counsel.

83. Moreover, the email was sent by defendant to a dormant email address that defendant Politis knew, or should have known, was never used by CCH's chief executive officer.

84. Indeed, CCH learned of this massive defalcation by defendant only the next morning when defendant's chief financial officer, who was evidently blind-copied on the email sent by defendant Politis the previous day, passed it along to three of the usual CCH recipients of impound advices with the comment, "I noticed you weren't copied on this, so I am forwarding to you."

85. Defendant Politis also knew that CCH's chief executive officer delegated management of such matters within CCH's organization and, when corresponding by email, utilized his own personal email address.

86. Defendant Politis had, in fact, utilized this personal email address in previous correspondence with CCH's chief executive officer.

87. Moreover, the Agreement as amended provided that "any and all notices required under the terms of this Agreement shall be effected by hand delivery, in writing or by certified mail, return receipt requested."

88. The November 10 email or its attachments, however, were not delivered by hand delivery or certified mail.

89. As promised in that email, however, defendants did in fact impound, without authorization or approval, $518,001.88 from CCH's bank account, all but $2,475.00 of which it applied to satisfy its claim to penalties under the BOR Provision.

90. CCH management, in fact, swiftly determined that the change of BOR had been an administrative error within CCH, and within days re-designated defendant as BOR as required under the Agreement.

91. At no time was defendant deprived of any revenue, nor upon information and belief did it suffer any financial loss, as a result of the temporary misdesignation of these BOR's – the only ones relating to insurance coverage or administration being handled for CCH by defendant CSI – by CCH.

92. Thus any non-compliance by CCH of the BOR Provision was technical, promptly remediated and harmless, as defendant was once again BOR and for all practical purposes was in the same financial position it would have been had it never been removed as such.

93. Nonetheless, defendant Politis took the position that defendant CSI was entitled to "back bill" CCH pursuant to the BOR Provision in the amount of $19.96 per employee for the "applicable" period.

94. Defendants have subsequently refused, despite repeated demands and attempts through normal banking channels to reverse this unauthorized, fraudulent debit, to return these wrongfully impounded funds to CCH.

95. Upon information and belief, this wrongful impound was undertaken by or at the direction of defendant Politis.

96. Furthermore, defendants have unilaterally imposed other unauthorized and baseless charges on CCH, which, upon CCH's withdrawal of defendant's impoundment authorization, defendant has demanded CCH pay.

* * *

112. Defendant CSI owed a duty of care respecting its use of bank impoundment withdrawal privileges for CCH's account.

113. Defendant CSI delegated its duty of care to defendant Politis, a corporate officer.

114. Alternatively, defendant Politis wrongfully directed, on his initiative, CSI's staff to take the above-alleged wrongful actions.

115. Defendant Politis breached his duty of care by the actions as alleged above.

Despite these specific, detailed allegations of Politis' direct and outrageous involvement in the theft of over $500,000 from CCH's bank account and his careful deception practiced against CCH to attempt to provide cover for his actions, defendants insist that "Plaintiff makes no sustainable allegations with respect to Politis' involvement in any intentional torts." (Defendants' Brief on Motion to Dismiss at 2.) But in fact the allegations set off above can hardly be interpreted as vague about Politis' "involvement" in very specific acts. There is nothing in these words that could allow the interpretation that his conduct was unintentional. That what he did was tortious is the subject matter of this brief. And whether they are "sustainable" is a matter for proof and, ultimately, trial or substantive motions after a full opportunity for discovery—not dismissal at the pleadings stage.

Finally, it is necessary to address defendants' cynical suggestion that because Politis is an attorney, he should be exempt from responsibility for his actions. Politis' inclusion as a defendant, they argue, is no more justifiable than asserting claims properly made against a principal against that party's advocate or legal representative who has only performed his professional duties. But the defendants' argument is exactly backwards. The Amended Complaint does not describe a lawyer representing a client. It recounts instead the tawdry acts of a man on the make, trained in law and schooled in the canons of professional responsibility yet who readily resorts to empty a trusting customer's bank account to "resolve" a heated dispute between the parties. The only evidence of legal skill in these allegations is in the attempt to "cover" these un-lawyerly outrages with correspondence larded with legalisms—but sent to a

dead email address to ensure that enough time passes before it is discovered to take the money and run.

