IN THE MATTER OF NICOLE-KIRSTIE LLC, Appellant, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002308-21 (T4) CIVIL ACTION ON APPEAL FROM FINAL AGENCY DECISION DATED FEBRUARY 16, 2022 BY THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

BRIEF OF APPELLANT

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STATEMENT OF FACTS AND PROCEDURAL HISTORY[1][2]

1. Nicole-Kirstie Purchases The Dorchester Shipyard While The Assignee For The Benefit Of Creditors, Paul Porreca, Then Exercising Control Over The Shipyard In Accordance With A Court Order, Continues To Perform Environmental Remediation Of The Shipyard Property In Compliance With ISRA And The NJDEP's Oversight.

Nicole-Kirstie has owned the Dorchester Shipyard, a property abutting the Maurice River in Cumberland County ("the Property" or "the Site"), since November 17, 2005. (Aa54) Nicole-Kirstie acquired the Property on that date from Paul R. Porreca, the court-appointed Assignee for the Benefit of Creditors of Dorchester Industries, Inc. ("Assignee" or "Dorchester"), which had previously owned the Property (Aa53) The Property, a former industrial establishment, was subject to the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 *et seq.* ("ISRA"). The assignment of the Property to the Assignee had been the subject of a Probate Part proceeding, Docket No. 9028, which it is understood

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[1] By Order entered on May 25, 2013 by the Court in response to Nicole-Kirstie's Motion No. M-005010-22, and in a subsequent scheduling notice filed by the Clerk on that same date, the due date for the within brief was referenced as May 29, 2023. However, inclusion of this date was based on an error in the aforementioned Motion when counsel failed to account for the fact that May 29 was an official holiday, Memorial Day. Therefore, the actual due date is, or should be, May 30, 2023, because of the operation of *Rule* 1:3-1, dealing with Computation of Time. Counsel regrets the error.

[2] The statement of facts and procedural history have been combined for the sake of clarity and ease of reference.

was commenced in or about 1999. As will be discussed in greater detail below, in August 2006, in the same Probate Part proceeding, the NJDEP filed a Counterclaim against Dorchester and the Assignee for environmental remediation of the Shipyard under ISRA and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.* ("Spill Act") (Aa92-Aa98). The NJDEP and the Assignee had previously executed an Administrative Consent Order in 2002 setting forth the Assignee's environmental obligations pertaining to the Property (the "2002 ACO"). (Aa11)

After the 2002 ACO, and continuing even until after 2005 when Nicole-Kirstie took title to the Property, the Assignee performed remedial activities at the Site subject to the NJDEP's various remediation instructions and approvals. (Aa52-Aa54)

2. The Assignee And The NJDEP Execute A Remediation Agreement In July 2005 Concerning The Shipyard Property, And Thereby Memorialize The NJDEP's Approval For The Sale Of The Shipyard Property To Nicole-Kirstie, Without Requiring Any Further Investigation Or Remediation Relating To The Maurice River.

On October 22, 2004, after years of investigation and remediation by the Assignee, the NJDEP issued an approval of the Assignee's remedial measures, subject to certain conditions ("October 22, 2004 NJDEP Approval"). (Aa17-Aa28) The Assignee's activities had included compliance with the NJDEP's demand for the sampling of soil near three specified "areas of concern"

("AOCs") where low levels of primarily metals contaminants had been detected. The Assignee had proposed to the NJDEP that the NJDEP should approve limited, local excavations in those areas, without any need for further ecological investigation within or outside the Property. (Aa22) The Assignee had noted that there was "no indication that contaminants of concern ha[d] migrated off-site." (Aa24) The October 22, 2004 NJDEP Approval letter unequivocally accepted (among other things) the Assignee's proposal of no additional sampling. As the NJDEP also stated in its approval letter:

> A BEE [baseline ecological evaluation] was conducted in accordance with NJAC 7:26E 3:11. The Maurice River was identified as the only ecological receptor associated with the site. Low levels of contaminants found in the shallow ground water that discharged to the Maurice River. Arsenic (As) and lead (Pb) were detected in the groundwater at low levels in isolated areas of the site. Elevated TCE concentrations were detected in only one monitoring well (MW-16).
>
> Dorchester states that it is possible that future ground water monitoring investigations utilizing low-flow methodologies would confirm that total metals, As and Pb are not present in groundwater at concentrations exceeding the GWQS [groundwater quality standards].
>
> *Dorchester proposes that there is no indication that contaminants of concern have migrated off-site, therefore, no further ecological investigations are needed*. However, as remedial activities continue further ecological evaluations may be required.
>
> *The NJDEP finds this proposal acceptable*. If future ground water RI activities indicate that groundwater

> contaminants are migrating towards the river at concentrations above their respective NJ Surface Water Quality Standard, then surface water sampling may be required.
>
> [(Aa24 (emphasis added))]

Thus, the Assignee proposed, and NJDEP plainly accepted, that while metals "were detected in the groundwater at low levels in isolated areas of the site," the evidence had not shown that contaminants had migrated to the Maurice River in concentrations above the GWQS. Accepting Nicole-Kirstie's assessment of the evidence, data, and proposal, the NJDEP plainly agreed not to require any additional ecological investigations, absent further evidence of contaminants migrating towards the Maurice River at excessive levels. (Aa24)

The NJDEP also noted that, in March and April 2004, the Assignee had collected samples from all site wells on the Property, using "low-flow sampling methods in order to obtain more representative analysis of dissolved metals in ground water at the site." (Aa25) The NJDEP stated: "The results from this second round of ground water sampling (using low flow) indicate *significant reductions* in several of the PPMs [Priority Pollutant Metals] detected previously. *The reductions are in both concentrations and monitor well locations*." (Aa25) (emphasis added).) Based on these results, the Assignee proposed continuing to monitor ground water at the Site quarterly "to assess ground water quality over time," unless "[f]uture ground water quality data"

warrants a different "sampling protocol." (Aa25) The NJDEP found this proposal "acceptable." (Aa25)

Relying on the October 22, 2004 NJDEP approval letter, the Assignee and Nicole-Kirstie proceeded to go ahead with the purchase of the Shipyard by Nicole-Kirstie. (Aa53-Aa54) However, prior to title transfer actually occurring, and in full accordance with NJDEP policy and practice under ISRA at the time, the Assignee and NJDEP entered into a Remediation Agreement dated July 18, 2005 ("2005 RA") to govern the Assignee's remaining obligations to complete the remediation of the property. Nicole-Kirstie was not a signatory to the 2005 RA, but it was specifically named and identified as the intended purchaser in that agreement. (Aa29-Aa30) The apparent reason for this procedure was because of the requirement in the prior version of ISRA in effect at the time, N.J.S.A. 13:1K-9c, providing that:

> [E]xcept as otherwise provided in …., the owner or operator of an industrial establishment shall not transfer ownership or operations until a negative declaration or a remedial action workplan has been approved by the department, a remedial action workplan has been prepared and certified by a licensed site remediation professional and submitted to the department, *or the conditions of subsection e. of this section for remediation agreements or remediation certifications have been met . . . .*

(Emphasis added).

In purpose and effect, the 2005 RA allowed Nicole-Kirstie to take title to the Property before there was a final signoff under ISRA on the environmental conditions of the site, or else Nicole-Kirstie might have been required to await full completion of the cleanup activities before it would be legally entitled to accept title. However, there was nothing in this arrangement whereby Nicole-Kirstie agreed to become responsible for any remediation activities itself. (See Aa29-Aa30).

Expressly incorporating the October 22, 2004 NJDEP Approval, the 2005 RA had the legal effect of NJDEP allowing the sale of the Site to go forward prior to completion of the ISRA process, subject to the obligations of the Assignee who "shall submit a Remedial Investigation Report in accordance with N.J.A.C. 7:26E *and the October 22, 2004 Remedial Investigation Workplan approval* for the Maurice River Township industrial establishment by September 15, 2005." (Aa31 (emphasis added).) Thereafter, within 120 days of receiving the DEP's approval of the Remedial Investigation Report, the Assignee would be required to submit either a "Negative Declaration" or a "Remedial Action Work plan," as applicable. (Aa31). As a non-signatory to the 2005 RA, Nicole-Kirstie had no obligations under that agreement.

Relying on the 2005 RA, the Assignee and Nicole-Kirstie concluded the latter's purchase of the Shipyard on November 28, 2005. (Aa54) Under the terms

of the sale, the Assignee remained responsible for all outstanding remedial measures. The only expected activity and expense relating to the Property to be undertaken by Nicole-Kirstie was the ongoing monitoring of certain wells on the Property. Following the sale, the Assignee continued to complete its remaining obligations as set forth in the 2005 RA and the October 22, 2004 NJDEP approval letter, eventually completing the remediation of twenty-two (22) areas of concern by March 2006. (Aa109)

3. Shortly After Nicole-Kirstie Purchases The Site, The NJDEP Reneges On Its Prior Approvals, And Does So Without Any New Evidence Of Contaminant Migration Into The Maurice River.

In March 2006, only four (4) months after Nicole-Kirstie had accepted title to the Property, as permitted by the 2005 RA but before the Assignee had fully completed all of the Assignee's remaining remedial obligations at the Site, the NJDEP suddenly reversed course about the requirements of the cleanup.[3] In a letter dated March 15, 2006 addressed to the Assignee, the NJDEP abruptly announced that the remedial actions at the Site which the NJDEP and the Assignee had previously agreed had been satisfactorily completed were, according to the NJDEP, no longer sufficient. Specifically, the NJDEP asserted

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[3] Because the Site Remediation Reform Act, N.J.S.A. 58:10C-1 *et seq*., was not enacted until 2009, no Licensed Site Remediation Professional ("LSRP") was involved with the Property at this time. Instead, the NJDEP was still managing and supervising such cleanups directly.

that extensive sampling and potential remediation of areas in the Maurice River itself would now be required from the Assignee. (Aa42)

In so doing, however, the NJDEP did not point to any new evidence, or even a recently adopted new regulatory obligation following the October 22, 2004 Approval and the 2005 RA, to show any actual or even potential migration of contaminants from the Property into the Maurice River. It can only be assumed this was because there was no such evidence or other support for the NJDEP's change in position.

Instead, the NJDEP's March 15, 2006 letter simply provided the following wholly conclusory assertion: "Given the nature of the discharge, there is no reason to believe that the areas between and potentially beyond the contaminated samples are [not] also contaminated." (Aa42) Based on this mere conclusory assertion, the NJDEP changed its entire prior position and essentially demanded the Assignee to "prove a negative." Specifically, the NJDEP required that the Assignee must conduct what amounted to extensive sampling of the sediments at various points in the Maurice River and, if anything was found, it must be remediated by the Assignee. (Aa42)

4. The Assignee And The NJDEP Litigate Their Dispute As To The Alleged Requirement To Conduct Further Sampling And Remedial Actions Concerning The Sediments In The Maurice River, Culminating In A Final Judgment Against The NJDEP And In Favor Of The Assignee,Which Final Judgment Completely Dismissed The NJDEP's Claim For Any Further Sampling And Remediation.

The Assignee, who along with Nicole-Kirstie had relied to his detriment on the NJDEP's prior approval and the 2005 RA to proceed with the sale of the Property, suddenly found himself facing a completely unexpected new financial and remediation burden of unknown scope. He decided to seek relief from the Court in the same previously referenced Probate proceeding, under Docket No. 9028, which had retained jurisdiction over the matter from when the Assignee was first appointed.

Specifically, the Assignee filed a Verified Complaint and Order to Show Cause on June 23, 2006 in the Probate proceeding. (Aa49) In the Verified Complaint, the Assignee sought (1) approval of a final accounting, (2) to compel the NJDEP to "waive and relinquish its new demands" relating to the Maurice River sediment, and (3) to be discharged entirely as fiduciary. (Aa56) The Verified Complaint recounted the Assignee's past compliance with ISRA and the prior NJDEP approvals, including especially the NJDEP's October 22, 2004 Approval, the execution by the NJDEP and the Assignee of the 2005 RA, and the NJDEP's belated and mystifying U-turn about the river sediments. (Aa51-Aa56.) The Assignee asserted that "[a]fter five years and more than

$400,000.00[4] spent in determining what the NJDEP wanted done and satisfying those demands, reporting on the progress and gaining approval each step of the way," the Assignee simply did not have the assets to conduct the further extensive sampling that the NJDEP was now demanding. (Aa56)

The Assignee also provided a certification by Frank J. Pace, P.E.A., of Pace & Associates, the environmental consulting and project management firm who had been hired by the Assignee to conduct the remedial measures pursuant to the NJDEP's directives and the 2005 RA.[5] (Aa105-Aa110.) Mr. Pace certified that, in his "considered professional opinion," "the results from the low flow sampling" Pace had performed in March and April 2004 "make the possibility that contaminants have migrated into the river highly unlikely." (Aa107) Mr. Pace stressed "that the metals sampled in the test are naturally occurring and only not in compliance with the DEP workplan approval if they exceed the applicable water quality management standard." (Aa107). He concluded: "There is no reason why the issue of the possible migration of arsenic and lead from the site towards the Maurice River cannot be addressed as the DEP previously had

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4 Those were 2006 dollars. The costs would likely be much higher today.

5 Mr. Pace's Certification was submitted in support of the Assignee's Reply Brief, which responded to the NJDEP's Opposition Brief, discussed below.

agreed by an extended period of ground water sampling using the DEP's low flow methodology." (Aa109)

In response to the Verified Complaint, the NJDEP filed an Answer, Affirmative Defenses, and the aforementioned Counterclaims on August 4, 2006. (Aa83-Aa100). The First Count of NJDEP's Counterclaim was premised on ISRA, and the Second Count was based on the Spill Act. In the ISRA count, the NJDEP sued in relevant part to compel the Assignee "to abide by the terms of the" 2005 RA, and "to conduct sampling in accordance with the March 15, 2006 letter sent by [NJDEP]" dealing with the river sediment, and "to perform such other remediation as [the NJDEP] requires pursuant to ISRA and the contractual authority granted [NJ]DEP by the existing Remediation Agreement." (Aa95) In the Spill Act count, the NJDEP sued, in relevant part, for a "declaratory judgment against [the Assignee], without regard to fault, for all cleanup and removal costs that [NJ]DEP and the Administrator will incur as a result of the discharge of hazardous substances at the Dorchester Property," and for judgment "compelling [the Assignee] to perform any further cleanup of hazardous substances discharged at the Dorchester Property under [NJ]DEP's oversight." (Aa98).

