TIGER REVITALIZATION FUND LLC and 408 WHITON PLAZA LLC Plaintiffs, v. 309 PINE PLAZA LLC and SHIMON JACOBOWITZ, Defendants.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No.: A-001592-24T4
309 PINE PLAZA LLC, 309 PINE PLAZA TENANT LLC, 309 PINE PLAZA MANAGER LLC, CAVEN ACRES LLC, and SHIMON JACOBOWITZ, individually and derivatively on behalf of 129 LINDEN HOLDINGS, LLC and PINE WHITON HOLDINGS LLC, Counterclaimants and Third-Party Plaintiffs, v. MOSHE C. "MARK" RIGERMAN, PAUL JENSEN (f/k/a YISROEL RIGERMAN), ELIMELECH RIGERMAN, TIGER REVITALIZATION FUND LLC, 408 WHITON PLAZA LLC, 408 WHITON PLAZA MANAGER LLC, STREKTE CORP., STREKTE NY LLC, STK EIGHT LLC, FOLXCO LLC, and CAVEN VIEWS LLC, Counterclaim- and Third-Party Defendants. -and- 129 LINDEN HOLDINGS LLC, LINDEN GARDENS JC LLC, CAVEN POINT PARTNERS LLC, KISPM LLC, and PINE WHITON HOLDINGS LLC, Nominal/Interested Parties.	On Appeal from Orders of the Superior Court Chancery Division, General Equity Part, Hudson County dated December 20, 2024 Trial Docket No.: HUD-C-72-24 Sat Below: Hon. Mary K. Costello, P.J.Ch.

BRIEF ON BEHALF OF APPELLANTS AND DEFENDANTS/COUNTERCLAIMANTS/THIRD-PARTY PLAINTIFFS SHIMON JACOBOWITZ, 309 PINE PLAZA LLC, 309 PINE PLAZA TENANT LLC, 309 PINE PLAZA MANAGER LLC, AND CAVEN ACRES LLC (THE "JACOBOWITZ PARTIES")

Submitted March 21, 2025

CALCAGNI & KANEFSKY LLP
One Newark Center
1085 Raymond Boulevard, 18th Floor
Newark, New Jersey 07102
T: (862) 233-8130
F: (862) 902-5458
E: sam@ck-litigation.com
E: lobrien@ck-litigation.com

Attorneys for Shimon Jacobowitz, 309 Pine Plaza LLC, 309 Pine Plaza Tenant LLC, 309 Pine Plaza Manager LLC, and Caven Acres LLC (the "Jacobowitz Parties")

Of counsel and on the brief:

Samuel Scott Cornish (Attorney ID: 014392003)
Luke J. O'Brien (Attorney ID: 419632023)

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STATEMENT OF FACTS & PROCEDURAL HISTORY[1]

The background facts set forth below are drawn from the parties' pleadings, other filings and proceedings before the trial court, and, where indicated, other court records of which this Court may take judicial notice.

A. The Parties

1. Shimon Jacobowitz and the Jacobowitz Parties

Defendant and counterclaimant Shimon Jacobowitz is a well-established real estate professional with a successful track record of acquiring real estate in Jersey City and elsewhere, especially through off-market, private transactions. (JPa122, 125.)[2] The other Jacobowitz Parties—defendant/counterclaimant 309 Pine Plaza LLC and third-party plaintiffs 309 Pine Plaza Tenant LLC, 309 Pine Plaza Manager LLC, and Caven Acres LLC—are entities owned and controlled by Jacobowitz that were involved in various projects, potential projects, agreements, and transactions with the Rigerman/Jensen Parties. (JPa125-26.)

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[1] Because the relevant facts and procedural history are intertwined, they are presented together.

[2] "JPa____" refers to the Jacobowitz Parties' Appendix. "1T" refers to the transcript of the November 8, 2024 hearing on the Jacobowitz Parties' motion to consolidate and the Rigerman/Jensen Parties' motion to dismiss. "2T" refers to the transcript of the November 22, 2024 hearing on the request for temporary restraints in the Jacobowitz Parties' Order to Show Cause. "3T" refers to the transcript of the December 20, 2024 hearing on the Rigerman/Jensen Parties' motion to compel arbitration, the Jacobowitz Parties' cross-motion, and the Jacobowitz Parties' Order to Show Cause and request for a preliminary injunction.

2. Mark Rigerman, Paul Jensen, and the Rigerman/Jensen Parties

Counterclaim-/third-party defendants Mark Rigerman and Paul Jensen (formerly known as Yisroel Rigerman) are New York residents and full biological brothers who own and operate various businesses together in New Jersey and elsewhere. (JPa126, 218.) In business dealings, Rigerman and Jensen conceal that they are brothers, presenting commercial counterparties with the false impression that they are unrelated business partners operating at arms' length from each other. (JPa123.) The other Rigerman/Jensen Parties—plaintiffs/counterclaim-defendants Tiger Revitalization Fund LLC and 408 Whiton Plaza LLC ("Plaintiffs") and counterclaim-/third-party defendants 408 Whiton Plaza Manager LLC, Strekte Corp., Strekte NY LLC, STK Eight LLC, Folxco LLC, and Caven Views LLC—are entities owned and controlled by, and the alter egos of, Rigerman and Jensen. (JPa126-27, 177-80, 218, 345-46.)

3. Eli Rigerman

Third-party defendant Elimelech ("Eli") Rigerman is Mark Rigerman and Paul Jensen's brother. (JPa127-28, 218.) He is the plaintiff in Caven Point Action II, where his claims are based on rights purportedly assigned to him by Mark Rigerman. (JPa86.) Upon information and belief, he is prosecuting the action in coordination with the Rigerman/Jensen Parties (with whom he shares the same counsel). (JPa7, 28, 59, 86.)

B. The Parties' Real Estate Projects and Other Business Dealings

In the 2016 to 2022 period, the Jacobowitz Parties engaged in a series of transactions, agreements, and real estate projects and potential projects with the Rigerman/Jensen Parties. (JPa130-48.) Their business dealings most relevant to this appeal relate to three properties in Jersey City—the "Pine Street Property," the "Linden Street Property," and the "Caven Point Property"—and, to a lesser degree, a property in New Brunswick (the "George Street Property").

1. The Pine Street Project

The Pine Street Property is the location of Jacobowitz's first project with the Rigerman/Jensen Parties. (JPa133.) In 2015 or early 2016—when the Pine Street Property was being used by its then-owner for waste-related operations—Jacobowitz identified the Property as a development opportunity, believing it could be put to valuable use as the site of a large apartment complex. (*Id.*.) And so in February 2016, in his personal capacity, Jacobowitz entered into a contract of sale to acquire the Pine Street Property. (*Id.*)

At that time, in 2016, Jacobowitz had substantial experience acquiring real estate, but he did not focus his time or energy on construction and development. (JPa134.) As a result, after he put the Pine Street Property under contract, he was in search of a partner (or partners) with relevant construction and development experience in Jersey City. (*Id.*) Enter Rigerman and Jensen, whom

Jacobowitz was introduced to in that same time period. (*Id.*)

When they met Jacobowitz, Rigerman and Jensen touted themselves and their companies as real estate developers with experience in Jersey City. (*Id.*) Specifically, they told Jacobowitz that they had substantial experience developing and constructing property in Jersey City and, moreover, that they could develop the Pine Street Property into an apartment building for a total cost of no more than $10 million. (*Id.*) None of those representations were true—as Jacobowitz would later learn. (*Id.*) But Jacobowitz believed Rigerman and Jensen at the time, and on the basis of their false representations, he agreed to partner with them in connection with the Pine Street Property. (JPa134-35.)

As part of the Pine Street project, (i) 309 Pine Plaza and 408 Whiton Plaza acquired the Pine Street Property in March 2018 and subsequently entered a tenants-in-common agreement with each other; (ii) Jacobowitz and Rigerman/Jensen Parties formed Pine Whiton Holdings LLC ("Pine Whiton) to develop and manage the Property; and (iii) Pine Whiton entered into a ground lease for the Property with 309 Pine Plaza and 408 Whiton Plaza. (JPa135-40.)

In December 2022, construction was completed on an eight-story, 56-unit apartment complex at the Pine Street Property (the "Pine Street Complex"). (JPa141.) A certificate of occupancy was issued in January 2023, and the Pine Street Complex has been generating rental income for Pine Whiton since that

time. (*Id.*; JPa386 (¶ 24).) Unfortunately, due to the Rigerman/Jensen Parties' improper self-dealing and payment of fees to certain other Rigerman/Jensen Parties, the amount expended on construction and development of the Pine Street Complex was approximately $10 million over budget. (JPa141)

2. The Linden Street Project

In 2019, without the Rigerman/Jensen Parties' involvement, Jacobowitz identified another development opportunity in Jersey City: the Linden Street Property. (JPa141-42.) The property was owned at that time by non-party A Better Life Ministry, a church, and contained vacant land and a church facility operated and maintained by the church. (*Id.*) Jacobowitz had (and still has) a personal relationship with the church's pastor, who informed Jacobowitz that the church was struggling financially and proposed that Jacobowitz purchase the Linden Street Property. (*Id.*) Rather than propose an outright acquisition, however—which may have resulted in the church's closure—Jacobowitz instead proposed a development agreement whereby (i) A Better Life Ministry would transfer title to a new company owned jointly by the church and a Jacobowitz entity; and (ii) Jacobowitz's entity would develop the Linden Street Property and seek zoning approvals to construct both a new church facility for A Better Life Ministry ***and*** a multi-unit residential apartment complex. (*Id.*) The pastor agreed to Jacobowitz's proposal, and in December 2019, they entered a

development agreement. (JPa142.)

After learning about this development opportunity that Jacobowitz had secured, Rigerman and Jensen asked to be included in the deal. (JPa143.) At the time, they were already working together in connection with the Pine Street project, and relations had not yet soured. (*Id.*) Desperate for a share of the Linden Property's equity upside, Rigerman and Jensen—again touting their supposedly substantial development and construction experience in Jersey City—offered to give Jacobowitz a $250,000 finder's fee and to pay all costs of developing the Property, if only he would cut them in on the deal. (*Id.*) Based on those and other false representations, Jacobowitz agreed. (JPa143-44.)

Ultimately, as part of the Linden Street project, title to the Linden Street Property was transferred from A Better Life Ministry to the newly formed entity Linden Gardens JC LLC ("Linden Gardens"). (JPa144.) The members of Linden Gardens are A Better Life Ministry and 129 Linden Holdings LLC ("129 Linden Holdings"). (JPa145.) The members of 129 Linden Holdings, in turn, are Jacobowitz and Strekte NY LLC (a Rigerman/Jensen Party). (*Id.*)

Unlike the Pine Street project, the Linden Street project has not yet yielded a completed apartment complex. In fact, due to the Rigerman/Jensen Parties' inexperience, mismanagement, and intentional stalling of the project, construction has not even commenced. (JPa170-72.)

3. The Caven Point Property

In 2016, without the involvement of Rigerman or Jensen, Jacobowitz identified the Caven Point Property as another development opportunity in Jersey City and entered a contract with its then-owner to purchase the Property. (JPa147.) Jacobowitz acquired the Property in March 2017, through Caven Point Partners LLC, together with two non-party partners. (*Id.*) Contrary to their allegations in the two Caven Point Actions (*see infra*), the Rigerman/Jensen Parties and Eli Rigerman were not involved in the ownership or operation of the Caven Point Property until 2022. (*Id.*)

In 2022, Rigerman and Jensen invested approximately $2 million in the Caven Point Property, obtaining a 10 percent equity interest. (*Id.*) Rigerman and Jensen had practically begged Jacobowitz for the opportunity to do so; they had just received approximately $2 million in proceeds from the sale of an unrelated property and desperately wanted to reinvest those proceeds through a like-kind exchange under Section 1031 of the Internal Revenue Code, thereby deferring payment of any capital gains taxes. (*Id.*.) Jacobowitz and the members of Caven Point Partners—the sole owners of the Caven Point Property—agreed to let Rigerman and Jensen do so. (*Id.*)

4. George Street (New Brunswick)

The George Street Property in New Brunswick is the site of another

Jacobowitz project. (JPa164.) Similar to the Linden Street Project, in New Brunswick, Jacobowitz has partnered with a church to develop and construct an apartment complex on land currently owned by the church. (*Id*.) The Rigerman/Jensen Parties are not part of this partnership, but in 2023, they claimed to be owed money for creating a schematic design for the George Street Property, demanding $1 million. (JPa164.) Jacobowitz disputed their entitlement to payment for this work—let alone such an exorbitant amount—but as part of the 2023 Settlement Agreement (*see infra*), out of a desire to resolve all open issues with the Rigerman/Jensen Parties, he agreed to pay $200,000 to Strekte at the start of construction for the George Street project. (JPa164.)

C. The Loan Relating to the Pine Street Property

In April 2019, 309 Pine Plaza and 408 Whiton Plaza—the Jacobowitz Party and Rigerman/Jensen Party, respectively, that own the Pine Street Property—executed a note, guaranty, and assignment (the "Loan Documents") relating to a $120,000 loan from 408 Whiton Plaza to 309 Pine Plaza. (JPa461-70.) The Rigerman/Jensen Parties' claims in the Pine Street Action, in part, hinge on allegations that (i) 309 Pine Plaza defaulted on this loan; (ii) 408 Whiton Plaza noticed the default and 309 Pine Plaza failed to timely cure; and (iii) pursuant to the Loan Documents, this "uncured default" resulted in 309 Pine Plaza "automatically assigning 18% of its membership interests in Pine Whiton

to Plaintiffs." (JPa12.) The Jacobowitz Parties dispute all of these allegations. (JPa113.)

The Rigerman/Jensen Parties did not attach the Loan Documents to their complaint or otherwise submit them to the trial court—an especially curious decision given that one of their claims is for judicial reformation of the Loan Documents "to correct obvious scrivener's errors." (JPa9.) The Jacobowitz Parties did, however, in their opposition to Arbitration Motion. (JPa459, 461-70.)

The Pine Action complaint, tellingly, does not say when Jacobowitz and 309 Pine Plaza are alleged to have defaulted on the Loan Documents. But as seen on the face of the note, the maturity date of the loan was "the 45th day from the date hereof," i.e., June 1, 2019. (JPa461.) The Rigerman/Jensen Parties have not alleged that the loan's maturity date was extended.

The Loan Documents do not contain an arbitration clause, but neither do they contain any provision requiring disputes relating to the Loan Documents to be litigated in court or otherwise precluding arbitration. (JPa461-70.)

D. The Pine Whiton Operating Agreement

As discussed above, Pine Whiton is the entity that was formed to develop and manage the Pine Street Property. Pine Whiton's original two members were Tiger (a Rigerman/Jensen Party) and 309 Pine Plaza (a Jacobowitz Party), but

in 2023, 309 Pine Plaza assigned its interest in Pine Whiton to 309 Pine Plaza Tenant LLC (another Jacobowitz Party). (JPa383, 397.) Since that time, Pine Whiton's two members have been Tiger and 309 Pine Plaza Tenant LLC. (JPa383)

On September 23, 2019—over five months after the Loan Documents were executed and over three-and-a-half months after the loan had matured—309 Pine Plaza and Tiger entered an operating agreement for Pine Whiton (the "Pine Whiton Operating Agreement"). (JPa399.) The Operating Agreement was signed by Jacobowitz on behalf of 309 Pine Plaza and by both Rigerman and Jensen on behalf of Tiger. (JPa431.) Importantly, these were essentially the same parties that had entered the Loan Documents five months earlier; Tiger was (and is) wholly owned by 408 Whiton Plaza, the party that entered the Loan Documents with 309 Pine Plaza and Jacobowitz. (JPa126, 218.) And notably, the Operating Agreement explicitly states that "as of September 23, 2019," Tiger and 309 Pine Plaza each held a "50%" interest in Pine Whiton (JPa433)—contrary to Plaintiffs' apparent position that, months earlier, an "uncured default" resulted in "309 Pine automatically assigning 18% of its membership interests in Pine Whiton to Plaintiffs." (JPa12.)

The Pine Whiton Operating Agreement has been amended only once, in November 2023. (JPa383, 392) Like the original Operating Agreement, the

First Amendment to the Operating Agreement was personally signed by each of Jacobowitz, Rigerman, and Jensen. (JPa397.) And the First Amendment did not make any changes to what is, for purposes of this appeal, the most important provision in the Operating Agreement: the arbitration clause.

E. The Pine Whiton Operating Agreement's Clear, Extremely Broad Arbitration Clause and Its Incorporation of the JAMS Rules

The Pine Whiton Operating Agreement contains a clear, extremely broad, mandatory arbitration clause (the "Arbitration Clause"). Specifically, section 13.10 of the Operating Agreement—entitled "Dispute Resolution"—provides:

> ***Any*** disputes arising out of or relating to this Agreement or the Company [i.e., Pine Whiton], including, ***without limitation***, any disputes regarding the occurrence or existence of a For Cause event, ***shall*** be submitted to binding arbitration before a qualified arbitrator . . . ***under the Judicial Arbitration and Mediation Services, Inc. ('JAMS') Streamlined Arbitration Rules and Procedures (the 'Rules')***.