These are not allegations of vicarious liability or professional duty but of personal moral failure of the type that the law calls tortious, or worse. Far from being a make-weight to this case, the tort claims against Politis and the explicit factual allegations on which they stand are a sufficient basis for this action all by themselves. Defendants' refusal to acknowledge, much less address, the substance of these allegations speaks volumes about the merits of their motion to dismiss from this lawsuit the man who, ultimately, is its author. That motion should be denied.

IV. THE AMENDED COMPLAINT ADEQUATELY STATES A CLAIM FOR CONVERSION AGASINT ALL DEFENDANTS

Conversion is the "wrongful exercise of dominion and control over property owned by another in a manner inconsistent with the owner's rights." *Advanced Enterprises Recycling, Inc. v. Bercaw*, 376 N.J. Super. 153 (App. Div.2005). The tort of conversion developed historically with respect to chattels, but it can be applied to money. *Hirsch v. Phily,* 4 N.J. 408, 416 (1950); *Glenfed Fin. Corp. v. Penick Corporation*, 276 N.J.Super. 163, 181 (App.Div.1994). Conversion does not require an intent to harm the rightful owner, or knowledge that the money belongs to another. *Chicago Title Ins. v. Ellis*, 409 N.J.Super 444, 456 (App.Div.2009). "The elements of good faith, intent or negligence do not play a part in an action for damages in conversion." *McGlynn v. Schultz*, 90 N.J.Super. 505, 526 (Ch.Div.1966), *quoting* 89 C.J.S., *Trover and Conversion* at 536.

Furthermore, "It is well settled ... that the officers of a corporation are personally liable to one whose money or property has been misappropriated or converted by them to the uses of the corporation, although they derived no personal benefit therefrom and acted merely as agents of

the corporation." *Hirsch v. Phily,* 4 N.J. at 416. Any corporate officer or director who participates in a conversion by aid, instigation or assistance is liable. *Charles Bloom & Co. v. Echo Jewelers*, 279 N.J.Super. 372, 381-82 (App. Div. 1995); *Fidelis Factors Corp. v. DuLane Hatchery, Ltd.*, 47 N.J.Super. 132, 139-140 (App.Div.1957); *Sensale v. Applikon Dyeing & Printing Corp.*, 12 N.J.Super. 171, 175 (1951).

The Eighth Count of the Amended Complaint for Conversion alleges all the facts needed to state a claim for conversion, as follows:

> 155. CCH reposed faith, confidence and trust in defendant as CCH's payroll service provider, and relied on defendant CSI to act on CCH's behalf and in its interest.
>
> 156. Defendant took possession of CCH's property, namely its money, by means of the improper November 10, 2010 withdrawal, without authority, justification or legal basis, and appropriated it for its own use.
>
> 157. Defendants thereafter exercised unauthorized dominion over the CCH's property, which was inconsistent with CCH's interest in it.
>
> 158. CCH has suffered damages as a result of the defendants' conversion of CCH's property.

(See Amended Complaint, Ex. "1"). Thus the pleadings state every element of the tort of conversion, including defendant's "unauthorized dominion" of CCH's funds to pay penalties, liquidated damages or disputed charges constituted a conversion of the funds for CSI's own use, and that Politis, by his own acts or by his directions, directed and thereby committed that conversion by means of the improper November 10, 2010 withdrawal, without authority, justification or legal basis.

This is hardly a novel application of the theory of the conversion tort. In *Hirsch v. Phily, supra,* the defendant was alleged to have diverted for its own use proceeds from accounts

receivable that were specifically assigned to the plaintiff; the Court ruled that the plaintiff had set forth a prima facie case of conversion. Similarly, in *Glenfed Fin. Corp. v. Penick Corporation*, the debtor's president and chief operating officer had expressly authorized the diversion of payments into the debtor's operating accounts which the debtor had agreed to place in blocked accounts for the creditors' benefit. He was held personally liable for conversion of the plaintiff creditor's property, as Politis should be here. Accordingly, taking the facts asserted in plaintiffs' Amended Complaint as true and drawing all reasonable inferences in favor of the plaintiffs, the Amended Complaint sets forth more than sufficient facts to state a claim for conversion against both CSI and Politis.

