IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	
TRUMP ENTERTAINMENT RESORTS, INC., et al.,[1]	**Chapter 11** **Case No. 14–12103 (KG)**
Debtors.	**Jointly Administered** **RE: D.I. 295**

DEBTORS' OBJECTION TO MOTION OF LEVINE, STALLER, SKLAR, CHAN & BROWN, P.A. FOR ENTRY OF AN ORDER FIXING THE VALUE AND PRIORITY OF, AND ALLOWING ITS CLAIM AS SECURED IN FULL, PURSUANT TO 11 U.S.C. § 506(A) AND RULE 3012 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

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[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Trump Entertainment Resorts, Inc. (8402), Trump Entertainment Resorts Holdings, L.P. (8407), Trump Plaza Associates, LLC (1643), Trump Marina Associates, LLC (8426), Trump Taj Mahal Associates, LLC (6368), Trump Entertainment Resorts Development Company, LLC (2230), TER Development Co., LLC (0425) and TERH LP Inc. (1184). The mailing address for each of the Debtors is 1000 Boardwalk at Virginia Avenue, Atlantic City, NJ 08401.

Trump Entertainment Resorts, Inc. ("**TER**") and its above-captioned affiliated debtors and debtors in possession (each, a "**Debtor**" and collectively, the "**Debtors**") hereby submit this objection to the *Motion of Levine, Staller, Sklar, Chan & Brown, P.A. for Entry of an Order Fixing the Value and Priority of, and Allowing Its Claim as Secured in Full, Pursuant to 11 U.S.C. § 506(a) and Rule 3012 of the Federal Rules of Bankruptcy Procedure* (the "**Motion**") [Docket No. 295]. In opposition to the Motion, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT

1. By its Motion, the law firm of Levine, Staller, Sklar, Chan & Brown, P.A. ("**Levine Staller**") seeks to jump the line of all other creditors in these chapter 11 cases and obtain a $1.25 million super-priority secured claim based on legal work for which Levine Staller has already been paid over $6 million by the Debtors. The undisputed documentary record reveals, however, that Levine Staller's asserted attorney's charging lien (the "**Charging Lien**") is unenforceable for multiple reasons. The alleged Charging Lien is invalid on its face because Levine Staller never gave proper "Pre-Action Notice" of its intent to perfect a lien and never commenced the required plenary action for payment of its fee. Applicable New Jersey law is clear that these procedures are absolute prerequisites to the enforcement of any attorney's lien; Levine Staller's admitted failure to follow these procedures renders its alleged lien a nullity. The Charging Lien also cannot be enforced because the only assets securing the lien – the cash proceeds of a 2012 tax settlement – have been expended in the ordinary operation of the Debtors' business. In the absence of any restraint or trust with respect to those funds, Levine Staller cannot invoke the "lowest intermediate balance" rule to help itself to $1.25 million from TER's general operating account. Finally, and as more fully shown in the objection to the Motion filed by the Debtors' secured lenders (the "**First Lien Lenders**"), even if the Charging Lien were

valid (and it is not), and even if it related back to 2008 as Levine Staller alleges, it still would be junior to the 2007 lien on all the Debtors' assets that secures the First Lien Lenders.

2. Considerations of equity also counsel that Levine Staller should not be allowed to advantage itself at the expense of all other creditors. Although not mentioned in the Motion, the Debtors, in compliance with their fee agreements with Levine Staller, have already paid Levine Staller all its agreed hourly fees plus contingency fees of *$6 million*. Grant of the Motion would afford Levine Staller a $1.25 million windfall on top of the generous compensation it has already received for the limited amount of work performed on a tax case that never even went to trial. As a matter of law, Levine Staller cannot assert an "equitable lien" on the Debtors' property in the absence of any pledge or other agreement to pay Levine Staller from that property. As Levine Staller's own Motion shows, there is no such agreement and, hence, Levine Staller stands before this Court as a general unsecured creditor of the Debtors. In the difficult circumstances of these chapter 11 cases, where every stakeholder constituency will be forced to make substantial sacrifices, equity dictates that Levine Staller is not entitled, alone among all other creditors, to come out whole.

FACTUAL BACKGROUND[2]

A. Levine Staller's Fee Agreements and Receipt of Over $6 Million in Legal Fees

3. On or about June 19, 2008, three of the Debtors, Trump Taj Mahal Associates, LLC, Trump Plaza Associates, LLC and Trump Marina Associates, LLC (collectively, the "**Tax Parties**") signed engagement letters (the "**Original Fee Agreements**") by which the Tax Parties retained Levine, Staller, Sklar, Chan, Brown & Donnelly, P.A. (as Levine Staller was then known) to represent the Tax Parties in certain real estate tax appeals with respect to the tax years

[2] The relevant facts are before the Court in the accompanying declaration of Daniel McFadden, dated November 3, 2014 ("**McFadden Dec**."), and the exhibits thereto ("**Ex. __**").

2008 through 2012 (the "**Tax Appeals**"). Under the Original Fee Agreements, the Tax Parties agreed to pay Levine Staller at a reduced hourly rate of $185 per hour for attorneys and $75 per hour for paralegals, which would be credited against a contingency fee owing in the amount of 17.5% of any tax savings received by the Tax Parties if the Tax Appeals were settled before trial on or after June 1, 2009. McFadden Dec. ¶ 2, Ex. A.

4. Pursuant to the terms of the Original Fee Agreements, between 2008 and October 3, 2012, the Tax Parties paid the full amount of all bills rendered by Levine Staller for hourly legal fees and expenses with respect to the Tax Appeals. *Id.* ¶ 3.

5. As a result of a settlement of the Tax Appeals and before any trial of the appeals, on or about June 22, 2012, the Tax Court of New Jersey entered judgments reducing assessments on the real property at issue in the Tax Appeals and resulting in tax savings to the Tax Parties in the aggregate amount of $54 million to be paid over five years. This settlement was subsequently amended and restructured so that, subject to certain conditions, the City of Atlantic City agreed to a tax refund in the aggregate amount of $50.5 million (the "**Tax Refund**"), $35.5 million of which would be paid upfront in cash and the remaining $15 million of which would be paid by way of credits against future taxes due from Trump Taj Mahal Associates, LLC in calendar year 2013. *Id.* ¶ 4.