(JPa429-30 (emphases added).)

The Arbitration Clause's incorporation of the JAMS Streamlined Rules and Procedures ("JAMS Rules") is significant. As JAMS Rule 1(b) provides—and case law confirms (*infra* at 44-45)— parties "shall be deemed to have made these Rules a part of their Arbitration Agreement . . . whenever they have

provided for Arbitration by JAMS under its Streamlined Rules." (JPa475.)[3]

Importantly, JAMS Rule 8(b)—regarding "Jurisdictional Challenges"—provides that "[j]urisdictional and arbitrability disputes, including disputes about the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator." (JPa478.) The Rule further provides that "[t]he Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." (*Id.*)

F. The Parties' Escalating, Interrelated Disputes; the Refinancing of the Pine Street Property; and the 2023 Settlement Agreement

Unfortunately, disputes have proliferated. In the 2016 to 2022 period, as their business affairs became steadily entangled, Jacobowitz learned that Rigerman and Jensen were not the savvy developers they had billed themselves as, but rather unscrupulous fraudsters who looked at every transaction as a zero-sum opportunity to bilk their counterparties. (JPa123.) As a result, the parties

[3] JAMS Rule 3 provides that "[t]he Rules in effect on the date of the commencement of an Arbitration . . . shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules." (JPa475.) The Jacobowitz Parties' Appendix includes—and we quote herein—the JAMS Rules currently in effect, which have been effective since June 1, 2021. (JPa472.) Regardless, the specific JAMS Rules cited and quoted in this brief were identical in the prior version of the Rules, which was in effect from July 1, 2014 until June 1, 2021. *See* JAMS Streamlined Rules & Procedures (Effective July 1, 2014), JAMS, https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_streamlined_arbitration_rules-2014.pdf.

became mired in an escalating series of disputes—including (but not limited to) disputes relating to the Pine Street Project, the Linden Street Project, the Caven Point Property, and the George Street Property. (JPa148-55.)

In 2023, things finally came to a head. The construction loan on the Pine Street project was scheduled to mature, and that loan needed to be refinanced with a permanent loan and mortgage. (JPa123, 155.) The parties reasonably anticipated that the refinancing would be a liquidity event resulting in millions of dollars available for distribution. (JPa123, 156.) But for the refinancing to close in an ordinary manner, and for the parties to agree on how to distribute the resulting proceeds, they needed to resolve their many outstanding disputes. (JPa123, 156, 159-60.) So, in advance of the refinancing, the Jacobowitz Parties and Rigerman/Jensen Parties entered a settlement agreement that, with a few discrete exceptions, resolved all of the pending disputes and open issues between them ("the 2023 Settlement Agreement"). (JPa123-24, 155-67.) The refinancing proceeded to close in November 2023, resulting in over $7.5 million in proceeds for distribution to the parties. (JPa124, 157-58.) And per the terms of the 2023 Settlement Agreement, over $7 million of those proceeds were allocated to the Rigerman/Jensen Parties, despite the Jacobowitz Parties' equal equity interest in the Pine Street Project. (*Id.*)

G. The Rigerman/Jensen Parties Violate the 2023 Settlement Agreement and Launch a Litigation Campaign Against Jacobowitz, Filing Four Separate Lawsuits in Hudson County—Each With an Inaccurate *R.* 4:5-1 Certification—Based on Disputes Resolved in the Settlement

After receiving their disproportionate share of the refinancing's proceeds, the Rigerman/Jensen Parties quickly began to renege on their own obligations under the 2023 Settlement Agreement. (JPa167-68.) Most relevant here, they began demanding payment and otherwise agitating about various disputes that had already been conclusively settled in the 2023 Settlement Agreement. (JPa168.) Eventually, this refusal to accept the terms of the 2023 Settlement Agreement culminated in Rigerman/Jensen Parties filing four separate lawsuits against Jacobowitz Parties in Superior Court in Hudson County (the "Rigerman/Jensen Lawsuits"), each of which brings claims that were resolved in the Settlement Agreement.

1. The Pine Action (HUD-C-72-24)

In the Pine Action—filed on May 31, 2024—Tiger and 408 Whiton Plaza brought claims against 309 Pine Plaza and Jacobowitz based on disputes relating to the Pine Street project. (JPa7-20.) Doing so violated the 2023 Settlement Agreement. (JPa168, 182.) Moreover, by filing the claims in court rather than initiating arbitration, Plaintiffs violated the mandatory Arbitration Clause; as discussed below, all four claims in the complaint "aris[e] out of or relat[e] to th[e Operating] Agreement or [Pine Whiton]" and thus fall squarely within the

Clause's scope. (*Infra* at 29-31.) Indeed, precisely because the claims so obviously "arise out of" or "relate to" Pine Whiton, Plaintiffs named it an "Interested Party" in the case caption and filed the complaint "on notice to Interested Party, Pine Whiton." (JPa7.)

2. The Linden Action (HUD-C-84-24)

On June 18, 2024, less than three weeks after filing the Pine Action, Rigerman/Jensen Parties commenced the Linden Action. (JPa28-57.) In that case, Strekte brought nine claims against Jacobowitz relating primarily to the Linden Street project; the causes of action range from claims for expulsion from (or dissolution of) 129 Linden Holdings to claims for breach of fiduciary duty, an accounting, and corporate waste, among others. (JPa49-55.) Because the parties had resolved their disputes relating to Linden Street in the 2023 Settlement Agreement, filing the Linden Action further violated the Settlement Agreement. (JPa168.) Moreover, despite ostensibly being directed toward the Linden Street project, the complaint relied on numerous allegations relating to Pine Street—including allegations that, in connection with that project, Jacobowitz displayed "ineffectiveness and recklessness and deceit," was "hold[ing] funds hostage," and made misrepresentations to financial institutions. JPa31-32, 43-44.)

3. Caven Point Action I (HUD-L-2993-24)

On August 9, 2024, Caven Views and Strekte (Rigerman/Jensen Parties) filed Caven Point Action I, bringing six claims against Jacobowitz and Caven Acres (a Jacobowitz Party). (JPa59-80.) The claims include a hodgepodge of fraud, tort, and contract claims relating to the Caven Point Property—all of which (again) relate to disputes that were resolved in the 2023 Settlement Agreement. (JPa74-78.) And while ostensibly about the Caven Point Property, nearly a third of the factual allegations in Caven Point Action I consist of accusations regarding Jacobowitz's purported blackmail efforts in connection with the Pine Street project. (JPa70-73.)

4. Caven Point Action II (HUD-C-118-24)

Finally, on August 23, 2024, Caven Point Action II was filed. (JPa86-97.) There, Eli Rigerman—based on rights purportedly assigned to him by Mark Rigerman—brings fraud and breach-of-contract claims and seeks a declaratory judgment that he owns 50% of the Caven Point Property. (JPa92-96.) The claims—like those in the other Rigerman/Jensen Lawsuits—are foreclosed by the 2023 Settlement Agreement. (JPa159-60, 182.) Caven Point Action II also relies on the same allegations of fraud that appear in Caven Point Action I. (C*ompare* JPa63-64 (Caven I Compl. ¶¶ 29-34), *with* JPa87-88, 91-92 (Caven II Compl. ¶¶ 2-9, 37-39).)

5. The Rigerman/Jensen Lawsuits' Inaccurate R. 4:5-1 Certifications

Even though the four Rigerman/Jensen Lawsuits were filed by the same counsel over a span of less than three months—and despite the cases' manifest connections and their substantial overlapping factual allegations and legal claims—in the *R.* 4:5-1 certifications appended to each complaint, counsel for the Rigerman/Jensen Parties certified that "the matter in controversy is not the subject of any other action pending in any court" and that "no such action or arbitration proceeding is contemplated." (JPa21; *accord* at JPa57, 81, 97.) Equally inexplicable, in the Civil Case Information Statements filed in the Linden Action and in Caven Point Action I, the prompts asking whether there are any "[r]elated cases pending" were answered: "No." (JPa99-103.)[4]

H. The Jacobowitz Parties File Counterclaims in the Pine Action

On October 3, 2024, the Jacobowitz Parties filed an Answer with Affirmative Defenses and Counterclaims and Third-Party Complaint in the Pine Action (the "Counterclaims"). (JPa105.) The Counterclaims added as counterclaimants/third-party plaintiffs the Jacobowitz Parties that were not already parties, and it added as third-party defendants every Rigerman/Jensen Party not already a party. (JPa105, 125-28.) As a result, all of the Jacobowitz Parties and Rigerman/Jensen Parties are now parties in the Pine Action.

[4] Caven Point Action II was filed without a Civil Case Information Statement.

As the pleadings make clear, a central defense to the claims asserted against the Jacobowitz Parties—not only in the Pine Action but also in the Linden and the Caven Point Actions—is that all of the claims were resolved in the 2023 Settlement Agreement. (JPa119, 124.) Similarly, the Jacobowitz Parties' affirmative claims against the Rigerman/Jensen Parties turn in large part on the 2023 Settlement Agreement. Indeed, nine Counterclaims seek relief based on the 2023 Settlement Agreement (directly or indirectly),[5] and two are pled solely in the alternative based on claims believed to have been released in the 2023 Settlement Agreement.[6] And in accordance with the entire controversy doctrine—since the disputes are inextricably intertwined and involve the same real parties in interest—the Counterclaims filed in the Pine Action include the Jacobowitz Parties' claims against the Rigerman/Jensen Parties relating to the

[5] (JPa181-88, 205-07 (**Count I** (breach of contract seeking specific performance and injunctive relief under the 2023 Settlement Agreement); **Count II** (breach of contract based on the 2023 Settlement Agreement); **Count III** (breach of implied duty of good faith and fair dealing based on 2023 Settlement Agreement); **Count IV** (alternative claim for promissory estoppel based on the Rigerman/Jensen Parties' promises in connection with the 2023 Settlement Agreement); **Count V** (alternative claim for unjust enrichment based on windfall benefits obtained by Rigerman/Jensen Parties); **Count VI** (claim for declaratory judgment based in part on 2023 Settlement Agreement); **Count VIII** (claim for declaratory judgment and injunctive relief based on the 2023 Settlement Agreement); **Count IX** (alternative claim for breach of contract under original, unamended terms of 2023 Settlement Agreement); **Count XX** (claim for declaratory judgment based in part on 2023 Settlement Agreement)).)

[6] (JPa189-92 (**Count X** (legal fraud); **Count XI** (alternative relief based on claims allegedly released/resolved under 2023 Settlement Agreement)).)

Linden Street project and the Caven Point Property; the Jacobowitz Parties did not file separate counterclaims in the Linden or Caven Point Actions.

I. The Jacobowitz Parties Successfully Move for Consolidation, Defeat Motion to Dismiss, and Obtain Preliminary Injunction Against Rigerman/Jensen Parties for Their Unauthorized, *Ultra Vires* Transfer of $150,000 from Pine Whiton to Their Personal Attorneys

Three motions preceded the Rigerman/Jensen Parties' eventual motion to compel arbitration: (i) the Rigerman/Jensen Parties' motion to dismiss and/or sever and transfer eight Counterclaims (JPa328); (ii) the Jacobowitz Parties' motion to consolidate the four Rigerman/Jensen Lawsuits (JPa338); and (iii) the Jacobowitz Parties' Order to Show Cause (JPa378). The motions were exhaustively briefed and argued, with 156 pages of briefing, hundreds of pages of certifications and exhibits, and oral argument on all three motions (1T, 2T, 3T). All three motions were resolved favorably on behalf of the Jacobowitz Parties.

1. Competing Motions to Dismiss/Sever and to Consolidate

On October 23, 2024, the Rigerman/Jensen Parties moved to dismiss and/or sever and transfer Counts XII through XX of the Counterclaims. (JPa328). The same day, the Jacobowitz Parties moved to consolidate the Pine, Linden, and Caven Point Actions. (JPa338.) Both motions were opposed, and they were briefed simultaneously on parallel tracks.

Neither the Rigerman/Jensen Parties' initial opposition to consolidation

nor their motion to dismiss was premised on (or even mentioned) any right to arbitration. But on November 4, 2024, in a certification attached to their reply brief in support of their motion to dismiss, the Rigerman/Jensen Parties raised for the first time the argument that Counterclaims VI, VII, and X were subject to the Arbitration Clause. (JPa367-78.) Although they raised the argument in a reply certification in support of their motion to dismiss, the Rigerman/Jensen Parties were not seeking to dismiss any of those counterclaims; the certification instead argued that, because Counterclaims VI, VII, and XI were subject to arbitration, that was "an additional reason why the four matters cannot be consolidated." (JPa368.)

On November 12, 2024, the trial court (i) denied the Rigerman/Jensen Parties' motion to dismiss (JPa370-72); and (ii) granted in part the Jacobowitz Parties' motion to consolidate (JPa373-75). As to consolidation, the Court consolidated the Linden and Caven Point Actions "for discovery purposes" and "dispositive motions," but denied consolidation of the Pine Action at that time—"without prejudice"—based on the Rigerman/Jensen Parties' representation that they intended to file a motion to compel arbitration. (JPa375; 1T27:11-12, 29:16-19.)

2. Order to Show Cause and Preliminary Injunction

On November 5, 2024—without the Jacobowitz Parties' consent and

without advance notice—the Rigerman/Jensen Parties' unilaterally withdrew $150,000 from Pine Whiton's bank account and wired the funds directly to their personal lawyers as purported indemnification and advancement of their legal fees in connection with the Pine Action (which they had initiated). (JPa387-88.) On November 14, 2024, the Jacobowitz Parties filed an order to show cause seeking a preliminary injunction, arguing that the unauthorized withdrawal breached the Pine Whiton Operating Agreement and New Jersey LLC Act and amounted to conversion. (JPa378.) On January 7, 2025, the trial court granted the preliminary injunction, ordering that (i) the Rigerman/Jensen Parties are enjoined from transferring funds from Pine Whiton's bank accounts absent consent from the Jacobowitz Parties and (ii) ordering their counsel to "hold in trust and not spend or disburse the $150,000 . . . pending adjudication of the consolidated case(s) or further order of this court." (JPa522-23.)

J. The Arbitration Motion and Cross-Motion; Trial Court's Decision

On November 27, 2024, the Rigerman/Jensen Parties filed a motion selectively seeking to compel arbitration of three of the Jacobowitz Parties' twenty Counterclaims—Counts VI, VII, and X—while maintaining that none of their own claims are subject arbitration. (JPa439.)

The Jacobowitz Parties opposed the motion to compel arbitration. The Jacobowitz Parties did not dispute that the Arbitration Clause is valid or that

Counterclaims VI, VII, and X fall within its scope. Instead, the Jacobowitz Parties argued that the Rigerman/Jensen Parties waived their right to arbitration. In addition, the Jacobowitz Parties also filed a cross-motion—in the alternative to a ruling of waiver—for an order compelling arbitration of ***all*** claims subject to the Arbitration Clause, not solely the three counterclaims that the Rigerman/Jensen Parties selectively sought to dismiss. (JPa455-56.)

In orders dated December 20, 2024, the trial court granted the motion to compel arbitration of Counterclaims VI, VII, and X (JPa1-3) and denied the Jacobowitz Parties' cross-motion (JPa4-6). Both orders are immediately appealable as of right under *R.* 2:2-3(b)(8), and the Jacobowitz Parties filed a notice of appeal, appealing both orders, on January 31, 2024.

K. Rigerman/Jensen Parties File Third-Party Counterclaims, Bringing Yet More Arbitrable Claims Against Jacobowitz Parties

On January 31, 2025, the Rigerman/Jensen Parties filed an answer to the Jacobowitz Parties' Counterclaims and Third-Party Complaint. (JPa213.) This pleading included a "Third-Party Counterclaim" in which Plaintiffs and certain third-party defendant Rigerman/Jensen Parties brought four more claims against Jacobowitz, his entity Ifany LLC, and KISPM. (JPa253-59.) The new claims—which all relate to alleged mismanagement of the Pine Street project—"arise out of" and "relate to" Pine Whiton and its Operating Agreement, and thus they fall squarely within the scope of the Arbitration Clause. (*See infra* at 37)

L. Rigerman/Jensen Parties Improperly Sue Jacobowitz Anonymously Through Sham Association to Block George Street Project

In their Counterclaims, the Jacobowitz Parties alleged upon information and belief that the Rigerman/Jensen Parties had "caused the filing of, and [we]re funding and controlling, lawsuits" against other Jacobowitz entities "by straw plaintiffs" that "Rigerman and Jensen formed or control, in whole or in part, to conceal their role in the lawsuits." (JPa180.) In the months since the arbitration motions were decided, this allegation has been proven true by public court records and proceedings of which this Court may take judicial notice.[7]

On April 12, 2024, the so-called "Association of Disenfranchised Bidders of Redevelopment Work in the City of New Brunswick" filed a lawsuit in the Law Division in Middlesex County against NB Plaza Urban Renewal LLC (a Jacobowitz entity), the City of New Brunswick, the New Brunswick Housing Authority, and the New Brunswick Planning Board. (JPa524.) The complaint is filled with personal invective directed towards Jacobowitz and seeks to invalidate his NB Plaza entity's appointment as redeveloper of the George Street Property, and the "Association" is represented by the same lawyers representing the Rigerman/Jensen Parties in the Rigerman/Jensen Lawsuits. (JPa524-40.)

