LARRY SCHWARTZ and NJ 322, LLC, Plaintiffs-Appellants, v. NICHOLAS T. MENAS, ESQ.; COOPER, LEVENSON, APRIL, NIEDELMAN & WAGENHEIM, P.A, ERIC A. FORD; PULTE HOMES; KDL REALTY MANAGEMENT, LLC; THERESA L. MENAS; ABC CORPORATION 1-10, ABC, LLC 1-10, XYZ PARTNERSHIP 1-10; JOHN DOES 1-10, and JANE DOES 1-10 (names being fictitious as true identities are unknown), Defendants-Respondents.	::	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002029-23 Docket No. Below: MON-L-2487-23 Sat Below: Hon. Gregory L. Acquaviva, J.S.C.

PLAINTIFFS-APPELLANTS' BRIEF

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INTRODUCTORY STATEMENT

The Law Division erred by holding that Plaintiffs' Complaint was an attempt to relitigate a previous lawsuit, namely, the matter of Schwartz, et al. v. Menas, et al., Docket No. MON-L-3904-11 ("2011 Matter"). In reality, this matter is based upon entirely new evidence and new claims seeking entirely different relief, all of which was discovered after the 2011 Matter concluded in law division. The fact that certain of the underlying facts are the same is irrelevant. In every single case where new claims are discovered following the conclusion of a previous case, certain of the underlying facts stated in the complaint of the new matter will necessarily be the same. However, this reality does not preclude the party's right to state in a new action these newly discovered claims, unknown and unknowable during the time of the previous action.

The Court erroneously held that this matter is based on the same transaction and *issues* as those previously litigated. This assertion is self-evidently false by even a cursory reading of the counts of the Complaint in comparison to the complaint in the 2011 Matter. While the underlying transaction and some of the underlying facts are the same, the *issues* and *claims* in this matter are completely different from the issues and claims in the 2011 Matter. It was only on August 9, 2019, *after* the disposition of the 2011 Matter, and in another matter (Fendt, et al. v. Ford, et al., MON-L-3782-15, hereinafter "MTDC Matter"), that Plaintiffs

discovered facts and claims that were not asserted in the 2011 Matter, nor could they have been, as they were unknown and unknowable at that time.

In addition, the Law Division based its erroneous decision on an "argument" that it sua sponte made as though it were an adversary, that none of the six Defendants argued in their motions, and to which Plaintiffs therefore did not have an opportunity to respond. The Law Division erroneously held that Plaintiffs should have filed a motion to amend the complaint in the 2011 Matter during the period of time that said matter was remanded by the Supreme Court of New Jersey in Schwartz v. Menas, 251 N.J. 556, 577 (2022), for the narrow and specific purpose of conducting proceedings to determine whether the plaintiff's lost profits evidence in the 2011 Matter is sufficient to establish their claim for damages with reasonable certainty. Neither the Supreme Court of New Jersey nor any of the Defendants' motions to dismiss contemplated that Plaintiffs had the right on remand to do anything else, let alone file a motion to amend the complaint.

Finally, it is erroneous for the Law Division to find that this matter is an identical "relitigation" of the 2011 Matter, rather than an appropriate and authorized new filing as a result of newly discovered facts and newly discovered claims which could not have been known prior to the disposition of the 2011 Matter and which Defendants and others fraudulently concealed for years by way of perjury and obstruction of discovery. The Discovery Rule undoubtedly permits

Plaintiffs to file these newly discovered claims at this time, and none of the preclusionary doctrines of Res Judicata, Collateral Estoppel, the Entire Controversy Doctrine, or any statute of limitations, bar newly discovered claims, unknown and unknowable at the time of a prior matter. Accordingly, the Law Division must be reversed.

STATEMENT OF PROCEDURAL HISTORY

On August 9, 2023, Plaintiffs Larry Schwartz and NJ 322, LLC ("NJ 322") filed a Complaint in the Superior Court of New Jersey, Law Division, Monmouth County, alleging legal malpractice, fraud, conversion, unjust enrichment, violation of New Jersey RICO, conspiracy, aiding and abetting, and negligent supervision against Defendants. 1a.[1] Defendant Pulte Homes filed a motion to dismiss Plaintiffs' Complaint on September 22, 2023. 30a. Defendants Nicholas Menas and Cooper Levenson filed a motion to dismiss Plaintiffs' Complaint on September 22, 2023. 32a. Defendants Eric A. Ford ("Ford") and KDL Realty Management, LLC ("KDL") filed a motion to dismiss Plaintiffs' Complaint on September 25, 2023. 34a. Defendant Theresa Menas ("Theresa Menas") filed a motion to dismiss Plaintiffs' Complaint on September 27, 2023. 36a. Plaintiffs filed Oppositions to

[1] "1a" denotes the accompanying appendix. Transcript references are as follows:

1T= December 15, 2023 Transcript of Motion to Dismiss Hearing

said motions on December 5, 2023. Defendants filed their respective reply briefs on December 11, 2023. The Law Division held oral argument on December 15, 2023, and entered an Order dismissing Plaintiffs' Complaint with Prejudice. 39a.

Plaintiffs timely filed a Notice of Appeal on March 10, 2024. 46a.

STATEMENT OF FACTS

As Plaintiffs pled in their Complant, in April/May of 2006, Defendant Menas contacted an acquaintance of his stepfather (Teddy Menas), Salvatore Surace, who in turn contacted his friend and business associate, Plaintiff Schwartz, in reference to real estate in Monroe Township, New Jersey. 2a. Within days, Mr. Surace and Plaintiff Schwartz met Defendants Menas and Ford at the home of Teddy Menas. Defendant Ford was introduced as Land Acquisition Manager for Defendant Pulte Homes. 2a. Defendants Menas and Ford represented that said real estate would be zoned and developed as a "free market" development and would be a very profitable investment. 3a. Defendants Menas and Ford also represented that if Plaintiffs got involved in the real estate transaction, Plaintiffs could either purchase the real estate and complete the development or sell the real estate to Defendant Pulte "approved and improved". 3a. Further, Defendant Menas represented to Plaintiffs that he was politically connected and could get things done. 3a.

Shortly thereafter, Plaintiffs agreed to pursue said real estate transaction and engaged the legal services of Defendants Menas and CooperLevenson. 3a. For the purposes of Plaintiffs' purchase of said real estate, Defendant Menas formed Plaintiff NJ 322 LLC, drafted its Operating Agreement, and oversaw its execution. 3a. Said real estate is located in Williamstown, Township of Monroe, Gloucester County, New Jersey, Block 14301, Lots 56 and 57, was also known as the Duncan Farm ("Property"). 3a. The Property was owned by Washington Development Company, LLC, a New Jersey limited liability company ("WDC") whose sole member, managing member and/or authorized signatory was Fred Azimi ("Azimi"). 3a.

In March/April 2006, Defendant Ford negotiated with Azimi the proposed purchase of the Property. 3a. On or about May 22, 2006, as a result of Defendant Ford's negotiations, WDC and 322 West Associates, LLC ("322 West"), entered into an Agreement Of Sale, pursuant to which 322 West agreed to purchase the Property from WDC for $2,160,000 ("Agreement of Sale). Said Agreement Of Sale was drafted by Defendant Menas. 3a. A mutual longtime friend of Defendants Menas and Ford, Michael Borini ("Borini"), was the sole member of 322 West. 4a.

Pursuant to the Agreement Of Sale, 322 West was required to pay a deposit of only $10.00. 4a. Said Agreement Of Sale set forth that the Property was intended to be a mixed-use development consisting of a minimum of one hundred

(100) market rate active adult townhome units and twenty thousand (20,000) square feet of commercial retail/office space. 4a. Pursuant to the Agreement Of Sale, Defendant Menas represented 322 West in said transaction. 4a. The Agreement Of Sale was amended four times: Amendment To The Agreement Of Sale dated January 31, 2007; Second Amendment To The Agreement Of Sale dated November 2007; Third Amendment To The Agreement Of Sale dated March 18, 2008; and Fourth Amendment To The Agreement Of Sale dated March 2009. 4a.

Said Amendments, among other things, required certain extension deposits, which pursuant to the instructions and direction of Defendant Menas were paid by Plaintiff. 4a. Said Second Amendment to the Agreement Of Sale amended the intended development to a "residential community comprised of 100% Affordable Housing Units subject to the requirements of the Council On Affordable Housing ("COAH"). 4a. Within approximately five weeks of the execution of the Agreement Of Sale, on or about June 29, 2006, 322 West and NJ 322 entered into an Assignment And Assumption Of Agreement, pursuant to which 322 West agreed to assign the Agreement Of Sale to NJ 322 for $2,140,000 ("322 West-NJ 322 Assignment"). 4a.

At all times relevant to the Complaint, Plaintiffs never met or communicated with Borini. All of Plaintiffs dealings pertaining to the 322 West-NJ 322

Assignment were exclusively with Defendants Menas and Ford. 5a. Pursuant to 322 West-NJ 322 Assignment, Plaintiffs were required to pay an initial deposit of $50,000.00. 5a. Said 322 West-NJ 322 Assignment set forth that the Property was comprised of approximately thirty-seven (37) acres to be developed as a mixed-use development comprising of a minimum of one hundred (100) market rate active townhome units and twenty thousand (20,000) square feet of commercial retail/office space. 5a.

After the execution of the 322 West-NJ 322 Assignment, Defendant Menas advised Plaintiffs of the required engineering and environmental work on the Property and directed Plaintiffs to certain firms which were engaged and paid for said work. 5a. The 322 West-NJ 322 Assignment was amended, on or about May 2007, pursuant to the Amended And Restated Assignment And Assumption Agreement. 5a. Said Amendment, among other things, amended the Consideration for the 322 West-NJ 322 Assignment from $2,140,000.00 to $600,000.00 and required an initial payment of $25,000.00. 5a. The Amendment also amended the intended development of the Property to a residential housing community with a minimum of one hundred (100) residential townhome units, together with all related site improvements. 5a.

Subsequently, on or about November-December 2007, 322 West and NJ 322 executed a General Release, prepared by Defendant Menas, which served as both a

mutual release and completed the buy-out of 322 West, by NJ 322 for $250,000.00 from the Agreement Of Sale. 5a. Pursuant to the instructions and direction of Defendant Menas, Plaintiff, on November 5, 2007, forwarded two checks totaling $50,000.00 to the Attorney Trust Account of Defendant CooperLevenson. 6a. Subsequently, pursuant to the instructions and direction of Defendant Menas, Plaintiff, on January 4, 2008, wired $200,000.00 into the Attorney Trust Account of Defendant CooperLevenson. 6a.

After years of Defendants' egregious improper, bad faith, and obstructionist motion practice before three (3) different judges and Defendants' perjurious deposition testimony, on August 9, 2019, evidence was obtained which established that $152,000.00 of the aforesaid $200,000.00 had been wrongfully taken by Defendant Menas. 6a. Upon the clearing of Plaintiffs' $200,000.00 wire in the Attorney Trust Account of CooperLevenson, Defendant Menas wrongfully had a check for $200,000.00 drawn from said Attorney Trust Account, dated January 4, 2008, made payable to Defendant KDL forwarded, via US Mail, to Defendant Ford. 6a. Defendant Ford, on January 9, 2008, wrongfully wrote two checks drawn from Defendant KDL's bank account, both made payable to TNM Development Consulting, LLC ("TNM"), totaling $152,000.00. 6a. Said two checks, one for $125,000.00 and the other for $27,000.00 were never deposited into the bank account of TNM. Rather, Defendant Theresa Menas deposited said two checks

into her and Defendant Menas' personal bank account. 6a. In breach of his fiduciary duties as attorney for Plaintiffs, Defendant Menas wrongfully took said $152,000.00. 6a.

Defendant Menas, at no time prior to or after Plaintiffs forwarded the aforesaid $250,000.00 to Defendant CooperLevenson's Attorney Trust Account, ever advised Plaintiffs that he would be and was the ultimate recipient of, and take, any portion of said funds paid by Plaintiffs as the purported required consideration in accordance with the General Release. 6a-7a. Further, Defendant Menas omitted, in breach of his fiduciary duties as Plaintiffs' attorney, to advise and/or disclose to Plaintiffs that said $250,000.00 was not going to be paid to 322 West or Borini but would be forwarded to Defendant KDL and that Defendant Ford in turn would transfer $152,000.00 of said money to Defendant Menas, via the two (2) aforementioned Defendant KDL checks made payable to TNM but deposited into Defendant Menas' personal bank account. 7a.

Defendant Menas omitted, in breach of his fiduciary duties as Plaintiffs' attorney, to advise and/or disclose to Plaintiffs that neither 322 West nor Borini ever received, requested, made any demand, made any claim for, or abandoned said $250,000.00 Plaintiffs forwarded to Defendant CooperLevenson's Attorney Trust Account in accordance with the General Release. 7a. Defendant Menas omitted, in breach of his fiduciary duties as Plaintiffs' attorney and in breach of

Defendant CooperLevenson's executed Retainer Agreement, to advise and/or disclose to Plaintiffs that he would and did take said $152,000.00 for his own benefit in addition to the legal fees as set forth in said Retainer Agreement instead of returning said funds to Plaintiffs. 7a.

Earlier, approximately one month after the aforementioned May 2007 Amendment to the 322 West-NJ 322 Assignment, unbeknownst to Plaintiff, Monroe Township Development Company, LLC ("MTDC") and MBI Development Company, Inc ("MBI"), entered into a Purchase And Sale Agreement, dated June 13, 2007, pursuant to which MBI was purchasing the Property to develop a 100% residential affordable housing development ("MTDC-MBI Purchase And Sale Agreement"). 7a. Said MTDC-MBI Purchase And Sale Agreement sold Plaintiff's Property without Plaintiff being a party to the said transaction, though Plaintiff had acquired the equitable interest in the Property by way of the 322 West- NJ 322 Assignment. 8a. In said MTDC-MBI transaction, unbeknownst to Plaintiff, Defendant Menas served as legal counsel to MTDC. 8a.

Similarly, unbeknownst to Plaintiff, in January 2007, Defendant Ford contacted and proposed to MBI the Property as a 100% affordable housing development and negotiated said transaction. 8a. On or about February 2007, without knowledge of the ongoing negotiations and structuring of the MTDC-MBI transaction, Plaintiffs first learned of the Property's intended development as a

100% affordable housing project at a workshop held at the Monroe Township Town Hall ("Project"). 8a. At said workshop, Defendant Ford presented the Project for the Property as a 100% affordable housing development in conjunction with an intended free market development to be developed by Defendant Pulte Homes. 8a. Prior to said workshop, Defendants Menas and Ford never informed or discussed any affordable housing development with Plaintiffs. 8a.

Years later it was learned that in 2005-2006 Defendants Menas and Ford had formulated and advanced their plan to Timothy Kernan, Monroe Township's Planner, to have the Property re-zoned for 100% affordable housing for the benefit of Defendant Pulte's intended free market development on other land in Monroe Township ("Plan") and obtained said re-zoning on or about April/May of 2007 by way of amendment to the Master Plan of Monroe Township. 8a.

Similarly, years later it was learned that in the spring/summer of 2006, Defendants Menas and Ford had meetings with a representative of MTDC and proposed a real estate transaction consisting of congruent properties in another part of Monroe Township, that came to be known as Pork Chop Hill. 9a. Defendant Ford explained to MTDC that Defendant Pulte Homes was interested in Pork Chop Hill to develop it as a free-market development but free of any affordable housing obligations. 9a.

Pursuant to the Plan, as explained by Defendant Ford to MTDC, MBI was going to acquire the Property from MTDC and develop it as a 100% affordable housing development, thus relieving Defendant Pulte Homes of any affordable housing obligation in its development of Pork Chop Hill. 9a. MTDC was to be the conduit through which the 100% affordable housing development on the Property would benefit Defendant Pulte Homes by permitting Defendant Pulte Homes to develop Pork Chop Hill as a totally free market development. 9a.

After the aforementioned workshop, Plaintiff Schwartz demanded an explanation from Defendant Menas who stated he too had just heard about the Project for the first time. 9a. Subsequently, Defendant Menas explained that Plaintiffs need not worry and that this would be a very profitable venture, however said 100% affordable housing development was going to be developed by others. 9a. Plaintiff Schwartz was advised that he needed to "stay the course" in order to profit on his substantial investments in the real estate transaction. 9a. To do so, Plaintiffs were required, including among other things, to continue to pay legal fees, engineering and other related professional services fees and expenses, property taxes and extension deposits. 9a.

On or about October 10, 2007, Defendant Menas, on the behalf of Plaintiff NJ 322, filed a "builder's remedy lawsuit" or "friendly lawsuit" claiming that Monroe Township had not met its affordable housing obligations, that is, it was not

COAH compliant. 10a. According to the Complaint In Lieu Of Prerogative Writs, the development of the affordable housing development on the Property would satisfy, in whole or to a significant degree, Monroe Township's affordable housing obligations. 10a.

The lawsuit was ultimately settled which resulted in NJ 322 obtaining the approvals for the affordable housing development which also helped Monroe Township meet, in whole or to a significant degree, its COAH obligations and has and will benefit other developers of real estate in Monroe Township. 10a. Shortly after the filing of the "builder's remedy lawsuit", Plaintiff Schwartz commenced inquiring about affordable housing developments and the process and requirements. 10a. Said inquiries and research resulted in Plaintiff Schwartz being introduced to a highly experienced and reputable affordable housing development advisor, Martin Bershtein, Esq. 10a.

During the spring and early summer of 2008, Plaintiff Schwartz had several meetings with Mr. Bershtein, who had commenced formulating models to assist Plaintiffs in its pursuit to develop the affordable housing Project on the Property. 10a. Shortly after Plaintiff Schwartz informed Defendants Menas and Ford of his meetings with Mr. Bershtein, Defendants Menas and Ford met with Plaintiff and presented Plaintiff a Memorandum, dated July 30, 2008. 10a. Said Memorandum, as discussed and explained by Defendants Menas and Ford, set forth that Plaintiff

would be paid, by MTDC, double the purchase price of the Property and could either retain control of the affordable housing development or enter into a deal with MTDC and MBI whereby Plaintiffs and MTDC would get the Property, with all improvements, after the 30 year deed restrictions/income control expire. Defendants Menas and Ford convinced Plaintiff to forego the assistance of Mr. Bershtein "and stay the course" with Defendants. 10a-11a.

Being reminded of the aforesaid Memorandum of July 30, 2008, pursuant to Defendant Menas' advice, on or about May 7, 2009, Plaintiff, without knowledge of the aforementioned MTDC-MBI Purchase And Sale Agreement, entered into an Assignment And Assumption Of Agreement with MTDC, whereby Plaintiff assigned the Agreement Of Sale to MTDC for $2,000,000.00, to be paid as set forth therein ("NJ 322-MTDC Assignment"). 11a. Said NJ 322-MTDC Assignment, among other things, set forth that the Property consisted of approximately 37 acres to be developed as residential development comprised of 100% Affordable Housing Units. 11a.