6. On or about December 20, 2012, the Tax Parties received $35.5 million from the City of Atlantic City in payment of the cash portion of the Tax Refund (the "**Cash Proceeds**"). With Levine Staller's knowledge, those Cash Proceeds were paid directly to Trump Taj Mahal Casino Resort. Declaration of Michael D. Sklar, dated October 15, 2014 ("**Sklar Dec.**") [Docket No. 295-3], ¶ 16, Ex. A. The Cash Proceeds were deposited in Trump Entertainment Resorts Holdings, L.P.'s bank account No. 275 986 9908 at TD Bank, where they were available without

restriction to pay the ordinary expenses of the Debtors' businesses. That account is a "Pledged Deposit Account" under a 2007 Security Agreement of TER and Trump Entertainment Resorts Holdings, L.P. with the predecessors in interest to the Debtors' First Lien Lenders, and its contents secure the Debtors' obligation to the First Lien Lenders under its existing Credit Agreement (defined below). McFadden Dec. ¶ 6.

7. Following the Debtors' receipt of the Cash Proceeds, the Tax Parties entered into a series of amendments of the Original Fee Agreements in January, June, and December, 2013 (collectively, the "**Amended Fee Agreements**"), by which Levine Staller ultimately agreed to reduce the contingency fee for the Tax Appeals from $8,837,500 (17.5% of the $50.5 million Tax Refund) to $7,250,000, and further agreed to a payment schedule under which the last payment of that amount would be due on July 30, 2014. *Id.* ¶ 7, Exs. C- E.

8. Pursuant to its various Fee Agreements with Levine Staller, from February 6, 2013 through January 2, 2014, Trump Taj Mahal Associates, LLC, on behalf of all the Tax Parties, paid to Levine Staller the aggregate amount of $6 million with respect to the Tax Appeals. *Id.* ¶ 8, Ex. F.

9. Significantly, the Debtors do not have any agreement with Levine Staller that would in any way restrict the Debtors' rights to use the Cash Proceeds in the operation of their businesses. The Debtors never pledged those funds for payment of Levine Staller's fees or made any promise that Cash Proceeds would be used for payment of those fees. To the contrary, and as the record facts demonstrate, with Levine Staller's knowledge, the Cash Proceeds were paid by the City of Atlantic City directly to the Debtors and deposited into an unrestricted bank account that was subject to a perfected security interest in favor of the First Lien Lenders. As reflected in the Amended Fee Agreements, Levine Staller did not require the Debtors to pay the

full amount of its contingency fee from the Cash Proceeds, but instead compromised the amount of its contingency fee and allowed the Debtors to continue to use the Cash Proceeds while they paid Levine Staller the reduced contingency fee over time. Other than the Fee Agreements, the Debtors do not have other agreements with Levine Staller concerning payment of Levine Staller's fees. *Id.* ¶ 13.

B. Levine Staller's Attempt to Perfect and Enforce a Charging Lien

10. On December 5, 2012, Levine Staller filed a motion in the Tax Court seeking to "establish and perfect its attorney's charging lien pursuant to N.J.S.A. 2A:13. . .in the Judgments [rendered in the Tax Appeals] and the [Tax Refund] realized therefrom by [the Tax Parties] in the amount of the Contingent Fee." Sklar Dec., Ex. B. Levine Staller's sole support for this motion was a one-page certification from one of its attorneys, Michael D. Sklar, which merely stated that: (a) Levine Staller entered into Fee Agreements with [the Tax Parties]; (b) "the Fee Agreements provide. . . that Levine Staller is to be paid a contingent fee. . .based on the tax savings realized as a result of a judgment entered by the Tax Court of New Jersey;" (c) the Tax Court entered judgments resulting in tax savings to the Tax Parties on June 22, 2012, and (d) Levine Staller served a "pre-action" fee arbitration notice "pursuant to R. 1:20A-6," which was attached. *Id.*

11. The purported Pre-Action Notice, sent to the Tax Parties on the same day via electronic mail, informed the Tax Parties that they had 30 days to exercise their right to fee arbitration. McFadden Dec. ¶ 5, Ex. B.

12. At the time it made its motion, Levine Staller was still actively representing the Tax Parties, both in the Tax Appeals and in other unrelated matters. *Id.*; Sklar Dec. ¶ 28, n.12. In fact, just one month later, the parties executed an Amended Fee Agreement that specifically

acknowledged the need for Levine Staller's continued representation of the Tax Parties in the Tax Appeals: "Whereas, the nature of the [Tax] Settlement [with the City of Atlantic City] provides for [the Tax Parties] to receive benefits over a period of time and therefore will require [Levine Staller] to provide ongoing legal support to assure that [the Tax Parties] obtain[ ] the full benefit of the terms of the Settlement. . . ." McFadden Dec., Ex. C.

13. On December 24, 2012, the Tax Court issued an Order granting Levine Staller's motion, holding that Levin Staller had "an attorney's charging lien in the amount of its contingent fee. . . which lien shall attach to the judgments. . . and *the proceeds thereof*." Sklar Dec., Ex. C (emphasis added). This Order was issued only nineteen days after the purported Pre-Action Notice was electronically mailed to the Tax Parties, eleven days prior to the expiration of the 30-day period during which the Tax Parties were entitled to exercise their right to fee arbitration. Sklar Dec., Ex. C.

14. After executing another Amended Fee Agreement with the Tax Parties, which again acknowledged the need for its continued representation of the Tax Parties in the Tax Appeals (McFadden Dec., Ex. D), Levine Staller made a second motion to establish and perfect its attorney's charging lien on June 17, 2013. The only support for this second motion was another certification from Mr. Sklar, which was virtually identical to the certification submitted in the previous motion. Sklar Dec., Ex. D. Levine Staller did not even bother to serve a Pre-Action Notice in connection with its second motion. *Id.*

15. On July 12, 2013, the Tax Court issued another Order granting Levine Staller's second motion and determining that Levin Staller had an "attorney's charging lien in the amount of its contingent fee...which lien shall attach to the judgments...and *the proceeds thereof*." Sklar Dec., Ex. E (emphasis added).

16. For each of its two motions, Levine Staller sent copies of its Tax Court submissions to Stroock & Stroock & Lavan, LLP ("**Stroock**"), the Debtors' corporate counsel in New York. Stroock, however, did not represent the Tax Parties with respect to the negotiation of, and did not participate in the discussions or negotiations regarding the terms of, the Original or Amended Fee Agreements or Levine Staller's efforts to obtain a charging lien. Nor did Stroock, a New York law firm that does not practice in New Jersey, appear as counsel for the Tax Parties in any Tax Court proceedings or on Levine Staller's motions. Stroock's limited role in these matters was to ensure that the Debtors' transactions with Levine Staller complied with the Debtors' Credit Agreement (defined below) with the First Lien Lenders. McFadden Dec. ¶ 14. Levine Staller's assertions that Stroock represented the Tax Parties in the New Jersey Tax Court are demonstrably false and nothing more than a fig leaf to hide the unseemly fact that Levine Staller turned on its own clients and sought to advantage itself at its clients' expense in the very court proceedings where it continued to represent those clients.