Although Nicole-Kirstie now owned the Site, of which the NJDEP was certainly aware, it made no attempt to join Nicole-Kirstie as a party to its

Counterclaim regarding the Maurice River sediment. What's more, the NJDEP, through counsel, failed even to identify Nicole-Kirstie in its *Rule* 4:5-1(b)(2) Certification as a "non-party known to the [NJ]DEP at this time who should be joined in [the] action pursuant to R. 4:28, or who is subject to joinder pursuant to R. 4:29-1." (See Aa99).[6]

The NJDEP also filed a brief specifically opposing the Assignee's request for relief from the NJDEP's new demand regarding the Maurice River sediment ("Opposition Brief"). (Aa76-Aa82)[7] In that brief, the NJDEP argued that, since it had authority to oversee remediations under ISRA, absolving the Assignee

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[6] The required *Rule* 4:5-1(b)(2) Certification is expressly designed to "implement the philosophy of the entire controversy doctrine," Pressler & Verniero, Current N.J. Court Rules, Comment R. 4:5-1(b)(2) (GANN). Its requirements have long been familiar to New Jersey practitioners.

[7] Nicole-Kirstie is mindful of the fact that, under *Rule* 2:6-1(a)(2), trial court briefs are not normally permitted to be included in an appendix on appeal. However, that rule contains a specific exception where "the question of whether an issue was raised in the trial court is germane to the appeal," which it is submitted is fully applicable here. As will be seen later in this brief, the gravamen of this appeal is that in 2006 the NJDEP fully litigated, and lost, essentially the same legal claims against the Assignee that it now seeks to assert against Nicole-Kirstie for compelled river sampling and remediation. As will be further seen below, Nicole-Kirstie is arguing that the NJDEP's legal claims are now *res judicata* not only as to the Assignee, but as to its present claims against Nicole-Kirstie as well, due to the legal relationship that these two parties had to each other and because of certain other details of the transaction between them. If would not be possible for this Court to fully assess the legal issues presented by this appeal were it not provided with the details of the NJDEP's prior legal claims and assertions that led to the matter now being *res judicata*.

from sampling the river sediment "would eviscerate" the statute. (Aa77.) As to the Shipyard, the NJDEP declared that the NJDEP was "properly exercising its statutory authority by requiring the Plaintiff to conduct further sampling." (Aa78) The NJDEP also invoked language in the 2002 ACO and the 2005 RA purporting to grant the NJDEP "sole discretion" in determining if the Assignee's actions remediation are "consistent with ISRA and the applicable regulations." (Aa77) However, the NJDEP conceded that the 2005 RA "does not impose new remediation obligations on the Plaintiff, but, instead, merely reinforced what those obligations were, and that the remediation was subject to NJDEP's review and approval." (Aa79) The NJDEP further noted that the 2002 ACO, similarly, included repeated references to the regulations that provided the NJDEP with its broad powers and discretion. (Aa79)

The NJDEP also cited to ISRA regulations to show that sampling of river sediment may sometimes be warranted (Aa79) – a purely general proposition that was never in dispute. The regulations which the NJDEP further cited were inapposite to, and did not provide any support for, the NJDEP's reversal of its position regarding the Shipyard. As an example, although the Maurice River was not "at the Site" but was *next to* the Shipyard, the NJDEP cited regulations that required delineation of contamination "at the Site." (Aa79) The NJDEP also cited the requirement of a remediator to "determine if there is any evidence that

discharges to [a neighboring] surface water body have occurred or are occurring" (Aa79), essentially ignoring that the Assignee had already determined, and the NJDEP had already accepted, that no such evidence existed. The NJDEP additionally cited to a regulation requiring further investigation "if evidence of discharges to a surface water body exists," although no such evidence was ever found at the Property either. (Aa79)

While the NJDEP made the wholly conclusionary assertion that "contaminants have migrated beyond the Property itself," it offered no evidence or data to back up this mere conclusion, nor did it claim that any such evidence even existed. (Aa79) Instead, echoing its March 15, 2006 letter, the NJDEP's Opposition Brief merely resorted to the entirely logical, but not very relevant, point that "[c]ommon sense lends credence to NJDEP's sampling requirement," because "[c]ontamination does not stop at property boundaries recorded on a municipal tax map." (Aa79) Moreover, this contention ignored the fact that, less than nine months before its March 15, 2006 letter, the NJDEP, along with the Assignee, had approved and signed the 2005 RA, which had itself incorporated the October 22, 2004 NJDEP Approval letter. (Aa31) Yet, both the October 22, 2004 NJDEP Approval letter and the 2005 RA had reached the very same conclusion that the NJDEP later claimed in its March 15, 2006 letter – repeated in its Opposition Brief – defied "common sense." (Aa24) The NJDEP's sudden

about-face has never been explained, although it smacks of being arbitrary and capricious – a point bolstered by the NJDEP's further contention that, because it is a governmental agency, it cannot actually be held responsible for its inconsistent actions or positions (Aa80-Aa81).

The NJDEP further claimed in its Opposition Brief that the Assignee "fails to show any action by DEP, either intentional or otherwise, upon which he detrimentally relied," because the 2005 RA included a provision that sampling may be required in the future. (Aa81) However, the NJDEP did not address the fact that the 2005 RA, by incorporating the October 22, 2004 NJDEP Approval letter, only provided for such sampling if evidence showed "that groundwater contaminants are migrating towards the river at concentrations above their respective NJ Surface Water Quality Standard" (Aa24) – which new evidence the NJDEP never actually provided.

After briefing and a two-day bench trial, during which the Probate Part took testimony from the parties' witnesses and heard the parties' arguments, the Court entered Final Judgment in favor of the Assignee on October 17, 2006. (Aa111-Aa113) The court's Order allowed the Assignee's final accounting, permanently discharged the Assignee from further responsibility and liability, and dismissed the NJDEP's counterclaim in its entirety ("2006 Final

Judgment").[8] (Aa111-Aa113). For reasons that only the NJDEP can explain, it never appealed from the 2006 Final Judgment and, thus, Nicole-Kirstie understands this to be a still viable and enforceable judgment against the NJDEP.

5. The NJDEP Belatedly Demands Further Action By Nicole-Kirstie And Reasserts Its Failed Claim Relating To The Maurice River Sediments.

Meanwhile, in its purchase negotiations with the Assignee, Nicole-Kirstie had fully expected that it would likely have to continue to undertake certain ongoing remedial actions mainly in the nature of onsite groundwater monitoring, even after acquiring title. However, this was never understood by Nicole-Kirstie to suggest that it would in any way be responsible itself liable for river sediment sampling or possible remediation, which it believed then, and still believes, was a matter put to bed entirely when the Probate Court entered the October 17, 2006 Final Judgment against the Assignee and absolved the Assignee of these same obligations. Later, after passage of the 2009 Site Remediation Reform Act, N.J.S.A. 58:10C-1 *et seq*. ("SRRA"), Nicole-Kirstie also became aware that, because the totality of the site remediation was technically still ongoing in the

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[8] As discussed below, the transcript of the hearing that preceded entry of the 2006 Judgment is no longer available.

NJDEP's files, it was required to engage a Licensed Site Remediation Professional ("LSRP"), which Nicole-Kirstie did.

Later, as part of his due diligence to familiarize himself with the site, the LSRP came to search through the NJDEP files concerning the Shipyard. (Aa144-Aa145) However, the 2006 Final Judgment and the filings from the Probate Part proceedings had been omitted from the ISRA file that Nicole-Kirstie's LSRP obtained from the NJDEP. (Aa145, Aa149). It remains unclear who removed these documents from the NJDEP's files, but it most likely was someone within the agency itself.

Nonetheless, to comply in good faith with the NJDEP's demands, and without notice of any specific demand by the NJDEP regarding the Maurice River sediment, the LSRP conducted continued investigations into groundwater and other areas of concern on the Site. (Aa143-Aa144) In May 2016, the LSRP submitted a Remedial Investigation Report ("RIR") to the NJDEP stating his activities and findings and basically concluding that, in his professional judgment, the remedial investigation for the Site was now concluded. (Aa144) The NJDEP responded to the RIR one year later, in May 2017, asserting that it needed "additional clarification of several claims . . . with respect to off-site surface water, historic fill impacted groundwater, and ecological issues at the Site." (Aa124-Aa125)

In later communications between the LSRP and the NJDEP, after Nicole-Kirstie specifically raised the issue of the 2006 Final Judgment acting as a bar to the NJDEP's claim as to the sediments of the Maurice River, the NJDEP tried to minimize the import of the 2006 Final Judgment. Improperly construing the 2006 Final Judgment as a kind of consensual outcome instead of an adjudicated result after an adversarial trial (from which the agency failed to appeal, no less), the NJDEP tried to argue that the judgment had no present preclusive effect, by claiming that "Nicole-Kirstie, LLC *is not a party to the 2006 Court Order entered into solely between the Department and Dorchester* and the 2006 Court Order is not binding or have [sic] any other impact on future property owners." (Aa122 (e*mphasis added*).) The NJDEP's later correspondence repeated this same argument (Aa134), but never gave a legal basis for the conclusory assertion that the 2006 Final Judgment had no impact on, or did not benefit, Nicole-Kirstie.[9]

Because the NJDEP declared the LSRP's May 2016 RIR unacceptable, the NJDEP initiated compulsory direct oversight of the site remediation because Nicole-Kirstie could not meet the NJDEP's site remediation time frames.

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[9] Unfortunately, by the time the parties' dispute escalated to warrant a review of the transcript of the Probate Part proceedings, our understanding is the transcript had already been destroyed pursuant to the Probate Part's five-year record retention policy.

(Aa144.) Becoming even more aggressive, in 2018, the NJDEP asserted that Nicole-Kirstie must request the execution of an Administrative Consent Order in connection with the compulsory direct oversight, or else face severe penalties. (Aa145.)

In order to avoid any potential further adverse consequences, but clearly without admission of any liability or fault, Nicole-Kirstie felt it had no other choice than to comply, and it reluctantly entered into an Administrative Consent Order with the NJDEP on February 19, 2019 ("2019 ACO"). (A114). The 2019 ACO stated that Nicole-Kirstie agreed, "[w]ithout any admission of fact, fault, or liability," to remediate hazardous substances in and emanating from the Property. (Aa115, ¶12). In accordance with its terms, the 2019 ACO was "issued pursuant to the authority vested in the [NJDEP]" under the Spill Act and ISRA, and purported to require remediation in accord with those statutes and the applicable regulations. (Aa116, ¶14.) Nevertheless, and most importantly, the 2019 ACO was utterly devoid of any mention of actions relating to the sediment in the Maurice River, nor did it anywhere even use the word "sediment." (Aa114-Aa120.)

6. The Parties' Dispute Continues, Leading To Two Appeals.

Thereafter, through its LSRP, Nicole-Kirstie completed what it believed to be all previously incomplete components of the remediation of the Property.

Following some false starts that are not now relevant, Nicole-Kirstie's LSRP eventually submitted to the NJDEP in July of 2020 a proposed restricted use Remediation Action Outcome ("RAO") and related documents seeking to close out all remaining remedial obligations at the Site. (Aa122.) However, the NJDEP refused to approve the RAO unless Nicole-Kirstie would also investigate and remediate the Maurice River sediments (Aa122) – again, the same actions that the NJDEP had demanded unsuccessfully from the Assignee and about which the Probate Part had entered the 2006 Final Judgment against the NJDEP.

The disagreement continued, mainly by email, over the next several months. (Aa134-Aa140) The NJDEP, and later the Division of Law, continued to demand the remediation of the sediments in the Maurice River, while Nicole-Kirstie consistently maintained that it had no duty to do so under the law, or the 2019 ACO, because of the continuing binding effect of the 2006 Final Judgment from which, once again to be noted, the NJDEP itself chose not to appeal. (Aa134-Aa140) Finally, on April 14, 2021, the Attorney General's Office communicated to Nicole-Kirstie's LSRP in an email that the NJDEP had "carefully considered" the issue and concluded that the 2006 Final Judgment did not bar the NJDEP from compelling Nicole-Kirstie to remediate the Maurice River sediments, concluding: "These are the Department's *final* thoughts on the matter." (emphasis added) (Aa134)

Focusing on the Deputy Attorney General's ("DAG") "final thoughts" comment, Nicole-Kirstie filed an appeal in 2021 from the DAG's April 14, 2021 email, on the belief that the DAG obviously had authority to speak on behalf of the NJDEP and that his use of the phrase "final thoughts" could only mean that his email was, in fact, final agency action. (See Aa152-Aa169). However, the Appellate Division administratively dismissed the appeal on September 29, 2021, holding that the DAG's email of April 14, 2021 was not an appealable final agency decision. Nevertheless, acting *sua sponte*, the Appellate Division's Order of Dismissal contained a remand and specifically directed the NJDEP "to issue a decision either adopting or rejecting the position espoused in the DAG's April 14, 2021 email, without prejudice to the NJDEP arguing on any future appeal from the Commissioner's disposition that the appeal is time barred and should have been filed before the DAG's email." (Aa170)

After considerable delay, the NJDEP eventually issued a letter on February 16, 2022, purporting to comply with the Appellate Division's Order either to adopt or reject the position espoused in the DAG's prior email. In pertinent part, that letter stated the following:

> To clarify the issue at hand, the Department's final decision relevant to this matter is encapsulated by the February 19, 2019, Administrative Consent Order ("ACO") entered into between Nicole-Kirstie and the Department, which outlines Nicole-Kristie's remedial obligations under the New Jersey Spill Compensation

> and Control Act, N.J.S.A. 58:10-23.11 to -23.24, the Industrial Site Recovery Act, N.J.S.A. 13:1K-1 [sic] to -18, the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 to -31, the Site Remediation Reform Act, N.J.S.A. 58:10C-1 to -29, the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. By its express terms, the ACO provides that it shall be enforceable in Superior Court as a final order. Further, Paragraph 42 of the ACO provides that Nicole-Kirstie shall not contest its terms or conditions.
>
> The DAG's April 14, 2021 email merely reiterates that the ACO is a final order, and does not convey the Department's "final thoughts on this matter" or affect the underlying ACO. Nicole-Kirstie has never filed an appeal of the ACO/final decision; for this reason, the ACO has remained in full force and effect since February 19, 2019, and continues to remain in effect today.
>
> [(Aa171-Aa172)]

Nicole-Kirstie filed the present appeal on April 1, 2022 (Aa1-Aa10), within 45 days after the NJDEP's letter dated February 16, 2022, purporting to comply with this Court's prior Order requiring the NJDEP to "issue a decision either adopting or rejecting the position" of the DAG's April 14, 2021 email. On May 6, 2021, shortly after the present appeal was filed, the NJDEP moved to dismiss the appeal as untimely, arguing in essence that the appeal was filed too late due to the position taken by the NJDEP in its February 16, 2022 letter

that the "final agency action" at issue had actually been the 2019 ACO, from which no appeal was ever taken by Nicole-Kirstie.