On March 7, 2025, Judge Corman dismissed the lawsuit for lack of

[7] The Court may take judicial notice of New Jersey state court records under *N.J.R.E.* 201(b)(4) and 202(b).

standing, concluding that the case was "an attempt by parties to prosecute their claim anonymously, which is not permitted." (JPa584; *see also* JPa592 (order dismissing case with prejudice).) Critically, the decision followed a February 26, 2025 public hearing at which one of the "Association" members—James Byrne—had been ordered to testify. (JPa553 (first order requiring testimony); JPa558 (second order requiring testimony); JPa560 (hearing transcript).) At that public hearing, Mr. Byrne testified that he was a member of Folxco (JPa567) and that the purported Association's members included Paul Jensen, Mark Rigerman, Eli Rigerman, and Folxco (JPa564-66, 568-69)—in other words, the Rigerman/Jensen Parties.

M. On the Eve of Being Unmasked in the Anonymous, Sham "Association" Case, Rigerman/Jensen Parties File Another Lawsuit Against Jacobowitz Challenging the George Street Project

On February 25, 2025—the day before Mr. Byrne's testimony in the *Bidders Association* case—the Rigerman/Jensen Party Folxco LLC filed yet another lawsuit against Jacobowitz. (JPa542.) The claims all relate to the George Street Property (JPa542-552)—the property at the heart of *Disenfranchised Bidders* and the same property that was part of the 2023 Settlement Agreement (*supra* at 7-8, 23). Among other claims, the complaint seeks specific performance to force the sale of the George Street Property to Folxco (JPa547-48)—based on a letter of intent from August 2022 that the

complaint concedes was almost entirely non-binding (except for, e.g., a 30-day exclusivity provision) (JPa543) and despite the fact that, based on the public record alone, Folxco has known the basis for this claim since at least April 2024 (*Disenfranchised Bidders*) and sat on its rights.

Even though the case seeks specific performance of the same property at issue in the *Disenfranchised Bidders* case—and even though the claims in this new case would all be foreclosed by the 2023 Settlement Agreement alleged in the Pine Street Action (JPa164)—the *R.* 4:5-1 certification appended to the complaint states that "the dispute is not the subject of any other action pending, in any other court or a pending arbitration proceeding," and that "no other action or arbitration proceeding is contemplated." (JPa552.)

LEGAL ARGUMENT

Orders compelling or denying arbitration are appealable as of right, *R.* 2:2-3(b)(8), and are reviewed de novo, *Flanzman* v. *Jenny Craig, Inc.*, 244 N.J. 119, 131 (2020). A trial court's order deciding "the legal issue of waiver" is likewise reviewed de novo. *Marmo & Sons Gen. Contracting* v. *Biagi Farms*, 478 N.J. Super. 593, 607 (App. Div. 2024); *accord Hopkins* v. *LVNV Funding*, --- A.3d ----, 2025 WL 440654, at *4 (N.J. App. Div. Feb. 10, 2025) (JPa612).

I. THE TRIAL COURT ERRED IN GRANTING THE ARBITRATION MOTION BECAUSE THE RIGERMAN/JENSEN PARTIES WAIVED THEIR RIGHT TO ARBITRATE (JPa3, 6)

A. Parties Waive a Right to Arbitrate by Choosing to Seek Relief in a Different Forum, and Waiver May Be Inferred from Conduct

Federal and New Jersey public policy—embodied in the Federal Arbitration Act ("FAA"), the New Jersey Arbitration Act ("NJAA"), and case law interpreting those statutes—favors "voluntary arbitration of civil disputes by mutual agreement." *Marmo*, 478 N.J. Super. at 602. But this general policy is "subject to certain exceptions," one of which "applies when a party to a contractual arbitration provision has waived the right to compel arbitration, by its actions or inactions." *Id.* at 602. Arbitration is a creature of contract, and "[t]he same principles govern waiver of a right to arbitrate as waiver of any other [contractual] right." *Cole* v. *Jersey City Med. Ctr.*, 215 N.J. 265, 276 (2013). While "[w]aiver is never presumed[,]" a valid arbitration agreement can "be overcome by clear and convincing evidence that the party asserting it chose to seek relief in a different forum." *Id.* (citation omitted).

In *Cole* v. *Jersey City Medical Center*, the New Jersey Supreme Court set forth "a multifactor 'totality of the circumstances' test for evaluating whether a party has waived its contractual right to arbitration.'" *Marmo*, 478 N.J. Super. at 602 (quoting *Cole*, 215 N.J. at 280). Those factors are as follows:

> (1) the delay in making the arbitration request; (2) the

> filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any.

Cole, 215 N.J. at 280-81. "No one factor is dispositive," *id.* at 281, and these factors are "non-exclusive," *Largoza* v. *FKM Real Estate Holdings*, 474 N.J. Super. 61, 84 (App. Div. 2022); courts should consider any "other factors" relevant as they assess "the totality of the circumstances." *Cole*, 215 N.J. at 280.

B. The Arbitration Clause in the Pine Whiton Operating Agreement Is Clear, Mandatory, and Extremely Broad, and It Applies to Every Claim Asserted in the Pine Action by the Rigerman/Jensen Parties

Fundamental to the waiver analysis here are the following unavoidable conclusions: (1) the Arbitration Clause is ***extremely*** broad and clear; (2) all four claims in the Rigerman/Jensen Parties initial Pine Complaint fall squarely within its scope; and (3) the Rigerman/Jensen Parties' continued refusal to acknowledge that ***any*** of their claims are arbitrable—coupled with their effort to selectively enforce the Arbitration Clause against the Jacobowitz Parties—support a strong inference that their arguments are not being made in good faith.

1. The Arbitration Clause Is Clear, Mandatory, and Extremely Broad and Benefits from a General Presumption of Arbitrability

Courts regularly "read the terms 'arising out of' or 'relating to' a contract

as indicative of an '***extremely broad***' agreement to arbitrate any dispute relating ***in any way*** to the contract." *Griffin* v. *Burlington Volkswagen, Inc.*, 411 N.J. Super. 515, 518 (App. Div. 2010) (emphases added) (citations omitted); *see also, e.g.*, *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 524 (3d Cir. 2019) ("a claim need only have 'some logical or causal connection' to the agreement to be related to it" (citation omitted)). The Arbitration Clause includes those broad terms, and it expressly applies not only to all disputes "arising out of or relating to" the Pine Whiton Operating Agreement, but also to any disputes "arising out of or relating to" ***Pine Whiton***, the company itself.

Moreover, in general, "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Jansen* v. *Salomon Smith Barney, Inc.*, 342 N.J. Super. 254, 258 (App. Div. 2001). In assessing "the scope of arbitration agreements, courts recognize 'a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with a positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Waskevich* v. *Herold Law*, 431 N.J. Super. 293, 298 (App. Div. 2013) (citation omitted).

2. All Four Claims in the Rigerman/Jensen Parties' Complaint Fall Squarely Within the Scope of the Arbitration Clause

All four claims in the Pine Complaint "aris[e] out of or relat[e] to th[e Operating] Agreement or [Pine Whiton]" and are thus squarely arbitrable:

- **Count I** seeks a declaratory judgment that Plaintiffs own 68% of Pine Whiton (JPa15)—a claim that, on its face, "relate[s] to" Pine Whiton.

- **Count II** seeks a declaratory judgment that, under "Section 9.1 of the [Pine Whiton Operating] Agreement" (JPa17), Plaintiffs "May Dissolve Pine Whiton Holdings Upon Confirmation of [Their] 68% Membership Interest" (JPa16). This claim also facially "aris[es] out of" and "relate[s] to" both Pine Whiton and the Pine Whiton Operating Agreement (on which the claim expressly relies).

- **Count III** seeks judicial reformation of the Loan Documents pursuant to which the Rigerman/Jensen Parties allege they gained an additional 18 percent membership interest in Pine Whiton (JPa17-18)—a claim that thus also clearly "relate[s] to" Pine Whiton.

- **Count IV** alleges breach of fiduciary duty by the Jacobowitz Parties based on their alleged fiduciary duties "[a]s members and managers of Pine Whiton." (JPa19.) This claim, too, plainly "aris[es] out of" and "relates to" Pine Whiton.

Plaintiffs insist that none of these claims are arbitrable, but their only defense of that position—that their "affirmative claims are based not on the Operating Agreement" and do not "relate to Pine Whiton's operations" but rather "arise from a separate Note and Guaranty" (JPa522)—utterly fails.

First, it is transparently false: Counts II and IV do ***not*** arise from the Note or Guaranty. The breach of fiduciary duty claim is based 309 Pine Plaza's and Jacobowitz's alleged duties "***[a]s members and managers of Pine Whiton***" (JPa19) and as such arises solely and expressly under the Operating Agreement (designating Jacobowitz a manager) and by virtue of 309 Pine Plaza's (former) membership ***in Pine Whiton***. Moreover, the allegations underlying the claim are that Defendants "blackmail[ed] their fellow members by threatening to

default on the construction loan" (*id.*), which of course ***does*** "relate to Pine Whiton's Operations." The claim has nothing to do with the Note or Guaranty.

Similarly, Count II expressly arises under "Section 9.1 of the Agreement" (JPa17) and a statutory provision that states a company is dissolved upon "an event or circumstance ***that the operating agreement states causes dissolution***." (*id.* (quoting N.J.S.A. 42:2C-48(a)) (emphasis added).) And while Plaintiffs' claim to 68% of Pine Whiton is premised on the Note/Guaranty, that is the declaratory judgment sought in Count I, not Count II; Count II seeks a declaratory judgment that ***if*** Plaintiffs hold a 68% interest (as a result of Count I), then ***pursuant to the Operating Agreement***, they may dissolve Pine Whiton. (JPa15-16.)

Second, Plaintiffs' defense that their claims are not arbitrable because they do not "relate to Pine Whiton's operations" (JPa522) misreads the Arbitration Clause by inserting a word—"***operations***"—that it does not contain. The Arbitration Clause applies to any disputes relating to "the Company"—full stop—not merely its operations; disputes regarding its membership percentages (Counts I, III) or continued existence (Count II) are easily within its scope.

Third, even to the extent Counts I and III do "arise from" the Note and Guaranty, that would not preclude them from also "relating to" Pine Whiton—which they clearly do (as discussed above). No provision in the Note or

Guaranty prevents application of the Arbitration Clause; neither contains a contradictory arbitration clause, for example. Since the Note and Guaranty were signed by the same people who signed the Operating Agreement only months later, and since the contracts relate to the same subject matter (Pine Whiton/Pine Street), the Arbitration Clause is "susceptible of an interpretation that covers the asserted dispute." *Waskevich*, 431 N.J. Super. 298 (citation omitted). The presumption of arbitrability thus controls, and the Arbitration Clause applies to disputes arising from the Note and Guaranty if they also "relat[e] to Pine Whiton," as the claims here all do.

C. The Rigerman/Jensen Parties' Continued Refusal to Acknowledge That ***Any*** of Their Claims Are Subject to the Arbitration Clause—Coupled With Their Effort to Selectively Enforce the Clause Against the Jacobowitz Parties—Is Frivolous to the Point of Bad Faith

The Rigerman/Jensen Parties' arguments against the arbitrability of the four claims in the Pine Complaint are not just wrong; they are frivolous. And while anyone can make a mistake, the Rigerman/Jensen Parties are represented by sophisticated, experienced commercial counsel (JPa510, 515) who are arguing that the Arbitration Clause is "extremely broad" (JPa446) and seeking to enforce it against the Jacobowitz Parties—while simultaneously doubling and tripling down on the notion that none of the Rigerman/Jensen Parties' claims are arbitrable. This "arbitration-for-thee-but-not-for-me" approach—together with the utter lack of support for their position—should give rise to an inference that

the Rigerman/Jensen Parties are not making these arguments in good faith. This inference is further supported by their repeated mischaracterization of their own claims, which they have done in at least two ways.

First, as discussed above, the Rigerman/Jensen Parties' claim that their "affirmative claims are based not on the Operating Agreement" but rather "arise from a separate Note and Guaranty" (JPa522) is flatly untrue.

Second, and relatedly, in no fewer than seven separate written filings to the trial court (JPa333-35, 337, 354-56, 358, 361-62, 365), including the opening brief in support of its motion to compel arbitration (JPa445); during oral argument on the arbitration motions (3T7:20-25), oral argument on the TRO (2T18:4-14, 2T22:22-23:15), and oral argument on the motion to consolidate (1T17:4-15, 1T20:9-17); and in its Case Information Statement to this Court (JPa311)—the Rigerman/Jensen Parties have purported to describe the claims and the relief they are seeking in the Pine Action and have ***entirely omitted their breach of fiduciary duty claim***. The complaint is only 15 pages and includes only 4 claims (JPa7-21); the claim has not been forgotten or lost in the shuffle. As the claim least suited to the argument that all of their claims arise from the Note and Guaranty, not the Pine Whiton Operating Agreement, the breach of

fiduciary duty claims has been intentionally buried.[8]

D. Under the *Cole* "Totality of the Circumstances" Test, the Rigerman/Jensen Parties Have Waived Their Right to Arbitrate

Assessing the totality of the circumstances here—guided by *Cole*—shows that the Rigerman/Jensen Parties have clearly waived their right to arbitrate.

1. The Pleadings

The pleadings factor—"whether the party raised the arbitration issue in its pleadings . . . or provided other notification of its intent to seek arbitration," *Cole*, 215 N.J. at 281—weighs strongly in favor of finding that the Rigerman/Jensen Parties have waived their right to arbitration.

This Court's recent *Marmo* decision is instructive. *Marmo* involved a dispute between general contractors ("Marmo") and parties for whom Marmo had agreed to build a house in New Jersey ("Biagi"), pursuant to a written contract. *Marmo*, 478 N.J. Super. at 598-99. Critically, the written contract had a clear, mandatory arbitration provision, yet contrary to that provision, Marmo filed a lawsuit in the Law Division bringing claims against Biagi for breach of contract, unjust enrichment, and reasonable value of services—"contractual" or

[8] There is one filing where the Rigerman/Jensen Parties mentioned their breach of fiduciary duty claim—their opposition to the Order to Show Cause—where they did so only as an aside, two pages after describing the "limited declaratory and injunctive relief" sought in the Pine Action (JPa449, 451.) In context, this serves only to prove that they have not, in fact, forgotten about the claim.

"quasi-contractual" claims squarely subject to the arbitration clause, which applied to "any disputes arising out of the contract," i.e., the contract alleged to have been breached. *Id.* at 599-600, 610. Significantly, in the complaint's accompanying *R.* 4:5-1 certification, Marmo also certified "that no arbitration was pending and that, 'to the best of its belief,' none was contemplated." *Id.* at 613. And after Bargo filed counterclaims—including for breach of contract—Marmo's first response to that pleading, an answer, "alleg[ed] eight affirmative defenses, none of which concerned arbitration." *Id.* Then, less than six months after commencing the suit, Marmo did an about-face, moving to compel arbitration of nearly all claims in the case (including its own). *Id.* at 602.

In applying *Cole* test and ultimately finding waiver, the *Marmo* court assessed the above facts and concluded that the pleadings factor "strongly weigh[ed]" in favor of waiver. *Id.* at 613. The same is true in our case.

First, as in *Marmo*, Plaintiffs "initiated th[is] action by filing [their] complaint rather than asserting [their] right to arbitration." *Id.* By doing so in this context, Plaintiffs "demonstrated an intention to litigate, not arbitrate," *id.* at 610 n.3—and a "knowing[] relinquish[ment] [of] the right to arbitrate," *id.* at 604 (citation omitted)—because (i) the Arbitration Clause in the Pine Whiton Operating Agreement is broad and clear (*supra* at 27-28); (ii) the Arbitration Clause plainly applies to all four claims asserted in the Pine Complaint (*supra*

at 28-31); (iii) the Rigerman/Jensen Parties are represented by experienced, sophisticated commercial litigators well-versed in arbitration (as their biographies attest[9]); and (iv) both the Rigerman/Jensen Parties themselves and also separately their counsel must have known about the Arbitration Clause before they filed the complaint, because Mark Rigerman and Paul Jensen each signed the Operating Agreement twice (most recently in November 2023) (*supra* at 10-11; JPa397, 431) and because the complaint repeatedly cites and relies on the Operating Agreement and seeks relief pursuant to its terms. (*See* JPa7, 10, 12, 14-15, 19 (Compl. ¶¶ 7, 14, 19, 33, 47-48, 55, 57-64, 78-85 and Prayer for Relief).) Given the foregoing, it beggars belief that the Rigerman/Jensen Parties did not know they had the right to arbitrate their claims when they instead chose to litigate them before this Court by filing the complaint.