17. On August 5, 2014, a little over a month before the Debtors filed for bankruptcy protection, Levine Staller made a motion for enforcement of an attorney's charging lien and issuance of judgment and a writ of execution. Sklar Dec. ¶ 24. It was only then and for the first time that the Tax Parties were represented in the Tax Court by counsel other than Levine Staller. The New Jersey law firm of Archer & Greiner, P.C. appeared for the Tax Parties and opposed the motion. McFadden Dec. ¶ 15. The Tax Court nonetheless granted Levine Staller's motion and issued a Writ of Execution in the amount of $1.25 million. Once again, the Tax Court's order only extended to the "*proceeds realized* by the [Tax Parties]" from the Tax Court judgments granting the Tax Refund. Sklar Dec., Ex H (emphasis added).

C. The Debtors' Expenditure of the Tax Refund in the Ordinary Course of Business

18. The Debtors do not hold any of the Tax Refund Cash Proceeds and did not hold any such proceeds at the time of their bankruptcy filings. All of the Cash Proceeds, net of fees and expenses related to those proceeds, have been reinvested and spent in the ordinary course of the Debtors' businesses. In fact, the Debtors kept track of the use of the Cash Proceeds in the Debtors' businesses as required under TER's Amended and Restated Credit Agreement with the First Lien Lenders, dated as of July 16, 2010, (the "**Credit Agreement**"). *Id.* ¶ 10, Ex. F.

19. Pursuant to Section 2.06 (b) of the Credit Agreement, TER and the other Debtors are required to offer to pay over to the First Lien Lenders all "Net Cash Proceeds" (as that term is defined in the Credit Agreement) in reduction of the principal amount then outstanding under the Credit Agreement. Under the Credit Agreement, Net Cash Proceeds includes "Extraordinary Receipts," itself a defined term that expressly includes "tax refunds" received by the Debtors. The definition of Net Cash Proceeds further provides, however, that it *excludes* all "Extraordinary Receipts, reinvested in the business of [TER] and its Subsidiaries, in each case within 365 days after the date of the receipt thereof." *Id.* ¶ 12, Ex. F at p. 16-17, definition of Net Cash Proceeds subparagraph (d).

20. In accordance with these provisions, the Debtors have kept an accounting to show that all net cash proceeds (after payment of related fees and expenses) of the Tax Refund were in fact spent in the Debtors' businesses within one year after the receipt of those proceeds on December 20, 2012, and therefore such proceeds did not have to be paid over to the First Lien Lenders. Specifically, the Debtors' records reflect that those net proceeds totaled approximately $27.6 million, and that within one year after receipt of the Cash Proceeds, the total amount of the

Debtors' reinvestment in their businesses was over $34 million, or over *$6 million more than* the net Cash Proceeds. *Id.* ¶ 12, Ex. G.

ARGUMENT

LEVINE STALLER IS NOT ENTITLED TO AN ALLOWED SECURED CLAIM

21. It is fundamental that Levine Staller can only have an allowed secured claim against the Debtors: (a) if its claim is "secured by a lien on property" of the Debtors; and (b) "to the extent of the value of [Levine Staller's] interest. . . in such property. . . ." 11 U.S.C. § 506(a)(1). Accordingly, "[a] claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of the claim is considered unsecured." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 239 (1989).

22. The undisputed facts here show that Levine Staller's claim does not satisfy either element of section 506(a). First, and as will be detailed below, Levine Staller does not have a valid lien on the Debtors' property because it did not obtain or perfect its purported Charging Lien in compliance with applicable New Jersey law. As such, its asserted lien is avoidable under section 545(2) of the Bankruptcy Code. 11 U.S.C. § 545(2) ("The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien – . . .is not perfected or enforceable at the time of the commencement of the case. . . ."). Second, the only property in which that alleged lien ever fixed – the Cash Proceeds – has gone. There is no more property securing the lien. It follows that Levine Staller's claim is wholly *unsecured* and no payment should be made on this claim on account of its secured status. *See, e.g., In re Hornes*, 160 B.R. 709, 716 (Bankr. D. Conn. 1993) ("under § 506(a), a creditor holds a secured claim only 'to the extent of the value of such creditor's interest in the estate's interest' in the collateral; if there is no value, there is no secured claim").

A. Levine Staller Does Not Have a Valid Charging Lien on Cash Proceeds of the Tax Refund

1. Levine Staller Failed to Comply with the Requirements of New Jersey Law Necessary to Create and Perfect Its Alleged Lien

23. Levine Staller cannot establish that it even has a valid Charging Lien because its own Motion shows that Levine Staller failed to comply with the stringent requirements of New Jersey law for creation and perfection of such a lien.

24. Levine Staller acknowledges that New Jersey law governs the creation and extent of the alleged Charging Lien. Motion ¶ 14; *and see Hoffman & Schreiber v. Medina*, 224 B.R. 556 (D.N.J. 1998). New Jersey law dictates that where, as here, a purported lien arises by statute, it may only be created and enforced by the means prescribed by the law.

25. New Jersey courts have long adhered to the procedures set by *H. & H. Ranch Homes, Inc. v. Smith*, 54 N.J. Super. 347 (App. Div. 1959), which established the process that must be followed in order to determine and enforce an attorney's charging lien against a client's property. *See, e.g., Schelisi & McLaughlin, P.A. v. LoFaro,* 430 N.J. Super. 347, 356 (App. Div. 2013). *H. & H. Ranch* instructs that:

> the attorney should make application to the court, as a step in the proceeding of the main cause, … [setting] forth the facts upon which he relies for the determination and enforcement of his alleged lien. The petition is to "request the court to establish a schedule for further proceedings…" The court shall, by order, set a short day upon which it will consider the application for the establishment of a schedule. A copy of this order, together with a copy of the petition, shall be served upon defendants as directed by the court. The matter should thereafter proceed as a plenary suit and be tried either with a jury, in the Law Division […] or without a jury if the venue of the main cause is laid in the Chancery Division. In no event should the mater be tried as a summary proceeding.

H. & H. Ranch Homes, Inc., 54 N.J. Super. at 353-54; *Musikoff v. Jay Parrino's The Mint, L.L.C.*, 172 N.J. 133, 146 (2002) (affirming the basic elements of the process articulated in *H. & H. Ranch Homes, Inc.*); *Levine v. Levine*, 381 N.J. Super. 1, 5-6 (App. Div. 2005) ("Although the determination whether to recognize and enforce an attorney's lien is within the equitable jurisdiction of the court, this determination *must be based on the evidence presented at a plenary hearing*, rather than the court's findings on an application for an award of counsel fees against the opposing part in the underlying action, to which the attorney was not a party." (emphasis added)).