However, Nicole-Kirstie opposed that motion, pointing out, among other things, that the appeal is manifestly timely because it was indisputably filed within 45 days from the date of the NJDEP's own February 16, 2022 letter, which letter was issued in response to an Order of this Court expreslly remanding the matter to the NJDEP for the purpose of making what amounts to its final agency action determination. By Order entered by the Appellate Division on June 14, 2022 the NJDEP's dismissal motion was denied, but with the supplemental instruction that: "The merits panel shall consider, among any other issues presented, the appealability of the alleged agency action(s) and the timeliness of the appeal."

With the exception of some procedural matters that are not now relevant and have all now been concluded (including prior motion practice over things like resolving the contents of the Statement of Items Comprising the Record on appeal, fixing the current briefing schedule, and a failed attempt by both sides to settle the appeal amicably under this Court's CASP program last year), the preceding factual and procedural summary is believed to represent a fair, accurate, and unbiased description of the facts and procedural matters that are, or may be, relevant to this appeal.

ARGUMENT

The Appellate Division's review of a state administrative agency's decision centers on whether the agency's decision (1) is unconstitutional; (2) "violates express or implied legislative policies"; (3) rests on factual conclusions that are unsupported by "substantial evidence" in the record; or (4) is clearly erroneous "in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Lourdes Med. Ctr. of Burlington Cnty. v. Bd. of Rev., 197 N.J. 339, 360 (2009). An agency decision will not stand if it is based on factual findings that lack a substantial evidentiary basis in the record. Ibid. Further, an agency's purely legal conclusions are not entitled to any weight. Seigel v. N.J. Dep't of Envt'l Prot., 395 N.J. Super. 604, 613-14 (App. Div. 2007). Even the agency's interpretation of statutes and regulations within its "enforcing responsibility," while ordinarily entitled to deference, are not binding on the Appellate Division. Ibid. The Appellate Division will not "simply act as a rubber stamp of approval for the agency's decisions." Id. at 614.

POINT I

THE DOCTRINE OF *RES JUDICATA* CONTROLS THE OUTCOME OF THIS APPEAL

(APPEAL FROM NJDEP'S LETTER DATED FEBRUARY 16, 2022, PURPORTING TO COMPLY WITH THIS COURT'S PRIOR ORDER REQUIRING THE NJDEP TO "ISSUE A DECISION EITHER ADOPTING OR REJECTING THE POSITION" OF THE DAG'S APRIL 14, 2021 EMAIL (Aa171-Aa172))

A. The Probate Part's 2006 Final Judgment Dismissing The NJDEP's Demands Against Nicole-Kirstie's Predecessor-In-Interest, From Which Judgment The NJDEP Never Took An Appeal, Is *Res Judicata* As To The NJDEP's Same Demands Now Being Asserted Against Nicole-Kirstie.

The doctrine of *res judicata* bars the re-litigation of any controversy that was already "fairly litigated and determined." First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007). *Res judicata* precludes a later claim that involves "substantially similar or identical causes of action and issues, parties, and relief sought" as a prior claim that was the subject of "a final judgment by a court of competent jurisdiction." Culver v. Ins. Co. of N. Am., 115 N.J. 451, 461 (1989); Brookshire Equities, LLC v. Montaquiza, 346 N.J. Super. 310, 318 (App. Div. 2002). Moreover, "*res judicata* applies 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, 115 N.J. at 463 (emphasis added) (citation omitted).

The doctrine of *res judicata* aims to promote "fairness to the defendant and sound judicial administration" by "providing finality and repose for the litigating parties; avoiding the burdens of relitigation for the parties and the court; and maintaining judicial integrity by minimizing the possibility of inconsistent decisions regarding the same matter." Velasquez v. Franz, 123 N.J. 498, 505 (1991) (citations omitted). The same policy considerations – including "finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness" – also apply to administrative agency actions. Forgash v. Lower Camden Cnty. Sch., 208 N.J. Super. 461, 465-66 (App. Div. 1985).

Here, the Probate Part's 2006 Final Judgment has all the elements that mandate its being *res judicata* as to the NJDEP's current claims or demands against Nicole-Kirstie. First, there is no dispute that the Probate Part had jurisdiction to decide the NJDEP's counterclaim against the Assignee for sampling and remediation of the Maurice River sediments. The Probate Part entered final judgment on the merits, after a two-day trial in which the court took testimony and heard the parties litigate fully their respective positions (Aa111-Aa114), and upon which briefs were filed by the parties. Moreover, the NJDEP chose not to appeal from the 2006 Final Judgment, nor to petition the

Probate Part to amend or reconsider the Final Judgment. Thus, the 2006 Final Judgment was truly a final and fully binding determination entered legally by a court of competent jurisdiction.

B. The NJDEP's Current Claim Against Nicole-Kirstie Involves The Same Issues And Is Essentially The Same Claim As Its Claim Previously Dismissed, With Prejudice, By The 2006 Final Judgment Against The Assignee.

Further, the NJDEP's claim against Nicole-Kirstie comprises the same cause of action, and involves basically the same issues, as the NJDEP's failed claim against the Assignee. While "[t]he test for the identity of a cause of action for claim preclusion purposes is not simple," the factors that inform this inquiry are noted as follows:

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the material facts alleged are the same.

Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 606-07 (2015) (quoting Culver, 115 N.J. at 461-62).

"[C]auses of action are deemed part of a single 'claim' if they arise out of the same transaction or occurrence. If, under various theories, a litigant seeks to remedy a single wrong, then that litigant should present all theories in the first

action. Otherwise, theories not raised will be precluded in a later action." McNeil v. Legis. Apportionment Comm'n, 177 N.J. 364, 395 (2003) (citation omitted). Likewise, *res judicata* bars any issues that could have been, but were not, raised in connection with the earlier claim. Culver, 115 N.J. at 463 (citation omitted).[10] In the absence of a record of the specific facts and law underlying a court's prior judgment, the judgment "presupposes a finding of facts in favor of the successful party . . . [and] that, in the opinion of the judge, the successful party is entitled to the judgment by the law arising upon the facts." Reeves v. Jersey City, 30 N.J. Super. 392, 401 (App. Div. 1954) (citations omitted).

Here, the NJDEP's demand against Nicole-Kirstie to conduct sampling and remediation of the Maurice River sediments is not just similar, it is essentially the same claim that the NJDEP brought unsuccessfully against the Assignee after a full trial on the merits. First, "the acts complained of and the demand for relief are the same." The NJDEP in its Counterclaim sued the

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[10] Thus, "identity of causes of action and issues" appears to be a single prong that focuses on whether the claim, instead of a specific issue of law or fact, was finally determined. See ibid. (holding *res judicata* precludes "issues that were or could have been dealt with in an earlier litigation," including theories or issues of law or fact that could have been raised); Villanueva v. Zimmer, 431 N.J. Super. 301, 311-12 (App. Div. 2013) (noting *res judicata* is a rule of "claim preclusion" that precludes re-litigation of "cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction") (quoting Velasquez, 123 N.J. at 505).

Assignee to perform sampling, and potentially remediation, of the Maurice River sediments. The claim was based on the low-level presence of metal contaminants at the Site and what the NJDEP alleged (in contradiction to its prior October 22, 2004 Approval letter as well as the 2005 RA executed by the NJDEP and the Assignee) was only a possibility of those contaminants having migrated into the Maurice River sediments. Likewise, the NJDEP's demand email of April 14, 2021 (Aa134) and the NJDEP's demand letter dated February 16, 2022 (Aa171-Aa172) against Nicole-Kirstie sought the very same sampling, and potentially remediation, of the same Maurice River sediments – based, once again, on the same levels of metal contaminants that were found on the Site in 2005. Accordingly, both claims – against the Assignee and against Nicole-Kirstie – involve the same alleged "acts" and "demand for relief."

Second, the NJDEP's claim against Nicole-Kirstie rests on the same evidence and involves the same material facts as did the NJDEP's failed claim against the Assignee. The material facts and evidence behind the NJDEP's recent claim against Nicole-Kirstie are the 2005 findings of the alleged presence of metal contaminants, which was the same allegation asserted by the NJDEP before the Court in the Probate Part proceedings in 2006 (Aa76). In its numerous communications with Nicole-Kirstie to date, the NJDEP has cited no additional or different facts demonstrating a need for further sampling.

Third, a single theory underlies both the NJDEP's dismissed claim against the Assignee and its current claim against Nicole-Kirstie. The NJDEP counterclaimed against the Assignee in the 2006 Probate Part proceedings based on the alleged "common-sense" notion that the presence of metal contaminants in the Site warranted sampling of the river sediments, despite a lack of evidence of any such migration (Aa76). This theory, as the NJDEP expressly argued it before the Probate Part, hinged on the contention that, under ISRA and its regulations, as well as the Spill Act, the NJDEP has unfettered discretion even to retract a prior administrative approval, regardless of there being no new facts, and doing so after inviting the detrimental reliance of private parties, which reliance obviously took place here. (Aa76-82)

Thus, the NJDEP's claim in 2006 required the Probate Part to delineate the boundaries of the discretion granted to the NJDEP under ISRA and its regulations. By dismissing the NJDEP's Counterclaim, the Probate Part necessarily held that the NJDEP had overstepped its statutory discretion when it reneged on its prior October 22, 2004 Approval, and on the terms set forth in the 2005 RA with the Assignee, after having invited detrimental reliance by the Assignee and Nicole-Kirstie on those same documents and approvals.

The 2006 Final Judgment also disposed of the NJDEP's reliance on the 2002 ACO and the 2005 RA as a source of unlimited discretion. As the NJDEP

itself noted, the 2002 ACO and the 2005 RA, repeatedly and explicitly, tethered the rights and obligations set forth in those agreements to ISRA and its regulations (Aa76). The NJDEP expressly conceded that the 2005 RA did not enlarge the NJDEP's discretion beyond what the statute and regulations already provided (Aa76). The Probate Part's ruling that the NJDEP had exceeded its authority necessarily rejected the 2002 ACO and the 2005 RA as alternate sources for the NJDEP's position of ever-expanding discretion to do whatever it likes.

These same issues are now determinative of the NJDEP's current claim against Nicole-Kirstie. Like the Assignee, Nicole-Kirstie relied to its detriment on the 2005 RA – which specifically named Nicole-Kirstie as the prospective contract purchaser – in placing the obligations for the Site's environmental burdens upon the Assignee, but which environmental burdens did not include any further sampling of the sediments in the Maurice River (Aa29-Aa30). The NJDEP's reversal of position *after the sale* of the Site to Nicole-Kirstie placed it in the same position in which the Assignee found himself before he was granted relief by the 2006 Final Judgment. Moreover, as noted, the NJDEP continues to rely upon the same findings and "common sense" assertions being made against Nicole-Kirstie that the NJDEP had alleged against the Assignee, with no actual showing that any additional evidence exists of contaminant

migration to the Maurice River. The NJDEP also espouses against Nicole-Kirstie the same theory of its "unfettered discretion" that the NJDEP had asserted against the Assignee, even after the NJDEP had invited detrimental reliance as subsequently provided by the private parties.

Indeed, the NJDEP itself asserted, in its response to the LSRP's submitted May 2016 RIR by email dated May 2, 2017, that the NJDEP's claim against Nicole-Kirstie is one and the same as its claim against the Assignee. (See Aa130) The NJDEP noted that a decade earlier, it had demanded "additional sampling" from the Assignee and had rejected the Assignee's proposal to conduct only local excavations to address the metal contaminants in the Site. (Aa130) The NJDEP further concluded, in the same letter, that since the Assignee had "not satisfied" the NJDEP's demand, "Dorchester" — presumably meaning Nicole-Kirstie — "must address this contamination" through further sampling. (Aa131) Entirely omitted from the NJDEP's letter is the NJDEP's own previous approval of no further sampling of the Maurice River sediments, which approval was incorporated in the 2005 RA, which also specifically named Nicole-Kirstie as the purchaser while affirming that remediation obligations continued to belong to the Assignee, not to Nicole-Kirstie at all. Entirely omitted from the NJDEP's email dated May 2, 2017 was any mention that the NJDEP had fully litigated and lost its claim in 2006 against the Assignee for and specifically any further

sampling of the sediments of the Maurice River. (Aa144-Aa145) Once again, the NJDEP failed to mention nor even take notice of and account for the Court's ruling and entry of the 2006 Final Judgement. (Aa144-Aa145) Additionally, and most tellingly, the NJDEP confirmed that it had determined, in its sole unfettered discretion, that Nicole-Kirstie was obligated to proceed with the remediation of the Maurice River sediments, merely based upon Nicole-Kirstie having become the successor Property-owner to the Assignee. As the successor Property-owner, Nicole-Kirstie was being required by the NJDEP to complete any environmental-related task as determined in the NJDEP's sole and unfettered discretion, that the Assignee had failed to do, whether or not the Assignee had even been obligated to do so. Accordingly, the NJDEP's claim against Nicole-Kirstie to sample the Maurice River sediments is identical to its claim against the Assignee to do the same, and the NJDEP still has cited no evidence showing that any soil contaminants at or from the Shipyard have, in fact, impacted the sediments of the Maurice River.