Second, and again as in *Marmo*, the Rigerman/Jensen Parties submitted a *R.* 4:5-1 certification with their complaint in which their counsel certified that "the matter in controversy is not the subject of any other action pending in any court or of [any] arbitration proceeding and that ***no such action or arbitration proceeding is contemplated***." (JPa21); *see Marmo*, 478 N.J. Super. at 613

[9] (JPa510 ("Tom has also arbitrated cases to conclusion in multiple forums including the American Arbitration Association and the American Health Lawyers Association."); JPa515 ("[Macklin] has achieved excellent results for clients in each of these practice areas at every stage, from negotiation through trial and arbitration.").)

(explaining that Marmo's complaint included an identical certification, which the Appellate Division found "[n]otabl[e] and the trial court "emphasized"). And despite "a party's 'continuing obligation' to amend the [*R.* 4:5-1] certification if the underlying facts change," *id.* at 613, the Rigerman/Jensen Parties never amended theirs—despite pursuing an active, aggressive litigation strategy over the ensuing months that included filing three additional, inextricably related lawsuits against the Jacobowitz Parties (the other, since-consolidated Rigerman/Jensen Lawsuits), all utilizing the same counsel. As *Marmo* emphasizes, "judicial resources are wasted when a case is brought by a plaintiff and litigate in the Superior Court when it should have been pursued instead in arbitration," which submitting "accurate *Rule* 4:5-1(b)(2) certifications at the outset of a case" is "important" and why counsel must exercise "due diligence in promptly advising the court and opposing counsel . . . as to whether arbitration might be sought." *Marmo*, 478 N.J. Super. at 613. The Rigerman/Jensen Parties did not comply with these obligations.

Third, the Rigerman/Jensen Parties' first filing in response to the Counterclaims—a motion to dismiss filed on October 23, 2024—did not mention arbitration. It was not until November 4, 2024—over five months after they had initiated this case—that the Rigerman/Jensen Parties first raised the prospect of arbitration. (JPa367-68.) Even then, they did so in a certification

filed with their reply brief in support of their motion to dismiss, where they raised the issue for the first time—improperly, because it was a reply, and one ostensibly in support of their ***own*** motion—as an additional reason to deny the Jacobowitz Parties' pending motion to consolidate. (*Id.*)

Fourth, the additional "Third-Party Counterclaims" filed by Plaintiffs certain other Rigerman/Jensen Parties on January 31, 2025—eight months after the initial Pine Complaint—further support a finding of waiver because all four new claims are subject to the Arbitration Clause. (JPa253-59.) Specifically, the claims are subject to the Arbitration Agreement because they are all based on alleged mismanagement of the Pine Street Property by Jacobowitz and his entity Ifany LLC in their alleged capacity as the property manager; the claims thus "relate to" both Pine Whiton (as the Pine Street Property's tenant) and the Pine Whiton Operating Agreement (Section 5.11 of which expressly relates to "Property Management" and appointment of a property manager (JPa412)).

In sum, as in Marmo, the pleadings factor "strongly weighs" in favor of waiver. *Id.* at 613.

2. Bad Faith

Whether considered with the "pleadings" or "litigation strategy" factor or (as we suggest) as a standalone factor, any fair assessment of the "totality of the circumstances" here must account for the Rigerman/Jensen Parties' evident bad

faith, and it should weigh heavily in favor of waiver. *See Largoza*, 474 N.J. at 84 (listed *Cole* factors are "non-exclusive"). As discussed above, Plaintiffs' reliance on transparently false and frivolous arguments in support of their continued refusal to acknowledge that ***any*** of their claims are arbitrable—while seeking to selectively enforce the Arbitration Clause against the Jacobowitz Parties—is rank gamesmanship that this Court should not countenance.

3. Motion Practice

The next *Cole* factor—"the filing of any motions, particularly dispositive motions, and their outcomes," *Cole*, 215 N.J. at 280-81—also weighs in favor of waiver. A flurry of motion practice occurred in the Pine Action before the Rigerman/Jensen Parties moved to compel arbitration. As discussed above, the Rigerman/Jensen Parties filed a motion to dismiss (***not*** based on the Arbitration Clause); the Jacobowitz Parties moved to consolidate the four Rigerman/Jensen Lawsuits; and the Jacobowitz Parties filed an order to show cause seeking a preliminary injunction based on the Rigerman/Jensen Parties' improper, unauthorized withdrawal of $150,000 from Pine Whiton's bank account in violation of the Operating Agreement and the New Jersey LLC Act. Moreover, all three motions were resolved in the Jacobowitz Parties' favor: the motion to dismiss was denied outright; the motion to consolidate was largely granted except as to the Pine Action (and then only because the Rigerman/Jensen Parties

had belatedly raised the prospect of moving to compel arbitration); and the preliminary injunction was granted.

This motion practice—which preceded the motion to compel arbitration—is sufficient for this *Cole* factor to weigh in favor of waiver. *See, e.g.*, *Lakeland W. Cap. VIII* v. *Reitnour Inv. Props.*, 2016 WL 1396165, at *4 (N.J. Super. Ct. App. Div. Apr. 11, 2016) (finding this factor weighed in favor of waiver—and ultimately finding waiver—where "[d]efendants engaged in motion practice, albeit on non-dispositive motions, before demanding arbitration") (JPa635).

4. Litigation Strategy

The "litigation strategy" factor also weighs in favor of a finding of waiver. The Rigerman/Jensen Parties' clear litigation strategy for the past year has been to overwhelm Jacobowitz with lawsuit after lawsuit, one after the other, inundating him with litigation costs and avoiding any attempts to consolidate the proceedings for judicially efficient and cost-effective resolution of the parties' interconnected disputes. As discussed above, in Hudson County alone, the Rigerman/Jensen Parties filed four separate lawsuits—none identifying any of the others—and then vigorously opposed consolidation despite the identity of the parties, the many common questions of law and fact, and the risks of inconsistent results. In Middlesex County, the Rigerman/Jensen Parties have filed (at least) two lawsuits against Jacobowitz—and on the eve of one being

dismissed (and the Rigerman/Jensen Parties' role being revealed), another lawsuit was filed. Viewed in this context, the Rigerman/Jensen Parties' attempt to selectively enforce the Arbitration Clause only against Jacobowitz—while frivolously denying that any of their own claims are arbitrable—is entirely of a piece with their larger strategy of increasing Jacobowitz's litigation costs, forcing him to litigate in as many forums as possible, and giving themselves multiple bites at the apple.

5. Prejudice

Jacobowitz has also been prejudiced by the Rigerman/Jensen Parties' reversal regarding arbitration—or would be, if arbitration were now compelled—in at least two ways. ***First***, as explained in *Cole*, "[i]f we define prejudice as 'the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—[then prejudice] occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.'" *Ringel* v. *BR Lakewood, LLC*, 2020 WL 3263221, at *4 (N.J. Super. Ct. App. Div. June 17, 2020) (quoting *Cole*, 215 N.J. at 282 (internal citation omitted)) (JPa645). While the Rigerman/Jensen Parties seek only to selectively compel arbitration of three of the Jacobowitz Parties' Counterclaims, as discussed further below, that position is untenable; if there has been no waiver, then substantially more claims are subject to mandatory arbitration under the Arbitration Clause—***including all four claims asserted by the***

Rigerman/Jensen Parties in the Pine Action. Thus at minimum, the Jacobowitz Parties would be prejudiced by being forced to start from square one in arbitration defending claims that the Rigerman/Jensen Parties improperly sought to litigate.

Second, as courts recognize, a primary "benefit of arbitration" is "the confidentiality of proceedings." *Khan* v. *Dell Inc.*, 2014 WL 718314, at *4 (D.N.J. Feb. 1, 2014) (citing *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1749 (2011)) (JPa629). The Jacobowitz Parties were deprived of that bargained-for benefit of arbitration when the Rigerman/Jensen Parties publicly filed in court claims properly subject to mandatory arbitration—dragging Jacobowitz's name through the mud with false allegations regarding his character and business acumen—and that harm cannot be undone now by compelling arbitration. To the contrary, sending the parties to arbitration for private resolution of disputes the Rigerman/Jensen Parties chose—improperly—to air publicly would deprive Jacobowitz of the ability to set the record straight in public.

6. Delay and Proximity to Trial

The "delay" and "proximity to trial" factors weigh slightly in favor of waiver. With respect to proximity to trial, a trial date was set before the Rigerman/Jensen Parties filed their motion to compel arbitration (JPa326), and it has been pushed back once already (from September 8, 2024 to October 20, 2025), in part due to delays and uncertainty caused by the arbitration question.

Regarding delay, the Rigerman/Jensen Parties waited nearly "six months between filing [their] complaint and moving to compel arbitration"—the same delay as in *Marmo*, where waiver was found. *Marmo*, 478 N.J. Super. at 610-11. While this delay is "not inordinate," neither can the Rigerman/Jensen Parties' motion to compel be characterized as prompt given their representation by experienced, sophisticated counsel "who w[ere] [well-]equipped to recognize their right to arbitration and act upon it swiftly," yet did not; the original sin here was filing plainly arbitrable claims in court—"demonstrat[ing] an intent to litigate, not arbitrate"—and thus "[d]elay is calculated as the time between the filing of the complaint and the first assertion of a right to arbitrate." *Marmo*, 478 N.J. Super. at 611. Moreover, the Rigerman/Jensen Parties still refuse to recognize that many of their own claims are arbitrable, and indeed they just filed four more arbitrable claims on January 31, 2025. Given their frivolous refusal to admit that their claims are subject to the Arbitration Clause, the "delay" is effectively ongoing, and this factor should weigh in favor of waiver.

7. Extent of Discovery

This factor does not weigh in favor of waiver, as discovery is still in its early stages.

* * * * *

In sum, considering the "totality of the circumstances" and each of the

above factors, the Rigerman/Jensen Parties clearly waived the right to arbitrate. For this reason, the motion to compel arbitration should have been denied.

II. THE TRIAL COURT ERRED IN DENYING THE JACOBOWITZ PARTIES' CROSS-MOTION—IN THE ALTERNATIVE TO A RULING OF WAIVER—FOR AN ORDER (A) COMPELLING ARBITRATION OF *ALL* CLAIMS SUBJECT TO ARBITRATION; (B) RULING THAT THE ARBITRABILITY OF THE PARTIES' CLAIMS MUST BE DECIDED BY THE ARBITRATOR, PURSUANT TO THE ARBITRATION CLAUSE'S CLEAR DELEGATION OF THAT AUTHORITY; AND (C) ISSUING A STAY PENDING ARBITRATION (JPa5-6)

A. The Arbitration Clause Applies to Every Claim Asserted by the Rigerman/Jensen Parties in the Pine Action—and to All or Nearly All Claims in the Linden and Caven Point Actions

As discussed above, all four claims in the original Pine Complaint—as well as all four claims in the Rigerman/Jensen Parties' "Third-Party Counterclaim"—are squarely within the scope of the Arbitration Clause. Moreover, given the incredible breadth of the Arbitration Clause, the shared ownership and key individuals involved across all three properties (Pine Street, Linden Street, and Caven Point Property), and the centrality of the 2023 Settlement Agreement that resolved disputes relating to all three properties (among others), the claims relating to those properties within the Pine Action—as well as the claims in the Linden Action and Caven Point Actions themselves—are likely subject to the Arbitration Clause as well. This Court need not determine which specific claims are or are not subject to arbitration

pursuant to the Arbitration Clause. As discussed in the next section, the Arbitration Clause clearly delegates authority to the JAMS arbitrator to determine arbitrability

B. The Parties Delegated Arbitrability to the Arbitrator by Incorporating the JAMS Rules into the Arbitration Clause

"[T]he law presumes that a court, not an arbitrator, decides any issue concerning arbitrability." *Morgan* v. *Sanford Brown Inst.*, 225 N.J. 289, 304 (2016). But that presumption can be overcome. In particular, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 586 U.S. 63, 68 (2019); *accord Goffe* v. *Foulke Mgmt. Corp.*, 238 N.J. 191, 211 (2019). And where, as here, an arbitration clause incorporates an arbitral association's rules, and those rules specifically empower the arbitrator to decide arbitrability, the parties have "clearly and unambiguously expressed [their] intent to empower the arbitrator to determine arbitrability." *Schmidt* v. *Laub*, 2020 WL 2130931, at *5 (N.J. Super. Ct. App. Div. May 5, 2020) (JPa650).

To be clear, the Appellate Division has not yet addressed this specific issue in a published opinion. But in three unpublished opinions—every case to consider the issue since *Henry Schein*—this Court has held that incorporation of an arbitral association's rules, where those rules empower the arbitrator to

determine arbitrability, "constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Tox Design Grp.* v. *RA Pain Servs.*, 2019 WL 7183687, at *4 (N.J. Super. Ct. App. Div. Dec. 26, 2019) (quoting *Chesapeake Appalachia* v. *Scout Petroleum*, 809 F.3d 746, 763 (3d Cir. 2016)) (JPa655); *accord Laub*, 2020 WL 2130931, at *5; *Guirguess* v. *Pub. Serv. Elec. & Gas Co.*, 2019 WL 6713411, at *4 (App. Div. Dec. 10, 2019) (JPa607).

These recent unpublished Appellate Division opinions are in accord with the ***overwhelming*** weight of authority from other jurisdictions. Indeed, every federal circuit court of appeal to have considered this issue—which is every circuit but the Seventh—has reached the same conclusion: If an arbitration clause incorporates arbitral rules that empower the arbitrator to decide arbitrability—as analogous JAMS and AAA rules do[10]—then arbitrability has been delegated to the arbitrator, and the court ***may not*** decide arbitrability.[11] Other states follow this rule as well, including at least New York.[12]

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[10] *See also, e.g.*, *Simply Wireless, Inc* v. *T-Mobile US, Inc.*, 877 F.3d 522, 527-28 (4th Cir. 2017) (noting that Rule 11(b) of the then-effective JAMS Comprehensive Arbitration Rules & Procedures—which is identical to JAMS Rule 8(b) in this case—is "substantively identical" to the analog AAA rule).

[11] *See Blanton* v. *Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020) (joining "every one of our sister circuits to address the question—eleven out of twelve by our count—[in finding] that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability'") (collecting cases).

[12] *See Revis* v. *Schwartz*, 192 A.D.3d 127, 139-42 (N.Y. App. Div. 2020).

Here, as discussed above, the Arbitration Clause expressly incorporates the JAMS Rules, and JAMS Rule 8(b), in turn, provides as follows:

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(JPa644.) As the Third Circuit observed regarding substantively identical language in the analog AAA rule, "[t]hat provision is about as 'clear and unmistakable' as language can get." *Richardson* v. *Coverall N. Am., Inc.*, 811 F. App'x 100, 103 (3d Cir. 2020) (quoting *Awuah* v. *Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009)) (JPa641.)

Since the Arbitration Clause has delegated arbitrability to the arbitrator, this courts may not decide the issue, and any disputes over arbitrability of particular claims should be referred to JAMS to be resolved by the arbitrator. For the same reasons, because JAMS Rule 8(b) also empowers the arbitrator to determine "who are proper Parties to the Arbitration," to the extent any individual parties in the Rigerman/Jensen Lawsuits contend that they are not subject to the Arbitration Clause, that issue, too, should be decided by the arbitrator.

C. The Parties Should Be Compelled to Arbitration for a Determination of Which of Their Claims Are Arbitrable, and the Rigerman/Jensen Lawsuits Should Be Stayed Pending That Determination

The Court should stay the Rigerman/Jensen Lawsuits pending the outcome of arbitration. Even to the extent not all claims are ultimately arbitrable, resolution of any arbitrable claims (e.g., regarding the 2023 Settlement Agreement) may nonetheless resolve any non-arbitrable ones. *See, e.g.*, *Tox Design Grp., LLC* v. *RA Pain Servs., PA*, 2019 WL 7183687, at *6 (N.J. Super. Ct. App. Div. Dec. 26, 2019); *Guirguess*, 2019 WL 6713411, at *4.