26. The procedure set forth in *H. & H. Ranch* must be followed in concert with the applicable New Jersey Rules of Court, including Rule 1:20A-6, which requires that: "No lawsuit to recover a fee may be filed until the expiration of the 30 day period herein giving Pre-Action Notice to a client...advis[ing] the client of the right to request fee arbitration" (the "**Pre-Action Notice**"). The attorney must provide the Pre-Action Notice to a client by either certified and regular mail or hand delivery, and "the attorney's complaint shall allege the giving of the [Pre-Action Notice] required by this rule or it shall be dismissed." Rule 1:20A-6*; see Mateo v. Mateo*, 281 N.J. Super. 73, 78–80, (App. Div. 1995) (discussing pre-action notice requirements under the New Jersey Rules of Court). If the client does not request fee arbitration, the court resolves the lien dispute after conducting a plenary hearing. *Cole, Schotz, Bernstein, Meisel & Forman, P.A. v. Owens*, 292 N.J. Super. 453, 458 (App. Div. 1996).

27. Failure to adhere to the procedures set forth in N.J. 2A:13-5 and Rule 1:20A-6 will result in the refusal of the courts to recognize the charging lien. *See id*. at 459 (providing that an attorney seeking to impose a lien must file a complaint and give the requisite Pre-Action Notice; otherwise the lien is not valid); *Schepisi & McLaughlin*, 430 N.J. Super. at 357 ("New

Jersey law is clear that in the absence of compliance with the Rule [1:20A-6], such a petition [for a charging lien filed in the main cause] must be dismissed.").

28. As shown in its own Motion, Levine Staller repeatedly violated these mandatory procedures. Instead of commencing the required, separate plenary proceeding to establish its lien, Levine Staller merely made a motion in the "main cause"— *i.e.*, the Tax Court proceedings challenging the assessment of the Tax Parties' real property — to set and supposedly perfect its alleged lien. Sklar Dec., Exs. B, D. Incredibly, Levine Staller thus made itself an adverse party to its own clients in the very court case where it was still representing those clients. Levine Staller then compounded that ethical dereliction and violation of the procedures set by *H. & H. Ranch* by failing to request, and therefore failing to obtain, from the Tax Court the required schedule for further proceedings, including the filing of an answer, discovery, and a trial, all of which were necessary to have "the matter [ ] thereafter proceed as a plenary suit and be tried...in the Law Division." *H. & H. Ranch*, 54 N.J. Super. at 354. Of course, no plenary proceeding followed, and the order on which Levine Staller bases its current application was issued after a summary proceeding in the same court of limited jurisdiction – the Tax Court – in which the main cause arose. Because "it has been held that simply moving for an attorney's lien pursuant to N.J.S.A. 2A:13-5, as distinguished from filing a complaint demanding a fee, is not the proper way to establish an attorney's lien," Levine Staller's motion in Tax Court could not have properly established a lien on the Tax Refund. *Martin v. Martin*, 335 N.J. Super. 212, 253 (App. Div. 2000); *Mateo v. Mateo*, 281 N.J. Super. at 79 (finding that attorney did not file a complaint in a separate action demanding payment of his fee, and rather, simply moved in the action for which he was engaged for an attorney's lien, thus violating the requirement that the application for a lien be tried as a separate and distinct plenary action, and not a summary proceeding).

29. Additionally, the Pre-Action Notice that Levine Staller served in connection with its 2012 motion suffered from numerous infirmities. In direct contravention of Rule 1:20A-6, Levine Staller sent this notice by electronic mail, rather than certified and first-class mail or via hand delivery. McFadden Dec. ¶ 5, Ex. B. Further, the Order granting Levine Staller's 2012 motion was issued on December 24, 2012, only nineteen days after filing its defective Pre-action Notice, thereby truncating the mandatory 30-day period that must elapse between service of the Notice and determination and enforcement of the lien. Sklar Dec. ¶ 18, Ex. C; *and see Shalit v. Shalit*, 323 N.J. Super. 351, 353 (Ch. Div. 1999) (there can be no determination and enforcement of an attorney's lien until expiration of 30-day period).

30. Levine Staller repeated its violation of the mandatory procedures six months later, when it made another defective motion in June, 2013, for an order establishing and perfecting its attorney's charging lien in response to the revised fee agreement it executed with the Debtors. Sklar Dec., Ex. D. This time, however, Levine Staller's error was even worse because it failed to provide any Pre-Action Notice at all and, instead, merely referenced the prior defective Pre-Action Notice. *Id.*

2. Levine Staller's Failure to Comply with Procedural Requirements Is Not Excusable

31. Levine Staller cannot excuse its conduct by arguing, as it did in the Tax Court, that any required plenary hearing on its request for an attorney's lien "would be pointless" and "a waste of the Court's time and the parties' time." Sklar Dec. Ex. F at 16:16-17:11. In fact, the very cases that Levine Staller relied on in the Tax Court acknowledge that the procedural requirements of establishing a charging lien "for the most part, are established to protect the client," and while a client can in certain circumstances waive those protections, "[i]n the first instance, however,…the claiming attorneys should initiate an action for fees on notice to the

client. . . .That action is to be brought as a 'step in the main cause,' although, as necessary, it is to be tried as a 'separate and distinct plenary action.'" *Martin v. Martin*, 335 N.J. Super. At 226 (finding that none of the attorneys properly petitioned the court for a charging lien pursuant to N.J.S.A. 2A:13-5).

32. Other courts have likewise held that attorneys cannot bypass the requisite procedures just because they believe (or wish) their clients do not need or want to take advantage of the protections that those procedures offer. Thus, the *Cole, Schotz* court invalidated an attorney's lien for failure to give the Pre-Action Notice, notwithstanding the attorney's argument that the client had made clear that she would not have pursued the option of fee arbitration even if she had received the Pre-Action Notice. *Cole, Schotz*, 292 N.J. Super. at 459 ("What [the client] might have done or not done if she had received the notice at the proper time is pure speculation. She should have been given the notice on or before [the date when the attorney] filed its motion. The failure to give the notice requires dismissal of the motion.") *See also Nieschmidt Law Office v. Leamann*, 399 N.J. Super. 125, 130 (Super. Ct. App. Div. 2008) (dismissing attorney's suit for fees because "[t]o permit a plaintiff to avoid the Pre-Action Notice simply because a defendant opts not to participate in fee arbitration would render the rule nugatory"); *In re Rapid Freight Sys., Inc.*, No. 09-34047 (GMB), 2011 WL 1300441, at *8 (Bankr. D.N.J. Mar. 31, 2011) (holding that perfection prerequisites under the relevant state law [*i.e.*, N.J.S.A. 2A:13-5] are necessary to uphold the validity of tax attorney's lien *even if there is no fee dispute* because the attorney sought "payment from the assets of the Debtor's estate, [and]

was bound by the requirement of R. 1:20A-6 and pre-action notice" in order to uphold the validity of the attorney lien.) (emphasis added).[3]

3. Levine Staller's Invalid Charging Lien Is Avoidable Under Section 545(2) of the Bankruptcy Code

33. By ignoring procedures prescribed by N.J.S.A. 2A:13-5, Rule 1:20(A)-6 and *H. & H. Ranch*, Levine Staller never successfully established or perfected a charging lien on the Cash Proceeds. Levine Staller's purported Charging Lien is therefore invalid on its face and its Motion to enforce its invalid lien should be denied on these grounds alone.