Further, like the 2002 ACO and the 2005 RA, the 2019 ACO provides no independent basis for the NJDEP's claim against Nicole-Kirstie to sample and remediate the Maurice River sediments. As noted previously, the 2019 ACO says nothing about the "Maurice River sediments," but rather describes the scope of Nicole-Kirstie's overall responsibility in generic terms. (Aa114-

Aa120) Similarly, when mentioning the NJDEP's discretion over its subject matter, the 2019 ACO simply cites generally to statutes and regulations. (Aa114-Aa116) The 2019 ACO does not purport to grant the NJDEP any kind of special discretionary power beyond what the statutes and regulations – as curtailed by the 2006 Final Judgment – may provide it. The 2019 ACO also expressly reserves Nicole-Kirstie's right to challenge the NJDEP's "interpretation or application of [the 2019 ACO's] terms and conditions." (Aa119) Thus, just like the 2005 RA, the 2019 ACO does not extend the NJDEP's existing discretion one iota. It only tracks the statutory and regulatory authority that the NJDEP already had in this matter, which the 2006 Final Judgment had limited long ago. The 2006 Final Judgment further rejected the NJDEP's claim that the 2005 RA operates as an independent source of authority for the NJDEP's claim against the Assignee. The 2019 ACO can fare no better.

In sum, the NJDEP's claims against Nicole-Kirstie and the Assignee, respectively, comprise a single cause of action against the Site's two owners over the pendency of the ISRA remediation. The NJDEP's cause of action seeks one thing (sampling and remediation of the Maurice River sediments) based on one set of facts (the alleged and arbitrary possibility that contaminants might migrate to the river, but with no evidence of any actual migration into, nor of impact upon, the sediments of the Maurice River) and one theory (the NJDEP's

alleged "discretion" (exercised by the NJDEP in unfettered manner) under ISRA, its regulations, the Spill Act, and the agreements that track those statutes and regulations). However, the 2006 Final Judgment rendered against the NJDEP after a full trial in 2006 precludes the NJDEP from now asserting against Nicole-Kirstie the very same claim – involving the same activities, issues, and alleged legal basis – that the NJDEP asserted against the Assignee. *Res judicata* prohibits the NJDEP from ignoring the 2006 Final Judgment and re-asserting a claim that was already finally and fully decided nearly 17 years ago.[11]

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[11] As noted in the Statement of Facts, while there is no available record of the Probate Part trial – thus requiring a reconstruction of the precise rationale behind the 2006 Judgment – the transcript is unavailable only because the NJDEP, for unknown reasons, never took an appeal and then failed even to contact Nicole-Kirstie for nearly four years after the 2006 Judgment was entered. During that silent period, Nicole-Kirstie had no reason to doubt that the NJDEP's claim regarding the Maurice River sediments had been laid to rest for good. Even after making contact in 2010, the NJDEP still did not clarify the scope of its demands. (Aa143-Aa144) When the NJDEP finally made known that it specifically sought Nicole-Kirstie to conduct the same sampling of river sediment that the NJDEP had demanded in its failed counterclaim against the Assignee – placing the Probate Part's reasoning in play – the transcript had long been destroyed pursuant to the court's record retention policies. Aside from everything else that it has done wrong, the NJDEP should not be allowed to reap the benefit of its own inexplicable delay, lack of due diligence, and the consequent gap that it created in the record. Purely and simply, that gap is only because of its own doing.

C. Nicole-Kirstie And The Assignee Are Functionally The Same Party For Purposes Of The 2006 Judgment's *Res Judicata* Effect, Because They Are In Privity.

In addition to the above, there is also identity of parties under the doctrine of *res judicata* (even though Nicole-Kirstie and the Assignee are not actually the same person) because Nicole-Kirstie acquired the same property interest the Assignee had, and was victim to the same detrimental reliance as was the Assignee. "Identity of parties" does not demand exact cloning, but can be satisfied simply where "a party in the second action is in privity with a party in the first action." Brookshire Equities, 346 N.J. Super. at 319. "Privity within the view of the rule of *res judicata* ordinarily means identity of interest, through succession to the same rights of property involved in the prior litigation." L. L. Constantin & Co. v. R. P. Holding Corp., 56 N.J. Super. 411, 417-18 (Ch. Div. 1959) (holding judgment as to shareholder's rights in corporate dividends under articles of incorporation was *res judicata* as to subsequent transferee of shares); Hudson Transit Corp. v. Antonucci, 137 N.J.L. 704, 707 (E. & A. 1948) ("Privity is simply mutual or successive relationship to the same rights of property."); Rutgers Cas. Ins. Co. v. Dickerson, 215 N.J. Super. 116, 122 & n.4 (App. Div. 1987) (stating "privity in this context requires some legal connection between the parties such as succession to the same rights to property," among others); see also Stop & Shop Supermarket Co. v. Bd. of Adjustment of Springfield, 162

N.J. 418, 436-37 (2000) (holding grant of variance based on property's characteristics was *res judicata* for successor in title). Underlying the concept of "privity" is the notion that the privy has "such connection in interest with the litigation and the subject matter as in reason and justice precludes a relitigation of the issue." L. L. Constantin, 56 N.J. at 418 (quoting Hudson Transit, 137 N.J.L at 706).

Here, there is identity of parties because Nicole-Kirstie succeeded to the same property ownership interest that was the basis of the NJDEP's claim against the Assignee and it is, in fact, the scope of remediation of that same property that is now at issue. As set forth in the recitals in the 2019 ACO, the NJDEP's claim against Nicole-Kirstie stems solely from Nicole-Kirstie's ownership of the Site: "Nicole-Kirstie is the current owner of the Site and, therefore is a person in any way responsible for any hazardous substance discharged at the Site pursuant to the Spill Act, and a person responsible for conducting the remediation pursuant to the Site Remediation Reform Act, N.J.S.A. 58:10C-2."[12] (Aa114) Moreover, Nicole-Kirstie was the transferee in

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[12] Strict liability for environmental remediation attaches to ownership of a property, even for contamination that predated the owner's title, provided the "innocent owner" defense does not apply. N.J. Dep't of Envt'l Prot. v. Dimant, 212 N.J. 153, 177 (2012); N.J. Schs. Dev. Auth. v. Marcantuone, 428 N.J. Super. 546, 560 (App. Div. 2012).

the same transfer of title that was at issue before the Probate Part. The 2006 Final Judgment determined that the NJDEP could not compel further sampling after specifically approving (in the 2005 RA) the Assignee's sale of the Shipyard to Nicole-Kirstie. Now, based on Nicole-Kirstie's detrimental reliance in entering that same transaction and acquiring title to the property, Nicole-Kirstie challenges the NJDEP's legal right to compel the same actions. Plainly, Nicole-Kirstie was in privity with the Assignee, and is entitled to the same preclusive effect of the 2006 Final Judgment.

D. *Res Judicata* Also Applies Because Nicole-Kirstie Succeeded To The Assignee's Interest In The Shipyard During The Actual Pendency Of The Probate Part Action

Res judicata applies for the related but separate reason that Nicole-Kirstie acquired the Shipyard while the Probate Part action was pending. *Res judicata* binds, but also benefits, a party who acquires a property while the property "is the subject of a pending action to which his transferor is a party." Restatement (Second) of Judgments § 44 (Am. Law Inst. 1982). The reason for this rule is that the successor, in effect, "acquiesces in the transferor's continuing, for purposes of the litigation, to be the apparent owner of the interest in the property" and to act "as his representative in the action." Id. at cmt. a. Therefore, "[t]he opposing party" – here, the NJDEP – "is in any event precluded as against the successor," since "the judgment for the transferor as his representative is

binding on the opposing party." Id. at cmt. b.; see also Collins v. E.I. Dupont De Nemours & Co., 34 F.3d 172, 177 (3d Cir. 1994) (noting New Jersey Superior Court has followed Restatement (Second) of Judgments § 41 as to *res judicata*); Nanavati v. Burdette Tomlin Mem'l Hosp., 857 F.2d 96, 113 (3d Cir. 1988) ("New Jersey courts have relied on the Restatement (Second) of Judgments generally in determining the preclusive effect to be given to claims under the entire controversy doctrine." (citing Brown v. Brown, 208 N.J. Super. 372 (App. Div. 1986)).

Stated a bit differently, the Probate Part's 2006 Judgment is *res judicata* as to Nicole-Kirstie because Nicole-Kirstie succeeded to the Assignee's interest in the Site during the pendency of the Probate Part action.[13] Moreover, the NJDEP knew, or should have known, that Nicole-Kirstie had a strong interest in the action as the contract purchaser of the Site (as specifically mentioned in the

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[13] This same Probate Part proceeding, which began in 1999, encompassed all the subsequent disputes and agreements between the Assignee and the NJDEP regarding the Property, including: (1) the NJDEP's complaint dated June 25, 2001 seeking to require the Assignee to perform remediation pursuant to ISRA; (2) the approval and entry of the 2002 ACO by the Honorable Georgia M. Curio, J.S.C. on January 28, 2002; and (3) the Assignee's Verified Complaint and Order to Show Cause for final accounting and relief from further remedial activities, filed June 23, 2006, also brought before Judge Curio. (See also the 2006 Final Judgment entered by Judge Curio in Probate Part Docket No. 9028 previously discussed.

2005 RA (Aa29-Aa30). Thus, while Nicole-Kirstie did not intervene in the action, it had no reason or cause to do so because its interests were fully represented by the Assignee.[14] Had the Probate Part ultimately ruled *against* the Assignee, Nicole-Kirstie would have been bound by the ruling – a point that the NJDEP, no doubt, would have strenuously argued. "Basic fairness," a hallmark of *res judicata*, Forgash, 208 N.J. Super. at 466, mandates the reciprocal treatment of a judgment against the NJDEP. Thus, the 2006 Final Judgment was binding on the NJDEP as to Nicole-Kirstie, in addition to the Assignee.

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[14] Nor did the NJDEP separately give Nicole-Kirstie any reason to intervene in the Probate Part proceedings that ultimately led to entry of the 2006 Final Judgment because, as previously noted, the NJDEP failed even to identify Nicole-Kirstie in its *Rule* 4:5-1(b)(2) Certification as a "non-party known to the [NJDEP] at this time who should be joined in [the] action pursuant to R. 4:28, or who is subject to joinder pursuant to R. 4:29-1." (See Aa99). If nothing else, fundamental fairness and required adherence to the court rules should have impelled the NJDEP – at the very least – to provide the requisite notice to Nicole-Kirstie that there could be any possibility that, someday, the NJDEP might be claiming that Nicole-Kirstie is responsible for undertaking the same remedial actions that the Probate Part ultimately absolved the Assignee of any responsibility to complete.

E. Policy Interests Of Basic Fairness, Avoidance Of Unnecessary Litigation, And Certainty For The Parties, Also Compel The Application Of *Res Judicata* To The NJDEP's Attempts To Resurrect Its Claim For Sampling Of The Maurice River Sediments, Now Being Asserted Against Nicole-Kirstie

Critically, the policy concerns that drive the doctrine of *res judicata* apply with special force to the NJDEP's renewed attempt to compel sampling of the Maurice River sediments by Nicole-Kirstie. As previously noted, the animating values of *res judicata* are "fairness to the defendant and sound judicial administration," Velasquez, 123 N.J. at 505 (citing Restatement (Second) of Judgments § 19 cmt. a) – policy concerns that also "have an important place in the administrative field," Forgash, 208 N.J. Super. at 466. The doctrine aims to achieve those ends by ensuring "finality and repose for the litigating parties; avoiding the burdens of relitigation for the parties and the court; and maintaining judicial integrity by minimizing the possibility of inconsistent decisions regarding the same matter." Velasquez, 123 N.J. at 505 (citations omitted). If not for the finality of *res judicata*, parties would be subject to "unnecessary burdens of time and expenses" from duplicative litigation, at the cost of "basic fairness." Forgash, 208 N.J. Super. at 465-66. A lack of finality also breeds uncertainty that destabilizes "the working premises upon which the transactions of the day are to be conducted." Restatement (Second) of Judgments, Introduction. Therefore, *res judicata* must always apply, except in

circumstances where "the possibility of failure of civil justice is so substantial as to justify remedial action in the form of relitigation." Ibid.

Here, the NJDEP continues its efforts to avoid the preclusive effects of the 2006 Final Judgment. This evasion violates the core values of basic fairness, judicial economy, and stability that underpin the doctrine of *res judicata*, and, quite frankly, constitutes an affront to the separation of powers that puts the judiciary on equal footing with the executive branch that the NJDEP represents. First, it is fundamentally unfair for the NJDEP, having fully argued and lost its cause of action against the Assignee in 2006 in a court of competent jurisdiction – *and* then having made the unilateral decision not even to appeal from that ruling – to attempt now a repeat of the same claim, on the same theories, against the Assignee's successor in title and contract purchaser of the same property. After a trial, the Probate Part considered, and duly rejected, the NJDEP's arguments. For whatever reason, the NJDEP chose not to appeal that decision when it had the chance. Basic fairness does not permit the NJDEP a second bite of the apple to evade the 2006 Final Judgment, which, having never been appealed, remains fully binding on it. If the response to the previous sentence is that an administrative agency *can* get repeated bites of the same apple after an issue or claim has been fully adjudicated, then we have to ask ourselves why

do we even have statutes, court rules, judicial review, or the constitutional separation of powers in government at all?

Res judicata is also necessary in this case to prevent a pointless waste of judicial and private-party resources. The Probate Part held a two-day trial, complete with witness testimony and oral argument, in addition to the parties' pre-trial pleading and briefing, to determine whether the NJDEP could demand further sampling from the Assignee. As the Court and the parties poured time and money into resolving the NJDEP's claim, the NJDEP – apparently hedging against a total defeat of its claim – gave no indication that it had Nicole-Kirstie (again, the Shipyard's *actual owner during the 2006 litigation*) in its sights as the next target for the very same claim it was litigating against the Assignee, and ultimately lost. As noted, the NJDEP even omitted Nicole-Kirstie from its *Rule* 4:5-1(b)(2) certification as a potentially interested party subject to joinder.[15]

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[15] The NJDEP, knowing that Nicole-Kirstie had acquired the Site in 2005, certified – falsely, as it turned out – that it knew of no non-party "at this time who should be joined in this action pursuant to *R.* 4:28, or who is subject to joinder pursuant to *R.* 4:29-1." (Aa99). The test for permissive joinder under *Rule* 4:29-1 is that "the right to relief . . . arises out of or in respect of the same transaction, occurrence, or series of transactions or occurrences and involves any question of law or fact common to all of them." The NJDEP's later claim against Nicole-Kirstie rested on the same facts, arose from the same transaction or occurrence, and involved the same legal or factual issues, as its claim against the Assignee. Nicole-Kirstie was thus a party subject to, at the least, permissive

The NJDEP resurrected its demand for sediment sampling, years later, without any new evidence of contaminant exceedance by positing that the 2006 Final Judgment was non-binding as to Nicole-Kirstie. The NJDEP's position effectively renders the Probate Part proceedings and Court decision in 2006 superfluous, all without an appeal having ever been taken by that agency from the 2006 Final Judgment.