CONCLUSION

For the above reasons, the Court should (i) rule that the Rigerman/Jensen Parties have waived their right to arbitration and, on that basis, reverse the trial court's order compelling arbitration of three of the Jacobowitz Parties' counterclaims; and (ii) vacate as moot the trial court's order denying the Jacobowitz Parties' cross-motion. In the alternative, if there has been no waiver, then the order denying the Jacobowitz Parties' cross-motion should be reversed, the parties should be compelled to arbitration before JAMS, and the four Rigerman/Jensen Lawsuits should be stayed at least until the arbitrator has decided the arbitrability of the parties' claims.

Dated: March 21, 2025

Respectfully submitted,

By: */s/ Samuel Scott Cornish*

Samuel Scott Cornish, Esq.
Luke J. O'Brien, Esq.
CALCAGNI & KANEFSKY LLP
One Newark Center
1085 Raymond Boulevard, 18th Floor
Newark, New Jersey 07102
(862) 397-1796
sam@ck-litigation.com
lobrien@ck-litigation.com

Attorneys for the Jacobowitz Parties

TIGER REVITALIZATION FUND LLC and 408 WHITON PLAZA LLC Plaintiffs, v. 309 PINE PLAZA LLC and SHIMON JACOBOWITZ, Defendants.
309 PINE PLAZA LLC, 309 PINE PLAZA TENANT LLC, 309 PINE PLAZA MANAGER LLC, CAVEN ACRES LLC, and SHIMON JACOBOWITZ, individually and derivatively on behalf of 129 LINDEN HOLDINGS, LLC and PINE WHITON HOLDINGS LLC, Counterclaimants and Third-Party Plaintiffs, v. MOSHE C. "MARK" RIGERMAN, PAUL JENSEN (f/k/a YISROEL RIGERMAN), ELIMELECH RIGERMAN, TIGER REVITALIZATION FUND LLC, 408 WHITON PLAZA LLC, 408 WHITON PLAZA MANAGER LLC, STREKTE CORP., STREKTE NY LLC, STK EIGHT LLC, FOLXCO LLC, and CAVEN VIEWS LLC, Counterclaim- and Third-Party Defendants. -and- 129 LINDEN HOLDINGS LLC, LINDEN GARDENS JC LLC, CAVEN POINT PARTNERS LLC, KISPM LLC, and PINE WHITON HOLDINGS LLC, Nominal/Interested Parties.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Docket No.: A-001592-24T4

On Appeal from Orders of the Superior Court Chancery Division, General Equity Part, Hudson County dated December 20, 2024

Trial Docket No.: HUD-C-72-24

Sat Below:

Hon. Mary K. Costello, P.J.Ch.

BRIEF ON BEHALF OF RESPONDENTS AND PLAINTIFFS/COUNTERCLAIMANTS/THIRD-PARTY DEFENDANTS MOSHE "MARK" C. RIGERMAN, PAUL JENSEN (F/K/A YISROEL RIGERMAN), ELIMELECH RIGERMAN, TIGER REVITALIZATION FUND LLC, 408 WHITON PLAZA LLC, 408 WHITON PLAZA MANAGER LLC, STREKTE CORP., STREKTE NY LLC, STK EIGHT LLC, FOLXCO LLC, AND CAVEN VIEWS LLC PLAZA

Submitted April 30, 2025

BRACH EICHLER, LLC
Thomas Kamvosoulis, Esq.(020132004)
Tkamvosoulis@bracheichler.com
Andrew R. Macklin, Esq.(031582004)
Amacklin@bracheichler.com
101 Eisenhower Parkway
Roseland, New Jersey 07068-1067
(973)228-5700
Attorneys for Respondents and Plaintiffs/Counterclaimants/Third Party Defendants, Moshe "Mark" C. Rigerman, Paul Jensen f/k/a Yisroel Rigerman, Elimelech Rigerman, Tiger Revitalization Fund LLC, 408 Whiton Plaza LLC, 408 Whiton Plaza Manager LLC, Strekte Corp., Strekte NY LLC, STK Eight LLC, Folxco LLC, and Caven Views LLC

Of Counsel:
Thomas Kamvosoulis, Esq. (020132004)
Andrew R. Macklin, Esq. (031582004)

On the Brief:
Andrew R. Macklin, Esq. (031582004)
John A. Simeone, Esq. (303812019)

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PRELIMINARY STATEMENT

The Hon. Mary K. Costello, P.J. Ch. of the New Jersey Superior Court, Hudson County, Chancery Division (the "Trial Court") properly granted the motion to compel arbitration filed by Respondent-Plaintiffs Tiger Revitalization Fund LLC and 408 Whiton Plaza LLC ("Plaintiffs"). Only Counts VI, VII, and X from the omnibus 422-paragraph counterclaim filed by Appellant-Defendants 309 Pine Plaza LLC and Shimon Jacobowitz (collectively "Defendants") presented arbitrable disputes that were captured by Paragraph 13.10 of the Pine Whiton operating agreement (the "Operating Agreement" or "OA").

The Trial Court correctly held that the initial claims pled by Plaintiffs were outside the scope of the arbitration provision (which only applied to disputes arising out of or related to the Pine Action, described below) because those claims did not arise from the Operating Agreement, but rather from loans made by Plaintiffs to Defendants. The Trial Court also correctly held that Plaintiffs in no way waived their right to compel arbitration by filing the Complaint in the Pine Action, but rather any arbitrable claims were not raised until Defendants filed their 422-paragraph, 20-count Counterclaim and Third-Party Complaint, after which Plaintiffs immediately moved to compel arbitration as to the arbitrable claims.

Seeking to muddy the waters, Defendants employ a similar strategy as employed in the 422-paragraph counterclaim by cobbling together facts from wholly separate and distinct disputes concerning some common interested parties that are already pending at the trial level in other actions and are unrelated to the motion on appeal.

For example, Defendants reference a pending action involving associations of concerned bidders seeking to challenge a redevelopment in New Brunswick, New Jersey that has nothing to do with the Pine Action or this appeal, and is therefore a red-herring. Defendants also detail an Order to Show Cause filed in the Pine Action concerning a dispute over the advancement of legal fees that is also unrelated to the instant motion to compel at issue in this appeal.[1]

Putting those unrelated matters aside, the Trial Court peered through the 422-paragraph behemoth omnibus pleading and employed the proper analysis in determining which claims were arbitrable under Paragraph 13.10 of the Pine

[1] The circumstances of the aforementioned New Brunswick matter and Order to Show Cause, along with the purported facts concerning "The Parties," the Linden Street Project, the Caven Point Property, the Linden Action (Hud-C-84-24), the Caven Point Actions I-II, and allegations concerning the "George Street Project" as set forth in Defendants' statement of facts should be disregarded by this panel because they are unrelated to the Trial Court's ruling on the motion to compel arbitration at issue in this appeal.

Whiton Operating Agreement. This panel should engage in the same analysis, which will lead to the only appropriate conclusion: Plaintiffs did not waive their right to compel arbitration of arbitrable claims, and that Counts VI, VII, and X from the omnibus pleading are the only claims so arbitrable. Accordingly, this panel should affirm the December 20, 2024 Order entered by the Trial Court.

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

I. The Pine Action

Defendant Shimon Jacobowitz ("Jacobowitz") approached the members of Plaintiff 408 Whiton ("408 Whiton") to assist him in developing a commercial real estate project that would be located on a lot on Pine Street in Jersey City, New Jersey. (*JPa0010*) [3]. Jacobowitz required assistance with this project because he lacked sufficient funds to purchase this lot for himself and had no experience in developing or managing the development of a project of this magnitude. (*Id.*).

In or about 2019, Plaintiff Tiger Revitalization Fund LLC and Defendant 309 Pine Plaza entered into an operating agreement establishing Pine Whiton

[2] Plaintiffs' brief combines the counter-statement of facts and counter-statement of procedural history because those circumstances are interrelated with respect to the issues presently on appeal before this panel.

[3] The abbreviation "*JPa*" as used throughout this brief shall refer to the Amended March 21, 2025 appendix submitted by Defendants, which Plaintiffs shall rely upon throughout this brief.

Holdings, LLC ("Pine Whiton"). (*Ra00007-Ra000042*)[4]. The express purpose of Pine Whiton was to own and develop the Pine Street, Jersey City real estate jointly purchased by the parties, thereafter referred to as the Pine Project, which became a 56-unit residential building located at 309-311 Pine Street and 408-410 Whiton Street in Jersey City, New Jersey. (*JPa0010*).

But Jacobowitz was unable to produce his approximate $1,000,000 share of the purchase price for the Pine Whiton joint venture. (*JPa0011*). So, he pleaded for Plaintiffs to allow Jacobowitz to encumber the Pine Project with a high-interest hard money loan. (*Id.*). Plaintiffs agreed, and moved forward with the Pine Whiton joint venture to develop the Pine Project. (*Id.*). At the outset of this development, Plaintiffs jointly owned 50% of the outstanding membership interest in Pine Whiton, with the other 50% interest owned by Defendant 309 Pine Plaza ("309 Pine Plaza"). (*Ra000041*).

Noteworthy here, Defendant Shimon Jacobowitz ("Jacobowitz") owned and/or controlled 309 Pine Plaza. (*JPa0009*). Central to this appeal is Defendants' illusory application of the dispute resolution clause set forth in

[4] The abbreviation "*Ra*" as used throughout this brief shall refer to the April 30, 2025 appendix of Respondent-Plaintiffs. Plaintiffs enclose their own appendix to include Plaintiffs' November 27, 2024 Certification of counsel with exhibits, and Plaintiffs' December 12, 2016 brief in reply to Defendants' opposition, which are omitted from Defendants' eight (8) volume appendix, to ensure the complete trial record is provided to this panel.

Paragraph 13.10 of the Pine Whiton operating agreement (the "Operating Agreement" or "OA"), which provides:

> 13.10 Dispute Resolution. Any disputes arising out of or relating to this Agreement or the Company, including, without limitation, any disputes regarding the occurrence or existence of a For Cause event, shall be submitted to binding arbitration before a qualified arbitrator (a "**Qualified Arbitrator**") under the Judicial Arbitration and Mediation Services, Inc. ("**JAMS**") Streamlined Arbitration Rules and Procedures (the "**Rules**"). The place of arbitration shall be _____, New jersey.

(*Ra000037*) (emphasis). The OA defined a "For Cause" event as including a claim that a Member "has engaged in fraud . . . or any other conduct that could materially injure the financial condition, business or reputation of the Company." (*Ra000025*).

As the Pine Project progressed, it became clear that Jacobowitz needed Plaintiffs to bankroll both his personal and business-related expenses over the course of the Pine Project joint venture. (*JPa0011-0012*). Jacobowitz ultimately borrowed money from Plaintiffs on dozens of occasions. (*Id.*). Still in need of additional financing, Jacobowitz attempted to extort more money from Plaintiffs by threatening to default on the construction loans Pine Whiton accrued over the Pine Project. (*JPa0012-0013*).

Prior to issuing any further loans, Plaintiffs required Jacobowitz to sign a promissory note (the "Note") securing those loans with an additional 18% of

Defendants' membership interest in Pine Whiton by way of an Assignment and Assumption of Membership Interest (the "Assignment") and for Jacobowitz to personally guarantee repayment of the loan (the "Guaranty") (the Note, Assignment, and Guaranty are collectively referred to as the "Loan Documents"). (*JPa0012*). Defendants signed the Loan Documents in April 2019 resulting in Plaintiffs issuing another loan which, together with other amounts previously borrowed, totaled $120,000. (*Id.*).

Defendants ultimately defaulted on the Note and failed to timely cure. (*Id.*). As a result, the additional 18% membership in Pine Whiton automatically transferred to Plaintiffs under the Note and Assignment. (*Id.*). But, Defendants refused to acknowledge their default and the resulting transfer or ownership. (*Id.*).

Notably, 309 Pine Plaza, LLC and 408 Whiton Plaza, LLC are the only entities who executed the Note and Guaranty. (JPa461-470). On the other hand, Plaintiff Tiger Revitalization Fund, LLC and Defendants 309 Pine Plaza, LLC signed the OA – Plaintiff 408 Whiton Plaza, LLC is not a signatory in the Pine Whiton Holdings, LLC venture and does not own any membership units in that entity. *(Ra00006-000042).* Taking a step back from the procedural morass Defendants attempt to create, it is clear that the allegations asserted by Plaintiff (described below) arise out of Defendants' default on the Loan Documents and

do not arise from the OA, because the OA and Loan Documents involve separate commonly interested parties. (*JPa461-470*); (*Ra00006-000042*).

Plaintiffs filed this action on or about May 31, 2024 (the "Pine Action") seeking the following discrete and limited relief: (1) a declaratory judgment confirming Plaintiffs' 68% majority ownership in Pine Whiton; (2) judicial reformation of the Loan Documents between the parties to correct obvious scrivener's errors in the Loan Documents to the extent necessary; (3) a declaratory judgment the Plaintiffs have the contractual authority to dissolve and wind up the affairs of Pine Whiton at their option; and (4) the appointment of a receiver to manage the operations of Pine Whiton during the pendency of the trial court proceedings. (*JPa0020*).

Plaintiffs initiated this action in the Superior Court of New Jersey, as opposed to attempting to assert those claims in arbitration, because the discrete relief requested in Plaintiffs' May 31, 2024 complaint (the "Complaint") clearly falls outside the scope of the dispute resolution provision in the OA, and rather arises from the Loan Documents which contain no arbitration clause. (*JPa007-0020; Ra000037*).

II. Defendants' Omnibus Answer with Counterclaims

On or about October 3, 2024, Defendants 309 Pine and Jacobowitz – in conjunction with many other related parties – filed an Answer with

Counterclaims and Third-Party Complaint against Plaintiffs, their owners, and many other asserting twenty causes of action over 422 paragraphs (the "Omnibus Pleading"). (*JPa0122*). The Omnibus Pleading sets forth all manner of alleged torts and breaches concerning not only the Pine Project, but also other projects in which there are some overlapping and common interested parties. (*JPa0122-207*).

For example, the Omnibus Pleading asserts multiple causes of action arising out of real estate development projects located at 129 Linden Avenue, Jersey City, New Jersey (the "Linden Project") and 34 Caven Point Avenue, Jersey City, New Jersey (the "Caven Project") that involve the common interested parties, which are wholly unrelated to the circumstances underlying the Pine Action. *(Id.).*

Only three (3) of the twenty (20) counterclaims asserted in the Omnibus Pleading actually concern the Pine Project. By Count VI, Defendants asked for declaratory relief under the Declaratory Judgments Act, N.J.S.A. 2A:16-52, declaring that Jacobowitz's entity owns 50% of Pine Whiton based at least in part on an alleged 2023 settlement agreement that Defendants contend settled all claims raised against them (but none of the affirmative claims asserted in their Omnibus Pleading). (*JPa0185-0186*). Noteworthy, and as acknowledged by the Omnibus Pleading, the alleged 2023 settlement agreement is not

contained in a formal document, but is rather supposedly gleaned from a smattering of oral communications, writings, and the Loan Documents. (*JPa0156-0157*).

Through Count VII, Jacobowitz demanded an accounting pursuant to the Revised Uniform Limited Liability Company Act (including N.J.S.A. 42:2C-40(a)(2)(a)) from Plaintiff, its members and other alleged affiliates. (*JPa0187*). And in Count X, Jacobowitz pled alternative relief for legal fraud allegedly committed by Plaintiffs' principals and others based on their inducing him into joining them in the Pine Project and also their conduct of the Pine Project. *(JPa01819-0191).*

The remaining claims in the Omnibus Pleading assert causes of action arising out of the alleged 2023 settlement agreement, the Linden Project, the Caven Projects, or separate commonly owned entities that are separate from the circumstances underlying the Pine Project.

III. Plaintiffs' Motion to Compel Arbitration

On November 27, 2024, Plaintiffs filed a motion to compel arbitration of Counts VI, VII, and X asserted by the Omnibus Pleading, pursuant to Paragraph 13.10 of the OA. (*Pa0439-0441*). Defendants filed their opposition to Plaintiffs' motion to compel arbitration on December 12, 2024 and their cross-motion on

December 13, 2024. (*JPa0448; JPa0455-0457*). And Plaintiffs filed their brief in reply to Defendants' opposition on December 16, 2024. (*JPa0518*).

On December 20, 2024, the Trial Court granted Plaintiffs' motion to compel arbitration as to Counts VI, VII, and X of the Omnibus Pleading. (*JPa0001-0006*). The Trial Court held that compelling arbitration of those counterclaims "aligned with both the [Federal Arbitration Act] and New Jersey's public policy favoring arbitration." (*Id.*). The Trial Court also held that Plaintiffs "asserted non-arbitrable claims in" their initial pleading, with the only arbitrable claims under the OA being raised by Defendants in their Omnibus Pleading. (*JPa0003*).