MTDC, in addition to serving as the conduit for the transfer of the affordable housing obligation from Defendant Pulte Homes' intended Pork Chop Hill development to the Property, was to purchase Pork Chop Hill and sell it "approved and improved" to Defendant Pulte Homes, which in turn would develop a substantial free market residential development on Pork Chop Hill. 11a. The

affordable housing development on the Property would be utilized by MTDC and Defendant Pulte Homes to satisfy the COAH obligations in the Pork Chop Hill free market residential development, resulting in enormous savings and profits. 11a.

During the Fall of 2009, MTDC, in default with NJ 322, attempted to renegotiate its contractual obligations, proposing to pay Plaintiff a substantially lesser amount than agreed upon in said NJ 322-MTDC Assignment. 11a. At all times during said negotiations, Defendant Menas advised Plaintiff to reach an agreement with MTDC. 12a. After negotiations unsuccessfully ended between Plaintiffs and MTDC, unbeknownst to Plaintiff, a representative of MTDC, MTDC's attorney, and Defendant Menas, met twice with Azimi of WDC to discuss MTDC's purchase of the Property directly from WDC. 12a.

In late January/early February 2010, Defendant Ford communicated to MTDC that Defendant Pulte was no longer interested in pursuing the Pork Chop Hill real estate transaction development. 12a. On or about February 27, 2010, unbeknownst to Plaintiff, pursuant to the instructions and direction of Defendant Ford, MTDC terminated the NJ 322-MTDC Assignment. 12a. Putting Plaintiffs in even greater difficulty, Defendant Menas withheld said termination from Plaintiffs until April/May 2010, leaving Plaintiffs, at that point, without any viable solutions. 12a. Defendant Menas organized a meeting between WDC, Plaintiff and MBI to discuss the sale of the Property and Approvals directly to MBI. 12a.

On or about May/June 2010, WDC, Plaintiffs (described in the agreement as a Former Assignee) and MBI entered into a Purchase And Sale Agreement, pursuant to which WDC and Plaintiff sold the Property and approvals to MBI for $1,980,000.00. 12a. Plaintiffs received approximately $480,000.00. 12a.

POINT I
THE TRIAL COURT ERRD IN FINDING THAT PLAINTIFFS' COMPLAINT MUST BE DISMISSED FOR FAILURE TO FILE A MOTION TO AMEND THE COMPLAINT ON REMAND IN THE 2011 MATTER (1T, 20:14-21:25)

The Trial Court held that Plaintiffs should have filed a motion to amend the Complaint in the 2011 Matter when it was remanded by the Supreme Court of New Jersey on August 17, 2022. The Trial Court quotes the decision of the Supreme Court of New Jersey in Schwartz v. Menas, 251 N.J. 556, 577 (2022), as stating, "'The matter is remanded to the trial court for further proceedings in accordance with this opinion,' and that fundamentally comes down to whether the plaintiff's lost – 'the plaintiff's lost profits evidence is sufficient to establish their claim for damages with reasonable certainty despite plaintiff's inexperience in developing housing.'" 1T, 20:7-13. The Trial Court, unprompted by any argument by any Defendant, *sua sponte* determined that the Supreme Court's remand was Plaintiffs' full and fair opportunity to file a motion to amend the Complaint to include the newly discovered facts and claims cited above.

Nothing in the language of the Supreme Court's decision, however, as cited by the Trial Court, indicates that any such motion was appropriate on remand. Instead, it is clear that the scope of the remand was narrow and precise: the Trial Court was to conduct further proceedings to determine whether plaintiff's lost profits evidence was sufficient to establish their claim for damages with a reasonable degree of certainty. In fact, the Trial Court's imaginative interpretation is so far-fetched that none of the seasoned attorneys representing the six Defendants in this matter thought to make the argument that Plaintiffs had an obligation to move to amend the complaint on remand in the 2011 Matter. Instead, Defendants filed their motions to dismiss solely on the basis of preclusive rules which will be discussed further below.

In what was essentially a *sua sponte* "argument", the Trial Court relied on Kaselaan and D'Angelo 18 v. Soffian, 290 N.J. Super. 293, a matter in which the Appellate Division ruled that the entire controversy did *not* bar claims brought in a new action despite the fact that a motion to amend the complaint in the previous action was not filed. Specifically, in discussing the entire controversy doctrine, the Court in Kaselaan stated the following:

> *"[T]he application of the doctrine requires that a party who has elected to hold back from the first proceeding a related component of the controversy be barred from thereafter raising it in a subsequent proceeding."* William Blanchard Co. v. Beach Concrete Co., Inc., *150 N.J.Super. 277, 292–93, 375 A.2d 675 (App.Div.), certif. denied, 75 N.J. 528, 384 A.2d 507 (1977). Therefore, if a party withholds a constituent claim or fails to join a party and the case is tried to judgment or settled, that party "risks losing the right to bring that claim later."* Mystic

> *Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 324, 662 A.2d 523 (1995).*
>
> *However, the entire controversy doctrine only precludes successive suits involving related claims. See Mortgageling Corp. v. Commonwealth Land Title Ins. Co., 142 N.J. 336, 343, 662 A.2d 536 (1995). It does not require dismissal when multiple actions involving the same or related claims are pending simultaneously.*

Kaselaan & D'Angelo Assocs., Inc. v. Soffian, 290 N.J. Super. 293, 299, 675 A.2d 705, 708 (App. Div. 1996).

The Court in Kaselaan at 709, continued by explaining:

> *Although efficient judicial management may be more complex when a related case is pending in a federal court or in the court of another state, our courts also have appropriate means to address those situations. For example, "the New Jersey action may, as a matter of sound discretion, be stayed by our courts until the prior action has been adjudicated." American Home Prods. v. Adriatic Ins., supra, 286 N.J.Super. at 33, 668 A.2d 67; accord Devlin v. National Broadcasting Co., 47 N.J. 126, 131, 219 A.2d 523 (1966).*

Here, the Trial Court could have justly and fairly elected to stay this matter until the pending appeal of the 2011 Matter is adjudicated, but a dismissal of the matter is inappropriate where Plaintiffs did not "withhold" a known claim, or "fail" to name a party or "hold back" from filing their newly discovered claims. Rather, Plaintiffs understood the clear instructions of the Supreme Court of New Jersey's remand of the 2011 Matter. Notably, all the Defendants similarly understood said instructions, as none of them argued that Plaintiffs should have filed a motion to amend the complaint on remand in the 2011 Matter. Only the Trial Court strained itself to misinterpret the Supreme Court of New Jersey in this manner, and the

result of that strain is a clear injustice against Plaintiffs who have been barred from stating newly discovered claims against parties who fraudulently obstructed their discovery for years. The "burden", if any, should fall on Defendants' shoulders, assuming one could consider it "burdensome" or "prejudicial" to face newly discovered claims whose discovery was delayed as a result of Defendants' own misconduct.

Ultimately, Res Judicata, the Entire Controversy Doctrine, Collateral Estoppel, and statutes of limitation are equitable doctrines to be considered and applied in the interest of justice. As the Court in J-M Mfg. Co. v. Phillips & Cohen, LLP, 443 N.J. Super. 447, 459, 129 A.3d 342, 349 (App. Div. 2015) held:

> *The decision whether to apply the Entire Controversy Doctrine is "ultimately 'one of judicial fairness and will be invoked in that spirit.'" Archbrook, supra, 414 N.J.Super. at 104, 997 A.2d 1035 (quoting Crispin, supra, 96 N.J. at 343, 476 A.2d 250). It is not an artificial bright line rule. See id. at 104–05, 997 A.2d 1035.*

In this matter, where the 2011 Matter was remanded by the Supreme Court of New Jersey for a narrow and defined purpose that could not reasonably have contemplated a motion to amend the complaint to bring claims that were newly discovered following dismissal of the 2011 Matter and prior to its eventual remand, judicial fairness must be exercised in the interest of justice. As the Supreme Court of New Jersey wisely stated in Romagnola v. Gillespie, Inc., 194 N.J. 596, 604, 947 A.2d 646, 651 (2008):

> *Justice Clifford's dissent in Stone v. Township of Old Bridge, captures the spirit that animates Rule 1:1–2: "Our Rules of procedure are not simply a minuet scored for lawyers to prance through on pain of losing the dance contest should they trip."*

The notion that Plaintiffs should be stripped of their fair and full opportunity to state newly discovered claims in a new action, simply because they "tripped" by following the mandate of the remand strictly and did not file a motion to amend on remand, is patently unfair and unjust. This is true particularly in light of the manner in which Defendants and others obstructed Plaintiffs' ability to discover said claims sooner, and also in light of the fact that the new claims even involve certain new Defendants who cannot possibly claim any prejudice. Indeed, none of Defendants' seasoned counsel found the creativity to make such an argument, and it was the Trial Court which *sua sponte* elected to find its own means to achieve a desired but clearly unjust result.

It was patently unfair and erroneous for the Trial Court to make an "argument" on behalf of Defendants, and ultimately predicate its decision on said "argument", which no Defendants presented and which Plaintiff therefore could not oppose. The mere happenstance that the Supreme Court of New Jersey overturned judgment in the 2011 Matter and remanded it to the trial court for specifically stated proceedings does not implicate an obligation by Plaintiffs to attempt to go beyond the mandate of the remand and file a motion to amend the complaint to state their newly discovered evidence and claims during the remand. Again, the idea is so far-removed

from the clear directives of the Supreme Court of New Jersey that no Defendant made this argument in their motions to dismiss. The Trial Court's error must be reversed.

POINT II

THE TRIAL COURT ERRD IN FINDING THAT PLAINTIFFS' COMPLAINT MUST BE DISMISSED BECAUSE IT IS BARRED BY PRECLUSIONARY RULES (1T, 24:16-25:25)

As set forth above and in Plaintiffs' Complaint, pursuant to the 322 West-NJ 322 Assignment, Plaintiffs were required to pay an initial deposit of $50,000.00. Said 322 West-NJ 322 Assignment set forth that the Property was comprised of approximately thirty-seven (37) acres to be developed as a mixed-use development comprising of a minimum of one hundred (100) market rate active townhome units and twenty thousand (20,000) square feet of commercial retail/office space. After the execution of the 322 West-NJ 322 Assignment, Defendant Menas advised Plaintiffs of the required engineering and environmental work on the Property and directed Plaintiffs to certain firms which were engaged and paid for said work. The 322 West-NJ 322 Assignment was amended, on or about May 2007, pursuant to the Amended And Restated Assignment And Assumption Of Agreement. Said Amendment, among other things, amended the Consideration for the 322 West-NJ 322 Assignment from $2,140,000.00 to $600,000.00, and required an initial payment of $25,000.00. The Amendment also amended the

intended development of the Property to a residential housing community with a minimum of one hundred (100) residential townhome units, together with all related site improvements.

Subsequently, on or about November-December 2007, 322 West and NJ 322 executed a General Release, prepared by Defendant Menas, which served as both a mutual release and completed the buy-out of 322 West by NJ 322 for $250,000.00 from the Agreement Of Sale. Pursuant to the instructions and direction of Defendant Menas, Plaintiff, on November 5, 2007, forwarded two checks totaling $50,000.00 to the Attorney Trust Account of Defendant Cooper Levenson. Subsequently, pursuant to the instructions and direction of Defendant Menas, Plaintiff, on January 4, 2008, wired $200,000.00 into the Attorney Trust Account of Defendant Cooper Levenson.

After years of Defendants' egregious improper, bad faith, and obstructionist motion practice before three different judges in other matters and Defendants' perjurious deposition testimonies, on August 9, 2019 in the MTDC Matter, evidence was obtained which established that $152,000.00 of the aforesaid $200,000.00 had been wrongfully taken by Defendant Menas. 61a-75a. More specifically, upon the clearing of Plaintiffs' $200,000.00 wire in the Attorney Trust Account of Cooper Levenson, Defendant Menas wrongfully had a check for $200,000.00 drawn from said Attorney Trust Account, dated January 4, 2008,

made payable to Defendant KDL, forwarded via US Mail to Defendant Ford. Defendant Ford, on January 9, 2008, wrongfully wrote two checks drawn from Defendant KDL's bank account, both made payable to TNM, totaling $152,000.00. Said two checks, one for $125,000.00 and the other for $27,000.00 were never deposited into the bank account of TNM. Rather, the Menas Defendants deposited said two checks into their personal bank account. 61a-75a.

In breach of his fiduciary duties as attorney for Plaintiffs, Defendant Menas wrongfully took said $152,000.00. Defendant Menas, at no time prior to or after Plaintiffs forwarded the aforesaid $250,000.00 to Defendant Cooper Levenson's Attorney Trust Account, ever advised Plaintiffs that he would be and was the ultimate recipient of, and take, any portion of said funds paid by Plaintiffs as the purported required consideration in accordance with the General Release.

Further, Defendant Menas omitted, in breach of his fiduciary duties as Plaintiffs' attorney, to advise and/or disclose to Plaintiffs that said $250,000.00 was not going to be paid to 322 West or Borini but would be forwarded to Defendant KDL and that Defendant Ford in turn would transfer $152,000.00 of said money to Defendant Menas, via the two aforementioned Defendant KDL checks made payable to TNM but deposited into Defendant Menas' personal bank account.

Defendant Menas omitted, in breach of his fiduciary duties as Plaintiffs' attorney, to advise and/or disclose to Plaintiffs that neither 322 West nor Borini ever received, requested, made any demand, made any claim for, or abandoned said $250,000.00 Plaintiffs forwarded to Defendant Cooper Levenson's Attorney Trust Account in accordance with the General Release.

Defendant Menas omitted, in breach of his fiduciary duties as Plaintiffs' attorney and in breach of Defendant Cooper Levenson's executed Retainer Agreement, to advise and/or disclose to Plaintiffs that he would and did take said $152,000.00 for his own benefit in addition to the legal fees as set forth in said Retainer Agreement instead of returning said funds to Plaintiffs.

All of Defendants' motions to dismiss were silent about the application of the discovery rule, and for good reason: the discovery rule is fatal to all of their erroneous arguments.

> *The discovery principle modifies the conventional limitations rule only to the extent of postponing accrual of the cause of action until client learns, or reasonably should learn, the existence of a state of facts which may equate in law with a cause of action.*

Burd v. New Jersey Telephone Company, 76 N.J. 284, 291, 386 A.2d 1310 (1978).

"New Jersey has adopted the discovery rule to postpone the accrual of a cause of action when a plaintiff does not and cannot know the facts that constitute an actionable claim." Grunwald v. Bronkesh, 131 N.J. 483, 492 (1993). The

discovery rule delays the accrual of a cause of action until "the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Id.

The new claims arising out of Plaintiffs' discovery of new evidence on August 9, 2019, only accrued on August 9, 2019, and not a day earlier. None of Defendants' motions even came so close as to graze the discovery rule, and none of the motions made any argument as to how or why Plaintiffs should have known or should have discovered these facts or claims earlier in time. Defendants' motions simply concluded *ipse dixit* that this Complaint is a "relitigation" of previous claims and that this new evidence and these new claims are not in fact new. It was Defendants' burden to address the discovery rule and provide an argument that explains why and how Plaintiffs should have known that Defendants stole their money despite the fact that Defendants did everything from discovery obstruction to perjury in order to conceal their wrongdoing.

For instance, Defendant Ford testified on May 6, 2015 in the 2011 Matter that he did not know why he was writing a check for $27,000.00 from Defendant KDL to TNM (53a, 220:11-24). Defendant Ford testified that he was not in business with Defendant Menas (54a, 231:7-14). Defendant Ford testified that there was no agreement between him and Defendant Menas to divide amongst themselves any money from the Duncan Farms transaction (55a, 233:1-7).

Defendant Ford testified that there was no agreement between him and Defendant Menas to divide amongst themselves any money from the Pork Chop Hill transaction (55a, 233:8-11).

Yet, on August 9, 2019, it was discovered that all of the above testimony was perjurious, as Defendant Ford, through KDL, did transfer $152,000.00 from the Duncan Farms transaction between 322 West and NJ 322 to Defendant Menas. Plaintiffs did not know and could not have reasonably known these facts until August 9, 2019, and Defendant Ford's perjury made sure of it.

Similarly, Defendant Menas testified on May 15, 2015 in the 2011 Matter that there was no agreement between him and Borini to divide amongst themselves any money from the Duncan Farms transaction (59a, 367:12-19). Defendant Menas testified that he received no money from the Duncan Farms transaction (59a, 365:4-8). Defendant Menas testified that there was no agreement between him and Defendant Ford to divide amongst themselves any money from the Duncan Farms transaction (59a, 368:2-10). Plaintiffs did not know and could not have reasonably known these facts until August 9, 2019, and Defendant Menas' perjury made sure of it. This is why none of Defendants' motions even dared to argue how or why Plaintiffs should have known these facts during the 2011 Matter. It would not only have been a losing argument, but it would have also highlighted their own clients' perjury.

Defendants' arguments with respect to preclusionary doctrines were similarly obtuse and futile, and should have been rejected by the Trial Court. The New Jersey Supreme Court in DiTrolio v. Antiles, 142 N.J. 253, 273–74, 662 A.2d 494, 505 (1995) held that "[T]he entire controversy doctrine does not apply to unknown or unaccrued claims." It is a well-established principle of justice and fairness that the Entire Controversy Doctrine is inapplicable to, and does not apply to bar, component claims either unknown, unarisen, or unaccrued at the time of the original action. K-Land Corp. No. 28 v. Landis Sewerage Auth., 173 N.J. 59, 70, 800 A.2d 861, 868 (2002). See Zaromb v. Borucka, 166 N.J.Super. 22, 27, 398 A.2d 1308 (App.Div.1979) (holding that slander claim was not precluded by Entire Controversy Doctrine because the party was not aware of its existence).

There is no rule or case law prohibiting a party from seeking to bring a new claim, previously unknown and unknowable. Instead, a dismissal only applies to known or knowable claims at the time of the dismissal. Plaintiffs' new claims in this matter against Defendants were not known, could not have been known, and therefore were not pled at the time of the dismissal of Plaintiffs' previous claims in the 2011 Matter on February 15, 2019. 76a.

In addition, when "considering fairness to the party whose claim is sought to be barred, a court must consider whether the claimant has had a fair and reasonable opportunity to have fully litigated that claim in the original

action." Gelber v. Zito P'ship, 147 N.J. 561, 565, 688 A.2d 1044, 1046 (1997). In the context of this matter and these new claims, there can be no doubt that Plaintiffs' new claims arising out of the discovery of new evidence on August 9, 2019 in the MTDC Matter, *after* the dismissal of the complaint in the 2011 Matter, were unknown and therefore unaccrued at the time of the filing of the original complaint in the 2011 Matter, as well as at the time of dismissal of the 2011 Matter. These new claims arose *after* they were uncovered in the MTDC Matter, following years of Defendants' concerted efforts to fraudulently conceal them. It is inconceivable to conclude otherwise and hold that Plaintiffs had a fair and reasonable opportunity to have fully litigated these new claims in the 2011 Matter, when they did not even learn of the existence of these new claims until August 9, 2019, and when Defendants actively concealed this evidence from Plaintiffs.