Additionally, the need for transactional certainty also mandates a firm end-date to the NJDEP's claim regarding the Site. After purchasing the Site in reliance on the 2005 RA, Nicole-Kirstie suddenly found itself saddled with an environmental liability of unknown limits for which it never bargained, and rightfully assumed did not exist. Later, after the 2006 Final Judgment dismissed the NJDEP's counterclaim, Nicole-Kirstie rightfully believed that it was in the clear of any such obligations to the NJDEP – until the NJDEP commenced its current campaign against Nicole-Kirstie that has now stretched for thirteen years, and is still counting. As long as the NJDEP continues to ignore the 2006 Final Judgment, Nicole-Kirstie's purchase of, and investment in developing, the Site since 2006 lies under a cloud of potentially enormous financial and time-

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joinder under *Rule* 4:29-1. It is not unimportant to ask ourselves: Were the NJDEP's failure to name Nicole-Kirstie in its *Rule* 4:5-1(b)(2) Certification and its decision not to appeal intentional? Was Nicole-Kirstie actually the NJDEP's "ace in the hole" in case it might lose its trial with the Assignee?

consuming burdens. As was true with the Assignee, Nicole-Kirstie must finally have repose from the NJDEP's attempts to resurrect its failed claim for further sampling and remediation of the Maurice River sediments. Therefore, the policy goals that drive the doctrine of res judicata mandate the preclusion of the NJDEP's claim against Nicole-Kirstie.

POINT II

NEW JERSEY'S ENTIRE CONTROVERSY DOCTRINE COMPELS THE SAME RESULT AS *RES JUDICATA*

(APPEAL FROM NJDEP'S LETTER DATED FEBRUARY 16, 2022, PURPORTING TO COMPLY WITH THIS COURT'S PRIOR ORDER REQUIRING THE NJDEP TO "ISSUE A DECISION EITHER ADOPTING OR REJECTING THE POSITION" OF THE DAG'S APRIL 14, 2021 EMAIL (Aa171-Aa172))

The above analysis, while focusing explicitly on *res judicata*, also mandates application of New Jersey's Entire Controversy Doctrine, which "stems directly from the principles underlying the doctrine of *res judicata*" but whose effect is "more preclusive than both *res judicata* and the Restatement [(Second) of Judgments]." Bank Leumi USA v. Kloss, 243 N.J. 218, 227-28 (2020) (citations omitted).

Under the Entire Controversy Doctrine, a litigation must resolve the "entire controversy," including all claims "aris[ing] from related facts or the same transaction or series of transactions." Dimitrakopoulos v. Borrus, Goldin,

Foley, Vignuolo, Hyman and Stahl, P.C., 237 N.J. 91, 108 (2019) (citation omitted); Ditrolio v. Antiles, 142 N.J. 253, 271 (1995). Here, for the reasons previously stated and analyzed at depth, *res judicata* suffices to preclude the NJDEP's claim against Nicole-Kirstie, because the NJDEP's claim is identical to its failed claim against the Assignee. However, even if the NJDEP's claim against Nicole-Kirstie were somehow distinct from the NJDEP's claim against the Assignee, the Entire Controversy Doctrine would still apply because the same set of facts (ownership of the Site, the presence of contaminants in the Site, but no evidence of further contamination of the Maurice River) underlies both claims.

POINT III

THE APPEAL IS MANIFESTLY TIMELY

(APPEAL FROM NJDEP'S LETTER DATED FEBRUARY 16, 2022, PURPORTING TO COMPLY WITH THIS COURT'S PRIOR ORDER REQUIRING THE NJDEP TO "ISSUE A DECISION EITHER ADOPTING OR REJECTING THE POSITION" OF THE DAG'S APRIL 14, 2021 EMAIL (Aa171-Aa172)

The NJDEP has continued its calculated, evasive maneuvering to avoid the impact of the 2006 Final Judgment, even after this matter came up on appeal. As previously noted, in September 2021, this Court expressly ordered the NJDEP to either adopt or reject the position espoused in the DAG's "final thoughts" communication, dated April 14, 2021, regarding sampling of the river

sediment. (Aa170.) However, instead of complying with a clear and direct Order of the Appellate Division, as was its obligation, the NJDEP at first delayed for many months even responding to the Court's Order, and then transparently tried to avoid committing to an appealable decision at all by sending a letter dated February 16, 2022 claiming that it did not need to issue a final decision because it *already had* – in the form of the 2019 ACO, which "outlines Nicole-Kirstie's remedial obligations" pursuant to the relevant statutes and regulations – despite the fact that the ACO itself says absolutely nothing about the issue of sediment sampling or possible remediation in the river. (Aa171-Aa172.) It is clear that the NJDEP is trying to defeat Nicole-Kirstie's claims on this appeal by engaging in an elaborate administrative shell game, since it no doubt realizes that if the within appeal is ever actually adjudicated by this Court on the merits, the NJDEP's game playing will not protect it from an adverse ruling by this Court for the legal reasons already discussed above.

Hiding behind boilerplate terms and string citations, none of which have even met the Court's instructions, the NJDEP has again tried to sidestep the central issue – the preclusive impact of the 2006 Final Judgment on the NJDEP's claim for further sampling and remediation absent new evidence of contaminants migrating from the Shipyard into the sediments of the Maurice River.

The NJDEP later tried to use its own self-created evasive language in the February 16, 2022 letter to argue, in its prior motion to dismiss the current appeal, that the letter was not even appealable because it was not a "final agency order" (Aa179), even though that was *exactly* the purpose of the Court's prior remand to the agency. Instead, the NJDEP has argued the February 16, 2022 letter "merely reiterates that the ACO is a final order and that the DAG's Letter is not a final agency order…. Accordingly, it is unclear what relief can be ordered by the Court." (Aa179)

In effect, the NJDEP has tried to end-run the appeals process by claiming, on the one hand, that it did comply with this Court's September 29, 2021 order "to issue a decision either adopting or rejecting the position espoused in the DAG's April 14, 2021 email" (Aa170), but, on the other hand, the only thing its February 16, 2022 letter actually "decided" was that it was not really a "decision" after all and, in fact, no decision could be had on the matter anyway.

However, in denying the NJDEP's prior motion to dismiss, the Appellate Division apparently recognized the elaborate shell game that the NJDEP has been playing, and also recognized the NJDEP's February 16, 2022 letter as the final, appealable decision that it in fact was (and still is).

In fact, and in a broader sense, the NJDEP's tactical avoidance of being pinned down, first by the 2006 Final Judgment, and then by its own decision

communicated in the February 16, 2022 letter, comes directly from the playbook that the facts show the NJDEP has been following since 2006. These evasive tactics do nothing but generate more litigation costs and tie up the Court's and the parties' resources. They most certainly do nothing to remediate toxic waste in the environment. This Court should recognize the NJDEP's tactics for what they are, exercise its inherent Constitutional power of review in lieu of prerogative writs, and accept and determine the outcome of this appeal on the merits. Anything less will only encourage the NJDEP to keep practicing the same gamesmanship that it has been playing in this matter for a long while.

CONCLUSION

For the foregoing reasons, Nicole-Kirstie respectfully requests this Court to dismiss the NJDEP's administrative claim against Nicole-Kirstie, and specifically to order the NJDEP to cease all efforts to compel Nicole-Kirstie to conduct any further sampling and/or remediation of the Maurice River sediments based upon the current record.

Respectfully submitted,

By:/s/ Franklin J. Riesenburger

IN THE MATTER OF NICOLE-KIRSTIE, LLC,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2308-21T1
Appellant,	:	CIVIL ACTION
v.	:	On Appeal from a February 16, 2022 Final Agency Decision of the New Jersey Department of Environmental Protection
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
Respondent.	:	

BRIEF OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Date Submitted: August 4, 2023

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PRELIMINARY STATEMENT

The Department is authorized by statute to require responsible parties to investigate and cleanup discharges of hazardous substances. Before this court is an untimely attempt by Nicole-Kirstie, LLC ("Nicole-Kirstie") to appeal a 2019 administrative consent order ("ACO")—which by its terms is a final agency decision and requires a broad investigation and cleanup—over three years after its entry. Nicole-Kirstie has attempted to do so by seeking the Department of Environmental Protection's ("Department") permission to be relieved from the part of the ACO dictating that Nicole-Kirstie must remediate all areas to which any hazardous substance discharged have migrated, and then appealing the Department's denial of that request. Such litigation tactics violate the forty-five-day time for appeal prescribed by Rule 2:4-1(b). It would also deprive litigants of the repose that ACOs are intended to provide if a party could simply seek permission to be relieved from its terms and then rely upon the ensuing denial as a means of reopening and renegotiating the ACO.

Further, Nicole-Kirstie argues that because, many years ago, the previous owner of the subject property was relieved of having to further investigate off-site contamination under an agreement that Nicole-Kirstie was not a party to, the Department is now collaterally estopped from requiring Nicole-Kirstie to comply with the subsequent ACO. Because Nicole-Kirstie's compliance with

the subsequent ACO was not at issue or actually litigated before the Probate Part, this argument unequivocally fails. This argument is also flawed because it assumes that the Probate Part would have the authority to adjudicate Nicole-Kirstie's liability under ISRA and the Spill Act, which it did not.

COMBINED PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Nicole-Kirstie is the owner of the properties located at 9 and 13 Front Street, (no street number) Carlisle Place Road, and 294 Carlisle Place Road, Maurice River, New Jersey 08316, which are also known and designated as Block 274, Lots 1 and 2, and Block 252, Lots 20 and 21 on the Maurice River Tax Map (collectively, "Site"). (Aa114 at ¶¶1, 3).

The previous owner of the Site, Dorchester Industries, Inc. ("Dorchester"), used the Site to operate a ship building facility. (Ra1). Based on the nature of those operations, the industrial establishment is subject to the environmental remediation requirements of the Industrial Site Recovery Act, N.J.S.A. 13:1K-1 to -13 ("ISRA"). (Ra1-3, Ab1). On June 12, 1998, Dorchester ceased operations at the Site, which triggered notification and environmental remediation requirements under ISRA.[2] (Ra2).

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[1] Given the close relationship of the factual and procedural histories, the factual and procedural histories are being merged for the sake of clarity.

[2] See N.J.S.A. 13:1K-9.

Frank Wheaton, the principal of Dorchester, died in July, 1998. On or about March 24, 1999, Paul R. Porrecca was appointed as the Assignee for the Benefit of Creditors of Dorchester ("Assignee") in the disposition of Wheaton's estate under Cumberland County Probate Docket No.: 9028 ("Probate Matter"). (Aa49-50 at ¶1). The execution of a deed of assignment for the benefit of creditors also triggered notification and remediation requirements under ISRA.[3] (Aa65-66 at ¶10).

More specifically, ISRA provides that that the owner or operator of an industrial establishment planning to close operations or transfer ownership or operations shall notify the Department in writing within five days of closing operations or deciding to close operations, and, subsequent to providing notice and (subject to limited exceptions) shall remediate the industrial establishment. N.J.S.A. 13:1K-9. Prior to passage of the Site Remediation Reform Act ("SRRA") in 2009, the Department would offer prospective purchasers of contaminated property the opportunity to enter into prospective purchaser agreements to help facilitate the transfer of the properties and to clearly define the liabilities and obligations of the purchaser. Such agreements were replaced by pre-purchaser administrative consent orders following the 2009 passage of SRRA.

[3] See N.J.A.C. 7:26B-1.6(a)14.

As required by ISRA, on September 30, 1999, the Assignee submitted notification to the Department to report the June 12, 1998 cessation of operations. (Ra1-3). Between January 2000 and May 2001, Dorchester performed some environmental investigatory work at the Site, but ultimately failed to implement the necessary remedial work as directed by the Department. (Aa66-Aa70 at ¶¶14-29). On June 21, 2001, the Department filed a verified complaint and order to show cause in the Probate Matter, seeking, among other relief, to compel Dorchester to perform the remediation of the contamination existing at and emanating from the Site. (Aa58-75). The Department filed in Probate Part to ensure that Wheaton's estate's assets were allocated for remediation before they were distributed.

On January 28, 2002, the Department entered a consent order with the Assignee in which the Assignee agreed to perform a site investigation and submit a site investigation report to the Department. (Aa11-16). From 2002 to 2005, the Assignee submitted various remedial documents to the Department, including multiple remedial investigation reports.[4] (Aa52-53 at ¶¶8-12; Aa86-87 at ¶¶8-12). On July 18, 2005, the Department entered a Remediation Agreement ("2005 Remediation Agreement") with the Assignee in which the

[4] A remedial investigation is required to, in part, determine the horizontal and vertical reach of the contamination.

latter agreed to complete the remediation of the Site. (Aa29-40). Nicole-Kirstie was aware of the Probate Matter as it was occurring. (Aa6). However, it was not a party to the 2005 Remediation Agreement. Ibid.

On November 28, 2005, Nicole-Kirstie purchased the Site. (Aa54 at ¶21). In 2005, the Department offered prospective purchasers of contaminated property the opportunity to enter into a prospective purchaser agreement, and to clearly define the liabilities and obligations of the purchaser, but Nicole-Kirstie declined that opportunity.

Meanwhile, on June 23, 2006, the Assignee in Wheaton's estate matter filed an order to show cause and verified complaint in the Probate Matter to compel the Department to waive and relinquish its demand that he investigate and remediate the Maurice River, and arguing that this demand exceeded the scope of the 2005 Remediation Agreement. (Aa49-57).

On August 3, 2006, the Department filed an answer and counterclaims to compel the Assignee to fully remediate the Site and wherever contamination had migrated therefrom, including the Maurice River. (Aa83-100). The Department argued that ISRA and its implementing regulations required the Assignee to investigate three areas of environmental concern, including the Maurice River, because contamination does not abide by property boundaries. (Aa78-80). Nonetheless, on October 17, 2006, following a two-day hearing conducted on

September 27 and 29, 2006, Judge Georgia M. Curio entered an order dismissing the Department's counterclaims, discharging the Assignee from his duty as Assignee for the benefit of Creditors of Dorchester, and allowing a final accounting ("2006 Order"). (Aa111-113). Judge Curio did not provide her reasoning in the October 17, 2006 Order. Ibid.