34. Under section 545(2) of the Bankruptcy Code, Levine Staller's failure to properly perfect is lien is fatal to its Motion. Section 545(2) provides that the trustee in bankruptcy has the power to avoid a statutory lien on a debtor's property if the lien "is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser[4] that purchases such property at the time of the commencement of the case." 11 U.S.C. § 545(2). Consequently, the Court should avoid the purported Charging Lien and determine that Levine Staller's claim, if any, is that of a general unsecured creditor. *In re Rapid Freight Sys., Inc.*, 2011 WL 1300441, at *2 (avoiding a New Jersey attorney's purported charging lien on the

[3] Nor can Levine Staller defend its self-serving disregard of required procedures by citing *In re Smith*, 263 B.R. 71 (Bankr. D.N.J. 2001), a decision that questioned the need to comply with New Jersey's procedures for enforcement of an attorney's lien. That decision was later vacated on appeal and the case remanded. On remand, the attorney's lien at issue was invalidated, and that determination was then affirmed by the Third Circuit in a decision that criticized the creditor attorney's conduct as an example of "procedural fun" with "claim yo-yos through layers of appeals." *In re Smith*, 165 Fed. Appx. 961, 963 (3d Cir. 2006) (Ambro, J.). It has since been held that a court "will give minimal weight, if any" to the initial Bankruptcy Court decision in *In re Smith. In re Rapid Freight Sys., Inc.*, WL 1300441, at *6.

[4] For purposes of section 545(2), the trustee has the status of a hypothetical bona fide purchaser as of the date the bankruptcy petition was filed. 4 Collier on Bankruptcy p. 545.04 (15th ed. 2010).

debtor's property pursuant to § 545(2) by reason of the attorney's failure to perfect his charging lien in accordance with N.J.S.A. 2A:13-5).[5]

B. The Purported Charging Lien Does Not Attach to the Debtors' Commingled Cash

35. Even if it were valid (and it is not), Levine Staller's purported Charging Lien cannot be enforceable here because the lien only extends to the "proceeds" of the Tax Refund, and all those proceeds have been spent in the ordinary course of the Debtors' business. This can hardly come as a surprise to Levine Staller given that: (a) the Cash Proceeds were paid directly to Trump Taj Mahal Casino Resort nearly two years ago (Sklar Dec., Ex. A); and (b) Levine Staller did not have any agreement with the Debtors to segregate or otherwise restrict the use of those funds. Levine Staller tries to escape the consequences of those facts by citing inapposite state court decisions to assert a lien on the Debtors' cash in gross without any tracing of the proceeds and by invoking the "lowest intermediate balance rule" to lay claim to any cash in the

[5] Levine Staller cannot prevent that result with its footnoted reference to the *Rooker-Feldman* doctrine. Motion at ¶ 38, n. 15. The *Rooker-Feldman* doctrine does not apply "when a federal statute specifically authorizes a lower federal court to vitiate a state-court judgment." *In re Martyak*, 432 B.R. 25, 30 (N.D.N.Y. 2010). Accordingly, application of the *Rooker-Feldman* doctrine in bankruptcy "is limited by the separate jurisdictional statutes that govern federal bankruptcy law," and therefore, "[t]he *Rooker-Feldman* doctrine has little or no application to bankruptcy proceedings that invoke the substantive rights under the Bankruptcy Code." *In re Funches*, 381 B.R. 471, 483, 485 (E.D. Pa. 2008) Thus, where a debtor asserts an independent claim under the Bankruptcy Code, the bankruptcy court has jurisdiction regardless of whether the result will "set-aside" a state-court judgment. *Id.*, at 485 ("[t]he bankruptcy avoidance provisions represent specific bankruptcy legislation permitting federal courts to set aside state-court judgments in appropriate circumstances"). The *Rooker-Feldman* doctrine therefore has no application where, as here, the debtor merely seeks to avoid the effect of a state-court judgment under bankruptcy laws. *Id.*; *see also In re Huie*, No. 07-40627, 2007 WL 2317152 (E.D. Tex. Aug. 8, 2007) (finding that *Rooker-Feldman* doctrine does not preclude bankruptcy court from deciding whether the judicial lien resulting from a state-court judgment can be avoided pursuant to section of the Bankruptcy Code); *In re Martyak*, 432 B.R. at 31 (finding *Rooker-Feldman* doctrine inapplicable to debtor's avoidance claims under various Bankruptcy Code provisions). Where, as here, a state court judgment is a legal nullity on its face and void *ab initio*, the Third Circuit has held that this Court jurisdiction to determine the validity and extent of Levine Staller's lien claim. *See In re James*, 940 F.2d 46, 52 (3d Cir. 1991) ("[a] federal bankruptcy court may intervene only when the state proceedings are void *ab initio*").

Debtors' general operating account so long as that account always held at least $1.25 million. Motion at ¶¶ 45-57. All of these arguments, however, fail as a matter of law.

1. Tracing Is Required

36. Levine Staller cannot rely on New Jersey authority to assert a blanket lien on the Debtors' assets in gross because the law is clear that federal bankruptcy law preempts state law on the question of whether and how a creditor must trace commingled funds. Thus, the Third Circuit has held "because [this issue] pertains to distribution of assets from an entity in federal bankruptcy proce[e]ding, [it] is exclusively a question of federal law." *Goldberg v. N.J. Lawyers' Fund for Client Protection*, 932 F.2d 273, 280 (3d Cir. 1991) (quoting *Connecticut Gen. Life Ins. Co. v. Universal Ins. Co.*, 838 F.2d 612, 618–19 (1st Cir. 1988)); *see also City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 (3d Cir. 1994) (same); *Coronation Sheet Metal Co., Inc. v. Interchange Bank (In re KI Liquidation, Inc.)*, Bankr. No. 05-60002 (KCF), 2008 WL 5109369, *4 (D.N.J. Dec. 1, 2008) (same).