Res Judicata, the Entire Controversy Doctrine, Collateral Estoppel, and statutes of limitations are equitable doctrines to be considered and applied in the interest of justice. As the Court in J-M Mfg. Co. v. Phillips & Cohen, LLP, 443 N.J. Super. 447, 459, 129 A.3d 342, 349 (App. Div. 2015) held:

> *The decision whether to apply the Entire Controversy Doctrine is "ultimately 'one of judicial fairness and will be invoked in that spirit.'" Archbrook, supra, 414 N.J.Super. at 104, 997 A.2d 1035 (quoting Crispin, supra, 96 N.J. at 343, 476 A.2d 250). It is not an artificial bright line rule. See id. at 104–05, 997 A.2d 1035.*

It is patently and gravely unjust to allow Defendants to conceal evidence for years through discovery obstruction and perjury, only to then bar Plaintiffs from bringing new claims resulting from that new evidence once it was at last discovered. Such a result rewards Defendants for their wrongdoing and punishes Plaintiffs for not knowing what was unknown and unknowable. There is no obligation on a party to litigate all aspects of a single controversy or bring all possible claims in one proceeding when that party did not know and could not reasonably have known all facts, all aspects, and all claims. That is not justice, and that is precisely why the case law is clear that these preclusionary doctrines do not artificially and blindly apply to component claims either unknown, unarisen, or unaccrued at the time of the original action. A party is only required to litigate all *known and knowable* aspects of a single controversy and bring all possible *known and knowable* claims in one proceeding. That is justice.

In conclusion, none of the preclusionary doctrines upon which Defendants erroneously based their arguments apply in this matter, as the new claims and new evidence in this matter was unknown and unknowable at the time of the 2011 Matter. In addition, the discovery rule exists precisely for cases like this, where a party discovers evidence and claims which for so long were concealed by the wrongdoing parties. The Trial Court's error must be reversed.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully submit that this Court should reverse the decision of the Law Division dismissing Plaintiffs' Complaint and remand the matter to the Law Division.

Dated: January 9, 2025

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LARRY SCHWARTZ AND NJ 322 LLC,

Plaintiffs/Appellants,

-vs-

NICHOLAS T. MENAS, ESQ.; COOPER, LEVENSON, APRIL, NIEDELMAN & WAGENHEIM, P.A.; ERIC A. FORD; PULTE HOMES; KDL REALTY MANAGEMENT, LLC; THERESA L. MENAS; ABC CORPORATION 1-10; XYZ PARTNERSHIP 1-10; JOHN DOES 1-10; and JANE DOES 1-10 (names being fictitious as true identities are unknown)
Defendants/Respondents

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002029-23

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No: MON-L-2487-23

Sat Below:
Honorable Gregory L. Acquaviva, J.S.C.

BRIEF ON BEHALF OF DEFENDANT/RESPONDENT THERESA MENAS

Robert W. McAndrew, Esq.
Of Counsel and On the Brief

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PRELIMINARY STATEMENT

In support of this opposition to the appeal, we rely upon and join in the Procedural History and Statement of Facts filed on behalf of Defendants/Respondents Nicholas T. Menas, Esq. and Cooper, Levenson, April, Niedelman & Wagenheim, P.A. by their counsel John L, Slimm, Esq. We also join in their legal arguments. We rely upon the further legal arguments set forth herein.

PROCEDURAL HISTORY

In this case the allegations of the Complaint, filed on August 9, 2023 under Docket No. MON-L-2387-23 ("Schwartz II"), 1a, arise out of the exact set of transactions as were the basis for the Complaint previously filed by the Plaintiff in 2011, and dismissed with prejudice, under Docket No. MON-L-3904-11 ("Schwartz I") and discussed at length in the matter entitled Schwartz v. Menas, et al., 251 N.J. 556 (2022). Plaintiff has added one or more additional defendants in Schwartz II, including Theresa Menas, the spouse of Defendant Nicholas T. Menas, Esq.

In Schwartz II, Motions for dismissal were filed on behalf of all defendants. 30a-38a. The trial Court held oral argument on December 15, 2023 and, in an opinion from the bench, granted all motions. 1T:1; 18-27. Orders of dismissal of the Complaint with prejudice were filed by the Court. 39a-45a.

STATEMENT OF FACTS

In Schwartz I, as set forth in Schwartz v. Menas, et al., 251 N.J. 556 (2022), Schwartz and NJ 322, LLC filed a complaint against Defendants under Docket No. MON-L-3904-11 alleging damages as a result of a purported failed real estate transaction asserting that all defendants conspired to commit fraud, conversion, and tortious interference with a contract and business advantage. The matter was thereafter litigated on all issues. On January 19 and 20, 2023, the Hon. Gregory Acquaviva conducted a hearing and on March 9, 2023 the Court issued an Order and Amended Order, with an accompanying Statement of Reasons, granting Defendants' respective motions for summary judgment dismissing Schwartz I.

On August 9, 2023, plaintiff filed this new complaint, Schwartz II, under Docket No. MON -L-2487-23, 1a, reiterating all of the allegations set forth in MON-L-3904-11 and joining two new parties, KDL and Theresa Menas, 11 years after the original filing and 14 years after the events which allegedly give rise to this purported new, or more accurately reasserted, cause of action.

Plaintiffs' 2023 complaint seeks to relitigate a matter already adjudicated by this Court. Defendant Theresa Menas sought, and was granted, a dismissal of Schwartz II based on principles of res judicata, collateral estoppel, entire controversies doctrine and application of the New Jersey Statute of Limitations. See 1T: 18-27.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DISMISSED THE COMPLAINT BY VIRTUE OF THE APPLICATION OF THE ENTIRE CONTROVERSY DOCTRINE (1T:23-25)

All allegations against the defendants and all claims for relief in Schwartz II arise out of and relate to the exact same series of transactions set forth in Schwartz I. There is no suggestion that the facts and allegations in Schwartz II were not known or knowable during the litigation in Schwartz I. As such, the Entire Controversy Doctrine ("ECD") bars Schwartz II in its entirety. As pointed out by the trial Court:

> All right. So, these parties have a long history here. The litigations, and I'm using that plural, because there have been a variety of litigations by and among these parties, are broad, and there's been many, many of these litigations, but I think fundamentally we're talking about what I'll call the 2011 litigation, which ultimately went to the Supreme Court, Schwartz v. Menas, 251 N.J. 556. [1T:18:15-23.]

Defendant Theresa Menas relied upon Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, P.C., 237 N.J. 91 (2019). There the New Jersey Supreme Court held that the application of the entire controversy doctrine is discretionary "and clarification of the limits of the doctrine is best left to case-by-case determination." Cogdell ex rel. Cogdell v. Hosp. Ctr. At Orange, 116 N.J. 7, 27-28 (1989). The opinion states that a party "may avoid the entire controversy doctrine by demonstrating that the prior forum did not afford a fair and reasonable opportunity to have fully litigated [the claim]." Dimitrakopoulos, supra at 99.

"The polestar for the application of the entire controversy rule is judicial fairness, a court must apply the doctrine in accordance with equitable principles, with careful attention to the facts of a given case." Dimitrakopoulos, supra at 114. The Court also cautioned trial courts to be

sensitive to the accrual date of the cause of action which is being asserted and to permit the development of a record in that regard.

In this case the Court correctly agreed that fairness and equity are clearly on the side of the defendants. The plaintiffs fully and fairly litigated their claims in Schwartz I. Plaintiffs had an obligation, per the ECD, to join all parties and all causes of action arising out of the transactions at issue. They had an opportunity to do so, having learned of the alleged "newly discovered evidence" in 2019. They did not, and as such, they should be barred from attempting to do so in Schwartz II. In that regard, the Court's reasoning is completely sound and in accord with the prevailing precedents:

> The objectives of the entire controversy doctrine are very simply as -- and I believe Mr. Slimm cited the Mystic Isle Development Corp. v. Persky, 142 13 N.J. 310, but there's three reasons: encourage comprehensive and conclusive determination of a legal controversy; achieve fairness for everybody, the parties and the Court; and to promote judicial economy and efficiency by avoiding fragmented, multiple, and duplicative litigation. This is precisely that. The '11 case was 20 litigated for 12 years, and there's other offshoots of that in the '15 litigation, and there was another litigation that was settled by Judge Jones on the morning of trial. It all should have been in one. And now, to come forward after the opportunity, a six-month opportunity to file a motion to amend, after having known about these alleged revelations in 2019, and take another bite at the apple and try again in another way, creative? Sure, but it violates the entire controversy doctrine. It -- to go back to Cogdell, it would create delay. It would create harassment. It creates clogging of the judicial system. It wastes the time and effort of the parties and it undermines fundamental fairness. Cogdell notes the adjudication of a legal controversy should occur in one litigation in one court. All parties involved in a litigation should at the very least present in that proceeding all of the claims and defenses that are related to the underlying controversy. That could have been done here, and there was every opportunity for more than six months to file a motion to amend, and plaintiffs either missed the boat or strategically decided to sit on it. I don't know, but they had the opportunity, and this all goes back to the fundamental Duncan Farms transaction. And even if -- even if -- even if this was discovered in 2019, there was the opportunity to bring this forward. It went and passed, and the preclusive effect of the entire controversy doctrine clearly, clearly, clearly requires a dismissal in this matter. [1T:23-25.]

As such, the Order entered below should be affirmed.

POINT II

THE COMPLAINT WAS PROPERLY DISMISSED BASED UPON THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL (1T: 25:2 – 26:8)

Defendant Theresa Menas joins in and adopts the arguments set forth on this issue in the Briefs filed by Mr. Slimm.

The New Jersey Supreme Court has noted that the purpose of *res judicata* is to require litigants "to bring all possible claims in one proceeding." McNeil v. Legislative Apportionment Comm'n of State, 177 N.J. 364, 395 (2003). As such, the doctrine precludes the re-litigation of claims that were previously litigated, or which could have been litigated in a previous proceeding. The application to this case is clear, as all claims in Schwartz II were either previously litigated in Schwartz I or could have been. The analysis as to the application of the doctrine of collateral estoppel is similar. Collateral estoppel, also known as issue preclusion, is a "branch of the broader law of res judicata which bars the relitigating of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action.'' Tarus v. Borough of Pine Hill, 189 N.J. 497, 520 (2007) (quoting Sacharow v. Sacharow, 177 N.J. 62, 76 (2003)). In this regard, the trial Court was clearly justified in dismissing the Complaint based upon the following sound reasoning:

> The same can be said for res judicata. Res judicata a very similar doctrine, but it protects litigants from the burden or relitigating identical issues with the same party or his privy promoting judicial economy and preventing needless judification (sic), Parklane Hosiery Co. v. Shore. That's the U.S. 7 Supreme Court, 439 U.S. 322 from 1979. New Jersey has adopted fundamentally the same rule, and in McNeil v. Legislative Appointment Commission, 177 N.J. 364 requires that litigants "bring all possibly claims in one proceeding." Under New Jersey law, claim preclusion prevents a litigant from relitigating when a judgment is valid, the parties in a latter action are identical to or in privity in the prior action, and the claims in the latter action grow out of the same transaction or occurrence, Watkins v. Resorts International Hotel and Casino, 124 N.J. 398. All of those are satisfied here. All of this goes back to Duncan Farms. All of it colloquially was an allegedly broad conspiracy among all of the

> defendants to deprive the plaintiffs of profits and the ability to go forward with the Duncan Farms prospect. The parties are identical. The actions are identical. The underlying transactions are identical. And maybe there is one new fact that was learned in 2019, but again, going back to Bustamante, going back to 4:9-1, 3 going back to Notte, it's a liberal amendment standard that can be addressed even on a remand, and I disagree with plaintiff's contention that the remand was so limited. They should have taken a shot, especially in view of that very, very, very broad, broad view of amendments. [1T:25:2 – 26:8.]

As such, the Order if dismissal with prejudice should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Court should deny the appeal and affirm the Order dismissing Plaintiffs' Complaint in its entirety with prejudice.

Respectfully submitted,

s/Robert W. McAndrew

_____

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Dated: March 7, 2025

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LARRY SCHWARTZ and NJ 322, LLC Plaintiffs-Appellants, vs. NICHOLAS T. MENAS, ESQ.; COOPER, LEVENSON, APRIL, NIEDELMAN & WAGENHEIM, P.A.; ERIC A. FORD; PULTE HOMES; KDL REALTY MANAGEMENT, LLC; THERESA L. MENAS; ABC CORPORATION 1-10; XYZ PARTNERSHIP 1-10; JOHN DOES 1-10; and JANE DOES 1-10 (names being fictitious as true identities are unknown) Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-002029-23 On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No: MON-L-2487-23 Sat Below: Honorable Gregory L. Acquaviva, J.S.C. Date Submitted: March 7, 2025

BRIEF OF DEFENDANTS-RESPONDENTS, NICHOLAS T. MENAS, ESQ. AND COOPER, LEVENSON, APRIL, NIEDELMAN & WAGENHEIM, P.A.

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PRELIMINARY STATEMENT

In Schwartz v. Menas, 251 N.J. 556 (2022), the Supreme Court "join[ed] the majority of jurisdictions that reject a *per se* ban on claims by new businesses for lost profits damages." However, the court held that claims by new businesses for "lost profits damages are governed by the standard of reasonable certainty", and remanded the cases to the trial court for consideration of defendants' motions to bar plaintiffs' proofs of lost profits damages. Id. at 561, 577.

On January 19 and 20, 2023, the trial court conducted the N.J.R.E. 104 hearing, at which time plaintiffs' expert, Dr. Powell, testified. On March 9, 2023, the trial court entered an order granting defendants' motion, supported by written opinion. Plaintiffs appealed from that decision, and on January 2, 2025, the Appellate Division issued its opinion in Larry Schwartz and NJ 322, LLC v. Nicholas Menas, Esq.; Cooper, Levenson, April, Niedelman & Wagenheim, P.A.; Eric Ford; and Pulte Homes, A-2481-22, A-2482-22 (App. Div. January 2, 2025). The Appellate Division affirmed the trial court's order and opinion, and held that the plaintiffs fell far short of establishing their alleged lost profit damages with a reasonable degree of certainty. The Appellate Division held "Where, as here, new business seeks lost profits that

are remote, uncertain, or speculative, the trial court should bar the evidence supporting the claim." See, Schwartz, 251 N.J. at 577.

On August 9, 2023, while the appeal of the 2011 case was pending, plaintiffs re-filed their claims which are the subject of this appeal. Defendants moved to dismiss the re-filed claims. The Motions were heard by Judge Acquaviva on December 15, 2023. The trial court noted that the Supreme Court remanded the matter on August 17, 2022, and the trial court entered the order for summary judgment more than six months later, on March 9, 2023. For more than six months, plaintiffs had every opportunity to file a motion to amend, and to add claims for "newly discovered evidence", and has never filed a motion to amend following the Supreme Court's remand and prior to the decision of the court on the Rule 104 hearing.

The trial court noted the "long history" of this matter which went to the Supreme Court in Schwartz v. Menas, 251 N.J. 556. The court also properly noted that if plaintiffs were to be believed, plaintiffs knew about these "alleged new facts in 2019." Yet, following a remand, plaintiffs had more than six months to file a motion to amend the complaint. Instead of filing a motion, they "sat on it." Following the order for summary judgment, on March 9, 2023, plaintiffs filed a new action under MON-L-2487-23, which is the subject of the current appeal. The trial court correctly observed that this new action was "…

the 2011 with a wrinkle, and that is the plaintiff contends there was new information learned on August 9, 2019 about where the monies went and who received them."

In addition, the trial court found that plaintiff's certification under R. 4:5 did not comply with R. 4:30A. The 2023 action was the subject of another pending action. There was an appeal and, according to the court, "… close enough where it should be recognized and identified in the certification." Accordingly, the trial court property found that the entire controversy doctrine applied, and barred the action. All of the matters should have been in one litigation.

In addition, the trial court properly held that *res judicata* applied because the parties were identical, the actions were identical, and the underling transactions were identical arising out of the Duncan Farms transaction. The trial court found that this case was the "poster child" regarding why we have the entire controversy doctrine and *res judicata*. It is clear that plaintiffs were simply attempting to circumvent Judge Acquaviva's order for summary judgment which dismissed the claims following the Rule 104 hearings.

PROCEDURAL HISTORY

On August 17, 2022, the Supreme Court issued its opinion in the matter of Schwartz v. Menas, et al., 251 N.J. 556 (2022). Justice Patterson, writing for

a unanimous court, held that Schwartz "conceded that he had no experience with or knowledge of the requirements imposed on developers of affordable housing …" The Supreme Court noted that the expert report of Dr. Powell did not acknowledge that Schwartz had ever been involved with a residential development or built housing of any kind. The Supreme Court held that:

> … a trial court should carefully scrutinize a new business's claim that a defendant's tortious conduct or breach of contract prevented it from profiting from an enterprise in which it has no experience and should bar that claim unless it can be proven with reasonable certainty. The Court remands these matters so that the trial court may decide defendants' motions in accordance with the proper standard.

Id. at 561.

The Supreme Court then remanded the matter to the trial court for a Rule 104 hearing. Id.

The Rule 104 hearings were conducted on January 19 and 20, 2023 by Judge Acquaviva to assess the expert opinions of Dr. Powell, in accordance with the newly adopted standard concerning loss of profit claims for a new business. See, Schwartz v. Menas, 251 N.J. 556 (2022).

The trial court entered an order on March 9, 2023 barring Dr. Powell from testifying in the 2011 remanded case. Because plaintiffs no longer had an expert, the court granted defendants' respective motions for summary judgment. (Da1).

On April 22, 2023, plaintiffs filed a Notice of Appeal of the trial court's ruling, under A-2481-22 and A-2482-22. (Da18).

On August 9, 2023, while the appeal of the 2011 case was pending, plaintiffs re-filed their claims against the Menas and Cooper Levenson defendants, among others. (1a).

In response, defendants Nicholas Menas, Esq. and Cooper Levenson, April, Niedelman & Wagenheim, P.A. filed their motion to dismiss that complaint pursuant to R. 4:6-2(e)[1]. (32a).

Judge Acquaviva conducted oral argument on the motions to dismiss on December 15, 2023 and on December 15, 2023, Judge Acquaviva entered orders granting the defendants' motions to dismiss on behalf of defendants Ford, Theresa Menas, Pulte Homes, Nicholas Menas, and Cooper Levenson. (39a).

This appeal followed. (46a).

[1] On September 27, 2023, defendant Theresa Menas filed her motion to dismiss the complaint under MON-L-2487-23. (36a). On September 22, 2024, defendant Pulte Homes filed its motion to dismiss the complaint under MON-L-2487-23. (30a). On September 25, 2024, defendants Eric Ford and KDL filed their motion to dismiss the complaint under MON-L-2487-23. (34a).