V. THE AMENDED COMPLAINT ADEQUATELY STATES A CLAIM FOR EMBEZZLEMENT

Defendants seek dismissal of the claim of embezzlement in the Amended Complaint. Their argument can be made only by misstating the law or ignoring the allegations of that document. Defendants have chosen to do both. They first urge that embezzlement is strictly a criminal offense, not a tort. This would not, however, militate in favor of dismissal, but rather against it. Where, as here, the factual allegations are complex and a claim is based on an unsettled legal question, "a court should 'follow the more prudent course of withholding judgment on the unsettled question of law until the issues are more clearly focused and the facts definitively found.'" *Grow Company, Inc. v. Chokshi*, 403 N.J. Super. 443, 470 (App. Div. 2008), *quoting*, *GNC Franchising, Inc. v. O'Brien*, 443 F.Supp.2d 737, 749 (W.D. Pa. 2006).

In any event, defendants' insistence that embezzlement is not a tort recognized in this State is mistaken. They cite no authority for their position, but insist that no cases in New Jersey even **discuss** "embezzlement as a civil tort." This is incorrect. *See, In Re Fritze LLC*, 07-19059

(DHS), 2009 WL 3245499 (Bankr. D.N.J. Oct. 6, 2009) (discussing *Schwab v. Birches III Prop. Owners Assoc., Inc. (In re Hefner)*, 262 B.R. 61 (Bankr. M.D. Pa. 2001) involving civil action for embezzlement); *Singer Shop-Rite, Inc. v. Rangel*, 174 N.J. Super. 442 (App. Div. 1980) (appeal from civil trial involving claim that employee had converted or embezzled funds); *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Magill*, 58 N.J. Super. 402, 407 (Law Div. 1959) (plaintiff established prima facie case of embezzlement). Significantly, all these cases accept, prima facie, the existence of an embezzlement tort—and not one of them suggests, much less rules, that there is not one.

Criminal or civil, the definition of embezzlement is the "fraudulent appropriation to his own use or benefit of property or money intrusted to him by another, or by a clerk, trustee, public officer, or other person acting in a fiduciary character." *Trustees of the Clients' Security Fund of the Bar of New Jersey v. Yucht*, 243 N.J.Super. 97 (Ch. Div.1989). The First Count of the Amended Complaint for Embezzlement alleges just that, as follows:

> 106. CCH authorized defendant CSI to withdraw funds from CCH's bank account solely for the purpose of payment by CSI of CCH's payroll tax other payroll liabilities.
>
> 107. CCH authorized defendant CSI to withdraw funds from CCH's bank account only after review and approval of such impoundments by designated staff and managements.
>
> 108. Defendant CSI did, in fact, regularly withdraw such funds and make such payments pursuant to such arrangements.
>
> 109. CCH entrusted CCH with such funds for purposes of satisfying CCH's payroll, insurance and other obligations only.
>
> 110. On November 10, 2010, however, without authorization for such withdrawal but wrongfully and unlawfully utilizing CSI's impoundment privileges which were meant to benefit CCH, defendants withdrew over $500,000 from CCH's account with no intention of utilizing such funds to meet CCH's payroll

> obligations, to satisfy a bona fide fee owed to CSI by CCH or for any other legitimate, authorized or lawful purpose.
>
> 111. Defendant CSI retained the November 10, 2010 withdrawal, intending to appropriate and convert the funds to its own use and to deprive CCH of the use of those funds permanently.
>
> 112. Defendant CSI owed a duty of care respecting its use of bank impoundment withdrawal privileges for CCH's account.
>
> 113. Defendant CSI delegated its duty of care to defendant Politis, a corporate officer.
>
> 114. Alternatively, defendant Politis wrongfully directed, on his initiative, CSI's staff to take the above-alleged wrongful actions.
>
> 115. Defendant Politis breached his duty of care by the actions as alleged above.
>
> 116. CCH has sustained damages as a result of the actions of defendants.