Under the Spill Act, "any person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs." N.J.S.A. 58:10-23.11g(c)(3). Because Nicole-Kirstie purchased the Site after September 14, 1993 when the discharge of hazardous substances had already occurred, the Spill Act and ISRA obligated Nicole-Kirstie to remediate the Site and wherever contamination had migrated.

On February 19, 2019, Nicole-Kirstie entered into the 2019 ACO with the Department, which by its terms is a final order. (Aa118 ¶31). Nicole-Kirstie agreed to "remediate the Contaminated Site, including all discharges at the Site discovered during the remediation as the Department directs." (Aa116 ¶14). The 2019 ACO defines "Contaminated Site" as "[t]he Site and all other areas to which any hazardous substance discharged on the Site has migrated." (Aa114

¶1). During the negotiation of the 2019 ACO, Nicole-Kirstie had the opportunity to clarify whether further investigation of the Maurice River was necessary and expected, but it declined to do so. (Aa114-120).

From 2016 through 2021, Nicole-Kirstie, through its Licensed Site Remediation Professional ("LSRP"), submitted several documents to the Department that set forth the investigatory and remedial action taken at the Site. (Aa144-150). None of the submissions reflected an investigation of the Maurice River having ever occurred. Ibid. On several occasions, Nicole-Kirstie's LSRP argued that the 2006 Order relieved Nicole-Kirstie from having to investigate the Maurice River. Ibid. The Department rejected this argument every time it was raised and, on April 14, 2021, the undersigned sent an e-mail to Nicole-Kirstie's LSRP advising him once more that the 2006 Order does not absolve Nicole-Kirstie of its legal responsibility to remediate the Maurice River ("DAG email"). (Aa134).

On May 28, 2021, Nicole-Kirstie filed a notice of appeal of the DAG email, which it characterized as a final agency decision ("2021 Appeal"). (Aa152). The 2021 Appeal was captioned In Re: Nicole-Kirstie LLC v. New Jersey Department of Environmental Protection, Docket No. A-2695-20. Ibid. On September 29, 2021, following briefing by the parties, the Appellate Division entered an order dismissing the 2021 Appeal upon a finding that the

email was not an appealable final agency decision and remanding the matter "to the NJDEP for the Commissioner to issue a decision either adopting or rejecting the position espoused in the DAG's April 14, 2021 email." (Aa170).

On February 16, 2022, in accordance with the Appellate Division's order, Mark Pedersen, Assistant Commissioner of the Department's Site Remediation and Waste Management Program, issued a letter to counsel for Nicole-Kirstie with the authority delegated to him by the Commissioner of the Department ("Commissioner Letter"). (Aa171-72). The Commissioner Letter stated that the relevant final decision is encapsulated by the 2019 ACO, and the DAG email merely reiterated that the 2019 ACO is a final order. Ibid.

On April 1, 2022, Nicole-Kirstie filed the notice of appeal that initiated the instant matter, appealing the Commissioner Letter as a final agency decision ("2022 Appeal"). (Aa1). On May 16, 2022, the Department moved for dismissal of the 2022 Appeal on timeliness grounds. (Aa173-181). On June 14, 2022, the Appellate Division denied the Department's motion and noted that "the merits panel shall consider, among any other issues presented, the appealability of the alleged agency action(s) and the timeliness of the appeal." (Ra4).

ARGUMENT

POINT I

NICOLE-KIRSTIE'S CHALLENGE TO THE 2019 ACO IS TIME-BARRED.

The present appeal is time-barred because the ultimate relief Nicole-Kirstie seeks is release from part of the 2019 ACO. Since Nicole-Kirstie's challenge comes over three years after its execution, the terms of the 2019 ACO are not subject to further review. See Dep't of Envt'l. Prot. v. Mazza & Sons, Inc., 406 N.J. Super. 13, 23 (App. Div. 2009) (holding that to challenge final administrative agency action, an adversely affected party must file a notice of appeal to the Appellate Division within forty-five days of the agency action); see also In re Valley Rd. Sewerage Co., 295 N.J. Super. 278, 290 (App. Div. 1996), aff'd, 154 N.J. 224 (1998); State Farm Mut. Auto. Ins. Co. v. State, 118 N.J. 336, 344-345 (1990).

Rule 2:4-1(b) provides that "[appeals] from final decisions or actions of state administrative agencies or officers. . . shall be taken within 45 days of their entry." The limitation on the time for appeal is critical to the resolution of matters, as "it is a well-established principle in this State that when the time for taking an appeal has run the parties to the judgment have a vested right therein which cannot subsequently be taken from them . . . . [I]t is of the utmost importance that at some point judgments become final and litigations come to

an end." In re Pfizer, 6 N.J. 233, 239 (1951). "To satisfy Rule 2:4–1(b), an agency decision should contain adequate factual and legal conclusions. The decision also should give unmistakable notice of its finality . . . . Although not mandatory, the notice also should describe briefly the right to an appeal within the agency and the time limits for filing such an appeal." In re CAFRA Permit No. 87-0959-5 Issued to Gateway Assocs., 152 N.J. 287, 299 (1997). The 2019 ACO includes all of these features, with the exception of a description of the right to appeal.[5]

Nicole-Kirstie's current appeal is a thinly veiled attempt to circumvent the requirements of Rule 2:4-1(b). Nicole-Kirstie argues that it is not seeking a release from the 2019 ACO, but rather an order from this court finding that the Department cannot demand Nicole-Kirstie to perform investigation and remediation of the Maurice River because the 2006 Order absolved it of that responsibility. However, the remediation of the Maurice and all other off-site receptors is an integral part of the 2019 ACO, which provides: "Nicole-Kirstie shall remediate the Contaminated Site, including all discharges at the site discovered during the remediation as the Department directs." (Aa116 ¶14). Once more, the plain language of the ACO, which Nicole-Kirstie agreed to,

[5] Although the 2019 ACO does not describe Nicole-Kirstie's right of appeal, it waived its right to an administrative hearing concerning the terms of the 2019 ACO pursuant to N.J.A.C. 7:26C-9.10. (Aa119 ¶41).

provides that the Contaminated Site encompasses "the Site and all other areas to which any hazardous substance discharged on the Site has migrated." (Aa114 ¶1). Nicole-Kirstie had numerous opportunities to clarify whether further investigation of the Maurice River was necessary or contest its responsibility, but at every turn declined to do so. Nicole-Kirstie could have requested to enter a prospective purchaser agreement before acquiring the Site, wherein its liabilities and obligations would be clearly defined, but declined to do so. Nicole-Kirstie could have sought to clarify whether further off-site investigation was required when negotiating the 2019 ACO, but declined to do so. Nicole-Kirstie even could have sought relief from the 2019 ACO within forty-five days of its entry, but again, declined to do so. At each of these points, Nicole-Kirstie was represented by counsel, yet still failed to raise collateral estoppel and res judicata arguments.

Notably, Nicole-Kirstie acknowledges that it was aware of the Probate Matter as it was occurring, as its counsel participated in parts of the order to show cause hearing conducted on September 27 and 29, 2006. (Aa7). Presumably, Nicole-Kirstie was also aware of its outcome, the 2006 Order, but provides no explanation for why it did not previously assert as a defense its belief that the 2006 Order absolves it of responsibility for investigating and remediating contamination in the Maurice River. Even if, for the sake of

argument, the 2006 Order provided it some sort of defense, Nicole-Kirstie cannot explain why it failed to raise this argument that had been existence for thirteen years as of when it entered the 2019 ACO, or the reason for its ongoing silence for two years after it agreed to the 2019 ACO's terms. After passing up several opportunities to object to investigating the off-site impacts of the contamination, Nicole-Kirstie now finally raises the 2006 Order as a means to avoid complying with the 2019 ACO.

Nicole-Kirstie had adequate opportunity to contest its responsibility, and allowing it to now appeal would render Rule 2:4-1(b) obsolete. Like statutes of limitations, a limitation on the time to appeal a final agency decision exists in order to compel a party aggrieved by agency action to timely challenge that action promptly and to give finality to the matter. Cf. D.R. Horton, Inc.-New Jersey v. New Jersey Dep't of Envtl. Prot., 383 N.J. Super. 405, 408 (App. Div. 2006) (discussing the purpose of the twenty-day time to request an adjudicatory hearing on agency action, which is akin to the limitation on the time to appeal a final agency decision). Without actual finality being brought to agency action, a party that wished to reopen a final agency decision to belatedly assert a defense beyond the forty-five day time to appeal could simply solicit a response from the Department about the Department's position as to that defense, and then appeal the response. In fact, that is exactly what has occurred here. Such a

precedent would endanger the finality of all agency decisions, and therefore this court should dismiss the appeal as time-barred. Such precedent would also be contrary to the strong public policy that favors the settlement of litigation. See Dep't of Public Advocate, Div. of Rate Counsel v. N.J. Bd. of Public Utils., 206 N.J. Super. 523, 528 (App. Div. 1985).

Therefore, Nicole-Kirstie's attempts to challenge the 2019 ACO are time-barred and should be denied.

POINT II

WHETHER THE COMMISSIONER LETTER COMPLIED WITH THE COURT'S SEPTEMBER 29, 2021 ORDER IS NOT PROPERLY BEFORE THIS COURT.

The court remanded the 2021 Appeal "to the NJDEP for the Commissioner to issue a decision either adopting or rejecting the position espoused in the DAG's April 14, 2021 email." (Aa170). The Commissioner Letter complies with that directive and explains that Nicole-Kirstie is bound by the 2019 ACO because it never appealed its terms. (Aa171-72). That position is consistent with the plain language of the 2019 ACO, which provides that it shall be enforceable in Superior Court as a final order. (Aa118 ¶31).

Moreover, Nicole-Kirstie's argument to the contrary is not even properly before this court. That is because the September 29, 2021 Order was entered in the 2021 Appeal, under Docket No. A-2695-20. This matter was initiated in

2022, under Docket No. A-2308-21. Nicole-Kirstie had 469 days after the Commissioner Letter was issued and before its brief in this matter was due to file a motion in the 2021 Appeal and argue that the Department failed to comply with the court's order. Just as Nicole-Kirstie's belated appeal of the 2019 ACO is not properly before this court, so too is its objection to the form of the Commissioner Letter.

Nicole-Kirstie further argues that the Department "tried to avoid committing to an appealable decision at all." (Ab47). However, the Department did not contest the appealability of the Commissioner Letter in its motion to dismiss, nor in the instant brief, which certainly undermines that argument.

DEP complied with the September 29, 2021 Order. Nicole-Kirstie's argument to the contrary is incorrect and the court should reject their attempt to restart the clock for appealing the 2019 ACO.

POINT III

THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL ARE NOT APPLICABLE HERE.

Even if this court should find that Nicole-Kirstie's appeal of the 2019 ACO is timely, its claimed basis for relief—that the 2006 Order relieved it of responsibility for remediating the Maurice River—is without merit. According to Nicole-Kirstie, the probate decision is dispositive on the issue. However,

Nicole-Kirstie was not a party to the probate matter, nor to the underlying 2005 Remediation Agreement enforced by the Department's August 3, 2006 counterclaims in the Probate Matter. And because its own liability for the contamination at the Site under the Spill Act and ISRA was not adjudicated in that matter, the doctrines of res judicata and collateral estoppel do not apply.

"Collateral estoppel applies to issues already litigated and determined in the original action between the parties; res judicata applies both to issues actually litigated and to those that might have been." Williams v. A & L Packing & Storage, 314 N.J. Super. 460, 467 (App. Div. 1998). "Res judicata prevents a party from relitigating for a second time a claim already determined between the same parties." In re Vicinage 13 of the N.J. Superior Ct. ("Vicinage 13"), 454 N.J. Super. 330, 341 (App. Div. 2018). The doctrine of collateral estoppel, or "issue preclusion," is "that branch of the broader law of res judicata, which bars re-litigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." Ibid. The court considers the same factors when deciding whether to apply res judicata or collateral estoppel. Ibid.; Pace v. Kuchinsky, 347 N.J. Super. 202, 215 (App. Div. 2002); Hackensack v. Winner, 162 N.J. Super. 1, 28 (App. Div. 1978). Thus, in assessing whether either doctrine applies, our

Supreme Court has explained that courts should consider the following five factors:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.[6]
>
> [First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007) (citation and internal quotations omitted).]

A. The Issues Are Not Identical Because DEP's Counterclaim in the Probate Matter Arose Out of the Distribution of the Estate of Frank Wheaton and the Assignee's Violation of the 2005 Remediation Agreement, ISRA, and the Spill Act, Whereas the Current Matter Is Related to Nicole-Kirstie's Contractual Obligations Under the 2019 ACO.

[6] Nicole-Kirstie argues that the relevant inquiry concerning identity of parties is whether Nicole-Kirstie and Dorchester were the same party or in privity with one another. (Ab36). However, the doctrines of collateral estoppel and res judicata are not being asserted against Nicole-Kirstie—they are being asserted against the Department. See First Union Nat'l Bank, 190 N.J. at 352 (holding that the party asserting the bar must demonstrate that "the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding). Therefore, the pertinent question is whether the Department appeared in the Probate Matter, which the Department concedes it did.

Here, the issues are not identical because DEP's counterclaim in the Probate Matter and its current demand that Nicole-Kirstie investigate the Maurice River arise out of two distinct agreements and factual scenarios.[7]

In considering whether the issues are identical, the court must consider:

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the material facts alleged are the same.
>
> Culver v. Ins. Co. of N. Am., 115 N.J. 451, 461-62 (1989) (citation omitted).

A recounting of the history preceding entry of the 2006 Order is critical to understanding why the issues in that action are not identical to the issues currently in dispute. During the distribution of an estate, disbursements related to environmental matters shall be paid from principal, including "assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the cost of those activities, penalties imposed under

[7] For this same reason, the Entire Controversy Doctrine is not applicable here.

environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties and defending claims based on environmental matters." N.J.S.A. 3B:19B-25(a)(9). To ensure that sufficient assets in Wheaton's estate (and, by extension, Dorchester) would be set aside to cover the cost of remediating the Contaminated Site, the Department, in 2001, filed a verified complaint and order to show cause in the Probate Matter seeking, among other relief, to compel Dorchester to perform the remediation of the contamination existing at and emanating from the Site. (Aa58-75). The Department's cause of action arose out of several events that occurred years before Nicole-Kirstie purchased the Site, including the ISRA-triggering events of Dorchester's cessation of operations at the Site and the execution of a deed of assignment for the benefit of creditors, and Dorchester's subsequent failure to perform the remedial investigation of the Site as required under ISRA. (Aa65-70 ¶¶9-10, 13, 16, 23-24, 26, 28, 32).