37. Federal law requires Levine Staller to trace the Tax Refund proceeds here. Recent cases in this Circuit hold that commingling triggers a tracing *requirement.* *See In re Mary Holder Agency, Inc.*, No. 11-34280, 2012 WL 6021481, at *2 (Bankr. D.N.J. Dec. 4, 2012) ("…if commingling occurs, then the burden to trace the proceeds of collateral is triggered"); *In re KI Liquidation, Inc.*, 2008 WL 5109369, at *5 ("A plaintiff claiming trust benefits *must* identify and trace the alleged trust funds if they are commingled.") (emphasis added).

38. Those federal cases that Levine Staller does cite are not to the contrary. Thus, *In re Cybridge Corp.*, 304 B.R. 681 (Bankr. D.N.J. 2004), has nothing to do with tracing or attorneys' liens, but held only that a creditor could offset post-petition collections of the debtor's accounts receivable against post-petition loans made to the debtor. Indeed, the decision in *In re Rapid Freight Sys., Inc.* is decidedly *un*helpful to Levine Staller because the court there held that

an attorney did *not* have a valid charging lien due to his failure to comply with New Jersey procedures and only had a retaining lien on client property actually in the attorney's possession. 2011 WL 1300441, at *11. Nor can Levine Staller gain any traction from cases that merely affirm the commonplace observation that "money is fungible." *See, e.g., United States v. Sperry Corp*., 493 U.S. 52, 62 at n. 9 (1989) (government deduction of a fee from a claims award is not akin to an unconstitutional taking of real property because money is fungible).

39. Even the New Jersey cases that Levine Staller invokes do not support its insistence that it need not trace the Cash Proceeds. The decision that Levine Staller principally relies on, *Martin v. Martin*, 335 N.J. Super. at 225, does not concern tracing at all, but rather stands for the unremarkable proposition that an attorney could enforce his lien against funds in an escrow account where the trial court had given him a lien *in that specific account*. Equally inapposite are *Schepisi & McLaughlin*, 430 N.J. Super. at 347 (attorney's charging lien could not attach to client's assets where client had not recovered anything in litigation); *Bresnahan v. Bresnahan*, No. FM-14-165-10, 2014 WL 3407087, *4 (N.J. Super. Ct. App. Div. 2014) (attorney's lien did not attach to client assets obtained by client's opponent in a settlement); and *Norrell v. Chasan*, 125 N.J. Eq. 230, 237 (Err.&App. 1939) (attorney's assertion of a charging lien did not preclude attorney's common law retaining lien).

40. In short, none of the authorities cited by Levine Staller contravene the basic rule that if Levine Staller wants to enforce its purported Charging Lien on the Debtors' commingled cash, it must trace the Cash Proceeds to that cash.

2. The Cash Proceeds Have Been Spent

41. Levine Staller undoubtedly wants to avoid any tracing of the Cash Proceeds because it knows what that tracing will reveal: that all such proceeds were spent on the Debtors' ordinary course business operations before the end of 2013.

42. As the McFadden Declaration demonstrates, any of the Cash Proceeds that were not reinvested in the Debtors' operations within a year after receipt would have to be offered to the First Lien Lenders under the Credit Agreement. *See* McFadden Dec. ¶ 11, Ex. G at p. 28-29. In point of fact, however, all of those proceeds and more were spent on the Debtors' business as contemplated under the Credit Agreement and were accounted for accordingly. *Id.* ¶ 12, Ex. H.

43. This fact is also consistent with the settled legal presumption, established in *Clayton's Case*, 1 Merrival 572 (Ch. 1816), that the funds first deposited are the funds first withdrawn. *See In re Mushroom Transp. Co., Inc.* 227 B.R. 244, 255 (Bankr. E.D. Pa. 1998) (applying Pennsylvania law); *Empire State Surety Co. v. Carroll County*, 194 F. 593, 603 (8th Cir. 1912) ("Applying the settled rule that, in the absence of affirmative evidence to the contrary, where payments are made out of a common fund, the presumption is that the earliest in are the earliest out"). Here, of course, the affirmative evidence amply confirms that the Cash Proceeds moved exactly in accordance with the "first-in-first-out" presumption. All those proceeds were spent within one year of receipt, and nothing remains on which Levine Staller's Charging Lien can attach.[6]

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[6] The same goes for the $15 million in tax credits due under the Tax Refund by way of credits against future taxes due from Trump Taj Mahal Associates, LLC for calendar year 2013. *Pine Street Management v. City of East Orange*, 15 N.J. Tax 688 (App. Div. 1995), which is factually similar to the instant case, is instructive as to this point. In *Pine Street*, an attorney agreed to prosecute tax appeals against the city for one of his clients in return for a fee equal to 25% of any tax refund. After negotiating a settlement with the city, the attorney secured a tax refund of more than $250,000 for his client on one of his client's properties. However, there was a delinquency on one of the client's other properties, and the city applied the refund to that deficiency. Because the deficiency exceeded the amount of the refund, no

3. The Lowest Intermediate Balance Rule Does Not Apply

44. Levine Staller cannot have the benefit of the "lowest intermediate balance rule" (the "**LIBR**") because that rule exists only as an equitable remedy for tortious misconduct or breach of trust. As this Court stated in the case principally relied upon by Levine Staller, *In re Catholic Diocese of Wilmington, Inc.,* 432 B.R. 135 (Bankr. D. Del. 2010), "[t]he LIBR and tracing rules were developed to protect the interest of *trust beneficiaries"* by giving them a "'break' by adopting the legal fiction that their trust funds are the last to leave. Without that fiction, the beneficiaries would face the insurmountable hurdle of trying to identify their cash [in the commingled account]." *Id.*, 432 B.R. at 161-62 (emphasis added). Similarly, the *Mushroom Transp.* court recognized that the LIBR exception to the "first-in-first-out" presumption only applied "when tracing funds which have been commingled by a *tortfeasor* into a bank account…." *Mushroom Transp.*, 227 B.R. at 255, citing *In re Hallett's Estate [Knatchbull v. Hallet]*, 13 Ch.D. 696 (1879) (emphasis added). In particular, the court noted:

> There are two related presumptions derived from *Hallett's Estate* and accepted in Pennsylvania (*and federal*) common law. First, if the fiduciary (i.e., *tortfeasor*/depositor) has a choice of withdrawing either the proceeds of trust funds or legitimate funds, then the fiduciary will withdraw the legitimate funds….Second, once the proceeds of the trust (i.e., *stolen* funds) are spent by the fiduciary, new deposits made are not treated as replenishing the trust proceeds….Together, these two tracing presumptions are sometimes referred to as the "lowest intermediate balance" rule.

Id. (emphasis added) (internal citations omitted).

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funds were actually paid out to the client. The attorney, seeking payment, sought to quantify and enforce an attorney's lien on the refund pursuant to N.J.S.A. 2A:13-5. However, the court determined that "the attorney's lien can only become affixed to his client's interest in the refund" and when the city set off the refund against the taxes owed, "*there w[as] no 'client's interest' for the attorney's lien to affix.*" *Id.* at 691 (emphasis added).