Defendants' argument that Plaintiffs waived their right to compel arbitration was also rejected by the Trial Court. (*Id.*). A straightforward application of the "Cole factors" outlined in Cole v. Jersey City Medical Center, 215 N.J. 265 (2013) (discussed in further detail below) led to the conclusion that there was "no significant delay in seeking arbitration and the motion practice" prior to the instant motion to compel arbitration "has been a necessary part of the litigation, not an attempt to avoid arbitration." (*Id.*).

The Trial Court rejected Defendants' argument that the OA delegated arbitrability to the arbitrator. (*Id.*). In so holding, the Trial Court explained that the OA's general reference to the JAMS rules did "not explicitly delegate the

question of arbitrability to arbiter[,]" therefore empowering the Trial Court to decide that issue. (*Id.*). Accordingly, Counts VI, VII, and X of the Omnibus Pleading were referred to arbitration, with the remaining seventeen (17) counts of the Omnibus Pleading to "proceed in due course" because staying those claims "would only serve to unduly delay resolution thereof." (*JPa0001-0003*).

Defendants filed their notice of appeal on January 31, 2024. (*JPa0261*). Shortly thereafter, Defendants filed their amended notice of appeal and amended civil case information statement on February 5, 2025. (*JPa0278-0295*). Defendants then filed a subsequent civil case information statement on February 14, 2025. (*JPa0310*).

LEGAL ARGUMENT

I. Standard of Review

The Appellate Division "review[s] a trial court's order granting or denying a motion to compel arbitration *de novo* because the validity of an arbitration agreement presents a question of law." Ogunyemi v. Garden State Medical Center, 478 N.J. Super. 310, 315 (App. Div. 2024). The disposition of a party's waiver claim is also reviewed *de novo*. Marmo and Sons General Contracting, LLC v. Biagi Farms, LLC, 478 N.J. Super. 593, 607 (App. Div. 2024).

This Court views the arbitration provision "with fresh eyes" without deference to the trial court's interpretation of such language. Ogunyemi, 478 N.J. Super. at 315. That said, in reviewing such orders, the Appellate Division is "mindful of the strong preference to enforce arbitration agreements, both at the state and federal level." Lahoud v. Anthony & Sylvan Corp., 481 N.J. Super. 29, 40 (App. Div. 2025).

II. The Trial Court Appropriately Granted Plaintiffs' Motion To Compel Arbitration Because The Operating Agreement Requires That Counts VI, VII, And X Of The Omnibus Pleading Be Arbitrated, And Plaintiffs Did Not Waive Their Right to Compel Arbitration Of Those Counterclaims

A. Waiver Cannot Attach Here Because Only Counts VI, VII, and X Of The Omnibus Pleading Are Arbitrable

Defendants speciously imply that Plaintiffs voluntarily selected a "different forum" to adjudicate the claims raised in the Pine Action. (*See Def. Br. at p. 6*)[5]. In reality, the plain language of Paragraph 13.10 of the OA clearly contemplates arbitrating counterclaims VI, VII, and X of the Omnibus Pleading and does not capture the causes of action pled by Plaintiffs, which arise out of and relate to the Loan Documents.

It is well settled that arbitration agreements are placed "upon the same footing as other contracts." Angrisani v. Financial Technology Ventures, L.P.,

[5] The abbreviation "*Def. Br.*" as used throughout this brief shall refer to Defendants' March 17, 2025 brief that is presently before this panel.

402 N.J. Super. 138 (App. Div. 2008). And, "a basic tenet of contract interpretation is that contract terms should be given their plain and ordinary meaning." Kernahan v. Home Warranty Administrator of Florida, Inc., 236 N.J. 301, 321 (2019).

Defendants rely upon authority seeking to expand the phrases "arising out of" and "relating to" as used Paragraph 13.10 of the OA to require that the claims asserted by Plaintiffs be arbitrated. (*S*ee *Def. Br. at p. 28*). But Defendants' proffered interpretation of those phrases is erroneous when viewed in the scope of the OA. Paragraph 13.10 of the OA clearly only applies to "[a]ny disputes arising out of or relating to this Agreement or the Company [(Pine Whiton)], including, without limitation, any disputes regarding the occurrence or existence of a For Cause event[.]" (*Ra000037*). And the claims asserted by Plaintiffs fall well outside the scope of the arbitrable disputes set forth in the OA.

Indeed, Courts will retain jurisdiction over claims not captured by an arbitration agreement. e,g. Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 273 (App. Div. 2000) (retaining jurisdiction over age discrimination claims because the arbitration provision applicable to the plaintiff-manager did not contemplate arbitration for discrimination claims); Griffin v. Burlington Volkswagen, Inc., 411 N.J. Super. 515, 519 (App. Div. 2010) (quoting Mannix v. Hosier, 249 A.D.2d 966 (4th Dept. App. Div. 1998) (holding the malicious

prosecution action raised by plaintiff were "only collaterally related to the financial relationship between the parties"); Trucking Employees of North Jersey Welfare Fund, Inc. v. Brockway Fast Motor Freight Co., 130 F.R.D. 314, 320 (D.N.J. 1989) (holding "if an arbitration provision does not mention the subject matter of the dispute involved, courts are unwilling to broadly construe the cope of such a provision to include matters not so addressed").

Here, the four causes of action included in the Pine Complaint are outside the scope of Paragraph 13.10 of the OA, and were therefore properly filed in the Superior Court of New Jersey. Those affirmative claims arise from a Note and Guaranty separate from the OA.

Specifically, Plaintiffs requested a declaratory judgment that they owned 68% of the outstanding interests of Pine Whiton, pursuant to the terms of the Note and Guaranty. (*JPa0015-0016*). And Plaintiffs also requested a declaratory judgment that Plaintiffs would be permitted to dissolve Pine Whiton upon confirmation of its 68% ownership in that entity. (*JPa0016-0017*). Neither of those remedies "arise out of" or "relate to" the OA or Pine Whiton. Instead, such relief is meant to remedy Defendants' breach of the Note that was secured with 18% of Jacobowitz's interest in Pine Whiton, which did not arise from any party's obligations under the OA.

Plaintiffs' request for judicial reformation of the Loan Documents is also separate from the OA and Pine Whiton, as is the request to appoint a receiver during the pendency of the trial court proceedings. (*JPa0017-0018*).

Indeed, the Loan Documents are wholly separate from the OA and Pine Whiton. This is confirmed by Plaintiff 408 Whiton Plaza's absence from the OA (only Plaintiff Tiger Revitalization Fund, LLC is involved in the Pine Whiton venture). (*JPa461-0470*); (*Ra00006-000042*). The OA and Loan Documents concern different transactions that merely involve separate commonly interested parties. (*Id.*). The affirmative claims pled by Plaintiffs therefore did not "arise out of" or "relate to" the OA or Pine Whiton. Quigley, 330 N.J. Super. at 273. Those claims are separable because they are at most collateral to the OA. Griffin, 411 N.J. Super. at 519 (citing Mannix, 249 A.D.2d 966).

Accordingly, the causes of action in the Complaint were properly pled in the Superior Court of New Jersey, and there is no implied waiver of arbitration by including those claims in the Pine Complaint. The only claims subject to mandatory arbitration are Counts VI, VII, and X of the Omnibus Pleading.

B. A Straight Forward Application Of The Cole Factors Demonstrates That Plaintiffs Did Not Waive Their Right to Compel Arbitration

Waiver is the "voluntary relinquishment of a known right." Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013) (quoting Knorr v. Smeal, 178 N.J. 169,

177 (2003)). A waiving party must "have full knowledge of [its] legal rights and intent to surrender those rights." Id. Where waiver is implied by a party's conduct, such a waiver must be done "clearly, unequivocally, and decisively," Id. at 277. An arbitration agreement "can only be overcome by clear and convincing evidence that the party asserting it chose to seek relief in a different forum." Id. (quoting Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008). In fact, "the mere institution of legal proceedings . . . without ostensible prejudice to the other party" does not constitute a waiver. Spaeth, 403 N.J. Super. at 514 (quoting Hudik-Ross, Inc. v. 1530 Palisade Ave. Corp., 131 N.J. Super. 159, 167 (App. Div. 1974)).

New Jersey Courts are directed to review the totality of the circumstances surrounding the litigation conduct of the person against whom waiver is asserted to determine if their conduct is consistent with their reserved right to arbitrate the dispute. Cole, 215 N.J. at 280. Here, and consistent with this Court's consideration of avoiding undue delay of arbitration proceedings, Plaintiffs only seek to compel arbitration as to certain claims raised by Defendants in their Omnibus Pleading. Plaintiffs timely and expeditiously communicated their intent to compel the arbitration of those claims, as evidenced by Plaintiffs' communication of intent to file a motion to compel arbitration on the record

during the hearing conducted to adjudicate Defendants' motion to consolidate the Linden, Caven, and Pine Actions. (*Ra000170-000171*).

That said, an examination of the Cole factors demonstrates that Plaintiffs' good faith conduct throughout this action precludes any finding of waiver. The Cole factors, which Courts utilize to assess the totality of the circumstances of a party's litigation conduct to determine if it preserved its right to arbitrate the dispute, are as follows:

> (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was party of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of the trial; and (7) the resulting prejudice suffered by the other party, if any.

215 N.J. at 233. We present these factors in turn.

1. **The Delay Factor Weighs in Favor of Plaintiffs**

Employing a similar strategy to that of the trial court proceedings, Defendants moved their analysis of this element to the end of this argument and combined it with the "proximity to trial" factor, inexplicably concluding that this factor "weighs slightly in favor of waiver." (*See Def. Br. at p. 41*). To the contrary, this factor weights strongly against a finding of waiver.

Defendants speciously assert that Plaintiffs "waited nearly 'six months between filing their complaint and moving to compel arbitration[,]'" as done in the Marmo matter. Marmo and Sons General Contracting LLC v. Biagi Farms LLC, 478 N.J. Super. 593, 610-611 (App. Div. 2024). In truth, Plaintiffs filed non-arbitrable claims in the Pine Complaint, and then filed their motion to compel arbitration in the trial court as their first substantive response to the Omnibus Pleading, which contained arbitrable claims, all within five weeks and as directed by the Trial Court. *(JPa0439).*

Recognizing that a six-month delay was "not inordinate" and did "not weigh heavily in favor of waiver[,]" Defendants fall back on their meritless argument that the claims set forth in the Pine Complaint somehow are arbitrable (which they reiterate in their imagined "Bad Faith" factor that they added to the Cole analysis). *(See Def. Br. at p. 37).* Those claims however, are not arbitrable for the reasons set forth in Section II(A) of this brief.

And, the third-party plaintiffs and third-party counterclaimants (*see JPa0213-0214*) are the parties who filed the third-party complaint in response to the Omnibus Pleading. Those third-party plaintiffs were not previously parties to this matter until they were implead by way of Defendants' 20-count behemoth Omnibus Pleading. Once they were so added to this action, they timely moved to compel arbitration of all claims so arbitrable.

This factor weighs strongly against waiver.

2. **Motions, Particularly, Dispositive Motions, and Their Outcomes**

Defendants mischaracterize the nature of the trial court motion practice, as ***there have been no dispositive motions filed***. Defendants' representation that Plaintiffs filed a motion to dismiss is incorrect. *(See Def. Br. at p. 37*).

Instead, there have only been procedural motions before the Trial Court. One such set of procedural motions concerned Defendants motion to consolidate the Caven and Linen actions with the Pine Action.[6] Plaintiffs in turn moved to sever the Linden and Caven issues from the Pine Action. And Plaintiffs also rely upon their own order to show cause seeking to enjoin certain third-party defendants from advancing their counsel fees in defense of the claims raised under the OA.

Defendants rely upon the unpublished case of Lakeland W. Capital VIII, LLC v. Reitnour Inv. Properties, L.P., 2016 WL 1396165 (N.J. Super. Ct. App. Div. Apr. 11, 2016), which is misplaced on all counts. None of the motions filed

[6] Defendants also misrepresented the nature of the outcome of these procedural motions in their brief. The motion to consolidate was not "largely granted" as framed by Defendants. The Trial Court merely consolidated the Linden, Caven, and Pine Actions "for discovery purposes only, including any discovery motions, case management conferences, discovery orders [and] dispositive motions." *(JPa0374-0375)*. Plaintiffs still maintain all rights to conduct separate trials with respect to those actions, as they concern separate and distinct circumstances, and happen to involve common interest parties.

by Defendants constitute Plaintiffs' litigation conduct that may be held against them here, as nothing in the Lakeland matter suggests that Plaintiffs' motion conduct supports a finding of waiver. Rather, our Supreme Court in Cole made clear that the "waiving" party's ***own*** litigation conduct is the very thing that is being weighed in the consideration of these Cole factors. See Cole, 215 N.J. at 280.

Plaintiffs' conduct in seeking to keep these matters separate is certainly not inconsistent with its right to seek arbitration. As was raised in those earlier motions, Plaintiffs asserted before the Court that there were rights and issues arising from each separate development project that was unique to that project. Among those issues was the arbitration provision in the OA which was going to compel arbitration of certain counterclaims raised in the Omnibus Pleading.

Plaintiffs raised that issue with the Trial Court and counsel and, when the Trial Court consolidated the Linden and Caven matters for discovery only, it carved out this Pine matter pending the outcome of the planned motion to compel arbitration. (*JPa0374-0375*). No stretch of imagination could convince the Trial Court that presenting the severance motion somehow evinced an intent by Plaintiffs to waive their right to seek arbitration of the arbitrable claims raised by Defendants – they explicitly indicated that they intended to make the motion,

and the Trial Court instructed them to do so by a certain date. (*Ra000170-000171*).

The Lakeland matter, in addition to being unpublished and therefore of little or no use to the Court, does not save Defendants' argument. There, the waiving party undertook fifteen months of discovery, and only sought to compel arbitration after the discovery period concluded in the form of a cross-motion to a summary judgment motion which it otherwise did not oppose. The waiving party had itself successfully moved to extend discovery, which is apparently from whence Defendants cherry-picked their argument that the case supports a finding of waiver based on procedural motions. Lakeland, 2016 WL 1396165, *4.

Those facts are clearly distinguishable from the circumstances presently before this panel, where Plaintiffs filed one procedural motion in which they expressly referenced their intention to seek to compel arbitration as to certain of the claims set forth in the Omnibus Pleading.

This factor weighs strongly against waiver.

3. **Litigation Strategy**

Defendants speciously claim that Plaintiffs are seeking to "selectively enforce" the arbitration clause in the OA against Defendants while denying their

affirmative claims are arbitrable. *(See Def. Br. at p. 39)*. It seems Defendants are committed to reiterating that failing argument throughout their submission.

Defendants seem to acknowledge that their arguments referencing third-party subpoenas issued in the Linden matter (as set forth in the trial court briefing) are meritless. They now shift gears to claiming that Plaintiffs are attempting to "overwhelm" Defendants with multiple lawsuits. *(Id. at p. 39)*. But that argument fails as well, because those separate lawsuits (including the pending disputes concerning the Linden and Caven Actions, as well as the George Street, New Brunswick dispute) concern distinct real estate ventures and disputes that involve some common interest parties. It is also simply of no moment to the question before this panel.[7]

[7] Furthermore, we should note that the Defendants' primary representative should not be heard to complain about complexity in matters in which the victims of his misdeeds seek redress from the appropriate fora. Put simply, the claims all arise from his dishonest and otherwise tortious conduct, which itself was complex and reached across a number of different projects involving different parties. As a result, there are numerous suits and claims each with its own facts and parties. The victims of Mr. Jacobowitz's conduct are entitled to be made whole. Indeed, those different legal actions relating to the Linden and Caven Actions, as well as the circumstances underlying the George Street, New Brunswick dispute, establish that Jacobowitz's deceitful and fraudulent conduct affects nearly everyone who is unfortunate enough to pursue business ventures with him.

Plaintiffs' filing of this motion was not "strategic" – they did so as soon as Defendants filed claims that are subject to the arbitration provision in the OA. Thus, the litigation strategy factor weighs against waiver.

4. **Extent of Discovery**

As acknowledged by Defendants, this factor weighs against waiver because, at the time Plaintiffs filed their motion to compel, there had been no discovery received in this action. Therefore, this factor militates strongly against waiver.

5. **Raising Arbitration Issue in the Pleadings, Particularly As an Affirmative Defense**

Defendants again cite favorably to Marmo in pointing out that the plaintiff in Marmo: 1) filed a Complaint containing claims subject to the arbitration provision in the construction contract at issue there, 2) did not include any mention of an anticipated arbitration in its R. 4:5-1 certification, and 3) answered a counterclaim without asserting arbitration as an affirmative defense. Defendants somehow assert that each of these items is analogous to the motion presently before the Court. (*See Def. Br. at p. 32-36*). They are wrong.