At the time the Department filed its verified complaint and order to show cause, it had no legal basis to compel any action by Nicole-Kirstie, as Nicole-Kirstie would not acquire the Site for another four years. (Aa54 at ¶21). The Probate Part also would not have jurisdiction to resolve those claims, as its authority is limited "to hear[ing] and determin[ing] all controversies respecting

wills, trusts and estates, and full authority over the accounts of fiduciaries, and also authority over all other matters and things as are submitted under this title." N.J.S.A. 3B:2-2. Whereas the Probate Part clearly had authority to hear the Department's claims against Wheaton's estate because the Department sought the allocation of the Estate's assets towards the remediation of the Contaminated Site, any of the Department's potential claims against Nicole-Kirstie were unrelated to the distribution of the Estate.

The 2002 Consent Order largely resolved the Department's claims against Dorchester, save for the fact that the investigation and remediation of the Contaminated Site had not yet proceeded, for which reason Judge Curio retained jurisdiction. (Aa15 ¶15). Under ISRA, an owner or operator of an industrial establishment subject to ISRA may not transfer the industrial establishment without issuance of a final remediation agreement, unless the Department authorizes the transaction. N.J.A.C. 7:26B-1.8. In 2005, the Department would permit such transactions by requiring the ISRA-liable seller to enter into a remediation agreement with the Department prior to the sale.[8]

[8] This procedure was supplanted on November 4, 2009, by the owner or operator's submission of a remediation certification pursuant to N.J.A.C. 7:26B-3.3(c). N.J.A.C. 7:26B-1.8. It remains the case that an authorization does not necessarily relieve "the owner or operator or any person responsible" of all obligations under ISRA to remediate an affected site. Ibid.

Therefore, to enable the sale of the Site to Nicole-Kirstie, the Assignee applied for, and then entered, the 2005 Remediation Agreement with the Department. The sale was completed on November 28, 2005. (Aa54 at ¶21). Nicole-Kirstie was not a party to the 2005 Remediation Agreement. (Aa40).

When the Department and the Assignee disagreed on the scope of the remediation agreement in 2006, the Assignee filed his own verified complaint and order to show cause seeking to be relieved from the 2005 Remediation Agreement and further remedial responsibility at the Site. (Aa49-57). The Department then filed an answer and counterclaims, the basis for which Nicole-Kirstie now contends is identical to the basis for the Department's current demand that Nicole-Kirstie investigate the Maurice River. (Aa83-100).

Nicole-Kirstie is incorrect. While the Department's counterclaims included statutory claims under the Spill Act and ISRA, the primary basis for relief was enforcement of the 2005 Remediation Agreement, which reflected the relief sought in the Assignee's verified complaint—to be relieved from the 2005 Remediation Agreement. Here, the Department has asserted that Nicole-Kirstie must investigate and remediate the Maurice River under the terms of the 2019 ACO, an entirely different contractual agreement.[9] Further, the statutory bases

[9] The difference between the two agreements is underscored, in part, by the intervening passage of the Site Remediation Reform Act, N.J.S.A. 58:10C-1 to

for the Department's ISRA claim were all premised on the actions (and inactions) of Dorchester, not Nicole-Kirstie. Finally, the Department's Spill Act claim sought the recovery of costs expended by the Department. Here, the Department has not alleged that Nicole-Kirstie must pay for past costs incurred by the Department. Therefore, the acts complained of and the demand for relief are not the same. For the same reasons, the theory of recovery, the witnesses and documents necessary at trial, and the material facts also differ.

B. Nicole-Kirstie's Liability and Obligations under the 2019 ACO, ISRA, and the Spill Act Were Not Decided or "Actually Litigated" in the Probate Matter.

In order for an issue to be precluded, it must have been actually litigated in the prior proceeding. Although Judge Curio conducted a trial and entered a final judgment, they were conducted and entered to resolve the issue of Dorchester's liability under the 2005 Remediation Agreement, ISRA, and the Spill Act. Judge Curio did not decide Nicole-Kirstie's liability under the 2019 ACO, ISRA, or the Spill Act. And nor could she have, as her authority was limited to "hear[ing] and determin[ing] all controversies respecting wills, trusts and estates, and full authority over the accounts of fiduciaries, and also authority

-29, in 2009, which overhauled New Jersey's site remediation procedures and introduced the LSRP Program.

over all other matters and things as are submitted to its determination under this title." N.J.S.A. 3B:2-2.

Nicole-Kirstie assumes that Judge Curio's order was preceded by a determination that the Maurice River had been fully investigated. But that is conjecture–there is no record of Judge Curio's reasoning or the substance of the trial. The record does not reflect what exact issues were litigated during the trial and decided by the court. All that is known is that Judge Curio "dismisse[d] the Counterclaim filed by the [Department] as to its exceptions to [the Assignee's] final account and also as to its request for the imposition of costs and penalties." (Aa113). Her basis for entering this order is not known.

It is just as likely that Judge Curio did not, or had no reason to, consider the ongoing extent of contamination of the Maurice River, but instead determined that the 2005 Remediation Agreement did not require investigation of the Maurice River (which, of course, would not preclude the issue of whether the 2019 ACO requires investigation of the Maurice River). Finally, Judge Curio may have simply concluded that further investigation of the Maurice River was necessary, but that Dorchester could not afford to perform the remediation.[10]

[10] This serves as a strong example of why it can also not be said whether "the determination of the issue was essential to the prior judgment." It could be that Judge Curio dismissed the Department's counterclaims for reasons wholly unrelated to the status of the investigation of the Maurice River.

Today, neither Nicole-Kirstie nor the Department can identify which issues were "actually litigated" at the order to show cause hearing in 2006 without employing guesswork. What can be said with certainty, however, is that Nicole-Kirstie's liability under the 2019 ACO, ISRA, and the Spill Act was not "actually litigated" at that juncture.

C. Policy Interests Support Ensuring That the Reasonable, Bargained-for Contractual Expectations of the Parties Are Protected.

Basic principles of contract law support upholding the 2019 ACO. There is a general controlling principle that parties are bound by the contracts they make for themselves. Intertech Assocs. v. City of Paterson, 255 N.J. Super. 52, 59-60 (App. Div. 1992). As such, courts should ordinarily enforce contracts as made by the parties. Vasquez v. Glassboro Serv. Ass'n, 83 N.J. 86, 101 (1980). But no contract can be sustained if it is inimical to the public interest or detrimental to the common good. Driscoll v. Burlington-Bristol Bridge Co., 10 N.J. Super. 545, 575 (Ch. Div. 1950).

In particular, a settlement agreement between parties to a lawsuit is a contract. Pascarella v. Bruck, 190 N.J. Super. 118, 124 (App. Div. 1983). "Settlement of litigation ranks high in our public policy." Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div. 1961). Consequently, our courts have refused to vacate final settlements absent compelling circumstances and, in

general, settlement agreements will be honored "absent a demonstration of 'fraud or other compelling circumstances.'" Pascarella, 190 N.J. Super. at 125 (quoting Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974)). Before vacating a settlement agreement, our courts require "clear and convincing proof" that the agreement should be vacated. DeCaro v. DeCaro, 13 N.J. 36, 42 (1953).

As previously set forth, Nicole-Kirstie had several opportunities to challenge its liability under the Spill Act and ISRA before entering into the 2019 ACO, yet it declined to do so. Nicole-Kirstie entered the 2019 ACO knowing full well that the remediation of the Contaminated Site was not complete, yet did so any way. Further, Nicole-Kirstie was not the only party to make concessions as part of the 2019 ACO. Indeed, Nicole-Kirstie faced liability for penalties far greater than the $12,500 it agreed to pay, but the Department was willing to accept a lower penalty in the interest of ensuring the Contaminated Site would be remediated and (so the Department thought) finality would be brought to this matter without the need for litigation. (Aa115 ¶13).

Accordingly, this court should not entertain Nicole-Kirstie's attempt to disturb the reasonable, bargained-for contractual expectations of the parties.

CONCLUSION

For these reasons, Nicole-Kristie's appeal should be dismissed as untimely.

Respectfully submitted,

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Dated: August 4, 2023

IN THE MATTER OF NICOLE-KIRSTIE LLC, Appellant, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002308-21 (T4) CIVIL ACTION ON APPEAL FROM FINAL AGENCY DECISION DATED FEBRUARY 16, 2022 BY THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

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STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Nicole-Kirstie respectfully relies upon, and expressly incorporates herein, the Statement of Facts and Procedural History set forth in its opening brief.

ARGUMENT

I. Nicole-Kirstie Has Never Challenged the 2019 ACO Itself, Only the NJDEP's Interpretation of Its Terms as Posited in the NJDEP's February 16, 2022 Letter, from which Final Agency Action Nicole-Kirstie Has Timely Appealed.

Attempting to deflect from the merits of Nicole-Kirstie's appeal, the NJDEP attacks the timeliness of this appeal by arguing Nicole-Kirstie "really" means to appeal from the 2019 ACO.[2] But its obfuscation fails. Nicole-Kirstie timely appealed from the only final agency decision that it contests — the NJDEP's February 16, 2022 Letter adopting the position stated in the DAG's email of April 14, 2021. (Aa1-Aa10, A171-Aa172). Nicole-Kirstie has never sought to be "released" from the 2019 ACO, and does not seek that relief, now, either.

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[1] All terms, acronyms, and abbreviations used herein shall have the same meaning as in Nicole-Kirstie's opening brief.

[2] In its Motion to Dismiss the Appeal as Untimely, filed May 12, 2023, the NJDEP tried to argue that the February 16, 2022 Letter — which was issued upon remand from this Court to remove any doubt that the agency had indeed issued its final determination in the matter — was not a final agency decision after all. In its merits brief, the NJDEP has apparently now abandoned this argument, although it does continue to assert, still without support, that somehow the 2019 ACO is the final agency determination from which Nicole-Kirstie should have filed an earlier appeal. The fallacy of this argument will be addressed later in this brief.

Instead, Nicole-Kirstie has always maintained that the NJDEP's demand for its sampling and remediation of the Maurice River sediments exceeds that agency's preexisting legal authority under the 2019 ACO, due to the legally preclusive effects of the 2006 Final Judgment that benefitted both the Assignee for the Benefit of Creditors and Nicole-Kirstie at the time the ACO was entered. Since, by virtue of the preclusive effects of that 2006 Final Judgment, the NJDEP continued to lack the legal authority to compel Nicole-Kirstie to address the river sediments at the time the latter and the NJDEP entered into the 2019 ACO, it follows that the positions taken by the NJDEP against Nicole-Kirstie subsequent to entry of that ACO — as reflected and ultimately culminating in the NJDEP's February 16, 2022 final agency action letter — cannot withstand this Court's scrutiny, either.

As Nicole-Kirstie discussed more fully in its opening brief, and further discusses below, its position fundamentally rests on the 2006 Final Judgment's rejection of the claims that the NJDEP asserted against the Assignee, the prior owner of the Dorchester Shipyard property, under ISRA, the Spill Act, and their applicable regulations, and which claims the NJDEP continues to assert against Nicole-Kirstie based on the same statutes and regulations.

Additionally, the 2019 ACO never once mentions the Maurice River sediments (Aa114-Aa120), and the ACO's own terms do not grant the NJDEP any discretion beyond whatever powers the NJDEP may have already possessed under

the statutes and regulations that are referenced in the ACO as limited by the impact of the 2006 Final Judgment. Indeed, this authority has, in turn, always been constrained by the terms and conditions of the still binding 2006 Final Judgment which, as previously noted, long ago set limits on the NJDEP's authority to act as to the same remediation at the same property well before the 2019 ACO even came into being. Meanwhile, nothing in the terms of the 2019 ACO references, or is otherwise interpretable to require, any relinquishment or forbearance by Nicole-Kirstie as to the preexisting rights and privileges that it held for thirteen years prior to the 2019 ACO's very existence based on the preclusive effects of the 2006 Final Judgment. In short, Nicole-Kirstie does not seek a "release" from the 2019 ACO by this appeal. It is quite willing to, and in fact continues to, carry out the remediation work required by that ACO (except whatever is precluded under the 2006 Final Judgment, of course). Nicole-Kirstie is simply trying to exercise its express right (Aa119 (¶ 42)) to insist upon limiting the NJDEP's power and discretion under the 2019 ACO to reflect the impact of the 2006 Final Judgment, from which the NJDEP has never sought relief.

Further, it should be noted that the NJDEP did not at first claim the 2019 ACO as a basis for its demand regarding the investigation and remediation of the Maurice River sediments, until November 10, 2020 (Aa121-Aa122) — which was much longer than 45 days after the signing of the 2019 ACO. Thereafter, Nicole-Kirstie

repeatedly sought reconsideration by the NJDEP of its position through correspondence over the next several months. (Aa134-Aa140). Nicole-Kirstie thus had no cause or basis even to consider appealing from the 2019 ACO within 45 days of entering into that document,[3] and it has not done so.

Additionally, it must be noted that the NJDEP's conclusory statement that "Nicole-Kirstie had numerous opportunities to clarify whether further investigation of the Maurice River was necessary or contest its responsibility, but at every turn declined to do so" (NJDEP Br. 11) is neither supported by the record nor relevant to the timeliness issue at all. Specifically, the NJDEP baldly alleges, with no record citation to support its claim, that in 2005, Nicole-Kirstie declined an alleged offer by the NJDEP to execute a so-called "prospective purchaser agreement," "and to clearly define [Nicole-Kirstie's] liabilities and obligations." (NJDEP Br. at 5). However, this statement blatantly violates Rule 2:6-2(a)(5), because no "prospective purchaser agreement" was ever listed by the NJDEP in the Statement of Items Comprising the Record, and, thus, simply may "not be considered." Thabo v. Z Transp., 452 N.J. Super. 359, 365 (App. Div. 2017). More importantly, even if the NJDEP had presented supporting facts to show that what it alleges in fact occurred back in 2005,

[3] Nor could Nicole-Kirstie have appealed from any of the mere correspondence reiterating the NJDEP's position until the NJDEP eventually issued a statement in the form of an actual final agency decision, consisting of its February 16, 2022 Letter on remand from this Court's order entered in the prior appeal.

the NJDEP offers no legal basis for the implausible notion that a party who anticipates signing an ACO must first "seek to clarify" in advance each and every bone of contention it anticipates may arise under that ACO.