45. Notably, all of the cases cited by Levine Staller in support of the application of the LIBR here involved proceeds held or distributed by a tortfeasor, usually in the context of breached obligations arising from a trust. Thus, *Catholic Diocese* involved a trustee's violation of the obligations arising from a resulting trust. *In re Columbia Gas Sys. Inc.*, 997 F.2d 1039 (3d Cir. 1993), involved the imposition of a constructive trust arising from the improper retention of funds. Both *In re Oriental Rug Warehouse Club, Inc.*, 205 B.R. 407 (Bankr. Minn. 1997), and *United States v. McConnell (In re Flying Boat)*, 258 B.R. 869 (N.D. Tex 2001), applied the LIBR to redress the improper retention of fees that were to be remitted to the petitioners. And finally, *In re Connecticut General Life Ins. Co.*, 838 F.2d at 615, also concerned a breach of trust obligations.

46. Here, in stark contrast to all those cases, Levine Staller never attempts to establish the existence of any trust, let alone show tortious misconduct on the part of the Debtors. As a matter of New Jersey law,[7] no such trust exists. Under New Jersey law, "a resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein. . . ." *In re Pemaquid Underwriting Brokerage, Inc.*, 319 B.R. 824, 841-42 (Bankr. D.N.J. 2005). To raise the presumption of a resulting trust, the proofs must be "very clear." *See Turro v. Turro*, 38 N.J. Super. 535, 540-41 (App. Div. 1956).

47. Levine Staller does not offer any proof, let alone "very clear" proof, of any circumstance that would support a finding of a resulting trust. As the Tax Parties' counsel, Levine Staller should be keenly aware (but apparently would like to forget) that it was the *Tax Parties*, not Levine Staller, who were to be the beneficiaries of any recovery in the Tax Appeals.

[7] State law determines the existence of a trust relationship. *See Catholic Diocese*, 432 B.R. at 147.

Unlike the movant in *Catholic Diocese* who was able to demonstrate the existence of a resulting trust, Levine Staller cannot establish any kind of trust relationship here, and "when nothing indicates one way or the other whether the parties intended to create a trust…there is no good reason to apply the law of trusts, which after all is predicated upon the intentions of the parties to create a fiduciary duty. Instead we should try to balance the competing policies and try to discern the congressional intent behind the Bankruptcy Code 11 U.S.C. 541(d). . . ." *In re Pemaquid*, 319 B.R. at 840-41 (citing Judge Nygaard's partial dissent and partial concurrence in *In re Columbia Gas Sys. Inc.*, 997 F.2d at 1065.

48. For much the same reason, Levine Staller cannot show that this Court should impose a constructive trust. Indeed, constructive trusts are "anathema to the equities of bankruptcy since they take from the estate, and thus directly from competing creditors, not from the offending debtor…The [Bankruptcy] Code recognizes that each creditor has suffered disappointed expectations at the hands of the debtor…Imposing a constructive trust on the debtor's estate impermissibly subordinates this primary concern [of maximization of the estate] to a single claim of entitlement." *Matter of Paul J. Paradise & Associates, Inc.* 217 B.R. 452, 456 (Bankr. D. Del. 1997), *aff'd* 249 B.R. 360 (D. Del. 2000).

49. In the absence of a trust, Levine Staller cannot credibly claim that the Debtors owed it any other obligation to preserve the Cash Proceeds. *See Coronation Sheet Metal Co., Inc., et al v. Interchange Bank et al.(In re KI Liquidation, Inc.),* Bankr. No. 05-60002, 2007 WL 4365308, at *6 (Bankr. D.N.J. Dec. 12, 2007) ("In bankruptcy, a debtor-creditor relationship, without more, is generally not considered a fiduciary relationship.") Certainly, Levine Staller did not request or obtain from the Tax Court any sort of restraint upon the use of the Cash Proceeds, or even request that those proceeds be placed in a segregated or escrow account.

Compare with Steinger v. Armellino, 315 N.J. Super. 176, 184 (Ch. Div. 1998) (granting motion of attorney to attach charging lien pursuant to N.J.S.A. 2A:13-5 to the settlement funds his client obtained through her matrimonial action and "permanently enjoining [client] and any of her representatives (or any other person who has or may come into possession of the funds in question and who has notice of that injunction) from disbursing, dissipating, or otherwise disposing of the funds" pending a final arbitration determination as to attorney's fee.).

50. Nor can Levine Staller assert that the Debtors' ordinary course expenditure of the Cash Proceeds constitutes wrongdoing of any sort. As shown above, the Debtors used the Cash Proceeds to fund their own ordinary business operations. McFadden Dec. ¶ 12, Ex. H. This type of expenditure is precisely the kind that courts have rejected as evidence of misconduct in the absence of a trust. *See Coronation Sheet Metal Co., Inc.*, 2007 WL 4365308 at *6 (finding that the funds in question were not spent with the intention of avoiding payment if they were spent to merely "pay[] whatever [the debtor] had to pay to continue its operation").

51. Nothing prohibited the Debtors from using the Cash Proceeds in the manner that they did. Now that those funds have been spent in the ordinary course, Levine Staller has nothing more than a purported Charging Lien in collateral that no longer exists. It therefore stands as an unsecured creditor of the Debtors. "If a trust fund or property cannot be identified in its original or substituted form, the purported beneficiary becomes merely a general creditor of the estate. *The result in the same where the trust property has been disposed of or dissipated in such manner as to leave nothing in its place."* 5-541 Collier on Bankruptcy 541.28 (emphasis added); s*ee also Mushroom Transp.,* 227 B.R. at 254 (in a conversion action, requiring that the bankruptcy trustee identify and trace the stolen bankruptcy estate proceeds to a specific account of the wrongdoer, and holding that, "if the stolen funds [a]re no longer in the possession of [the

wrongdoer] when the [ ] trustee made demand for their return, no such recovery would be ordered, and the [ ] trustee would hold but a general unsecured claim against [the wrongdoer] for conversion."); *In re Finnie*, Bankr. No. 05-16373, 2007 WL 1574294 at *5 (S.D.N.Y. May 29, 2007) (refusing to enforce an attorney's charging lien where the debtor client had dissipated disability insurance benefits obtained with the attorney's assistance, because "[e]ven if a lien existed at one time, the *res* at issue has long since been dissipated as of the Debtor's petition date, and [ ] there is no legal or factual basis that would support the proposition that a [charging lien] could exist on the *res* once it has been dissipated and is incapable of being traced to any other property").

C. Any Lien of Levine Staller Is Junior to the Security Interest of the First Lien Lenders

52. Despite its claims to the contrary, Levine Staller cannot show that its lien has priority over all other liens because it is predated by the lien established in 2007 on virtually all of the Debtor assets that secure the Debtors' obligations to the First Lien Lenders.