STATEMENT OF FACTS

The background of this matter is chronicled in the Supreme Court's Opinion issued in Schwartz v. Menas, et al., 251 N.J. 556 (2022) and this Court's Opinion issued on January 2, 2025 in Schwartz v. Menas, under Appellate Docket No. A-2481-22 and A-2482-22. (Da23).

By way of brief supplemental background, notwithstanding the fact that plaintiffs received 144% profit in the underlying transaction, on December 21, 2012, plaintiffs filed a lawsuit in the Superior Court, Law Division, Monmouth County, under Docket No: MON-L-3904-11, against Menas, Cooper Levenson, Pulte, Ford, Brad Ingerman and MBI. In the complaint, Schwartz alleged legal malpractice against Menas and his law firm. He also alleged that all of the defendants conspired to commit fraud, conversion, and tortious interference with a contract and business advantage. Schwartz sought damages, including lost profits. (Da28).

Plaintiffs also alleged that Menas and other defendants prevented plaintiff from acting as the affordable housing developer of the property, and caused MBI to acquire the project from Schwartz. (See App. Div. opinion, p. 6, Da28).

Plaintiff previously testified in the first case that he never acted as a developer. (Da35). Plaintiff first heard the term "affordable housing" in early

2007, when he and Surace went to the NJ Housing & Mortgage Finance Agency ("NJHMFA") to find out what "affordable housing" was. (Da35).

After Surace's interest was bought out in the LLC in 2007, Schwartz was the sole member of the plaintiff LLC. (Da36). Schwartz acknowledged that when Surace sold his interest to him in 2007, he had no experience with, or interest in, developing a COAH project. (Da34). Plaintiffs' development of the COAH project would have been the first time that plaintiffs had engaged in any real estate development, and specifically in development of the COAH project. (Da34).

The plaintiffs retained Dr. Powell to testify as an expert to establish damages. On October 15, 2018, the Honorable Lourdes Lucas, J.S.C. entered an order striking the report and expert opinion of plaintiffs' expert, Dr. Powell. (Da48). Plaintiffs filed a motion for reconsideration of the trial court's order barring Dr. Powell's report and expert testimony. (Da48). On November 30, 2018, the trial court held argument on plaintiffs' motion for reconsideration. The trial court denied plaintiffs' motion. (Da48).

On February 15, 2019, Judge Lucas granted an order for summary judgment in favor of the Menas and Cooper Levenson defendants (Da50), along with the granting of the Pulte/Ford defendants' motion for summary

judgment (Da50), dismissing plaintiffs' complaint against defendants with prejudice.

Plaintiffs appealed. The Appellate Division issued its opinion on November 6, 2020, under Docket No: A-3187-18T3/A-4292-18T3. The Appellate Division affirmed.

On August 17, 2022, the Supreme Court issued its opinion in Schwartz v. Menas, et al., 251 N.J. 556 (2022). Justice Patterson, writing for a unanimous Court, held that Schwartz "conceded that he had no experience with or knowledge of the requirements imposed on developers of affordable housing …" The Supreme Court noted that the expert report of Dr. Powell did not acknowledge that Schwartz had ever been involved with a residential development or built housing of any kind. The Supreme Court, in remanding this matter back to the trial court, held:

> … a trial court should carefully scrutinize a new business's claim that a defendant's tortious conduct or breach of contract prevented it from profiting from an enterprise in which it has no experience and should bar that claim unless it can be proven with reasonable certainty. The Court remands these matters so that the trial court may decide defendants' motions in accordance with the proper standard.

Schwartz v. Menas, 251 N.J. 556, 561 (2022).

Based on this remand, a Rule 104 hearing was conducted on January 19 and 20, 2023 by Judge Acquaviva to assess the expert opinions of Dr. Powell,

in accordance with the newly adopted standard concerning loss of profit claims for a new business. The trial court entered an order on March 9, 2023 barring Dr. Powell from testifying in the 2011 remanded case. Because plaintiffs no longer had an expert, the court granted defendants' respective motions for summary judgment. (Da1).

On April 22, 2023, plaintiffs filed a Notice of Appeal of Judge Acquaviva's ruling, which was decided by this Court on January 2, 2025. (Da18).

On August 9, 2023, while the appeal of the 2011 case was pending, plaintiffs re-filed their claims against the Menas and Cooper Levenson defendants, among others, which is the subject of this appeal. (1a).

Defendants moved to dismiss Plaintiffs' re-filed claims, which was the subject of oral argument on December 15, 2023. During this argument, the trial court noted that the Supreme Court remanded the matter on August 17, 2022, and the trial court entered an order for summary judgment more than six months later, on March 9, 2023. (1T:12:8-12). The court then stated:

> THE COURT: Okay. So, if you knew about this evidence on August 9, 2019, and this matter was reinstituted in front of me from August 17, 2022 to March 9, 2023, for six months plus, you had every opportunity to file a motion to amend, to add these "newly discovered evidence and claims" to incorporate them into the 2011 matter, correct?

(1T:12:15-21).

Following plaintiffs' counsel's response, in which it was argued that this was a different claim, the trial court observed:

> THE COURT: But hold on, but you did -- not you're -- you're presuming what I would have done on a motion to amend. You'll acknowledge you did not file following the Supreme Court remand a motion to amend to add in these claims that you are now asserting in what I'm going to call the '23 docket. You didn't file a motion to amend.

(1T:13:14-20).

In responding to the court's observation, plaintiffs' counsel argued that this was a "… different case, different claims that we could not have known and they made sure that we weren't going to know it, because they fought us tooth and nail with the most grotesque obstructions of motion practice and perjury and forgery and fraud." (1T:12:24-25).

In its decision granting dismissal of the claims, the trial court incorporated the Supreme Court's opinion regarding the factual background. (1T:18:24-25). The trial court noted that this all goes back to the "… Duncan Farms project …" (1T:19:1-3). The trial court observed that the underlying "thrust of plaintiff's contention is that there was a broad conspiracy among the defendants … where plaintiffs contend that they were deprived the opportunity

to go forward with the Duncan Farms project and accordingly lost a significant amount of profits." (1T:19:4-12).

The trial court further noted that Judge Lucas entered the order for summary judgment on February 15, 2019 based on the New Business Rule, which was the law at that time. (1T:19:14-21). The Appellate Division affirmed, and the Supreme Court granted plaintiffs' Petition for Certification and remanded the matter. (1T:19:21-25).

The trial court stated:

> Plaintiff knew about these new alleged facts in 2019. They had more than six months on the remand to file the motion to amend their complaint, and they sat on it. They didn't take a shot. And then now after this Court grants summary judgment last year on March 9, 2023, after the 2011 litigation has now been up on appeal for, I don't know, six months or so, they now file this action, 2487-23, which fundamentally is the Duncan Farms litigation. It's the 2011 with a wrinkle, and that is that plaintiff contends there was new information learned on August 9, 2019 about where these monies went and who received them.

(1T:21:21-25).

The trial court also found that both the entire controversy doctrine and the doctrine of *res judicata* applied, and were applicable. The court therefore dismissed the plaintiffs' complaint. (1T:27:1-9).

During the argument on December 15, 2023, the trial court pointed out to plaintiffs' counsel that the Supreme Court remanded the matter on August

17, 2022, and Judge Acquaviva entered the order for summary judgment more than six months later, on March 9, 2023. (1T:12:8-12). Plaintiffs' counsel disagreed, and argued that it was a different claim. (1T:23:24-13:1-9).

The court noted that plaintiffs never filed a motion to amend following the remand. (1T:13:14-20).

Defense counsel pointed out that plaintiffs' counsel had the KDL checks, and the transcripts associated with them, in 2014 and 2015. (1T:15:15-25). All of the facts regarding KDL, and the transfer of funds from the trust account of Cooper Levenson to KDL, were known. (1T:16:1-7). This all dated back to 2013, 2014 and 2015. (1T:16:3). Plaintiffs' counsel admitted that he had the KDL checks. (1T:16:16-17). Plaintiffs' counsel responded by arguing the discovery rule. (1T:18:5-10).

In his decision, trial court properly noted that the parties had a "long history" involving a variety of litigations beginning with the 2011 litigation which went to the Supreme Court in Schwartz v. Menas, 251 N.J. 556. (1T:18:15-24). The court noted that the matter goes back to the Duncan Farms project, where plaintiffs alleged a conspiracy among the defendants, and that they were deprived the opportunity to go forward with the Duncan Farms project and lost profits. (The court incorporated the Supreme Court's decision). (1T:18:24-19:1-14).

Judge Acquaviva noted that Judge Lucas granted summary judgment on February 15, 2019 under the new business rule. (1T:19:14-21). The Appellate Division affirmed, and the Supreme Court, on certification, modified the new business rule. (1T:19:22-20:1-5). The Supreme Court remanded on August 17, 2022. (1T:20:1-5). It was left to the trial court to determine whether the claim for lost profits was sufficient to establish the claim for damages with reasonable certainty, despite plaintiffs' inexperience in developing housing. (1T:20:5-14).

Judge Acquaviva noted that, following the remand, plaintiffs did not file a motion to amend, notwithstanding the fact that they had every opportunity to do so. (1T:20:20-21; 1T:21:21). If they were to be believed, plaintiffs knew about these "alleged new facts in 2019." (1T:21:21-23). Yet, following remand, they had more than six months to file a motion to amend the complaint. Instead of filing the motion, they "sat on it." (1T:21:21-24).

Following the order for summary judgment, on March 9, 2023, and after the 2011 litigation had been up on appeal for six months or so, plaintiffs filed the new action under MON-L-2487-23. The court pointed "… It's the 2011 with a wrinkle, and that is that plaintiff contends there was new information learned on August 9, 2019 about where these monies went and who received them. (1T:22:3-8).

Also, the trial court pointed out that plaintiffs' certification under R. 4:5 did not comply with R. 4:30A. (1T:22:20-23:1-10). The 2023 action was the subject of another action pending. There was an appeal, and that was, according to the court "… close enough where it should be recognized and identified in the certification." (1T:23:1-10).

The court agreed that the entire controversy doctrine applied, and barred this action. (1T:23:11-25). All of these matters should have been in one litigation. (1T:23:22-25). To file a motion following a six-month opportunity to amend, and having known about those alleged revelations in 2019, violated the entire controversy doctrine. (1T:24:1-8). Judge Acquaviva properly recognized that "… It wastes the time and effort of the parties and it undermines fundamental fairness." (1T:24:7-15). The court recognized "… That could have been done here, and there was every opportunity for more than six months to file a motion to amend, and plaintiffs either missed the boat or strategically decided to sit on it. I don't know, but they had the opportunity, and this all goes back to the fundamental Duncan Farms transaction. (1T:24:16-21).

The court noted that even if this was discovered in 2019, there was an opportunity, but that "… passed, and the preclusive effect of the entire controversy doctrine clearly, clearly, clearly requires a dismissal in this matter.

(1T:24:22-2:1). The court also ruled that *res judicata* applied, and that the elements of the same were satisfied. (1T:25:2-25). Certainly, the matter arose out of and was related to the Duncan Farms transaction, and the broad conspiracy alleged, where plaintiffs claimed that the defendants deprived them of the profits from the project. The court noted that it was the same transaction, the parties were identical, the actions were identical, and the transactions were identical. (1T:25:20-25).

The court rejected plaintiffs' argument that the remand was so limited that a motion to amend could not be filed, especially in view of the broad view of amendments. (1T:26:1-8). The court ruled as follows:

> So, with that said, I do based on those reasons conclude that this new litigation falls absolutely in the heartland and is the, you know, poster child, so to speak, for why we have the entire controversy doctrine, why we have *res judicata*, and accordingly, I think those preclusive … preclusive doctrines are on all four here, and without a doubt command that I grant the four pending motions to dismiss …

(1T:26:24-27:1-7).

This appeal followed[2] (Da18).

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[2] On January 2, 2025, the Appellate Division issued its opinion in the matter of Schwartz v. Menas, A-2481-22 and A-2482-22 (App. Div. January 2, 2025). (Da23). In this opinion, the Appellate Division affirmed the order and opinion of Judge Acquaviva, and was satisfied that the trial court did not misapply its discretion by finding plaintiff, as a new business entering an enterprise in which he had no experience, failed to establish lost profits damages with

In Plaintiffs' appeal, Plaintiffs argue that Schwartz had meetings with a Mr. Bershtein, who formulated models to assist plaintiffs in their pursuit to develop the affordable housing project. (See plaintiffs' brief at pp. 13-14)). Dr. Powell relied on the deposition testimony of a fact witness, Martin Bershtein, for the "possibility" that Schwartz could have joint ventured with an experienced developer.

However, Dr. Powell did not know whether Mr. Bershtein ever entered into a retainer agreement with Schwartz to provide professional services. (Da80). Also, Dr. Powell did not know if Schwartz ever provided Mr. Bershtein with any documents pertinent to the Monroe project. (Da80).

In addition, Dr. Powell did not know whether Bershtein ever looked at whether there were any project plans for the development. (Da80). Dr. Powell confirmed there was nothing in the Bershtein deposition where Bershtein looked at any of Mr. Schwartz's financial statements. (Da80-Da81). Likewise, Dr. Powell did not see in the Bershtein deposition that he [Bershtein] reviewed tax returns for Mr. Schwartz. (Da81).

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reasonable certainty. (Da47). The Appellate Division noted that the trial court correctly found that plaintiff failed to meaningfully address how his status as a novice entering a new business would affect his ability to develop the projects. Instead, Schwartz attempted to side step that issue by declaring it irrelevant. The Appellate Division was not convinced. (Da47).

Also, Dr. Powell did not see anything in the Bershtein deposition where Mr. Bershtein reviewed any of Mr. Schwartz's bank statements. (Da81). Dr. Powell was questioned at length about Mr. Bershtein's lack of involvement in this project, and acknowledged Mr. Bershtein's deposition testimony, wherein he testified: "I had run some very preliminary models in terms of, you know, how to possibly make it work, but we never really went very far, because it was terminated fairly quickly." (Da82)(emphasis added).

In addition, Dr. Powell recalled, from reading the Bershtein deposition, that Bershtein could not tell us off the top, in connection with tax credits, what they would be, because his analysis was preliminary. It was not something that would even be relevant. (Da82).

In addition, Bershtein only had preliminary discussions with Schwartz regarding the Duncan Farms project, and never reviewed any project documentation or evaluated Schwartz's financials (Da67). and, thus, made no determination of whether Schwartz would be qualified to pursue an affordable housing deal (Da71), nor did Mr. Bershtein explore partnering plaintiffs with an experienced affordable housing developer, as he had done for others. Id.

Dr. Powell's blind acceptance of Bershtein's speculative testimony was reflected in his testimony at the Rule 104 hearing, where he conceded he did not know basic information, including (a) whether Mr. Bershtein ever entered

into a retainer agreement with Mr. Schwartz to provide professional services; (b) if Schwartz ever provided Bershtein with any documents pertinent to the Monroe project; (c) whether Bershtein ever looked at whether there were any project plans for the development; (d) whether Bershtein looked at any of Schwartz's financial statements, tax returns, or bank statements; (e) whether Schwartz ever created the infrastructure, water, electric, roadways, parking lots, and signage for a new development; (f) whether Schwartz ever owned construction equipment; or (g) whether Schwartz had the workforce on hand to develop the Duncan Farms project. (Da89).

Dr. Powell had to acknowledge Bershtein's testimony that: "I had run some very preliminary models in terms of, you know, how to possibly make it work, but we never really went very far, because it was terminated fairly quickly." (Da82).

The Appellate Division previously rejected Schwartz's arguments that he could have partnered with other individuals with more experience, and completed the projects. Because nothing was consummated, the potential for such a partnership was only conjecture.

ARGUMENT

I. THE TRIAL COURT'S ORDER DISMISSING THE COMPLAINT PURSUANT TO THE ENTIRE CONTROVERSY DOCTRINE AND THE DOCTRINE OF RES JUDICATA SHOULD BE AFFIRMED (39a)

On December 15, 2023, the trial court conducted oral argument in connection with the defendants' motions to dismiss the complaint in the matter of Schwartz and NJ 322, LLC v. Menas, et al., under L-2487-23. (1T). At that time, the Cooper and Menas defendants argued that the case should be dismissed under the entire controversy doctrine since the matter arose out of the same bundle of rights that are at issue in the 2011 case. (1T:5:14-6:1).

In addition, the Cooper and Menas defendants argued that the complaint was barred under the doctrine of *res judicata* as a result of the rulings of the court in the 2011 case. (1T:6:2-7).

Also, the Cooper and Menas defendants argued that the complaint was barred under the statute of limitations, because the events occurred 14 years before the complaint was filed. (1T:6:7-13). Accordingly, defendants argued that the present complaint was simply an attempt to get around rulings, decisions, orders and opinions of various courts related to and regarding the 2011 action. (1T:6:7-13).

In addition, the Pulte defendants argued that the matter arose out of the same Duncan Farms transaction, and involved the same "dollar flow" that was

involved in the prior litigation which started in 2011, and culminated after 12 years of litigation in March of 2023 with Judge Acquaviva's order and opinion of March 9, 2023. (1T:6:18-7:1-3). The same issues were involved, and the same damages were involved. (1T:7:4-9). The plaintiffs had every opportunity to fully litigate the matter, including the damages related to the same. (1T:7:10-14).

Judge Acquaviva noted that Judge Lucas entered an order for summary judgment on February 15, 2019. (1T:12:1-7). The court further noted that the Supreme Court remanded the matter on August 17, 2022, and the trial court entered the order on remand for summary judgment six months later, on March 9, 2023. (1T:12:8-14).

The court observed that plaintiffs had "every opportunity to file a motion to amend, to add these newly discovered evidence and claims to incorporate them into the 2011 matter." (1T:12:15-21). However, plaintiffs argued that they had a "different claim". (1T:12:24-13:9-11). In addition, the court noted that plaintiffs failed to file a motion, following the Supreme Court remand, to amend, to add in the claims plaintiffs were asserting in this 2023 docket. (1T:13:14-20).

Defendant Ford argued, at the time of the motion, that plaintiffs did have the checks and transcripts associated with them in 2014 and 2015. (1T:15:21-

25). The point was made that plaintiffs were in possession of all facts regarding KDL and the transfer of funds from the trust account of Cooper Levenson to KDL dating back to 2013, 2014 and 2015. (1T:15:25-16:1-7).

Judge Acquaviva further noted that the 2011 litigation went to the Supreme Court in the matter of Schwartz v. Menas, 251 N.J. 556. (1T:18:15-23). The court incorporated the factual recounting of Justice Patterson's decision, and found:

> … it all goes back to the Duncan Farms project, and I think to put it colloquially, although a conspiracy was not alleged, that's fundamentally the underlying thrust of plaintiff's contention is that there was a broad conspiracy among the defendants here, Nicholas Menas may have -- possibly being the -- the lead conspirator here, where plaintiffs contend that they were deprived the opportunity to go forward with the Duncan Farms project and accordingly lost a significant amount of profits, but I'll incorporate the Supreme Court's factual recitation into this decision and not belabor the point.