Finally, it is more than a little ironic that the NJDEP now stresses the importance of ensuring finality and repose, and the concern for "endanger[ing] the finality of all agency decisions." (NJDEP Br. at 9, 13). Indeed, after the Probate Part dismissed with prejudice the NJDEP's claims to compel the Assignee's investigation and remediation of the Maurice River in October 2006 (Aa111-Aa113), the NJDEP consciously chose to do nothing to preserve its own alleged rights, such as by appealing or seeking reconsideration of the 2006 Final Judgment. Instead, the NJDEP simply sat on its rights and chose to let the matter sit and fester for years until it finally reached out to Nicole-Kirstie (which the NJDEP knew had only come to own the Site in November 2005, while the 2005–2006 Probate Part proceedings were underway) and then later asserted against that entity the very same claims that it had unsuccessfully tried to compel against the Assignee until the 2006 Final Judgment tied the NJDEP's hands.

Because of the NJDEP's tactics, the very same claim for off-site sampling, based on the same alleged facts, statutes, and regulations, remains unresolved and is still at issue some 17 years later. However, "finality" is not within the NJDEP's exclusive right to declare or not to declare. The Site owner, a private entity largely

at the mercy of the NJDEP's alleged outsized discretion, is also entitled to repose so it can finish the work under the 2019 ACO, except as precluded by the 2006 Final Judgment.

II. The Principles of Claim and Issue Preclusion Apply Because the NJDEP Demand Against Nicole-Kirstie Is the Identical Claim, Based on the Same Alleged Legal and Factual Grounds, that the NJDEP Asserted in its Dismissed Counterclaims Against the Assignee in 2006.

As discussed in Nicole-Kirstie's opening brief, equitable preclusion doctrines such as *res judicata*, collateral estoppel, and the entire controversy doctrine bar the NJDEP's claim against Nicole-Kirstie to further investigate and remediate the Maurice River sediments, because the 2006 Final Judgment disposed of that same claim and dismissed the NJDEP's argument of any alleged authority to assert it. In the *res judicata* context, a "claim" encompasses "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Schmidt v. Celgene Corp., 425 N.J. Super. 600, 612 n.6 (App. Div. 2012) (citing Restatement (Second) of Judgments § 24(1) (Am. Law Inst. 1982)). Relevant factors in defining a single "claim" include identity of the essential "wrong" to be redressed; theory of recovery; relevant evidence; and material facts. Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 606-07 (2015). Whether "factual groupings" comprise a single "claim" is "determined pragmatically," considering their similarities "in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment

as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) of Judgments § 24(2).

Here, an honest and pragmatic look at the facts shows the NJDEP has pursued, since long before the 2019 ACO even existed, a single claim against the Site owner for further investigations and remediation of the Maurice River sediments. As discussed below, that claim is based upon a single "occurrence" or "status" — that is, the ownership of land from which, in 2006, the NJDEP alleged that migration of contaminants was likely to occur, as a matter of "common sense" but not driven by scientific data. (Aa79). The alleged legal authority for the NJDEP's demand, as shown below, is ISRA, the Spill Act, and their respective regulations. Since at least 2006, the NJDEP's demand has not materially changed. The NJDEP's current demand seeks the same sampling, to address the same alleged possibility of contamination, and conspicuously is based on the same alleged evidence, "common sense," and fractured legal basis as earlier, when the NJDEP was making its same demand for river sediments sampling and remediation against the Assignee. The NJDEP's current demand against Nicole-Kirstie arises in the same "time and space," and from the same "origin and motivation," as did the NJDEP's previous Counterclaims against the Assignee. See Restatement (Second) of Judgments § 24(2). Thus, if the *Assignee* still owned the Site today, instead of Nicole-Kirstie, the NJDEP's current claim would unquestionably be barred by the 2006 Final

Judgment's *res judicata* effect. There is no legal or factual reason known to Nicole-Kirstie — once again, the actual title owner of the same property interest held by the Assignee when the 2006 Final Judgment was entered — why it is not entitled to the same *res judicata* effect.

1. The NJDEP's Claims Against Nicole-Kirstie Are Based on the Same Alleged Legal Authority as the NJDEP's Counterclaims Against the Assignee, Which Claimed Legal Authority Was Already Dismissed by Final Judgment Ruled upon and Entered in 2006 by a Court of Competent Jurisdiction.[4]

A single legal assumption lies at the core of both the NJDEP's prior Counterclaims against the Assignee and its current claim against Nicole-Kirstie. As discussed more fully in Nicole-Kirstie's opening brief, that assumption is that even after Nicole-Kirstie bought the Site from the Assignee in reliance on the NJDEP's express approval of October 22, 2004 of no further off-site sampling (Aa17), the NJDEP is still empowered by statute and regulation to retract its approval, based on no new evidence. To further provide support for this alleged legal assumption, the NJDEP argues that its 2006 Counterclaims relied on the 2005 Remediation Agreement, not ISRA or the Spill Act, as "the primary basis for relief," while its

[4] Preliminarily, it bears clarifying that Nicole-Kirstie's "preclusion" arguments relate specifically to the NJDEP's prior Counterclaims against the Assignee for further sampling and remediation of the Maurice River sediments. Thus, the NJDEP's discussion about the earlier pleadings in that action is wholly irrelevant.

current claim against Nicole-Kirstie rests entirely on the 2019 ACO. (NJDEP Br. at 20). The record shows this narrative is wrong on both accounts.

The NJDEP's prior Counterclaims in the Assignee action, while referencing to the 2005 Remediation, nonetheless did not include a count for breach of the 2005 Remediation Agreement at all. Rather, the Counterclaims asserted two counts against the Assignee, one titled "ISRA," and the other titled "Spill Act." (Aa92-Aa99). In the ISRA count, the NJDEP claimed the Assignee "has failed to conduct the requested sampling in violation of N.J.S.A. 13:1K-3, N.J.A.C 7:26B and N.J.A.C 7:26E, and instead . . . [is] seeking to have this Court relieve him from his ongoing remediation obligations under ISRA and the July 2005 Remediation Agreement." (Aa94 (¶ 11)). Under this count, the NJDEP sought (a) to compel the Assignee "to abide by the terms of the July 2005 RA *in accordance with ISRA, N.J.A.C. 7:26B and N.J.A.C. 7:26E*"; (b) specifically to conduct further sampling and remediation of the Maurice River sediments per "the March 15, 2006 letter sent by DEP *in accordance with ISRA, N.J.A.C. 7:26B and N.J.A.C. 7:26E*"; (c) to conduct any further remediation the NJDEP may require under ISRA and the 2005 Remediation Agreement; (d) statutory penalties under ISRA; and (e) litigation costs and fees. (Aa95) (emphases added).

The NJDEP's Spill Act count did not even mention the 2005 Remediation Agreement. (Aa95-Aa98). Instead, the NJDEP alleged that the Assignee was liable

because he was "the successor-in-interest to the discharger of hazardous substances at the Dorchester Property." (Aa96 (¶ 18)). Under this count, the NJDEP sought to compel the Assignee to pay more statutory penalties, reimburse all cleanup and removal costs, and "perform any further cleanup of hazardous substances discharged at the Dorchester Property under NJDEP's oversight." (Aa98).

The NJDEP's present claim against Nicole-Kirstie rests on the same alleged statutory authority that the NJDEP asserted against the Assignee in 2005–2006, and not on the 2019 ACO. Indeed, the NJDEP has pursued its claim against Nicole-Kirstie since at least 2017 — two years before the 2019 ACO was entered, based only on Nicole-Kirstie's status as the mere present owner of the Site. (See Aa124-Aa125 (describing NJDEP's demands in May 2017)). As the NJDEP itself stated in a May 2017 correspondence to Nicole-Kirstie's LSRP, the Assignee had "not satisfied" the NJDEP's March 15, 2006 directive regarding the Maurice River, requiring Nicole-Kirstie to finish the job. (Aa125).

Nor does the 2019 ACO purport to grant the NJDEP any powers that the 2006 Final Judgment foreclosed the NJDEP from pursuing as a matter of law. Additionally, the 2019 ACO never references the Maurice River sediments at all (Aa114-Aa120) — just a generic obligation to "remediate the Contaminated Site" (Aa116 (¶ 14)). The 2019 ACO contains no language — and the NJDEP has not pointed to any — implying a broader grant of authority to the NJDEP than what the

2005 Remediation Agreement had previously granted. Thus, the 2019 ACO is confined by the limits set by the underlying statutes and regulations upon which it rests, and the impact of the 2006 Final Judgment. Accordingly, the agency may not surreptitiously overstep that constraint by entry into a document like the 2019 ACO, which on its face says nothing about revoking the preexisting constraints on the NJDEP's authority that stem from the 2006 Final Judgment.

2. The NJDEP's Claim Against Nicole-Kirstie Relies on the Identical Facts Underlying the NJDEP's Counterclaims Against the Assignee.

Further, as discussed more fully in Nicole-Kirstie's opening brief (pp. 28-29), from the time the Probate Part considered the NJDEP's factual allegations in 2006, the NJDEP has not raised any new evidence to suggest further migration of contaminants from the Site into the Maurice River sediments. Tellingly, even in its opposition brief, the NJDEP never suggests any such evidence exists. Thus, the NJDEP has made no factual findings or discretionary determinations entitled to deference. The NJDEP is pursuing Nicole-Kirstie based solely on the very same alleged factual conclusions that the 2006 Final Judgment disregarded. Nor does the NJDEP assert any specific facts surrounding the signing of the 2019 ACO (*e.g.*, course of dealing, industry terms) that conceivably might bear on the meaning of the 2019 ACO's plain terms. Thus, the NJDEP's conclusory statement that "the

witnesses and documents necessary at trial, and the material facts also differ" (NJDEP Br. at 21) is simply wrong.

III. The 2006 Final Judgment Decided the Same Issues that Comprise the NJDEP's Demand Against Nicole-Kirstie.

Because the NJDEP's demands against Nicole-Kirstie are the same claims as the NJDEP's 2006 Counterclaims against the Assignee, the 2006 Final Judgment necessarily disposed of both.[5] The NJDEP asserts, in a grievous mischaracterization, that "Nicole-Kirstie assumes that Judge Curio's order was preceded by a determination that the Maurice River had been fully investigated." (NJDEP Br. at 22). In fact, Nicole-Kirstie makes no such assumption. Rather, Nicole-Kirstie argues that the 2006 Final Judgment, in dismissing the NJDEP's Counterclaims after a trial on the merits, dismissed the claim that the NJDEP is still pursuing against Nicole-Kirstie. Since the NJDEP claimed such authority based on ISRA and the Spill Act, the 2006 Judgment rejected the NJDEP's authority under those statutes as sufficient to support its claim for further sampling of the Maurice River sediments. Indeed, as the Assignee argued in his verified Complaint, the NJDEP only demanded the

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[5] Contrary to the NJDEP's bald assertion (NJDEP Br. at 21-22), under N.J.S.A. 3B:19B-25 the Probate Part had full jurisdiction to determine the NJDEP's authority under ISRA and the Spill Act. Therefore, the Probate Part's decision is preclusive even in later actions unrelated to the original estate. See Pivnick v. Beck, 326 N.J. Super. 474, 486 (App. Div. 1999) (holding probate judge's determination of testator's intent in probate action had preclusive effect as to same factual issue in later Law Division malpractice action).

further sampling and remediation after it expressly approved the Assignee's remedial measures, on which approval Nicole-Kirstie relied in buying the Site from the Assignee. (Aa51-Aa56). Moreover, the NJDEP did not state it had found new evidence of contaminant migration, but simply relied on "common sense" to require the further measures. (Aa79).

IV. Basic Fairness, the Need for Repose, and the Avoidance of Duplicate Actions Require an Equitable, Pragmatic Approach to Defining the NJDEP's Long-Running Demand as a Single Claim.

Although the preclusionary doctrines embody an equitable, pragmatic approach to prior judgments, the NJDEP's emphasis on the purportedly different agreements treats preclusion as a rigid, hyper-technical rule that ignores the factual and functional identity of a claim. The driving values behind *res judicata* are "fairness to the defendant and sound judicial administration," by ensuring "finality and repose for the litigating parties; avoiding the burdens of relitigation for the parties and the court; and maintaining judicial integrity by minimizing the possibility of inconsistent decisions regarding the same matter." Velasquez v. Franz, 123 N.J. 498, 505 (1991) (citations omitted). "Basic fairness," as well, is a key policy concern of *res judicata*. Forgash v. Lower Camden Cnty. Sch., 208 N.J. Super. 461, 465-66 (App. Div. 1985). Claims are defined "pragmatically," not rigidly. Restatement (Second) of Judgments § 24(2). The same interests of finality, fairness, and efficiency animate the entire controversy doctrine. Wadeer, 220 N.J. at 605.

In attempting to reframe the NJDEP's demand against the Assignee and against Nicole-Kirstie as essentially two unrelated contractual claims, the NJDEP not only contradicts the record but also ignores the essential equities at the heart of the preclusionary doctrines. Indeed, the 2019 ACO only came about after the NJDEP initiated direct compulsory oversight *because Nicole-Kirstie refused to sample and remediate the Maurice River sediments*. (Aa144-Aa145). Subsequently, the NJDEP threatened severe penalties if Nicole-Kirstie would not request an Administrative Consent Order in connection with the compulsory oversight. (*Ibid.*). For the NJDEP now to try to elude the 2006 Final Judgment's preclusive effect by insisting it is merely trying to enforce the 2019 ACO does grave harm to the facts. The NJDEP, however broad its mandate, may not use such cynical tactics to bully and manipulate proper owners and then revise the facts to suit its purposes before this Court.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Nicole-Kirstie's opening brief, Nicole-Kirstie respectfully requests this Court to reverse the NJDEP's final agency decision, dismiss the NJDEP's administrative claim against Nicole-Kirstie, and specifically to order the NJDEP to cease all efforts to compel Nicole-Kirstie to conduct any further sampling and/or remediation of the Maurice River sediments based upon the current record.

Respectfully submitted,

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