53. On December 21, 2007, two of the Debtors, TER and Trump Entertainment Resorts Holdings, L.P. (the "**2007 Debtors**"), entered into a credit agreement with Beal Bank Nevada and Beal Bank as initial lenders and collateral and administrative agents (together, "**Beal**"), pursuant to which Beal provided more than $493 million in financing to the 2007 Debtors (the "**2007 Credit Agreement**"). Declaration of Shmuel Vasser, dated November 3, 2014, ("**Vasser Dec.**"), Ex. M. On the same day, the 2007 Debtors also entered into a Security Agreement with Beal, which "secure[d], in the case of [the 2007 Debtors], the payment and performance of all Obligations...existing under the [2007 Credit Agreement]" (the "**2007 Security Agreement**"). Vasser Dec. Ex. N, § 2 at p. 6. Until the loan was fully repaid, the 2007 Security Agreement required the 2007 Debtors to maintain certain deposit accounts, or "Pledged

Deposit Accounts," which constituted part of Beal's collateral, and from which Beal could transfer funds to satisfy the 2007 Debtors' obligations under the 2007 Credit Agreement in the event of a default. Vasser Dec. Ex. N, § 1(f)(i) at p. 4 and § 5(c) at p. 8. Among the Pledged Deposit Accounts was the deposit account where the Tax Parties had deposited the Cash Proceeds portion of the Tax Refund. McFadden Dec. ¶ 6; Vasser Dec., Ex. N, Schedule II. (listing Account No. ending in 9908 held by loan party Trump Entertainment Resort Holdings, L.P. at TD Bank).

54. In 2009, the Debtors filed voluntary chapter 11 petitions in the United States Bankruptcy Court for the District of New Jersey. Upon emerging from bankruptcy in 2010, the Debtors entered into the Credit Agreement with the First Lien Lenders for $356.4 million principal amount of first lien debt (subsequently reduced to $346.5 million), which restructured the existing debt that arose from the 2007 Credit Agreement. McFadden Dec., Ex. G at p. 1. The Debtors also entered into an Amended and Restated Secured Agreement, dated as of July 16, 2010, which amended and restated the 2007 Security Agreement and served to continue securing the obligations arising under the 2007 Credit Agreement. Vasser Dec., Ex. P at 1 and Schedule II.

55. Accordingly, Levine Staller's lien, even if it is deemed perfected and relates back to 2008, is subordinate to the lien that Beal first established on December 21, 2007, and that was reaffirmed in favor of the First Lien Lenders during the 2009 bankruptcy proceedings. As shown above, the First Lien Lender's lien is secured by the very deposit account from which Levine Staller now seeks to collect $1.25 million. Any purported lien of Levine Staller is therefore subordinate to the lien of the First Lien Lenders.

D. Considerations of Equity Require Denial of the Motion

56. Levine Staller's appeal to "equity" to access $1.25 million of the Debtors' money is as futile as the rest of its Motion and most noteworthy for what it fails to disclose. Levine Staller studiously avoids mentioning that it has collected more than *$6 million* in attorneys' fees from the Debtors for its work on the Tax Appeals. Given that the Debtors have already paid more than 82% of its claimed fees, Levine Staller can hardly contend that the Debtors here have failed to "pa[y] an attorney for the work" or "b[ear] the legal expense incurred in creating [the funds]," like the debtor in *Pallet Company LLC*, a case decided by Your Honor earlier this year. Motion at ¶ 62. At bottom, Levine Staller is not seeking an equitable result; to the contrary, it is attempting to use its defective and conflict-ridden Charging Lien to advantage itself by another $1.25 million — the last 18% of a $7.25 million fee — at the expense of other creditors.

57. Levine Staller is manifestly unable to meet the standards of the very case it principally relies on in this regard. The court in *Kramer v. Alston (In re Alston*) held that to establish an equitable lien, a claimant must first show that "there is [an] agreement between the debtors and [the claimant] pledging property…as security for an obligation…" and "[s]econd, [that] the party responsible for creating the funds …was promised payment out of the proceeds for [its] efforts in getting those proceeds released." 322 B.R. 265, 270 (Bankr. D.N.J. 2005). Here, unlike the plaintiff insurance adjuster in *Alston*, Levine Staller cannot show that the Debtors ever pledged the Tax Refund as security for the legal fees or ever promised to pay Levine Staller's fees out of the Tax Refund proceeds. Unlike the plaintiff in *Alston*, who had a signed agreement providing that the debtors "hereby agree to pay and assign to [the adjuster] for services rendered 5% when adjusted, paid or otherwise recovered from the insurance companies," the Debtors never signed anything requiring Levine Staller's payment to be sourced or "assigned" from the Tax Refund.

58. This distinction is dispositive. In *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539 (1994), the New Jersey Supreme Court denied a broker's application for an equitable lien on rental proceeds because it found that the parties "did not explicitly agree that the broker's commission would be paid out of the rental income generated by tenants of the shopping mall [that the broker helped procure]," and that, like the agreement between Levine Staller and the Tax Parties, "the terms of the agreement thus specify only that [the broker's] compensation is both contingent on and measured by the rental income received by [the building owner] for the leases that [the broker] procured." *Id.* at 549.

59. An equitable lien is unavailable to Levine Staller for the additional reason that New Jersey law requires "for an equitable lien to be valid. . . . .there must be no available legal means to perfect such lien." *In re Rapid Freight Systems, Inc.*, 2011 WL 1300441, at *9 (refusing to impose an equitable attorney's lien where an attorney failed to perfect a charging lien in accordance with New Jersey law); s*ee also In re L.D. Patella Const. Corp.*, 114 B.R. 53, 58 (Bankr. D.N.J. 1990) (an equitable lien will not be upheld where all available means of perfecting a legal lien were not employed).

60. Finally, as this Court weighs the equitable considerations here, it should note that Levine Staller's inability to assert either a statutory or equitable lien does not spell the end of its claim. *See In re MicroBilt Corp.*, No. 11-18143, 2014 WL 2711172, at *7 (D.N.J. 2014). Instead, Levine Staller has a general unsecured claim for the remaining 18% of its fee. *See In re Rapid Freight*, 2011 WL 1300441, at *7 (after refusing to enforce attorneys' alleged charging lien and equitable lien, commenting, "the result may seem harsh to [the attorneys], however they are not left wholly without remedy or redress. They will still have a general unsecured claim for

alleged amounts owed based upon pre-petition services provided to Debtor in connection with [the underlying matters].").

CONCLUSION

61. For all of the foregoing reasons, the Motion should be denied in its entirety.

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Wilmington, Delaware

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