(1T:19:1-13).

Judge Acquaviva also noted that, on February 15, 2019, Judge Lucas entered an order for summary judgment, finding that the New Business Rule barred the claims for lost profits. As a result, Judge Lucas granted the motion for summary judgment. (1T:19:14-21).

Then, the Appellate Division affirmed. The New Jersey Supreme Court granted Certification. (1T:19:21-25). The Supreme Court remanded for

proceedings to determine whether plaintiffs' lost profits evidence was sufficient to establish the claim for damages with reasonable certainty, despite plaintiffs' inexperience in developing housing. (1T:20:6-13).

Judge Acquaviva also noted that the matter was revived back at the trial court on August 17, 2022, and that plaintiffs did not file a motion to amend the complaint, despite having every opportunity to file a motion to amend. (1T:20:14-24). Also, the court noted that plaintiffs presumed what the trial court would have done with a motion to amend. (1T:20:22-25). However, a motion to amend was never filed. (1T:21:21). Plaintiffs, however, knew about the alleged new facts in 2019, and also had more than six months on the remand to file a motion to amend the complaint. Rather, they "sat on it." (1T:21:21-24).

Judge Acquaviva observed that after he entered the order granting summary judgment on March 9, 2023, after the 2011 litigation had been up on appeal for six months, plaintiffs filed the present action under L-2487-23, which fundamentally was the Duncan Farms litigation with a wrinkle. (1T:21:22-22:1-7). That is, plaintiffs were alleging that there was new information learned on August 9, 2019, as to where monies went and who received them. (1T:22:6-8).

Judge Acquaviva analyzed the entire controversy doctrine, citing Kaselaan & D'Angelo v. Soffian, 290 N.J. Super. 293 (App. Div. 1996) and Archbrook Laguna, LLC v. Marsh, 414 N.J. Super. 97, 105 (App. Div. 2010), noting that all claims arising from a particular transaction of series of transactions should be joined in a single action. (1T:22:14-24). The court also noted that, under R. 4:30A, the non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims. (1T:22:20-25).

The court also observed that plaintiffs violated the Certification requirements of the rule. It was clear the plaintiffs did violate the Certification requirements regarding other litigations. The fact remained that the Schwartz matter was on appeal, and was close enough where it should have been recognized and identified in the Certification. (1T:23:1-10). See also, Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310 (1995). The court noted there were three reasons for the doctrine, which are to encourage comprehensive and conclusive determination of a legal controversy; achieve fairness for everybody, the parties and the court; to promote judicial economy and efficiency by avoiding fragmented, multiple, and duplicative litigation. (1T:23:11-19).

The trial court noted that the 2011 case was litigated for 12 years, and then there were other "offshoots" of that in the 2015 litigation, and another litigation which was settled by Judge Jones on the morning of trial. The court recognized that "it all should have been in one." (1T:23:20-24). The court observed that plaintiffs had a six month opportunity to file a motion to amend, after having known about the alleged revelations in 2019. The court noted that this would have been "another bite at the apple." (1T:24:1-5).

The court found that the complaint violated the entire controversy doctrine; created delay, harassment, clogging of the judicial system; was wasting the time and efforts of the parties; and undermined fundamental fairness. (1T:24:4-9). Citing, Cogdell, which holds that the adjudication of a legal controversy should occur in one litigation and one court. (1T:24:10-15). That could have been done, because there was an opportunity for more than six months to file a motion to amend, and plaintiffs either "missed the boat or strategically decided to sit on it." (1T:24:16-21). In any event, the entire matter went back to the fundamental Duncan Farms transaction. (1T:24:20-21).

Also, the court noted that even if this was discovered in 2019, there was an opportunity to go forward which passed, and the preclusive effect of the entire controversy doctrine clearly applied to require dismissal of the complaint. (1T:24:22-25:1).

In addition, the court properly held that *res judicata* applied in this case because the doctrine protects litigants from the burden of re-litigating identical issues with the same party or his privy, promoting judicial economy, and preventing needless litigation. (1T:25:2-8). Citing, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) and McNeil v. Legislative Apportionment Commission, 177 N.J. 364 (2003). The court noted that, under New Jersey law, claim preclusion prevents a litigant from re-litigating when a judgment is valid, the parties in a latter action are identical to or in privity in the prior action, and the claims in the latter action grow out of the same transaction or occurrence. Citing, Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398 (1991). (1T:25:9-18).

The court found that all of the requirements were satisfied in this case; the matter went back to Duncan Farms; and the claims were basically a broad conspiracy among the defendants to deprive plaintiffs of profits and their ability to go forward with the Duncan Farms project. (1T:25:19-25). The court found that the parties were identical, the actions were identical, and the underlying transactions were identical. (1T:25:20-25). The court found that this case was the "poster child" regarding why we have the entire controversy doctrine and *res judicata*. (1T:27:1-8).

Amendments to pleadings are addressed in the sound discretion of the trial court. Fox v. Mercedes-Benz Credit Corp., 281 N.J. Super. 476, 483 (App. Div. 1995); Alpert, Goldberg, Butler, Norton & Weiss v. Quinn, 410 N.J. Super. 510 (App. Div. 2009)(the trial court denied the application for the amendment because it was an attempt to re-litigate the summary judgment that had just been entered, and the proposed amendment made the same claims which the court had just decided, and would be subject to the same defenses on which the court had ruled favorably – the Appellate Division affirmed).

Accordingly, the trial court's order should be affirmed.

II. SINCE THE ENTIRE CONTROVERSY DOCTRINE BARS THIS ACTION, THE ORDER OF THE TRIAL COURT SHOULD BE AFFIRMED (39a)

Plaintiffs' latest attempt to sue Mr. Menas and Cooper Levenson for the same allegations presented in the 2011 matter is the exact reason why the entire controversy doctrine was developed, and is the reason the doctrine currently exists. Plaintiffs should not be permitted to file a new mirrored lawsuit, alleging the same causes of action, simply because they were unable to obtain relief in the 2011 matter from the trial court.

The entire controversy doctrine requires that a party "litigate all aspects of a controversy in a single legal proceeding." Kaselaan & D'Angelo Assocs. v. Soffian, 290 N.J. Super. 293, 298 (App. Div. 1996). "[A]ll claims arising

from a particular transaction or series of transactions should be joined in a single action." Archbrook Laguna, LLC v. Marsh, 414 N.J. Super. 97, 105 (App. Div. 2010). "Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of omitted claims …" R. 4:30A. See also, Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 322 (1995).

The decisions imposed in the 2011 matter had a direct preclusive effect on this case, and the applicability of the entire controversy doctrine. Plaintiffs, in the present complaint, similar to numerous times in the past, seek to pour "old wine in new bottles"[3], and simply attempt to make the same arguments before different courts in an attempt to obtain a different result. Plaintiffs' allegations in the newly filed complaint in this case are the same as the claims against Menas and Cooper in the 2011 case, which was fully disposed of by the court. Thus, this meritless lawsuit seeks to re-litigate the exact same core claims, which is prohibited by the entire controversy doctrine.

Therefore, based on the applicability of the entire controversy doctrine, the order and opinion of Judge Acquaviva should be affirmed.

[3] Borrowed from "Old Wine In New bottles" (December 27, 2019) by Milton Friedman, The Economic Journal, 101 (Jun. 1991), 33-40.

It is uncontested that the 2011 court ruled upon plaintiffs' claims, and decisions and orders were entered. The present complaint, which involves the same nucleus of facts and circumstances that were at issue in the 2011 case, is still active and currently on appeal for the second time. Accordingly, the entire controversy doctrine and the doctrine of *res judicata* applied, and required dismissal of this action.

The issues in the present complaint all arise out of or are related to the previous orders and decisions. Plaintiffs filed their complaint against Menas and Cooper Levenson in 2011. That case was fully litigated and dismissed twice. Accordingly, the present action is fully duplicative of the prior litigation. It is therefore barred. Therefore, the trial court properly granted the motions to dismiss the complaint with prejudice.

The plaintiffs were not permitted to file this new lawsuit alleging the same causes of action simply because the court ruled against them in the 2011 matter. Those decisions in the 2011 action have a direct preclusive effect on the present case. Plaintiffs continually seek to pour "old wine in new bottles", and attempt to make the same arguments before different courts in an attempt to obtain a different result. It is clear that plaintiffs were simply attempting to circumvent Judge Acquaviva's order for summary judgment which dismissed the claims against Menas and Cooper Levenson. Judge Acquaviva conducted

the Rule 104 hearing regarding the opinions of plaintiffs' expert, Dr. Powell, based upon the Supreme Court's new standard.

Accordingly, the order granting summary judgment as to the Menas and Cooper Levenson defendants cannot be changed simply by filing a new complaint under a different docket number, alleging that "newly discovered evidence" permits plaintiffs a re-do. It is clear that plaintiffs were simply attempting to circumvent Judge Acquaviva's order which barred the opinions of Dr. Powell, and then granted summary judgment pursuant to the Supreme Court's new standard.

III. THE PLAINTIFFS' CLAIMS WERE BARRED BY THE DOCTRINE OF *RES JUDICATA*; THEREFORE, THE TRIAL COURT'S ORDER AND OPINION SHOULD BE AFFIRMED (39a)

The doctrine of *res judicata* bars this action. The doctrine protects litigants from the burden of re-litigating identical issues with the same party or his privy, and promotes judicial economy by preventing needless litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 (1979). The New Jersey Supreme Court has noted the purpose of *res judicata* is to require litigants "to bring all possible claims in one proceeding." McNeil v. Legislative Apportionment Comm'n of State, 177 N.J. 364, 395 (2003).

Under New Jersey law, claim preclusion will prevent a litigant from re-litigating disputes that have been resolved in an earlier proceeding if three

requirements are met: (1) the judgment in the prior action must be valid, final and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one. Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 412 (1991).

In Watkins, the court noted that "[c]laim preclusion applies not only to matters actually determined in an earlier action, but to all relevant matters that could have been so determined." Id.[4]

"For the purposes of *res judicata*, causes of action are deemed part of a 'claim' if they arise out of the same transaction or occurrence." Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 413 (1991). If "a litigant seeks to remedy a single wrong, then that litigant should present all theories in the first action." Ibid.

"The application of *res judicata* is a question of law", and is reviewed *de novo*. Walker v. Choudhary, 425 N.J. Super. 135, 151 (App. Div. 2012) (quoting, Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 173 (App. Div. 2000)).

[4] Whether an issue is precluded based upon prior litigation is a question of law. Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 173 (App. Div.), certif. denied, 164 N.J. 188 (2000).

The plaintiffs' claims are barred by *res judicata* as they arise from the same set of facts, between the same parties, and arise out of the same transaction or occurrence – the Duncan Farms transaction matter – which were repeatedly decided in the Law Division, the Appellate Division, and in the New Jersey Supreme Court. The answer to this question of law is clear. The *res judicata* effect here is dispositive. See also, Brookshire Equities, LLC v. Montaquiza, 346 N.J. Super. 310, 318 (App. Div. 2002).

In this case, plaintiffs seek to challenge the actions and judgments of the trial court under the 2011 case by filing a new lawsuit against Menas and Cooper. However, rulings, decisions and orders were entered in the 2011 litigation. The instant complaint involves the same nucleus of facts and circumstances that were at issue in the 2011 case and, therefore, it is barred under the doctrine of *res judicata*. The issues in this present complaint arose out of or are related to previous orders of the 2011 court. Plaintiffs could not challenge the validity of those orders without filing an appeal, which they have done.

This is not a situation where plaintiffs did not file a claim previously against Menas and Cooper. Plaintiffs previously filed the action against them. That case was litigated, dismissed, appealed, argued before the Supreme Court, remanded, dismissed a second time, and is now on appeal for a second time.

Therefore, the current action was duplicative of the prior litigation, and is therefore barred.

Since plaintiffs' instant claims are nothing more than an attempt a "re-do" of this court's prior orders and rulings, the present complaint is barred by the doctrine of *res judicata*, and was properly dismissed by the trial court.

CONCLUSION

For the reasons expressed above, it is respectfully submitted that the orders of the trial court of December 15, 2023 should be affirmed.

MARSHALL, DENNEHEY, P.C.
Attorneys for Defendants, Nicholas T. Menas, Esq. and Cooper, Levenson, April, Niedelman & Wagenheim, P.A.

/s/ John L. Slimm
BY:_____
JOHN L. SLIMM

Dated: March 7, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LARRY SCHWARTZ and NJ 322, LLC, Plaintiffs/Appellants, v. NICHOLAS MENAS, ESQ.; COOPER, LEVENSON, APRIL, NIEDELMAN & WAGENHEIM, P.A.; ERIC FORD; PULTE HOMES; BRAD INGERMAN; MBI DEVELOPMENT COMPANY, INC. and ABC CORPORATION 1-10, JOHN DOES 1-10, and JANE DOES 1-10 (names being fictitious as true identities are unknown), Defendants/Respondents.	DOCKET NO.: A-002029-23 Trial Court No. MON-L-2487-23 Civil Action On Appeal from Superior Court of New Jersey, Law Division, Monmouth County Sat Below: Hon. Gregory L. Acquaviva, J.S.C.

AMENDED BRIEF OF DEFENDANT/RESPONDENT, PULTE HOMES, IN OPPOSITION TO PLAINTIFFS/APPELLANTS' APPEAL

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PRELIMINARY STATEMENT

The Trial Court properly dismissed Plaintiffs' Complaint as barred by the entire controversy doctrine and *res judicata* because it is duplicative of the 2011 lawsuit these same Plaintiffs filed alleging a broad conspiracy to deprive them of the ability to develop a property known as Duncan Farms. As the Trial Court opined: "All of this goes back to Duncan Farms.... The parties are identical. The actions are identical. The underlying transactions are identical." [1T, 25:19-25].

In reaching its decision, the Trial Court properly rejected Plaintiffs' contention that their Complaint is based on "new evidence" discovered after the 2011 litigation was first dismissed. Even accepting the evidence as "newly discovered" for the purpose of the motions [although it was not], the Trial Court held that Plaintiffs had a full opportunity – after the 2011 litigation was remanded by the New Jersey Supreme Court – to file a motion to amend to assert their "new" claims, but "either missed the boat or strategically decided to sit on it." [1T, 24:16-25].

The purported "new evidence" is plaintiffs' claim that until 2019 he was not aware of who actually received the funds which plaintiffs expended to acquire the right to develop Duncan Farms. Regardless of who actually received those funds, it is undisputed that the monies plaintiffs paid for rights in Duncan Farms was less than the amount plaintiffs received in the eventual sale, such that there was no actual dollar loss. In the 2011 litigation plaintiff testified in deposition, and plaintiffs'

counsel conceded on a motion record, that plaintiff had sustained no actual dollar loss, but rather a $200,000 gain or at worst a "wash" and therefore focused its damages claim on alleged lost developmental profits. Plaintiffs' claim for developmental profits was dismissed by the trial court and that dismissal was affirmed on appeal based on the speculative nature of the claim. Now having failed to prove any case for developmental profits, plaintiffs improperly attempt to advance a different argument, claiming that it has new evidence of who received its funds. Regardless of who received the funds, or when plaintiffs acquired that evidence, the factual record is clear, plaintiffs did not incur any actual loss in the transaction. Plaintiffs attempt to relitigate its damages claims should therefore be rejected.

Accordingly, the Appellate Division should affirm the Trial Court's Order dismissing the 2023 Complaint with prejudice.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

A. The 2011 Lawsuit

On March 8, 2011, Plaintiffs Larry Schwartz and NJ 322, LLC ("Plaintiffs") filed a Complaint against Defendants Nicholas Menas ("Menas") and Cooper Levenson April Niedelman & Wagenheim, P.A. ("Cooper Levenson", and together with Menas, the "Cooper Defendants") in the Superior Court of New Jersey, Law Division, Monmouth County, under Docket No. MON-L-3904-11. ("2011

Lawsuit"). Plaintiffs subsequently filed an Amended Complaint, *inter alia*, joining Eric Ford ("Ford") and Pulte Homes ("Pulte") as Defendants (the "Amended Complaint"). Da53.

The Amended Complaint asserted claims related to a potential real estate development project on a property known as "Duncan Farms." Generally speaking, Schwartz alleged that in 2006, Menas, who was then a member of Cooper Levenson, proposed that Schwartz and his friend, Salvatore Surace, purchase Duncan Farms and develop it as a mixed-use townhouse and commercial development. Schwartz agreed, and Menas formed NJ322, LLC. Plaintiffs contend that Defendants subsequently conspired to have Duncan Farms rezoned for "affordable housing," and then prevented Schwartz from acting as the affordable housing developer at the property, instead causing an experienced developer to acquire the project from Schwartz. *Id.*

In their Amended Complaint, Plaintiffs alleged legal malpractice against the Cooper Levenson Defendants. Plaintiffs also alleged that the Defendants conspired to commit fraud, conversion, and tortious interference. Plaintiffs sought damages, including lost profits. *Id.*

In support of their claim for lost profits, Plaintiffs presented an expert report authored by Dr. Robert Powell, Jr. On September 12, 2018, Defendants filed a motion to bar Dr. Powell's report and testimony under New Jersey's New Business

Rule ("NBR"), pursuant to which a new business is barred *per se* from recovering lost profits damages. Because Plaintiffs had no experience in real estate development and, more specifically, affordable housing projects, they constituted a "new business." Following oral argument on October 12, 2018, the Trial Court granted defendants' motion to bar Dr. Powell's report and, thus, barred Plaintiffs alleged lost profits damages, pursuant to the NBR. Da4.

On January 30, 2019, Defendants filed summary judgment motions because Plaintiffs did not suffer any other monetary loss or any other recoverable damages. During oral argument, Plaintiffs' counsel confirmed on direct questioning from the Trial Court that Plaintiffs did not suffer any damages (other than the alleged "lost profits damages" that were barred by the NBR).

> THE COURT: Understood. So what I understand from that argument is that, yes, you are not disputing the fact that [Schwartz] did not suffer any actual damages, out-of-pocket expense damages as a result of this – of these claims, that the only other damages that you were claiming were for – that the only actual damages that you were claiming were lost profits, which you now c – we all concede those lost prof – evidence of those lost profits were barred by this Court. ***So what I'm just trying to make clear for the record is that you're conceding that in fact there are no other actual damages to your client at this point***.
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> Transcript of February 15, 2019 Motion Hearing before Judge Lourdes Lucas (p. 38, Ln. 9-20) [emphasis added].

After a brief colloquy, Plaintiffs' counsel conceded that Plaintiffs were paid more money for Duncan Farms than they spent acquiring their interest in it and, thus, did not suffer any recoverable damages:

> MR. DEPIERRO: … Mr. Schwartz testified. He expended possibly anywhere from 8 or $900,000 and he also testified that the payments to N.J. 322 were in order of about a million-one. That's his testimony.
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> *Id.* (p. 41, Ln. 12-16).