First, and as already noted, Plaintiffs' Complaint does not contain arbitrable claims, let alone claims that Plaintiffs now seek to arbitrate; instead, Plaintiffs seek by way of the Complaint remedies under a Note and Guaranty, neither of which contains a mandatory arbitration provision. The arbitrable

claims arise in Defendants' behemoth Omnibus Pleading. Therefore, Marmo does not help Defendants here. Defendants' reference to Plaintiffs counsel's biographical pages on their firm's website to somehow indicate that counsel should know better than to file a litigation and later seek arbitration is misplaced, bizarre and borderline unprofessional. (*See Def. Br. at p. 34*). To be sure, Cole does not stand for the proposition that counsel's experience is somehow a factor in the waiver analysis, a result that would lead to absurd discovery disputes over attorneys' *curriculum vitae*. The Marmo panel cited to representation of counsel in its delay analysis not in the context of considering counsel's experience, but simply to distinguish that case from the earlier matter of Spaeth, in which the purportedly waiving party was *pro se*. See Marmo, 478 N.J. Super. at 611 (citing Spaeth, 403 N.J. Super. at 516).

Second, Plaintiffs did not mention arbitration in their R. 4:5-1 certification because none of their claims are subject to arbitration; only certain of the claims raised by Defendants in the Omnibus Pleading are arbitrable. Defendants' reference to Plaintiffs' "active, aggressive litigation strategy" in filing the Linden and Caven matters is also misplaced. Those claims are simply not subject to arbitration, either. The Trial Court and counsel are obviously aware of all the pending actions, so Defendants' continued criticism of counsel's

conduct in connection with R. 4:5-1 certifications is simply of no use in this Court's analysis of the waiver issue.

Third, as addressed *supra*, Plaintiffs did not wait five months from the filing of their Complaint to seek arbitration of arbitrable claims, since the Complaint does not contain arbitrable claims. Rather, when Defendants raised arbitrable claims in the Omnibus Pleading, Plaintiffs notified the Trial Court and counsel within around two weeks of their intention to compel arbitration, and made the motion when and as requested by the Trial Court. (*Ra000171*). This cannot be deemed a waiver.

Fourth, Plaintiff and the third-party defendants referenced in (*JPa0214-0215*) filed the third-party counterclaim in the Pine Action in response to the Omnibus Pleading. Defendants' claim that Plaintiffs waited "eight months after the initial Pine Complaint" is yet another meritless position, because those third-party claims were not necessary until Defendants roped those third-parties into this dispute through the Omnibus Pleading. (*See Def. Br.at p. 36*). Plaintiffs and those third-party plaintiffs preserved all claims against Defendants by filing the third-party complaint, which contains non-arbitrable claims outside the scope of the OA's arbitration provision. (*JPa0253-0260*).

Accordingly, this factor weighs strongly against waiver.

6. **Prejudice**

Defendants say they have been prejudiced by the purported delay in seeking arbitration by: 1) being forced to first litigate then arbitrate the same issue(s), and 2) by the public filing of a Complaint subject to arbitration that might be confidential. (*See Def. Br. at p. 39-40*). Both such arguments are misplaced.

Defendants have not been obligated to litigate any of the substantive issues raised in Counts VI, VII, and X of the Omnibus Pleading they filed on October 23, 2024. In fact, so far they have only engaged in procedural motions regarding whether this and the Linden and Caven cases should be litigated together or separately. By way of comparison, in the unpublished case on which Defendants exclusively rely in asserting prejudice, the parties had litigated two related matters involving real estate entities owned by siblings for 27 months and 41 months, respectively. See Ringel v. BR Lakewood, LLC, 2020 WL 3263221 (N.J. Super. Ct. App. Div. June 17, 2020). The "waiving" party there had also filed a substantive partial summary judgment motion, the parties had exchanged thousands of pages of documents, written discovery had concluded in one of the two matters, and the parties had dedicated "extraordinary effort" in conducting discovery and preparing for trial. Id. at *4. This case is, therefore, not a useful analog for the present motion.

As to confidentiality, none of the claims in the Linden and Caven matters are subject to arbitration, and therefore those claims will all remain in Superior Court where they belong. For their part, Defendants have filed a 422-paragraph pleading in which they take innumerable *ad hominem* attacks at certain of the Plaintiffs and Third-Party Defendants, about which the parties will litigate in public. (*JPa0105-0207*). Defendants' assertion that Plaintiffs improperly filed claims in court that are subject to arbitration appears to miss the fact that Defendants are trying to convince the Court that these claims should continue to be litigated rather than arbitrated. (*See Def. Br. at p. 40*). To the extent Mr. Jacobowitz has a desire to "set the record straight" in public, this is one thing on which the parties can apparently agree. (*Id.*). All of the claims in the Pine Complaint, the Linden Complaint, and the two Caven Complaints will be litigated, along with seventeen of the twenty counts of the Omnibus Pleading, after which there will be a record available to the public reflecting the Court's conclusions. Plaintiffs eagerly await those conclusions.

There is not a single case Defendants can cite in which confidentiality was somehow a factor considered in the prejudice analysis under Cole. This factor weighs strongly against waiver.

7. **Proximity to Trial Date**

Defendants appear to have changed their tune by claiming that the "proximity to trial" factor "weigh[s] slightly in favor of waiver" after claiming to the Trial Court that this factor does not weigh in favor of waiver. (*See Def. Br. at p. 41*). Defendants then blame Plaintiffs for the brief approximate 6 week trial adjournment from September 8, 2025 to October 20, 2025, when the instant appeal likely caused such delay. (*Id.*).

That said, Plaintiffs initially filed their motion to compel arbitration in November 2024, shortly after Defendants first raised the arbitrable claims in the Omnibus Pleading. (*JPa0439*). And Defendants' repeated reliance upon Marmo is once again erroneous. As in Marmo, the case at bar is not "anywhere approaching the eve of trial." 478 N.J. Super. at 606 (trial court's recitation). Therefore, this factor "weighs . . . against waiver."

Accordingly, this factor weighs strongly against waiver. And the totality of the circumstances show that the Cole factors as a whole heavily militate against waiver.

III. The Trial Court Was Correct In Both Denying Defendants' Cross-Motion To Compel Arbitration of All Claims Across Four Different Lawsuits, Some of Which Have Been Consolidated for Discovery And Retaining Discretion Over Arbitrability Issues

A. Compelling Arbitration of Plaintiffs' Affirmative Claims Would Unfairly Require Parties Who Did Not Sign the OA To Submit to Arbitration

Plaintiffs incorporate the arguments set forth in Section II(A) above in support of the Trial Court's denial of Defendants' cross-motion to arbitrate all claims spanning four (4) different lawsuits. By way of further support, referring the Linden and Caven Actions to arbitration would cause common-interested parties ***who did not sign the arbitration clause*** to participate in arbitration. Indeed, this would be an absurd result.

It is well settled that only parties who have agreed to waive their right to litigate claims can be compelled to arbitrate claims. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 179 (2013). There are limited circumstances where an arbitration provision can be enforced against someone who did not sign the arbitration agreement, such as equitable estoppel. Id. However, our courts construe equitable estoppel narrowly when considering whether to compel a non-signatory to arbitrate or compel a signatory to arbitrate claims to which it did not agree to arbitrate. Id. at 179-180.

In Hirsch, the Court limited the "intertwinement theory" (an extension of equitable estoppel) "when its application is untethered to any written arbitration

clause between the parties[.]" Id. at 192-194. The facts in Hirsch are also instructive. The plaintiffs there had been advised by the defendant EisnerAmper to invest with its subsidiary, AFS, which used a certain broker dealer named SAI through its representative, Mr. Scudillo. Id. at 180-181. The plaintiffs made investments based on those recommendations, which included Medcap Notes that ultimately proved to be a Ponzi scheme, resulting in harm to the plaintiffs. Id. at 181.

The plaintiffs and SAI, through Scudillo, had signed applications for the Medcap Notes that contained a FINRA arbitration provision. Hirsch, 215 N.J. at 181-182. The plaintiffs ultimately sued Eisner Amper and AFS in Superior Court, and brought a separate FINRA arbitration proceeding against SAI and Scudillo. Id. at 183-184. AFS filed a third-party complaint against SAI, which in turn moved to compel arbitration as to all claims and parties. Id. at 184. The trial court granted that application, and the Appellate Division affirmed, based on the intertwinement of the various claims and parties. See generally, Hirsch, 215 N.J. at 180-185.

The Supreme Court reversed. While all the claims arose from the same Ponzi scheme, and all the parties had some manner of relationship to each other, that intertwinement of claims and parties was in itself sufficient to warrant the application of equitable estoppel in compelling all claims to be arbitrated. Id. at

195. The non-signatories to the arbitration clause had no reasonable expectation to arbitrate claims based on a clause they did not sign and which no evidence had been proffered indicated that they even knew about it. Id.

So too here. Defendants seek to compel arbitration as to claims brought against the following parties who did not sign the arbitration clause at issue, and therefore had no reasonable expectation to be bound thereby (nor, alternatively, to benefit from it): Elimelech Rigerman, Cavin Point Partners LLC, Caven Acres LLC, Isaac Schwartz, Mendy Lowy, Caven Views LLC, Strekte NY LLC, 129 Linden Holdings LLC, Linden Gardens JC LLC, Mark Rigerman, Paul Jensen, 408 Whiton Plaza LLC, 408 Whiton Plaza Manager LLC, Strekte Corp., STK Eight LLC and Folxco LLC.

There is no competent evidence to suggest that any of these parties expected to be subject to the arbitration clause in the OA. To the contrary, the Operating Agreements for the various other entities mentioned – as well as the Note and Guaranty on which Plaintiffs sue in this action – have no arbitration provision, meaning the parties thereto expected to litigate any claims arising therefrom.

It is, of course, entirely appropriate for certain claims arising between parties to one agreement to be arbitrated while other claims arising from a different agreement are litigated.

This was precisely the scenario in Hirsch, supra, where the claims against the broker-dealer arising from the Medcap Note applications were arbitrated and the claims against the accounting firm and its affiliate were litigated under the accounting services agreement between those parties. See Id., see also Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138 (App. Div. 2008) (the plaintiff's claims under the employment agreement with an alternative dispute resolution provision were sent to arbitration while claims arising from a related stock purchase agreement without such a provision were litigated). As the panel stated in Angrisani, notwithstanding the courts' desire to enforce arbitration clauses, a party "may be required to arbitrate only those claims [it] has specifically agreed to submit to arbitration." Id. at 156.

Here, Plaintiffs' affirmative claims are based not on the OA nor do they relate to Pine Whiton's operations. Rather, they arise from a separate Note and Guaranty Jacobowitz gave Plaintiffs. (*JPa0007-0020*). Had the parties to the Note and Guaranty wanted to arbitrate disputes arising thereunder, they could have chosen to include such a provision. They chose not to. That choice is dispositive.

B. The Trial Court Properly Retained Jurisdiction Over the Arbitrability Issue

Defendants are unable to overcome the presumption that a court decides issues concerning arbitrability, as they fail to proffer "'clear and unmistakable'

evidence 'that the parties agreed to arbitrate arbitrability.'" Morgan v. Sanford Brown Institute, 225 N.J. 289, 304 (2016) (internal citations omitted).

Section 13.10 of the OA only generally refers to the Judicial Arbitration and Mediation Services, Inc. ("JAMS") streamlined arbitration rules and procedures, without referencing any particular provision thereof. (*Ra000037)*. Our Supreme Court's ruling in Morgan is dispositive, which held in pertinent part:

> In First Options, the United States Supreme Court stated that to overcome the judicial-resolution presumption, there must be "clear and unmistakable" evidence "that the parties agreed to arbitrate arbitrability." Ibid. (alterations in original) (quoting AT&T Techs., Inc. v. Commuc'ns Workers, 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of wehter the parties agreed to arbitrate is to be decided by the court, not the arbitrator.")). Silence or ambiguity in an agreement does not overcome the presumption that a court decides arbitrability. Ibid.
>
> [. . .]
>
> The issue in First Options was whether a stock-trading firm had agreed with clients to arbitrate the issue of arbitrability. Id. at 940-941 . . . The Supreme Court determined that, based on the record, the firm could not "show that the clients clearly agreed to have the arbitrators decide (*i.e.*, to arbitrate) the question of arbitrability." Id. at 946 . . . Because the clients "did not clearly agree to submit the question of arbitrability to arbitration," the arbitrability of the "dispute was subject to independent review by the courts." Id. at 947.

Morgan, 225 N.J. at 304-305.

The Supreme Court ultimately refused to enforce the delegation clause therein since it was not "clear and unmistakable." Id. at 310-311. Unlike the clause presently before this panel, the one under consideration in Morgan included language indicating that "any objection to arbitrability" was among the issues to be decided "pursuant to this paragraph," which related to mandatory arbitration. Id. at 306. Therefore, the Morgan clause at least arguably contained delegation language, but was still found unenforceable by the Supreme Court.

By way of contrast, the Morgan Court pointed to U.S. Supreme Court precedent in which a delegation clause was enforced. Id. at 305. That enforceable clause read: [t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement." Id. (citing Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 71 (2010)).

Here, Section 13.10 of the OA only makes a vague reference to the JAMS Rules, and in no place does it state that the question of arbitrability or enforceability was to be decided exclusively by an arbitrator. (*Ra000037*). Instead, Defendants ask the Court to find that the parties thereto should have known to consult the JAMS Rules to learn that they were surrendering the presumption that such a question would be decided by the courts. The binding precedent of Morgan permits no such conclusion.

At best, the clause at issue is ambiguous on the question of delegation. At worst, it is completely silent. In either event, the delegation clause is neither clear nor unmistakable and therefore cannot defeat the presumption in favor of the Trial Court's adjudication of arbitrability.

Therefore, the trial court appropriately retained jurisdiction over all arbitrability-related issues.

C. The Actions Should Not be Stayed

In an effort to further frustrate Plaintiffs' rights by muddying an otherwise straight forward suit on the Note and Guaranty, Defendants once again state (without explaining the rationale, as done in the Trial Court proceedings) that any claim not referred to arbitration should be stayed because those claims "may nonetheless resolve any non-arbitrable ones." (*See Def. Br. at p. 46*).

There is nothing about Counts VI, VII, and X of the Omnibus Pleading that suggests their disposition will somehow resolve any of the other various claims relating to the Pine, Linden, and Caven Actions. Rather, since those claims are severable from the remaining claims of the Omnibus Pleading, only those claims should be stayed here. See N.J.S.A. 2A:23B-7(g).

CONCLUSION

In conclusion, this panel should affirm the December 20, 2024 Orders of the Trial Court.

BRACH EICHLER LLC
Attorneys for Respondents and Plaintiffs/Counterclaimants/Third Party Defendants, Moshe "Mark" C. Rigerman, Paul Jensen f/k/a Yisroel Rigerman, Elimelech Rigerman, Tiger Revitalization Fund LLC, 408 Whiton Plaza LLC, 408 Whiton Plaza Manager LLC, Strekte Corp., Strekte NY LLC, STK Eight LLC, Folxco LLC, and Caven Views LLC

Dated: April 30, 2025

/s/ Andrew Macklin
Andrew Macklin, Esq.

/s/ John Simeone
John Simeone, Esq.

TIGER REVITALIZATION FUND LLC and 408 WHITON PLAZA LLC Plaintiffs, v. 309 PINE PLAZA LLC and SHIMON JACOBOWITZ, Defendants.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No.: A-001592-24T4
309 PINE PLAZA LLC, 309 PINE PLAZA TENANT LLC, 309 PINE PLAZA MANAGER LLC, CAVEN ACRES LLC, and SHIMON JACOBOWITZ, individually and derivatively on behalf of 129 LINDEN HOLDINGS, LLC and PINE WHITON HOLDINGS LLC, Counterclaimants and Third-Party Plaintiffs, v. MOSHE C. "MARK" RIGERMAN, PAUL JENSEN (f/k/a YISROEL RIGERMAN), ELIMELECH RIGERMAN, TIGER REVITALIZATION FUND LLC, 408 WHITON PLAZA LLC, 408 WHITON PLAZA MANAGER LLC, STREKTE CORP., STREKTE NY LLC, STK EIGHT LLC, FOLXCO LLC, and CAVEN VIEWS LLC, Counterclaim- and Third-Party Defendants. -and- 129 LINDEN HOLDINGS LLC, LINDEN GARDENS JC LLC, CAVEN POINT PARTNERS LLC, KISPM LLC, and PINE WHITON HOLDINGS LLC, Nominal/Interested Parties.	On Appeal from Orders of the Superior Court Chancery Division, General Equity Part, Hudson County dated December 20, 2024 Trial Docket No.: HUD-C-72-24 Sat Below: Hon. Mary K. Costello, P.J.Ch.