Each element of the embezzlement tort ("appropriation to his own use or benefit of property or money intrusted to him by another") is found in the above allegations—and more than once.

Defendants nonetheless insist that the Court place the cart before the horse and dismiss the embezzlement claim because the wrongfully impounded funds were not "fraudulently appropriated." By so arguing defendants ask the Court to make a preemptive mixed finding of fact and law in order to dismiss a claim at the pleading stage. But besides the fact that the Amended Complaint uses the "magic words" in question—for example, in the allegation that "Defendants have subsequently refused, despite repeated demands and attempts through normal banking channels to reverse this unauthorized, fraudulent debit, to return these wrongfully impounded funds to CCH" (Amended Complaint ¶ 94), and elsewhere—the Amended Complaint as well as the embezzlement cause of action are rife with allegations amounting to common law fraud. "The five elements of common law fraud are: (1) a material misrepresentation of a

presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." *Triffin v. Automatic Data Processing, Inc.*, 394 N.J. Super. 237, 246 (App. Div. 2007). Defendants' scheme to mislead plaintiffs about their surreptitious removal of funds from their accounts in and of itself meets these standards.

In any event, to accept defendants' argument that there is no allegation of fraudulent misappropriation is to have already granted them a summary judgment based on their self-serving view of the facts and law. This is certainly not an appropriate ground for dismissal for failure to state a claim. Accordingly, taking the facts asserted in plaintiffs' Amended Complaint as true and drawing all reasonable inferences in favor of the plaintiffs, the Amended Complaint sets forth sufficient facts to state a claim for Embezzlement against defendants CSI and Politis.

VI. THE AMENDED COMPLAINT ADEQUATLY STATES A CLAIM FOR FRAUDULENT CONTRACTING OF DEBT OR INCURRING OF DEMAND

CCH has, pleading in the alternative, also alleged that, to the extent (as defendants argue) the impoundment of funds by CSI directly from CCH's bank account could be construed as being a mere breach of the Agreement between CSI and CCH, CCH has stated a claim for the fraudulent contracting of a debt or incurring a demand, pursuant to N.J.S.A. 2A:15-42(d)[1], and

[1] N.J.S.A. 2A:15-42(d) provides:

> A capias ad respondendum shall issue in an action founded upon contract, express or implied, due to plaintiff from defendant, only when the proof establishes the particulars specified in one or more of the following subparagraphs:
> a. That defendant is about to remove any of his property out of the jurisdiction of the court in which the action is about to be commenced or is then pending with intent to defraud his creditors; or
> b. That defendant has property or choses in action which he fraudulently conceals; or
> c. That defendant has assigned, removed or disposed of, or is about to assign, remove or dispose of, any of his property with intent to defraud his creditors; or
> d. That defendant fraudulently contracted the debt or incurred the demand.
> In such a case, the court shall hold the defendant to bail in such an amount as is shown by the proof to be due plaintiff from defendant except that in actions to recover money from a public officer, the amount shall

attachment pursuant to N.J.S.A. 2A:26-2[2].

Contrary to defendants' arguments, the fraud referred to in N.J.S.A. 2A:15-42(d) does not have to exist at the time of the making of the contract. As the Appellate Division explained in *Allied Fin. Corp. v. Steel Panel Sales Corp.*, 86 N.J. Super. 65, 75 (App. Div. 1964) (emphasis added):

> The rationale by which the concept of a fraudulently contracted debt is now deemed to comprehend, for attachment and Capias purposes, **a fraud, misappropriation or conversion growing out of, though later than the inception of, a contractual relationship between the defendant and the party aggrieved**, is stated in *Jordan v. Hoffman*, 126 N.J.L. 100, 104 (Sup.Ct.1941), a Capias case not involving a strict fraud but the failure of a consignee to set aside proceeds of sale for consignor as agreed. '(T)he resultant fraud, although not proved to have existed at the

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be that which the court thinks proper under the circumstances.
This section shall not apply to proceedings as for contempt to enforce civil remedies.