The Court then asked whether Plaintiffs' counsel agreed that damages were a required element for each of Plaintiffs' causes of action, and counsel responded affirmatively:

> THE COURT: … We understand that you are indicating that Mr. Schwartz clearly indicated what he spent and what he made and that ***obviously shows that he did not have any out-of-pocket actual damages. We've established that***.
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> My question is a legal question: Do you contest that proving damages is an element of your claims or do you think that defendants accurately posit the status of the law that requires that damages be shown in order to prevail on your claim?
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>
> MR. DEPIERRO: Thank you, Your Honor.
>
> *Id.* (p. 43, Ln. 8; p. 44, Ln. 2) [emphasis added].

The absence of any actual damages was also conceded by the Plaintiff himself. When asked about any actual dollar loss associated with the funds he paid into the Duncan Farms transaction, Mr. Schwartz admitted he made a modest profit. In his deposition Mr. Schwartz testified that he invested $700,000 to $800,000 and receive $1.1 million dollars in return from which he concluded… "it was a wash. It was a very minimal profit. Maybe $100,000 or $200,000." Da90 (Schwartz tr p. 80. Ln. 9-10)

Accordingly, on February 15, 2019, Judge Lucas entered Orders dismissing Plaintiffs' Amended Complaint, with prejudice. P77a.

By Opinion and Order dated November 6, 2020, the Appellate Division affirmed the trial court's Orders. Da5.

On April 21, 2021, the Supreme Court granted Plaintiffs' Petition for Certification. In its August 17, 2022 Opinion, the Supreme Court initially "concurred with the trial court and the Appellate Division that the development projects that gave rise to both cases constituted new businesses." However, it rejected the NBR as a *per se* ban on claims by a new business for lost profits damages. Instead, it held that the "reasonable certainty" standard applied, while maintaining a distinction between the proofs required for a new business to meet that standard versus an established business. Thus, the Supreme Court remanded the

matter so the Trial Court could conduct the required "fact-sensitive" inquiry to evaluate the reasonable certainty standard. *Schwartz v. Menas*, 251 N.J. 556 (2022).

Five (5) months after the Supreme Court's remand order, the Trial Court conducted a hearing on January 19 and 20, 2023, pursuant to N.J.R.E. 104, to assess Plaintiffs' claim and, more specifically, Dr. Powell's opinion allegedly supporting Plaintiffs' lost profits damages. Da53. On March 9, 2023, the Trial Court issued an Amended Order[1], with an accompanying Statement of Reasons, granting Defendants' respective motions to bar the testimony of Dr. Powell and granting Defendants' respective motions for summary judgment. Da1.

On January 2, 2025, the Appellate Division affirmed the Trial Court's decision in a comprehensive 30-page unpublished per curiam opinion. Da23.

On January 31, 2025, Plaintiffs filed a Notice of Petition for Certification. Da111. On February 17, 2025, Plaintiffs filed an Amended Notice of Petition for Certification. Da135. That Petition is still pending.

B. The 2023 Lawsuit

On August 9, 2023, Plaintiffs filed their Complaint in the present matter (the "2023 Complaint"). Plaintiffs nominally included two additional defendants – KDL Realty Management, LLC ("KDL") and Theresa Means. Ford is alleged to be the

[1] The Amended Order corrected the caption on the original Order entered on March 9, 2023.

"managing member" of KDL. And Theresa Means is the wife of Defendant Nicholas Means. However, all other parties are the same and the causes of action are based on the same transactions and factual allegations at issue in the 2011 Lawsuit. Pa1.

Despite the identity of parties and factual allegations, Plaintiffs' counsel did not disclose the existence of the 2011 Lawsuit or the pendency of its appeal in his accompanying Certification pursuant to R. 4:5-1. Instead, he certified that "the within matter is not the subject of any action pending in any Court or arbitration proceeding, and that no other such action or proceeding is contemplated." Pa29.

On September 25, 2023, all Defendants filed motions to dismiss Plaintiffs' Complaint on the grounds that it is barred by (1) the related doctrines of res judicata and collateral estoppel, (2) the entire controversy doctrine, and/or (3) the statute of limitations.

On December 15, 2023, the Trial Court conducted oral argument on the motions to dismiss and entered an Order dismissing Plaintiffs' Complaint with prejudice for the reasons set forth on the record. Pa40.

LEGAL ARGUMENT

I. STANDARD OF REVIEW ON APPEAL

The Appellate Division's standard of review on appeal of a dismissal under Rule 4:6-2(e) is de novo, meaning that it applies the same legal standard as the trial

court when reviewing its reasoning. *Donato v. Moldow,* 374 N.J.Super. 475, 483 (App. Div. 2005).

A motion under Rule 4:6-2(e) is a statement by a defendant that there is no legal claim alleged by the plaintiff. A court is "to approach with great caution applications for dismissal under R. 4:6-2(e) for failure to state a claim on which relief may be granted." *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 771-72 (1989). The court is to search the complaint in depth to determine if a claim is even suggested in the papers. *Id*. at 746. The court is not concerned with plaintiff's ability to prove the allegations but rather only that a cause of action can be gleaned from the complaint. *Printing Mart*, 116 N.J. at 772; *Smith v. SBC Communications, Inc*., 178 N.J. 265, 282 (2004).

All facts alleged in the complaint are to be taken as true. *Craig v. Suburban Cablevision*, 140 N.J. 623, 625 (1995). These allegations must be reviewed with great liberality, and all inferences resolved in favor of the plaintiff. *Communication Workers of America v. Whitman*, 298 N.J. Super. 162, 166-167 (App. Div. 1997). However, it should be remembered that discovery is intended to lead to facts supporting or opposing a legal theory, not to the formulation of one. *Camden County Energy Recovery Assocs, L.P. v. N.J. Dep. of Environmental Protection*, 320 N.J. Super. 59, 64 (App. Div. 1999). Legal sufficiency requires allegation of all the facts

that the cause of action requires. *Cornett v. Johnson & Johnson*, 414 N.J. Super. 365, 385 (App. Div. 2010). Without such allegations, the claim must be dismissed. *Ibid.*

Under *R.* 4:6-2(e), if any material outside the four corners of the pleadings is relied upon on a motion to dismiss for failure to state a claim, it is automatically converted into a motion for summary judgment. *Lederman v. Prudential Life Ins.*, 385 N.J. Super. 324, 337 (App. Div.), *certif. den.*, 188 N.J. 353 (2006). However, the motion to dismiss on the pleadings is not converted into a summary judgment motion by filing with the court a document referred to in the pleading. *Myska v. New Jersey Mfrs. Ins.*, 440 N.J. Super. 458, 482 (App. Div.), *app. dismissed*, 224 N.J. 523 (2015). It is well-established that "a court may consider documents specifically referenced in the complaint 'without converting the motion into one for summary judgment.'" *Ibid.* (quoting *E. Dickerson & Son, Inc. v. Ernst & Young, LLP*, 361 N.J. Super. 362, 365 (App. Div. 2003), aff'd, 179 N.J. 500 (2004)).

Similarly, the court may consider "matters of public record, and documents that form the basis of a claim" without converting the motion into one for summary judgment. *Teamsters Local 97 v. State of New Jersey*, 434 N.J. Super. 393, 412 (App. Div. 2014) (citation omitted); *see Williamson v. Treasurer of the State of New Jersey*, 350 N.J. Super. 236, 242 (App. Div. 2002) (taking "judicial notice of the fact that pleadings and other documents on file in the Superior Court are generally public records").

A. The Trial Court Properly Dismissed Plaintiffs' Complaint as Barred by the Entire Controversy Doctrine and Res Judicata.

i. Entire Controversy Doctrine

The entire controversy doctrine, codified in *R*. 4:30A, is the principle that the adjudication of a legal controversy should occur in only one court; therefore, all parties involved in litigation should present all of the claims and defenses that are related to the underlying controversy in a single action. *Cogdell v. Hospital Center at Orange*, 116 N.J. 7, 15 (1989). R. 4:30A provides:

> Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions).

Ibid.

The entire controversy doctrine is:

> a precautionary principle intended to prevent fractionalization of litigation by requiring all claims between same parties arising out of or relating to same transactional circumstances to be joined in single action; [the] effect of [the] doctrine is to preclude a party from withholding from action for separate and later litigation a constituent component of controversy even where that component is a separate and independently cognizable cause of action.

Brown, 208 N.J. Super. at 372.

The doctrine "does not require commonality of legal issues. Rather, the determinative consideration is whether distinct claims are aspects of a single larger controversy because they arise from interrelated facts." *DiTrolio v. Antiles*, 142 N.J. 253, 271 (1995).

The entire controversy doctrine is designed to achieve economy in litigation by avoiding the waste, inefficiency, delay, and expense of piecemeal and fragmented litigation. *Cogdell*, 116 N.J. at 15. As such, the New Jersey Supreme Court has set forth a three-part test regarding the application of the doctrine:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.

Fisher v. Yates, 270 N.J. Super. 458, 470 (1994) (citing *Watkins v. Resorts Intern. Hotel & Casino*, 124 N.J. 398, 412 (1991)).

If a "party withholds a constituent claim ... and the case is tried to judgment or settled, that party 'risks losing the right to bring that claim later.'" *Kaselaan & D'Angelo Assocs. v. Soffian*, 290 N.J. Super. 293, 299 (App. Div. 1996) (citing *Mystic Isle Dev. Corp. v. Perskie & Nehmad*, 142 N.J. 310, 324 (1995)). It should be noted that the entire controversy doctrine includes "not only defenses but affirmative claims that could, and should be brought as counterclaims; the failure of such mandatory joinder would preclude a party in a subsequent lawsuit from

asserting a 'new and independent action for damages.'" *Cogdell*, 116 N.J. at 1 (citing *Ajamian v. Schlanger*, 14 N.J. 483, 488 (1954)).

Underlying the entire controversy doctrine are "the twin goals of judicial administration and fairness to the litigants." *Woodward-Clyde Consultants v. Chemical and Pollution Sciences*, 105 N.J. 464, 466 (1988). Indeed, "the doctrine recognizes that it is neither fair nor efficient to fragment a single controversy into separate actions. Such fragmentation can harass litigants, delay final adjudication, and waste.

Here, the Trial Court initially noted the fatal tactical decision made by Plaintiffs' counsel in the months following the Supreme Court's remand in the 2011 Lawsuit:

> So, the case is revived back at the trial court on August 17, 2022. Mr. De Pierro takes the position that that's the remand, that's what was in front of you. I couldn't have amended the complaint with the information that I learned after Judge Lucas' summary judgment but before the remand given the nature of the remand.
>
> I – I – I don't necessarily agree with that. ***He didn't file a motion to amend. I think he had every opportunity to file a motion to amend and he's presuming what I would have done with that motion to amend***, but I just go back on motions to amend of the great liberality afforded motions to amend….
>
> But really what drives home the point here is the Bustamante case, and the Bustamante case allowed an amendment even after a remand from a higher court. It opens the door to an amendment on a remand, and I think

> that's a fascinating legal proposition, which is a blinking red light for a just to say you need to go back to basics….
>
> ***There's no motion to amend. Plaintiff knew about these alleged new facts in 2019. They had more than six months on the remand to file a motion to amend their complaint, and they sat on it. They didn't take a shot***. And then now after this Court grants summary judgment last year on March 9, 2023, after the 2011 litigation has now been up on appeal for, I don't know, six months or so, they now file this action, 2487-23, which fundamentally is the Duncan Farms litigation….
>
> 1T20:6-22:8 [emphasis added].

From there, the Trial Court determined that the entire controversy doctrine "clearly, clearly, clearly" requires a dismissal of the 2023 Complaint:

> This is precisely that. The '11 case was litigated for 12 years, and there's other offshoots of that in the '15 litigation, and there was another litigation that was settled by Judge Jones on the morning of trial. It all should have been one.
>
> And now, to come forward after the opportunity, a six-month opportunity to file a motion to amend, after having known about these alleged revelations in 2019, and take another bite at the apply and try again in another way, creative? ***Sure, but it violates the entire controversy doctrine***. It – to go back to Codgell, it would create delay. It would create harassment. It creates clogging of the judicial system. It wastes the time and effort of the parties and it undermines fundamental fairness.
>
> ***
>
> That could have been done here, and there was every opportunity for more than six months to file a motion to amend, and plaintiffs either missed the boat or strategically decided to sit on it. ***I don't know, but they***

> ***had the opportunity, and this all goes back to the fundamental Duncan Farms transaction***.
>
> And even if – even if – even if this was discovered in 2019, there was the opportunity to bring this forward. It went and passed, and ***the preclusive effect of the entire controversy doctrine clearly, clearly, clearly requires a dismissal in this matter***.
>
> 1T:23:20-25:1.

In short, the Trial Court's decision on this basis is sound and should be affirmed.

ii. Res Judicata

Res judicata, also known as claim preclusion, is the Latin term for "a matter already judged." The doctrine prevents litigants from filing a second lawsuit to assert claims that have already been disposed of on the merits in an earlier lawsuit. *In re Mullarkey*, 536 F.3d 215, 225 (3d Cir. 2008). For an action to be barred based on the application of res judicata, three elements must be met:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to ***or in privity with those in the prior action***; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.

Watkins v. Resorts Intern. Hotel & Casino, 124 N.J. 398, 412 (1991) (emphasis added).

The New Jersey Supreme Court has stated that "in determining whether successive claims constitute one controversy for purposes of the doctrine, the central

consideration is whether the claims . . . arise from related facts or the same transaction or series of transactions." *DiTrolio v. Antiles*, 142 N.J. 253 (1995).

The doctrine of res judicata prevents a litigant from getting yet another day in court to relitigate issues already litigated. The bar extends not only to "all matters litigated and determined by such judgment but also as to all relevant issues which could have been presented but were not." *Culver v. Ins. Co. of N. Am.*, 115 N.J. 451, 463 (1989) (citing *Anselmo v. Hardin*, 253 F.2d 165, 168 (3d Cir. 1958)). If issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties, subsequent litigation is "needless" and will not be tolerated under the doctrine of res judicata. *Angel v. Bullington*, 330 U.S. 183 (1947).

Here, the Trial Court determined that the elements of the *res judicata* doctrine were satisfied:

> All of those are satisfied here. ***All of this goes back to Duncan Farms***. All of it colloquially was an alleged broad conspiracy among all of the defendants to deprive the plaintiffs of profits and the ability to go forward with the Duncan Farms prospect. ***The parties are identical. The actions are identical. The underlying transactions are identical.*** And maybe there is one new fact that was learned in 2019, but again, going back to Bustamante, going back to 4:9-1, going back to Notte, it's a liberal amendment standard that can be addressed even on a remand, and I disagree with plaintiff's contention that the remand was so limited. ***They should have taken a shot, especially in view of that very, very broad view of amendments.***
>
> 1T:25:19-26:8 [emphasis added].

B. Alternatively, Plaintiffs' Complaint Fails As a Matter of Law Because Plaintiffs Previously Conceded They Have Not Suffered Any Recoverable Damages.

As noted above, after the Trial Court in the 2011 Lawsuit barred Plaintiffs' lost profits damages, Defendants moved for summary judgment because Plaintiffs did not suffer any other out-of-pocket or compensable damages. During oral argument on those motions, the Trial Court engaged in a colloquy with Plaintiffs' counsel to confirm the two core issues: (1) damages are a required element of Plaintiffs' causes of action; and (2) Plaintiffs did not suffer any damages beyond their alleged (and barred) lost profits. And Plaintiffs' counsel conceded both points. Transcript of February 15, 2019 Motion Hearing before Judge Lourdes Lucas (p. 41, Ln. 12-16, p. 43, Ln. 8, p. 44, Ln. 2). Further, on remand, Plaintiffs pursued only their lost profits damages, which were again barred by the Trial Court following a full Rule 104 hearing. Da1.

Plaintiffs' 2023 Complaint is based on the same Duncan Farms transaction and seeks the same damages as in the 2011 Lawsuit. Given that they cannot recover lost profits damages, and given the concession that they suffered no other damages in the Duncan Farms transaction, Plaintiffs cannot satisfy a required element of each cause of action – *i.e.*, that they suffered compensable damages.

Accordingly, for this alternative reason, Plaintiffs' 2023 Complaint fails as a matter of law and should be dismissed.

CONCLUSION

For all the foregoing reasons, the Appellate Division should affirm the Trial Court's Order dismissing the 2023 Complaint with prejudice.

Respectfully submitted,

HILL WALLACK LLP
Attorneys for Defendants/Respondent,
Pulte Homes

By: */s/ James G. O'Donohue*
James G. O'Donohue

Dated: March 7, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LARRY SCHWARTZ and NJ 322, LLC, Plaintiffs/Appellants, v. NICHOLAS MENAS, ESQ.; COOPER, LEVENSON, APRIL, NIEDELMAN & WAGENHEIM, P.A.; ERIC FORD; PULTE HOMES; BRAD INGERMAN; MBI DEVELOPMENT COMPANY, INC. and ABC CORPORATION 1-10, JOHN DOES 1-10, and JANE DOES 1-10 (names being fictitious as true identities are unknown), Defendants/Respondents.	DOCKET NO.: A-002029-23 Trial Court No. MON-L-2487-23 Civil Action On Appeal from Superior Court of New Jersey, Law Division, Monmouth County Sat Below: Hon. Gregory L. Acquaviva, J.S.C.

BRIEF OF DEFENDANTS/RESPONDENTS, ERIC FORD AND KDL REALTY MANAGEMENT, LLC, IN OPPOSITION TO PLAINTIFFS/APPELLANTS' APPEAL

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In reaching its decision, the Trial Court properly rejected Plaintiffs' attempt to re-litigate the same case based on "new evidence" discovered after the 2011 litigation was first dismissed. Even accepting the evidence as "newly discovered" for the purpose of the motions [although it was not], the Trial Court held that Plaintiffs had a full opportunity – after the 2011 litigation was remanded by the New Jersey Supreme Court – to file a motion to amend to assert their "new" claims, but "either missed the boat or strategically decided to sit on it." [1T24:16-25].

Moreover, the purported "new evidence" consists of bank records allegedly demonstrating the persons who ultimately received the funds Plaintiffs invested in the Duncan Farms project. However, it has already been established in the 2011 lawsuit that Plaintiffs are barred from recovering alleged lost profits damages. And Plaintiffs and their counsel conceded on the record in the 2011 lawsuit that

Plaintiffs did not suffer any other out-of-pocket or compensable damages in the Duncan Farms transaction. Rather, Plaintiffs made $200,000 by selling the project to another developer. Plaintiffs are bound by their admissions and the Court's rulings to that effect. Thus, Plaintiffs' 2023 Complaint fails as a matter of law because Plaintiffs cannot satisfy a required element of each cause of action – *i.e.*, that they suffered compensable damages.

Accordingly, the Appellate Division should affirm the Trial Court's Order dismissing the 2023 Complaint with prejudice.