REPLY BRIEF ON BEHALF OF APPELLANTS AND DEFENDANTS/COUNTERCLAIMANTS/THIRD-PARTY PLAINTIFFS SHIMON JACOBOWITZ, 309 PINE PLAZA LLC, 309 PINE PLAZA TENANT LLC, 309 PINE PLAZA MANAGER LLC, AND CAVEN ACRES LLC (THE "JACOBOWITZ PARTIES")

Submitted May 7, 2025

CALCAGNI & KANEFSKY LLP
One Newark Center
1085 Raymond Boulevard, 18th Floor
Newark, New Jersey 07102
T: (862) 233-8130
F: (862) 902-5458
E: sam@ck-litigation.com
E: lobrien@ck-litigation.com

Attorneys for Shimon Jacobowitz, 309 Pine Plaza LLC, 309 Pine Plaza Tenant LLC, 309 Pine Plaza Manager LLC, and Caven Acres LLC (the "Jacobowitz Parties")

Of counsel and on the brief:

Samuel Scott Cornish (Attorney ID: 014392003)
Luke J. O'Brien (Attorney ID: 419632023)

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PRELIMINARY STATEMENT

The Jacobowitz Parties submit this reply brief in further support of their appeal and in response to the Rigerman/Jensen Parties' opposition brief.

ARGUMENT[1]

I. THE RIGERMAN/JENSEN PARTIES WAIVED THEIR RIGHT TO ARBITRATE (JPa3, 6)

A. Every Claim Asserted by the Rigerman/Jensen Parties in the Pine Action Is Subject to the Arbitration Clause, and They Continue to Mischaracterize Their Own Claims to Avoid That Conclusion

The Arbitration Clause provides that "any disputes arising out of or relating to th[e Pine Whiton Operating] Agreement or [Pine Whiton]" are subject to mandatory arbitration before JAMS. (JPa429-30.) As explained in the Jacobowitz Parties' opening papers, every claim asserted in the Pine Action by the Rigerman/Jensen Parties—including their more recently filed third-party counterclaims—comes squarely within the scope of the Arbitration Clause. (Db14-15, 22, 27-31, 37.) The Rigerman/Jensen Parties' attempts to avoid this conclusion in their opposition are exceedingly unpersuasive, as discussed below.

1. The Rigerman/Jensen Parties—Again—Completely Ignore Their Breach of Fiduciary Duty Claim, Which Is Indisputably Arbitrable

In the opening brief, the Jacobowitz Parties showed that Count IV of the

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[1] Capitalized terms not defined herein have the definitions set forth in the Jacobowitz Parties' opening brief, and citations to "Db" and "RDb" refer to the opening brief and opposition brief, respectively.

Pine Complaint—alleging Jacobowitz and 309 Pine Plaza LLC breached their fiduciary duties "[a]s members and managers of Pine Whiton" (JPa19)—plainly "aris[es] out of" and "relates to" both Pine Whiton and the Operating Agreement and, as such, is arbitrable. (Db29.) The opening brief also explained that, more so than Counts I-III, Count IV cannot be contorted to fit the Rigerman/Jensen Parties' theories as to why none of their claims are arbitrable—because the fiduciary duty claim (i) has nothing to do with the Note and Guaranty and (ii) relates to Pine Whiton's "operations." (Db29-30.) And the Jacobowitz Parties pointed out that in written and oral submissions to both the trial court and this Court, the Rigerman/Jensen Parties—tellingly—repeatedly omitted the fiduciary duty claim from purported summaries of their own claims. (Db32-33.)

Incredibly, the Rigerman/Jensen Parties have not merely failed to respond to the above argument; ***their opposition brief completely ignores the fiduciary duty claim and again omits it from descriptions of their claims***. Most glaringly:

- page 7 of the opposition purports to describe the "discrete and limited relief" sought in the Pine Action, but while items (1)-(3) describe the relief associated with Counts I-III, item (4) describes interim relief they have not sought (appointment of a receiver) rather than the ultimate relief demanded for Count IV ("compensatory damages") (JPa19-20); and
- at pages 14-15 of the opposition, the Rigerman/Jensen Parties assert that "[h]ere, the four causes of action included in the Pine Complaint are outside the scope of [the Arbitration Clause]"—but the argument that follows discusses only Counts I-III, not Count IV.

Especially given the opening brief's arguments, the opposition's silence

regarding Count IV speaks volumes. No colorable argument can be made that the breach of fiduciary duty claim is not arbitrable—and the Rigerman/Jensen Parties know it. But rather than owning up to that fact, they have chosen to ignore the fiduciary duty claim again while repeating to the Court their general denial that any claim in the Pine Complaint is arbitrable.

2. The Rigerman/Jensen Parties Have No Response to the Arguments Showing That Counts I-III Are Likewise All Arbitrable

The Jacobowitz Parties' opening brief explained why Counts I-III of the Pine Complaint are also squarely arbitrable. (Db28-31.) In their opposition, the Rigerman/Jensen Parties do not address the Jacobowitz Parties' arguments, but instead simply state their claims are not arbitrable because they arise from the Note and Guaranty—not dispositive even if true—and rely on other conclusory and illogical assertions that their claims are somehow "wholly separate from" or "at most collateral to" the Operating Agreement and Pine Whiton. (Pb14-15.)

First, Count II does ***not*** arise from the Note/Guaranty, but rather expressly arises under Section 9.1 of the OA. (Db30.) This argument is dispositive, yet the Rigerman/Jensen Parties ignore it—because they have no response.

Second, the Rigerman/Jensen Parties assert that the Pine Complaint's "causes of action" and "claims" are "outside the scope of [the Arbitration Clause]," but their argument proceeds to focus almost exclusively on the "relief" sought in connection with the claims. (Pb14-15.) This argument fails, first, on

its own terms: The requested relief plainly ***does*** "arise out of" or "relate to" the OA or Pine Whiton. For example:

- The requested relief for Count I is declaratory judgment that Plaintiffs own 68% of Pine Whiton. (JPa15.) A judicial order regarding Pine Whiton's ownership structure obviously relates to Pine Whiton (*contra* Pb14), and the requested order relates to the OA insofar as it contradicts the ownership structure as set forth in the OA's Schedule A. (JPa0433.)

- Count II's requested relief is "a declaratory judgment that [Plaintiffs] have the authority to dissolve [Pine Whiton] pursuant to Section 9.1 of the [Operating] Agreement." (JPa17.) That this relief "arises out of" the OA and "relates to" both Pine Whiton and the OA could scarcely be clearer.

More importantly, this argument misreads the Arbitration Clause, which states simply that "***[a]ny disputes*** arising out of or relating to this Agreement or the Company" are arbitrable (JPa429)—not, as the argument suggests, that disputes are arbitrable only if the requested relief relates to Pine Whiton or the OA.

Third, the Rigerman/Jensen Parties imply (but do not squarely argue) that their claims are not arbitrable because they are not "For Cause" events (Pb13), relying on the phrase "including, without limitation, any disputes regarding the occurrence or existence of a For Cause event." (JPa38.) But given the clear, unqualified, and "extremely broad" (JPa446) language in the Arbitration Clause that precedes this phrase, this interpretation would make no sense even if the relevant phrase did ***not*** expressly state "***without limitation***"—which it does.

Fourth, the Rigerman/Jensen Parties argue that "the Loan Documents are wholly separate from the OA and Pine Whiton" and that this is supposedly

"confirmed by Plaintiff 408 Whiton Plaza's absence from the OA" and the fact that "only Plaintiff Tiger Revitalization Fund, LLC is involved in the Pine Whiton venture." (Pb15.) This argument fails for multiple reasons:

- The argument elides that 408 Whiton Plaza is Tiger's "sole member," as the Rigerman/Jensen Parties admit. (JPa9.)

- Relatedly, the argument is factually incorrect: 408 Whiton Plaza is not "absen[t] from the OA"; it is specifically identified in the Operating Agreement as an entity to which "[a]ll notices, requests or other communication with respect to [Pine Whiton]" are to be sent. (JPa396.)

- The analysis is more revealing in reverse: Tiger is absent from the Loan Documents. (JPa461-70.) So why then is Tiger a plaintiff—if the claims in the Pine Complaint are truly "arise out of" and "relate to" only the Loan Documents, not the "wholly separate" OA and Pine Whiton? (The answer is that the claims ***do*** relate to Pine Whiton and so Tiger—the member of Pine Whiton—was included as a plaintiff.)

- Loan Documents allegedly secured by equity in Pine Whiton cannot reasonably be deemed "wholly separate" from Pine Whiton.

- ***Most importantly***, the argument fails as a defense to arbitrability because even if we accept its premises—and even if certain claims in the Pine Complaint ***do*** "arise from" the Loan Documents—that would not alter the

conclusion that the claims ***also*** "arise out of" or "relate to" Pine Whiton or the OA and, thus, are arbitrable. The Jacobowitz Parties' opening brief made this exact point, explaining that (i) while the Loan Documents do not include an arbitration clause, neither do they preclude arbitration (i.e., they are not inconsistent with the Arbitration Clause); and thus (ii) disputes between parties to the Arbitration Clause (or their agents/owners)—even if they "arise out of" the Loan Documents—are arbitrable if they also "arise out of" or "relate to" Pine Whiton or the OA, as all the claims in the Pine Complaint do. (Db30-31.)

B. The Rigerman/Jensen Parties Have No Substantive Response to the Argument That Their Third-Party Counterclaims, Filed on January 31, 2025, Are Also Plainly Subject to Arbitration

In their opening papers, the Jacobowitz Parties explained why the four third-party counterclaims filed by the Rigerman/Jensen Parties on January 31, 2025, also fall squarely within the scope of the Arbitration Clause. (Db22, 37.) The Rigerman/Jensen Parties have no substantive response to this argument. They simply assert that their January 31 pleading "contains non-arbitrable claims outside the scope of the OA's arbitration provision" (Pb25)—with no explanation, no argument, and no response to the contrary position set forth in the Jacobowitz Parties' opening papers (which is correct (Db22, 37)).

C. The Totality of the Circumstances Compel the Conclusion That the Rigerman/Jensen Parties Waived Their Right to Arbitration

For the reasons set forth in the opening brief (Db33-42) and the additional

reasons below, an analysis of the totality of circumstances shows that the Rigerman/Jensen Parties clearly waived their right to arbitrate.

First, the opposition *Cole* analysis and its contrary conclusions turn largely on the erroneous notion that none of their claims are arbitrable. (*See, e.g.*, Pb18, 21-25.) As discussed above, however, ***all*** of the Rigerman/Jensen Parties' claims in the Pine Action are arbitrable.

Second, the opposition dismisses the Jacobowitz Parties' bad-faith argument as an "imagined" factor and otherwise do not address it. (Pb18.) But the *Cole* factors are "non-exclusive," *Largoza* v. *FKM Real Estate Holdings*, 474 N.J. Super. 61, 84 (App. Div. 2022), and the Rigerman/Jensen Parties' bad-faith adherence to frivolous arguments weighs heavily in favor of waiver.

Third, the opposition objects that "Defendants' representation that Plaintiffs filed a motion to dismiss is incorrect." (Pb19.) But the Rigerman/Jensen Parties' motion papers, of course, confirm they filed a "motion to dismiss" requesting an order "dismissing" nine counterclaims (JPa328, 332); the motion's request for severance of the claims as "alternative" relief does not alter these facts. (*Id.*) Similarly, the Rigerman/Jensen Parties falsely imply the Jacobowitz Parties "mischaracterize[d]" motions as "dispositive" (Pb19), but the opening brief did not do so. More generally, motions need not be dispositive to weigh in favor of waiver; the motions below have not "only been procedural

motions" (Pb19); and the Rigerman/Jensen Parties cannot dispute that motion practice has been extensive, costly, and in no small measure due to their failure to concede the arbitrability of their own claims.

II. ALTERNATIVELY, IF THERE HAS BEEN NO WAIVER, THE JACOBOWITZ PARTIES' CROSS-MOTION SHOULD HAVE BEEN GRANTED (JPa5-6)

If there has been no waiver, then in the alternative, this Court should reverse the trial court's denial of the Jacobowitz Parties' cross-motion, and the parties should be compelled to arbitration for a determination of which claims and parties are subject to the Arbitration Clause—for the reasons set forth in the Jacobowitz Parties' opening brief (Db43-47) and the additional reasons below.

A. The Parties Delegated Arbitrability to JAMS—As Confirmed by Voluminous, Persuasive, and Essentially Uniform Case Law That the Rigerman/Jensen Parties Simply Ignore

If the right to arbitration has not been waived, then the Court need not—indeed ***may*** not—decide which specific claims are subject to the Arbitration Clause. As set forth in the opening brief, where, as here, an arbitration clause incorporates an arbitral association's rules, and the rules (like the JAMS Rules) empower the arbitrator to decide arbitrability, "then the parties have 'clearly and unambiguously expressed [their] intent to empower the arbitrator to determine arbitrability.'" (Db44 (quoting *Schmidt* v. *Laub*, 2020 WL 2130931, at *5 (N.J. Super. Ct. App. Div. May 5, 2020) (JPa650)).)

As explained in the opening brief, this general rule has been endorsed by ever recent Appellate Division case to address the issue, and it is in accord with the overwhelming weight of authority from other jurisdictions, including every federal circuit to have addressed the issue. (Pb44-45 & nn.10-12.)

The Rigerman/Jensen Parties simply ignore this voluminous, persuasive, and essentially uniform case law and argue that the *Morgan* v. *Sanford Brown Institute*, 225 N.J. 289 (2016), is "dispositive" and compels a conclusion that the Arbitration Clause did not delegate arbitrability to the arbitrator. (Pb32-35.) But *Morgan* is completely inapposite; *Morgan* did not involve the issue of whether an arbitral association's rules had been incorporated in an arbitration clause, and the case merely stands for the unobjectionable proposition—taken as a given in the case law cited by the Jacobowitz Parties—that the presumption that courts determine arbitrability can only be overcome by "'clear and unmistakable' evidence that the parties agreed to arbitrate arbitrability.'" *Morgan*, 225 N.J. at 304 (citation omitted). The key point here—which the opposition ignores—is that courts have overwhelmingly held that incorporating JAMS or AAA rules by reference ***does*** constitute the requisite "clear and unmistakable" evidence. *See, e.g.*, *Richardson* v. *Coverall N. Am., Inc.*, 811 F. App'x 100, 103 (3d Cir. 2020) ("[t]hat provision is about as 'clear and unmistakable' as language can get").

Tellingly, the Rigerman/Jensen Parties do not identify a single case in

which *Morgan* has been applied to conclude that an arbitration clause's incorporation of an arbitral association's rules did not delegate arbitrability. Nor, indeed, do they identify a single recent case—from this or any other jurisdiction—in which a court held that incorporation by reference of JAMS, AAA, or analogous arbitral rules was ***not*** sufficient to overcome the judicial presumption. We are aware of none either. The recent case law on this issue is uniformly against the Rigerman/Jensen Parties' position. The trial court's contrary ruling was erroneous and should be reversed.

B. The Opposition's Focus on the Operating Agreement's Signatories Elides the Identity of Ownership Across the Relevant Parties and Ignores JAMS Rule 8(b)

The Rigerman/Jensen Parties argue that "compelling arbitration of Plaintiffs' affirmative claims would unfairly require parties who did not sign the OA to submit to arbitration." (Pb29-32.) This argument fails for several reasons.

First, as to every claim in the Pine Complaint, it is false: Plaintiff Tiger signed the OA (and is wholly owned by Plaintiff 408 Whiton Plaza).

Second, as applied to the Rigerman/Jensen Parties' claims in the other three Rigerman/Jensen Lawsuits, the argument elides the identity of ownership across the relevant parties. As the Rigerman/Jensen Parties concede, every Rigerman/Jensen Party is owned and/or controlled by Mark Rigerman and Paul Jensen (JPa126-27, 177-80, 218, 345-46), and Rigerman and Jensen both signed

the Operating Agreement twice (JPa397, 431).

Third, the argument ignores JAMS Rule 8(b). As explained in the opening brief, JAMS Rule 8(b) empowers the arbitrator to determine "who are proper Parties to the Arbitration" (JPa478), and thus determination of the proper parties to the arbitration—like determination of arbitrability of particular claims—is an issue that the Arbitration Clause delegated to the arbitrator. (Db46.) The opposition brief did not respond to this argument.

CONCLUSION

For the reasons above and in the Jacobowitz Parties' opening papers, the Court should (i) reverse the trial court's order compelling arbitration (ii) vacate as moot the trial court's order denying the Jacobowitz Parties' cross-motion. In the alternative, if there has been no waiver, then the trial court's denial of the cross-motion should be reversed and the parties should be compelled to arbitration before JAMS.

Dated: May 7, 2025

Respectfully submitted,

By: */s/ Samuel Scott Cornish*

Samuel Scott Cornish, Esq.
Luke J. O'Brien, Esq.
CALCAGNI & KANEFSKY LLP
One Newark Center
1085 Raymond Boulevard, 18th Floor
Newark, New Jersey 07102
(862) 397-1796
sam@ck-litigation.com
lobrien@ck-litigation.com

Attorneys for the Jacobowitz Parties