[2] N.J.S.A. 2A:26-2 provides:

An attachment may issue out of the Superior Court upon the application of any resident or nonresident plaintiff against the property, real and personal, of any defendant in any of the following instances:
a. Where the facts would entitle plaintiff to an order of arrest before judgment in a civil action; and in such cases the attachment may issue against the property of a female, or of a corporation in the same manner as though the defendant would be liable to arrest in a civil action, except that, in actions founded upon a tort, an attachment shall not issue against a corporation upon which a summons can be served in this State; or
b. Where the defendant absconds or is a nonresident of this State, and a summons cannot be served on him in this State; but an attachment shall not issue hereunder against the rolling stock of a common carrier of another state or against the goods of a nonresident in transit in the custody of a common carrier of this or another state; or
c. Where the cause of action existed against a decedent, which survives against his heirs, devisees, executors, administrators or trustees, and there is property in this State which by law is subject to plaintiff's claim; but no action of attachment may be brought hereunder against the heirs unless they, or some of them, nor against the devisees unless they, or some of them, nor against the executors unless they, or some of them, nor against the administrators unless they, or some of them, nor against the trustees unless they, or some of them, are unknown or nonresident and cannot be served with a summons in this State; or
d. Where plaintiff has a claim of an equitable nature as to which a money judgment is demanded against the defendant, and the defendant absconds or is a nonresident and a summons cannot be served upon him in this State; or
e. Where the defendant is a corporation created by the laws of another state but authorized to do business in this State and such other state authorizes attachments against New Jersey corporations authorized to do business in that state.
For the purposes of this section a summons can be served upon a person in this State where service can duly be made upon someone on his behalf in the State, but not where service may be made only by publication in the State.

> inception of the contract, flows from the contract and becomes a component part thereof.'

This well describes the allegations here, where the fraudulent acts by defendants CSI and Politis arose after the inception of the Agreement.

Moreover, there is no bar to an attachment under N.J.S.A. 2A:26-2 as against the property of a corporation, which explicitly provides that "[w]here facts would entitle plaintiff to an order of arrest before judgment in a civil action; and in such cases the attachment may issue against the property of ... a corporation in the same manner as though the defendant would be liable to arrest in a civil action ...). There is no basis, therefore, for dismissal of this count of the Amended Complaint.

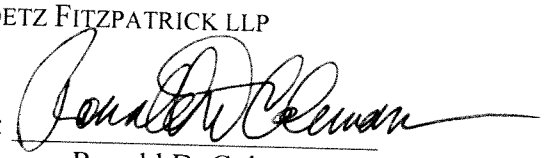
VII. COMPASSIONATE CARE HOSPICE OF CLIFTON, LLC IS A PROPER PARTY TO THIS ACTION

Defendants ask the Court to strike plaintiff Compassionate Care Hospice of Clifton, LLC from the caption. But defendants' moving papers contain no argument and specify no grounds for doing so. As it is, the Agreement between CCH and CSI provides at page 9 that Compassionate Care Hospice of Clifton, LLC, among other entities, "agree to all the requirements, obligations, terms and conditions of the Client Service Agreement . . ." This is more than sufficient basis to retain it as a party and, in the absence of a reasoned basis for striking it, should suffice for the Court to deny this request for relief in defendants' motion as well.

CONCLUSION

For all of the foregoing reasons, this Court should deny defendants motion to dismiss in its entirety.

GOETZ FITZPATRICK LLP

By: 
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Dated: March 24, 2011

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss and for Other Relief was served upon:

David B. Grantz, Esq.
Meyner and Landis LLP
One Gateway Center, Suite 2500
Newark, New Jersey 07102

on March 24, 2011, by electronic transmission and by FedEx overnight mail.

By: _____
Timothy B. Cummiskey

Dated: March 24, 2011