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> THE COURT: Understood. So what I understand from that argument is that, yes, you are not disputing the fact that [Schwartz] did not suffer any actual damages, out-of-pocket expense damages as a result of this – of these claims, that the only other damages that you were claiming were for – that the only actual damages that you were claiming were lost profits, which you now c – we all concede those lost prof – evidence of those lost profits were barred by this Court. ***So what I'm just trying to make clear for the record is that you're conceding that in fact there are no other actual damages to your client at this point***.
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> [2/15/2019 Tr. at 38:9-20] [emphasis added].

After a brief colloquy, Plaintiffs' counsel conceded that Plaintiffs were paid more money for Duncan Farms than they spent acquiring their interest in it and, thus, did not suffer any recoverable damages:

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> [*Id.*, 41:12-16].

The Court then asked whether Plaintiffs' counsel agreed that damages were a required element for each of Plaintiffs' causes of action, and counsel responded affirmatively:

> THE COURT: … We understand that you are indicating that Mr. Schwartz clearly indicated what he spent and what he made and that ***obviously shows that he did not have any out-of-pocket actual damages. We've established that***.
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> My question is a legal question: Do you contest that proving damages is an element of your claims or do you think that defendants accurately posit the status of the law that requires that damages be shown in order to prevail on your claim?
>
> MR. DEPIERRO: My understanding of the law since law school . . . you have to have damages.
>
> THE COURT: Okay, thank you. I wanted to establish that to made sure that there were no – you weren't taking any contrary position as to that.

MR. DEPIERRO: Thank you, Your Honor.

[*Id.*, 43:8-44:2] [emphasis added].

The absence of any actual damages was also conceded by the Plaintiff himself. When asked about any actual dollar loss associated with the funds he paid into the Duncan Farms transaction, Schwartz admitted he made a modest profit. In his deposition, Schwartz testified that he invested $700,000 to $800,000 and received $1.1 million dollars in return, from which he concluded "It was a wash. It was a very minimal profit. Maybe $100,000 or $200,000." Da90 [79:19-80:6].

Accordingly, on February 15, 2019, Judge Lucas entered Orders dismissing Plaintiffs' Amended Complaint, with prejudice. P77a.

By Opinion and Order dated November 6, 2020, the Appellate Division affirmed the trial court's Orders. Da5.

On April 21, 2021, the Supreme Court granted Plaintiffs' Petition for Certification. In its August 17, 2022 Opinion, the Supreme Court initially "concurred with the trial court and the Appellate Division that the development projects that gave rise to both cases constituted new businesses." However, it rejected the NBR as a *per se* ban on claims by a new business for lost profits damages. Instead, it held that the "reasonable certainty" standard applied, while maintaining a distinction between the proofs required for a new business to meet

that standard versus an established business. Thus, the Supreme Court remanded the matter so the Trial Court could conduct the required "fact-sensitive" inquiry to evaluate the reasonable certainty standard. Schwartz v. Menas, 251 N.J. 556 (2022).

Five (5) months after the Supreme Court's remand order, the Trial Court conducted a hearing on January 19 and 20, 2023, pursuant to N.J.R.E. 104, to assess Plaintiffs' claim and, more specifically, Dr. Powell's opinion allegedly supporting Plaintiffs' lost profits damages. Da53. On March 9, 2023, the Trial Court issued an Amended Order[1], with an accompanying Statement of Reasons, granting Defendants' respective motions to bar the testimony of Dr. Powell and granting Defendants' respective motions for summary judgment. Da1.

On January 2, 2025, the Appellate Division affirmed the Trial Court's decision in a comprehensive 30-page unpublished per curiam opinion. Da23.

Plaintiffs filed a Petition for Certification on January 21, 2025 (Da111) and an Amended Petition for Certification on February 17, 2025 (Da135). That Petition is still pending.

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[1] The Amended Order corrected the caption on the original Order entered on March 9, 2023.

B. The 2023 Lawsuit

On August 9, 2023, Plaintiffs filed their Complaint in the present matter (the "2023 Complaint"). Plaintiffs nominally included two additional defendants – KDL Realty Management, LLC ("KDL") and Theresa Means. Ford is alleged to be the "managing member" of KDL. And Theresa Means is the wife of Defendant Nicholas Means. However, all other parties are the same and the causes of action are based on the same transactions and factual allegations at issue in the 2011 Lawsuit. Pa1.

Despite the identity of parties and factual allegations, Plaintiffs' counsel did not disclose the existence of the 2011 Lawsuit or the pendency of its appeal in his accompanying Certification pursuant to R. 4:5-1. Instead, he certified that "the within matter is not the subject of any action pending in any Court or arbitration proceeding, and that no other such action or proceeding is contemplated." Pa29.

On September 25, 2023, all Defendants filed motions to dismiss Plaintiffs' Complaint on the grounds that it is barred by (1) the related doctrines of res judicata and collateral estoppel, (2) the entire controversy doctrine, and/or (3) the statute of limitations.

On December 15, 2023, the Trial Court conducted oral argument on the motions to dismiss and entered an Order dismissing Plaintiffs' Complaint with prejudice for the reasons set forth on the record. Pa40.

II. LEGAL ARGUMENT

A. STANDARD OF REVIEW ON APPEAL

The Appellate Division's standard of review on appeal of a dismissal under Rule 4:6-2(e) is de novo, meaning that it applies the same legal standard as the trial court when reviewing its reasoning. *Donato v. Moldow,* 374 *N.J.Super.* 475, 483 (App. Div. 2005).

A motion under Rule 4:6-2(e) is a statement by a defendant that there is no legal claim alleged by the plaintiff. A court is "to approach with great caution applications for dismissal under R. 4:6-2(e) for failure to state a claim on which relief may be granted." *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 771-72 (1989). The court is to search the complaint in depth to determine if a claim is even suggested in the papers. *Id*. at 746. The court is not concerned with plaintiff's ability to prove the allegations but rather only that a cause of action can be gleaned from the complaint. *Printing Mart*, 116 N.J. at 772; *Smith v. SBC Communications, Inc*., 178 N.J. 265, 282 (2004).

All facts alleged in the complaint are to be taken as true. *Craig v. Suburban Cablevision*, 140 N.J. 623, 625 (1995). These allegations must be reviewed with great liberality, and all inferences resolved in favor of the plaintiff. *Communication Workers of America v. Whitman*, 298 N.J. Super. 162, 166-167 (App. Div. 1997). However, it should be remembered that discovery is intended to lead to facts supporting or opposing a legal theory, not to the formulation of one. *Camden County Energy Recovery Assocs, L.P. v. N.J. Dep. of Environmental Protection*, 320 N.J. Super. 59, 64 (App. Div. 1999). Legal sufficiency requires allegation of all the facts that the cause of action requires. *Cornett v. Johnson & Johnson*, 414 N.J. Super. 365, 385 (App. Div. 2010). Without such allegations, the claim must be dismissed. *Ibid*.

Under *R*. 4:6-2(e), if any material outside the four corners of the pleadings is relied upon on a motion to dismiss for failure to state a claim, it is automatically converted into a motion for summary judgment. *Lederman v. Prudential Life Ins.*, 385 N.J. Super. 324, 337 (App. Div.), certif. den., 188 N.J. 353 (2006). However, the motion to dismiss on the pleadings is not converted into a summary judgment motion by filing with the court a document referred to in the pleading. *Myska v. New Jersey Mfrs. Ins.*, 440 N.J. Super. 458, 482 (App. Div.), *app. dismissed*, 224 N.J. 523 (2015). It is well-established that "a court may consider documents

specifically referenced in the complaint 'without converting the motion into one for summary judgment.'" *Ibid*. (quoting *E. Dickerson & Son, Inc. v. Ernst & Young, LLP*, 361 N.J. Super. 362, 365 (App. Div. 2003), aff'd, 179 N.J. 500 (2004)).

Similarly, the court may consider "matters of public record, and documents that form the basis of a claim" without converting the motion into one for summary judgment. *Teamsters Local 97 v. State of New Jersey*, 434 N.J. Super. 393, 412 (App. Div. 2014) (citation omitted); *see Williamson v. Treasurer of the State of New Jersey*, 350 N.J. Super. 236, 242 (App. Div. 2002) (taking "judicial notice of the fact that pleadings and other documents on file in the Superior Court are generally public records").

B. The Trial Court Properly Dismissed Plaintiffs' Complaint as Barred by the Entire Controversy Doctrine and Res Judicata.

1. Entire Controversy Doctrine

The entire controversy doctrine, codified in *R*. 4:30A, is the principle that the adjudication of a legal controversy should occur in only one court; therefore, all parties involved in litigation should present all of the claims and defenses that are related to the underlying controversy in a single action. *Cogdell v. Hospital Center at Orange*, 116 N.J. 7, 15 (1989). R. 4:30A provides:

> Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions).

Ibid.

The entire controversy doctrine is:

> a precautionary principle intended to prevent fractionalization of litigation by requiring all claims between same parties arising out of or relating to same transactional circumstances to be joined in single action; [the] effect of [the] doctrine is to preclude a party from withholding from action for separate and later litigation a constituent component of controversy even where that component is a separate and independently cognizable cause of action.

Brown, 208 N.J. Super. at 372.

The doctrine "does not require commonality of legal issues. Rather, the determinative consideration is whether distinct claims are aspects of a single larger controversy because they arise from interrelated facts." *Ditrolio v. Antiles*, 142 N.J. 253, 271 (1995).

The entire controversy doctrine is designed to achieve economy in litigation by avoiding the waste, inefficiency, delay, and expense of piecemeal and

fragmented litigation. *Cogdell*, 116 N.J. at 15. As such, the New Jersey Supreme Court has set forth a three-part test regarding the application of the doctrine:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.

Fisher v. Yates, 270 N.J. Super. 458, 470 (1994) (citing *Watkins v. Resorts Intern. Hotel & Casino*, 124 N.J. 398, 412 (1991)).

If a "party withholds a constituent claim ... and the case is tried to judgment or settled, that party 'risks losing the right to bring that claim later.'" *Kaselaan & D'Angelo Assocs. v. Soffian*, 290 N.J. Super. 293, 299 (App. Div. 1996) (citing *Mystic Isle Dev. Corp. v. Perskie & Nehmad*, 142 N.J. 310, 324 (1995)). It should be noted that the entire controversy doctrine includes "not only defenses but affirmative claims that could, and should be brought as counterclaims; the failure of such mandatory joinder would preclude a party in a subsequent lawsuit from asserting a 'new and independent action for damages.'" *Cogdell*, 116 N.J. at 1 (citing *Ajamian v. Schlanger*, 14 N.J. 483, 488 (1954)).

Underlying the entire controversy doctrine are "the twin goals of judicial administration and fairness to the litigants." *Woodward-Clyde Consultants v.*

Chemical and Pollution Sciences, 105 N.J. 464, 466 (1988). Indeed, "the doctrine recognizes that it is neither fair nor efficient to fragment a single controversy into separate actions. Such fragmentation can harass litigants, delay final adjudication, and waste.

Here, the Trial Court initially noted the fatal tactical decision made by Plaintiffs' counsel in the months following the Supreme Court's remand in the 2011 Lawsuit:

> So, the case is revived back at the trial court on August 17, 2022. Mr. De Pierro takes the position that that's the remand, that's what was in front of you. I couldn't have amended the complaint with the information that I learned after Judge Lucas' summary judgment but before the remand given the nature of the remand.
>
> I – I – I don't necessarily agree with that. ***He didn't file a motion to amend. I think he had every opportunity to file a motion to amend and he's presuming what I would have done with that motion to amend***, but I just go back on motions to amend of the great liberality afforded motions to amend….
>
> But really what drives home the point here is the Bustamante case, and the Bustamante case allowed an amendment even after a remand from a higher court. It opens the door to an amendment on a remand, and I think that's a fascinating legal proposition, which is a blinking red light for a just to say you need to go back to basics….
>
> ***There's no motion to amend. Plaintiff knew about these alleged new facts in 2019. They had more than***

> ***six months on the remand to file a motion to amend their complaint, and they sat on it. They didn't take a shot***. And then now after this Court grants summary judgment last year on March 9, 2023, after the 2011 litigation has now been up on appeal for, I don't know, six months or so, they now file this action, 2487-23, which fundamentally is the Duncan Farms litigation….
>
> 1T20:6-22:8 [emphasis added].

From there, the Trial Court determined that the entire controversy doctrine "clearly, clearly, clearly" requires a dismissal of the 2023 Complaint:

> This is precisely that. The '11 case was litigated for 12 years, and there's other offshoots of that in the '15 litigation, and there was another litigation that was settled by Judge Jones on the morning of trial. It all should have been one.
>
> And now, to come forward after the opportunity, a six-month opportunity to file a motion to amend, after having known about these alleged revelations in 2019, and take another bite at the apply and try again in another way, creative? ***Sure, but it violates the entire controversy doctrine***. It – to go back to Codgell, it would create delay. It would create harassment. It creates clogging of the judicial system. It wastes the time and effort of the parties and it undermines fundamental fairness.
>
> ***
>
> That could have been done here, and there was every opportunity for more than six months to file a motion to amend, and plaintiffs either missed the boat or strategically decided to sit on it. ***I don't know, but they had the opportunity, and this all goes back to the fundamental Duncan Farms transaction***.

> And even if – even if – even if this was discovered in 2019, there was the opportunity to bring this forward. It went and passed, and ***the preclusive effect of the entire controversy doctrine clearly, clearly, clearly requires a dismissal in this matter***.
>
> 1T:23:20-25:1.

In short, the Trial Court's decision on this basis is sound and should be affirmed.

2. Res Judicata

Res judicata, also known as claim preclusion, is the Latin term for "a matter already judged." The doctrine prevents litigants from filing a second lawsuit to assert claims that have already been disposed of on the merits in an earlier lawsuit. *In re Mullarkey*, 536 F.3d 215, 225 (3d Cir. 2008). For an action to be barred based on the application of res judicata, three elements must be met:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to ***or in privity with those in the prior action***; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.

Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 412 (1991) (emphasis added).

The New Jersey Supreme Court has stated that "in determining whether successive claims constitute one controversy for purposes of the doctrine, the central consideration is whether the claims . . . arise from related facts or the same transaction or series of transactions." *DiTrolio v. Antiles*, 142 N.J. 253 (1995).

The doctrine of res judicata prevents a litigant from getting yet another day in court to relitigate issues already litigated. The bar extends not only to "all matters litigated and determined by such judgment but also as to all relevant issues which could have been presented but were not." *Culver v. Ins. Co. of N. Am.*, 115 N.J. 451, 463 (1989) (citing *Anselmo v. Hardin*, 253 F.2d 165, 168 (3d Cir. 1958)). If issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties, subsequent litigation is "needless" and will not be tolerated under the doctrine of res judicata. *Angel v. Bullington*, 330 U.S. 183 (1947).

Here, the Trial Court determined that the elements of the *res judicata* doctrine were satisfied:

> All of those are satisfied here. ***All of this goes back to Duncan Farms***. All of it colloquially was an alleged broad conspiracy among all of the defendants to deprive the plaintiffs of profits and the ability to go forward with the Duncan Farms prospect. ***The parties are identical. The actions are identical. The underlying transactions***

> ***are identical.*** And maybe there is one new fact that was learned in 2019, but again, going back to Bustamante, going back to 4:9-1, going back to Notte, it's a liberal amendment standard that can be addressed even on a remand, and I disagree with plaintiff's contention that the remand was so limited. ***They should have taken a shot, especially in view of that very, very broad view of amendments.***
>
> 1T25:19-26:8 [emphasis added].

C. Alternatively, Plaintiffs' Complaint Fails As a Matter of Law Because Plaintiffs Previously Conceded They Have Not Suffered Any Recoverable Damages.

As noted above, after the Trial Court in the 2011 Lawsuit barred Plaintiffs' lost profits damages, Defendants moved for summary judgment because Plaintiffs did not suffer any other out-of-pocket or compensable damages. During oral argument on those motions, the Trial Court engaged in a colloquy with Plaintiffs' counsel to confirm the two core issues: (1) damages are a required element of Plaintiffs' causes of action; and (2) Plaintiffs did not suffer any damages beyond their alleged (and barred) lost profits. And Plaintiffs' counsel conceded both points. [2/15/2019 Tr., 41:12-16; 43:8-44:2]. Further, on remand, Plaintiffs pursued only their lost profits damages, which were again barred by the Trial Court following a Rule 104 hearing. Da1.

Plaintiffs' 2023 Complaint is based on the same Duncan Farms transaction and seeks the same damages as in the 2011 Lawsuit. Given that they cannot

recover lost profits damages, and given the concession that they suffered no other damages in the Duncan Farms transaction, Plaintiffs cannot satisfy a required element of each cause of action – *i.e.*, that they suffered compensable damages.

Accordingly, for this alternative reason, Plaintiffs' 2023 Complaint fails as a matter of law and should be dismissed.

III. CONCLUSION

For all the foregoing reasons, the Appellate Division should affirm the Trial Court's Order dismissing the 2023 Complaint with prejudice.

Respectfully submitted,

ARCHER & GREINER, P.C.
Attorneys for Defendants-Respondents, Eric Ford and KDL Realty Management, LLC

By: */s/ TREVOR J. COONEY*
Trevor J. Cooney

Dated: March 20, 2025

230236631 v1

LARRY SCHWARTZ and NJ 322, LLC, Plaintiffs-Appellants, v. NICHOLAS T. MENAS, ESQ.; COOPER, LEVENSON, APRIL, NIEDELMAN & WAGENHEIM, P.A, ERIC A. FORD; PULTE HOMES; KDL REALTY MANAGEMENT, LLC; THERESA L. MENAS; ABC CORPORATION 1-10, ABC, LLC 1-10, XYZ PARTNERSHIP 1-10; JOHN DOES 1-10, and JANE DOES 1-10 (names being fictitious as true identities are unknown), Defendants-Respondents.	::	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002029-23 Docket No. Below: MON-L-2487-23 Sat Below: Hon. Gregory L. Acquaviva, J.S.C.

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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THE TRIAL COURT ERRD IN FINDING THAT PLAINTIFFS' COMPLAINT MUST BE DISMISSED FOR FAILURE TO FILE A MOTION TO AMEND THE COMPLAINT ON REMAND IN THE 2011 MATTER (1T, 20:14-21:25)

The Trial Court held that Plaintiffs should have filed a motion to amend the Complaint in the 2011 Matter when it was remanded by the Supreme Court of New Jersey on August 17, 2022. The Trial Court quotes the decision of the Supreme Court of New Jersey in Schwartz v. Menas, 251 N.J. 556, 577 (2022), as stating, "'The matter is remanded to the trial court for further proceedings in accordance with this opinion,' and that fundamentally comes down to whether the plaintiff's lost – 'the plaintiff's lost profits evidence is sufficient to establish their claim for damages with reasonable certainty despite plaintiff's inexperience in developing housing.'" 1T, 20:7-13. The Trial Court, unprompted by any argument by any Defendant, *sua sponte* determined that the Supreme Court's remand was Plaintiffs' full and fair opportunity to file a motion to amend the Complaint to include the newly discovered facts and claims cited above.

Nothing in the language of the Supreme Court's decision, however, as cited by the Trial Court, indicates that any such motion was appropriate on remand. Instead, it is clear that the scope of the remand was narrow and precise: the Trial Court was to conduct further proceedings to determine whether plaintiff's lost profits evidence was sufficient to establish their claim for damages with a reasonable degree

of certainty. In fact, the Trial Court's imaginative interpretation is so far-fetched that none of the seasoned attorneys representing the six Defendants in this matter thought to make the argument that Plaintiffs had an obligation to move to amend the complaint on remand in the 2011 Matter. Instead, Defendants filed their motions to dismiss solely on the basis of preclusive rules which will be discussed further below.

In what was essentially a *sua sponte* "argument", the Trial Court relied on Kaselaan and D'Angelo 18 v. Soffian, 290 N.J. Super. 293, a matter in which the Appellate Division ruled that the entire controversy did *not* bar claims brought in a new action despite the fact that a motion to amend the complaint in the previous action was not filed. Specifically, in discussing the entire controversy doctrine, the Court in Kaselaan stated the following:

> *"[T]he application of the doctrine requires that a party who has elected to hold back from the first proceeding a related component of the controversy be barred from thereafter raising it in a subsequent proceeding."* *William Blanchard Co. v. Beach Concrete Co., Inc., 150 N.J.Super. 277, 292–93, 375 A.2d 675 (App.Div.), certif. denied, 75 N.J. 528, 384 A.2d 507 (1977). Therefore, if a party withholds a constituent claim or fails to join a party and the case is tried to judgment or settled, that party "risks losing the right to bring that claim later."* *Mystic Isle Dev. Corp. v. Perskie & Nehmad, 142 N.J. 310, 324, 662 A.2d 523 (1995).*
>
> *However, the entire controversy doctrine only precludes successive suits involving related claims. See Mortgageling Corp. v. Commonwealth Land Title Ins. Co., 142 N.J. 336, 343, 662 A.2d 536 (1995). It does not require dismissal when multiple actions involving the same or related claims are pending simultaneously.*

Kaselaan & D'Angelo Assocs., Inc. v. Soffian, 290 N.J. Super. 293, 299, 675 A.2d 705, 708 (App. Div. 1996).

The Court in Kaselaan at 709, continued by explaining:

> *Although efficient judicial management may be more complex when a related case is pending in a federal court or in the court of another state, our courts also have appropriate means to address those situations. For example, "the New Jersey action may, as a matter of sound discretion, be stayed by our courts until the prior action has been adjudicated." American Home Prods. v. Adriatic Ins., supra, 286 N.J.Super. at 33, 668 A.2d 67; accord Devlin v. National Broadcasting Co., 47 N.J. 126, 131, 219 A.2d 523 (1966).*

Here, the Trial Court could have justly and fairly elected to stay this matter until the pending appeal of the 2011 Matter is adjudicated, but a dismissal of the matter is inappropriate where Plaintiffs did not "withhold" a known claim, or "fail" to name a party or "hold back" from filing their newly discovered claims. Rather, Plaintiffs understood the clear instructions of the Supreme Court of New Jersey's remand of the 2011 Matter. Notably, all the Defendants similarly understood said instructions, as none of them argued that Plaintiffs should have filed a motion to amend the complaint on remand in the 2011 Matter. Only the Trial Court strained itself to misinterpret the Supreme Court of New Jersey in this manner, and the result of that strain is a clear injustice against Plaintiffs who have been barred from stating newly discovered claims against parties who fraudulently obstructed their discovery for years. The "burden", if any, should fall on Defendants' shoulders, assuming one could consider it "burdensome" or "prejudicial" to face newly

discovered claims whose discovery was delayed as a result of Defendants' own misconduct.

Ultimately, Res Judicata, the Entire Controversy Doctrine, Collateral Estoppel, and statutes of limitation are equitable doctrines to be considered and applied in the interest of justice. As the Court in J-M Mfg. Co. v. Phillips & Cohen, LLP, 443 N.J. Super. 447, 459, 129 A.3d 342, 349 (App. Div. 2015) held:

> *The decision whether to apply the Entire Controversy Doctrine is "ultimately 'one of judicial fairness and will be invoked in that spirit.'" Archbrook, supra, 414 N.J.Super. at 104, 997 A.2d 1035 (quoting Crispin, supra, 96 N.J. at 343, 476 A.2d 250). It is not an artificial bright line rule. See id. at 104–05, 997 A.2d 1035.*

In this matter, where the 2011 Matter was remanded by the Supreme Court of New Jersey for a narrow and defined purpose that could not reasonably have contemplated a motion to amend the complaint to bring claims that were newly discovered following dismissal of the 2011 Matter and prior to its eventual remand, judicial fairness must be exercised in the interest of justice. As the Supreme Court of New Jersey wisely stated in Romagnola v. Gillespie, Inc., 194 N.J. 596, 604, 947 A.2d 646, 651 (2008):

> *Justice Clifford's dissent in Stone v. Township of Old Bridge, captures the spirit that animates Rule 1:1–2: "Our Rules of procedure are not simply a minuet scored for lawyers to prance through on pain of losing the dance contest should they trip."*

The notion that Plaintiffs should be stripped of their fair and full opportunity to state newly discovered claims in a new action, simply because they "tripped" by

following the mandate of the remand strictly and did not file a motion to amend on remand, is patently unfair and unjust. This is true particularly in light of the manner in which Defendants and others obstructed Plaintiffs' ability to discover said claims sooner, and also in light of the fact that the new claims even involve certain new Defendants who cannot possibly claim any prejudice. Indeed, none of Defendants' seasoned counsel found the creativity to make such an argument, and it was the Trial Court which *sua sponte* elected to find its own means to achieve a desired but clearly unjust result.

It was patently unfair and erroneous for the Trial Court to make an "argument" on behalf of Defendants, and ultimately predicate its decision on said "argument", which no Defendants presented and which Plaintiffs therefore could not oppose. The mere happenstance that the Supreme Court of New Jersey overturned judgment in the 2011 Matter and remanded it to the trial court for specifically stated proceedings does not implicate an obligation by Plaintiffs to attempt to go beyond the mandate of the remand and file a motion to amend the complaint to state their newly discovered evidence and claims during the remand. Again, the idea is so far-removed from the clear directives of the Supreme Court of New Jersey that no Defendant made this argument in their motions to dismiss. The Trial Court's error must be reversed.

POINT II

THE TRIAL COURT ERRD IN FINDING THAT PLAINTIFFS' COMPLAINT MUST BE DISMISSED BECAUSE IT IS BARRED BY PRECLUSIONARY RULES (1T, 24:16-25:25)

As set forth above and in Plaintiffs' Complaint, pursuant to the 322 West-NJ 322 Assignment, Plaintiffs were required to pay an initial deposit of $50,000.00. Said 322 West-NJ 322 Assignment set forth that the Property was comprised of approximately thirty-seven (37) acres to be developed as a mixed-use development comprising of a minimum of one hundred (100) market rate active townhome units and twenty thousand (20,000) square feet of commercial retail/office space. After the execution of the 322 West-NJ 322 Assignment, Defendant Menas advised Plaintiffs of the required engineering and environmental work on the Property and directed Plaintiffs to certain firms which were engaged and paid for said work. The 322 West-NJ 322 Assignment was amended, on or about May 2007, pursuant to the Amended And Restated Assignment And Assumption Of Agreement. Said Amendment, among other things, amended the Consideration for the 322 West-NJ 322 Assignment from $2,140,000.00 to $600,000.00, and required an initial payment of $25,000.00. The Amendment also amended the intended development of the Property to a residential housing community with a minimum of one hundred (100) residential townhome units, together with all related site improvements.

Subsequently, on or about November-December 2007, 322 West and NJ 322 executed a General Release, prepared by Defendant Menas, which served as both a mutual release and completed the buy-out of 322 West by NJ 322 for $250,000.00 from the Agreement Of Sale. Pursuant to the instructions and direction of Defendant Menas, Plaintiff, on November 5, 2007, forwarded two checks totaling $50,000.00 to the Attorney Trust Account of Defendant Cooper Levenson. Subsequently, pursuant to the instructions and direction of Defendant Menas, Plaintiff, on January 4, 2008, wired $200,000.00 into the Attorney Trust Account of Defendant Cooper Levenson.

After years of Defendants' egregious improper, bad faith, and obstructionist motion practice before three different judges in other matters and Defendants' perjurious deposition testimonies, on August 9, 2019 in the MTDC Matter, evidence was obtained which established that $152,000.00 of the aforesaid $200,000.00 had been wrongfully taken by Defendant Menas. 61a-75a. More specifically, upon the clearing of Plaintiffs' $200,000.00 wire in the Attorney Trust Account of Cooper Levenson, Defendant Menas wrongfully had a check for $200,000.00 drawn from said Attorney Trust Account, dated January 4, 2008, made payable to Defendant KDL, forwarded via US Mail to Defendant Ford. Defendant Ford, on January 9, 2008, wrongfully wrote two checks drawn from Defendant KDL's bank account, both made payable to TNM, totaling $152,000.00.

Said two checks, one for $125,000.00 and the other for $27,000.00 were never deposited into the bank account of TNM. Rather, the Menas Defendants deposited said two checks into their personal bank account. 61a-75a.

In breach of his fiduciary duties as attorney for Plaintiffs, Defendant Menas wrongfully took said $152,000.00. Defendant Menas, at no time prior to or after Plaintiffs forwarded the aforesaid $250,000.00 to Defendant Cooper Levenson's Attorney Trust Account, ever advised Plaintiffs that he would be and was the ultimate recipient of, and take, any portion of said funds paid by Plaintiffs as the purported required consideration in accordance with the General Release.

Further, Defendant Menas omitted, in breach of his fiduciary duties as Plaintiffs' attorney, to advise and/or disclose to Plaintiffs that said $250,000.00 was not going to be paid to 322 West or Borini but would be forwarded to Defendant KDL and that Defendant Ford in turn would transfer $152,000.00 of said money to Defendant Menas, via the two aforementioned Defendant KDL checks made payable to TNM but deposited into Defendant Menas' personal bank account.

Defendant Menas omitted, in breach of his fiduciary duties as Plaintiffs' attorney, to advise and/or disclose to Plaintiffs that neither 322 West nor Borini ever received, requested, made any demand, made any claim for, or abandoned said $250,000.00 Plaintiffs forwarded to Defendant Cooper Levenson's Attorney

Trust Account in accordance with the General Release. Defendant Menas omitted, in breach of his fiduciary duties as Plaintiffs' attorney and in breach of Defendant Cooper Levenson's executed Retainer Agreement, to advise and/or disclose to Plaintiffs that he would and did take said $152,000.00 for his own benefit in addition to the legal fees as set forth in said Retainer Agreement instead of returning said funds to Plaintiffs.

The Trial Court erroneously found that Plaintiffs' Complaint involved the same issues, parties, and damages as the 2011 Matter. That is blatantly erroneous. The 2011 Matter claimed lost profits damages only. Instead, Plaintiffs' Complaint seeks damages arising from the $152,000.00, and legal fees, that Defendants Menas and Cooper Levenson wrongfully took from Plaintiffs, unbeknownst to Plaintiffs, until on or about August 9, 2019. The issues and damages are therefore different, and there are also new and different parties. Defendants further claim that Plaintiffs had the checks and transcripts that gave rise to these new claims in 2013, 2014, and 2015. This, too, is demonstrably false, and to the extent the Trial Court relied on this false argument, its decision is erroneous. It is indisputable that Plaintiffs first discovered these facts on or about August 9, 2019 in the MTDC Matter, when evidence was obtained which established that $152,000.00 of the aforesaid $200,000.00 had been wrongfully taken by Defendant Menas. 61a-75a. Moreover, as will be outlined in greater detail below, Defendants actively

concealed the evidence that gave rise to these new claims. Any notion that Plaintiffs possessed the evidence of their new claims prior to August 9, 2019, is patently false.

All of Defendants' motions to dismiss were silent about the application of the discovery rule, and for good reason: the discovery rule is fatal to all of their erroneous arguments.

> *The discovery principle modifies the conventional limitations rule only to the extent of postponing accrual of the cause of action until client learns, or reasonably should learn, the existence of a state of facts which may equate in law with a cause of action.*

Burd v. New Jersey Telephone Company, 76 N.J. 284, 291, 386 A.2d 1310 (1978).

"New Jersey has adopted the discovery rule to postpone the accrual of a cause of action when a plaintiff does not and cannot know the facts that constitute an actionable claim." Grunwald v. Bronkesh, 131 N.J. 483, 492 (1993). The discovery rule delays the accrual of a cause of action until "the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Id.

The new claims arising out of Plaintiffs' discovery of new evidence on August 9, 2019, only accrued on August 9, 2019, and not a day earlier. None of Defendants' motions even came so close as to graze the discovery rule, and none of the motions made any argument as to how or why Plaintiffs should have known

or should have discovered these facts or claims earlier in time. Defendants' motions simply concluded *ipse dixit* that this Complaint is a "relitigation" of previous claims and that this new evidence and these new claims are not in fact new. It was Defendants' burden to address the discovery rule and provide an argument that explains why and how Plaintiffs should have known that Defendants stole their money despite the fact that Defendants did everything from discovery obstruction to perjury in order to conceal their wrongdoing.

For instance, Defendant Ford testified on May 6, 2015 in the 2011 Matter that he did not know why he was writing a check for $27,000.00 from Defendant KDL to TNM (53a, 220:11-24). Defendant Ford testified that he was not in business with Defendant Menas (54a, 231:7-14). Defendant Ford testified that there was no agreement between him and Defendant Menas to divide amongst themselves any money from the Duncan Farms transaction (55a, 233:1-7). Defendant Ford testified that there was no agreement between him and Defendant Menas to divide amongst themselves any money from the Pork Chop Hill transaction (55a, 233:8-11).

Yet, on August 9, 2019, it was discovered that all of the above testimony was perjurious, as Defendant Ford, through KDL, did transfer $152,000.00 from the Duncan Farms transaction between 322 West and NJ 322 to Defendant Menas.

Plaintiffs did not know and could not have reasonably known these facts until August 9, 2019, and Defendant Ford's perjury made sure of it.

Similarly, Defendant Menas testified on May 15, 2015 in the 2011 Matter that there was no agreement between him and Borini to divide amongst themselves any money from the Duncan Farms transaction (59a, 367:12-19). Defendant Menas testified that he received no money from the Duncan Farms transaction (59a, 365:4-8). Defendant Menas testified that there was no agreement between him and Defendant Ford to divide amongst themselves any money from the Duncan Farms transaction (59a, 368:2-10). Plaintiffs did not know and could not have reasonably known these facts until August 9, 2019, and Defendant Menas' perjury made sure of it. This is why none of Defendants' motions even dared to argue how or why Plaintiffs should have known these facts during the 2011 Matter. It would not only have been a losing argument, but it would have also highlighted their own clients' perjury.

Defendants' arguments with respect to preclusionary doctrines were similarly obtuse and futile, and should have been rejected by the Trial Court. The New Jersey Supreme Court in DiTrolio v. Antiles, 142 N.J. 253, 273–74, 662 A.2d 494, 505 (1995) held that "[T]he entire controversy doctrine does not apply to unknown or unaccrued claims." It is a well-established principle of justice and fairness that the Entire Controversy Doctrine is inapplicable to, and does not apply

to bar, component claims either unknown, unarisen, or unaccrued at the time of the original action. K-Land Corp. No. 28 v. Landis Sewerage Auth., 173 N.J. 59, 70, 800 A.2d 861, 868 (2002). See Zaromb v. Borucka, 166 N.J.Super. 22, 27, 398 A.2d 1308 (App.Div.1979) (holding that slander claim was not precluded by Entire Controversy Doctrine because the party was not aware of its existence).

There is no rule or case law prohibiting a party from seeking to bring a new claim, previously unknown and unknowable. Instead, a dismissal only applies to known or knowable claims at the time of the dismissal. Plaintiffs' new claims in this matter against Defendants were not known, could not have been known, and therefore were not pled at the time of the dismissal of Plaintiffs' previous claims in the 2011 Matter on February 15, 2019. 76a.

In addition, when "considering fairness to the party whose claim is sought to be barred, a court must consider whether the claimant has had a fair and reasonable opportunity to have fully litigated that claim in the original action." Gelber v. Zito P'ship, 147 N.J. 561, 565, 688 A.2d 1044, 1046 (1997). In the context of this matter and these new claims, there can be no doubt that Plaintiffs' new claims arising out of the discovery of new evidence on August 9, 2019 in the MTDC Matter, *after* the dismissal of the complaint in the 2011 Matter, were unknown and therefore unaccrued at the time of the filing of the original complaint in the 2011 Matter, as well as at the time of dismissal of the 2011

Matter. These new claims arose *after* they were uncovered in the MTDC Matter, following years of Defendants' concerted efforts to fraudulently conceal them. It is inconceivable to conclude otherwise and hold that Plaintiffs had a fair and reasonable opportunity to have fully litigated these new claims in the 2011 Matter, when they did not even learn of the existence of these new claims until August 9, 2019, and when Defendants actively concealed this evidence from Plaintiffs.

Res Judicata, the Entire Controversy Doctrine, Collateral Estoppel, and statutes of limitations are equitable doctrines to be considered and applied in the interest of justice. As the Court in J-M Mfg. Co. v. Phillips & Cohen, LLP, 443 N.J. Super. 447, 459, 129 A.3d 342, 349 (App. Div. 2015) held:

> *The decision whether to apply the Entire Controversy Doctrine is "ultimately 'one of judicial fairness and will be invoked in that spirit.'" Archbrook, supra, 414 N.J.Super. at 104, 997 A.2d 1035 (quoting Crispin, supra, 96 N.J. at 343, 476 A.2d 250). It is not an artificial bright line rule. See id. at 104–05, 997 A.2d 1035.*

It is patently and gravely unjust to allow Defendants to conceal evidence for years through discovery obstruction and perjury, only to then bar Plaintiffs from bringing new claims resulting from that new evidence once it was at last discovered. Such a result rewards Defendants for their wrongdoing and punishes Plaintiffs for not knowing what was unknown and unknowable. There is no obligation on a party to litigate all aspects of a single controversy or bring all possible claims in one proceeding when that party did not know and could not

reasonably have known all facts, all aspects, and all claims. That is not justice, and that is precisely why the case law is clear that these preclusionary doctrines do not artificially and blindly apply to component claims either unknown, unarisen, or unaccrued at the time of the original action. A party is only required to litigate all *known and knowable* aspects of a single controversy and bring all possible *known and knowable* claims in one proceeding. That is justice.

In conclusion, none of the preclusionary doctrines upon which Defendants erroneously based their arguments apply in this matter, as the new claims and new evidence in this matter was unknown and unknowable at the time of the 2011 Matter. In addition, the discovery rule exists precisely for cases like this, where a party discovers evidence and claims which for so long were concealed by the wrongdoing parties. The Trial Court's error must be reversed.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully submit that this Court should reverse the decision of the Law Division dismissing Plaintiffs' Complaint and remand the matter to the Law Division.

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