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FOUR SEASONS AT NORTH CALDWELL CONDOMINIUM ASSOCIATION, INC.,

Plaintiff,

vs.

K. HOVNANIAN AT NORTH CALDWELL III, LLC, et al.,

Defendants.
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CIVIL PART
ESSEX COUNTY

Civil Action

Docket No.: ESX-L-7086-18

MEMORANDUM OPINION
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<td>
K. HOVNANIAN AT NORTH CALDWELL III, LLC, et al.,

Defendants/Third-Party Plaintiffs,

vs.

BLUE LINE DRYWALL et al.,

Third-Party Defendants.
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For Plaintiff Four Seasons at North Caldwell Condominium Association, Inc.: Martin C. Cabalar (argued and on the brief) and Sarah Klein (on the brief), Becker & Poliakoff LLP

For Defendants K. Hovnanian at North Caldwell, III, LLC; Hovnanian Enterprises, Inc.; K. Hovnanian Companies, LLC; and K. Hovnanian Enterprises, Inc.: Donald E. Taylor (argued on the brief), Daniel J. Kluska (on the brief), and Daniel A. Cozzi (on the brief), Wilentz, Goldman & Spitzer, P.A.

Decided: May 28, 2019

HON. KEITH E. LYNOTT, J.S.C.

This is a construction-defect case alleging breach of contract, fraud, breach-of-trust, and other claims related to the construction of a condominium complex—Four Seasons at North Caldwell (the "Complex"). Four named Defendants—K. Hovnanian at North Caldwell, III, LLC

("KHNC"), Hovnanian Enterprises, Inc. ("Enterprises"), K. Hovnanian Companies, LLC ("KHC"), and K. Hovnanian Enterprises, Inc. ("KHE")[1]—move to dismiss the Complaint of the Plaintiff, Four Seasons at North Caldwell Condominium Association, Inc. (the "Association"). Specifically, Enterprises, KHC, and KHE seek dismissal of all Counts of the Complaint as to those Defendants.[2] The four Defendants also move to dismiss eight of the sixteen Counts in their entirety (including as against KHNC).[3]

For the reasons set forth herein, the Court grants in part and denies in part the moving Defendants' motion. It will permit the Plaintiff to replead certain claims as set forth herein.

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[1] The Complaint refers to the moving Defendants as part of two groups of Defendants: the "Developer Defendants" (consisting of KHNC and fictitiously named individual and corporate Defendants also "involved with the development, marketing, and sale of homes to the public") and the "Hovnanian Defendants" (consisting of the four moving Defendants—KHNC, Enterprises, KHC, and KHE). The Court notes that KHNC is included in both categories.

[2] The allegations of the Complaint lodged against the remainder of the fictitiously named Defendants—those involved in the architectural planning, engineering, design, and construction of the Complex (identified in the Complaint as the "Design Defendants" and the "Construction Defendants"), as well as the individuals appointed to the Board of Trustees of the Plaintiff (the "Developer Board Defendants")—are not the subject of the motions currently before the Court. For the avoidance of doubt, the Court's disposition of this motion and its Order dismissing portions of the Complaint as against the moving Defendants has no bearing upon the Design Defendants, the Construction Defendants, or the Developer Board Defendants.

Though the moving Defendants do not explicitly seek the dismissal of Count Fourteen (veil-piercing), the Court addresses that Count on its merits herein. The four moving Defendants are the only Defendants named in that Count.

[3] These claims include: negligence (Count One); violations of the Planned Real Estate Development Full Disclosure Act ("PREDFDA"), N.J.S.A. 45:22A-21, <u>et seq.</u> (Counts Five and Six); breach of implied warranties (Count Eight); violations of the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-2 to -2.13 (Count Nine); common-law fraud (Count Ten); negligent misrepresentation (Count Twelve); and aiding and abetting CFA violations (Count Sixteen). The remaining Counts—Counts Two (professional malpractice), Three (breach of fiduciary duty), Four (aiding and abetting breach of fiduciary duty), Seven (breach of express warranties), Eleven (breach of contract), Thirteen (breach of the duty of good faith and fair dealing), and Fifteen (civil conspiracy)—are unaffected by this motion, except insofar as the Court dismisses certain parties from all Counts, including these Counts, for the reasons stated herein.

I

On this motion to dismiss, the Court draws the facts from the Complaint and accepts the allegations of the pleading as true (solely for the purposes of the motion). It confers upon the Plaintiff all reasonable inferences that one may draw from the allegations of the Complaint. The relevant facts are as follows:

The Complex is located near the southern border of North Caldwell and comprises roughly 108 age-restricted housing units, a clubhouse, and several other common-element facilities and amenities. (Compl. ¶ 7.) The Association is a nonprofit corporation and condominium association for the Complex established under the New Jersey Condominium Act, N.J.S.A. 46:8B-1, et seq. (the "NJCA"). In this capacity, the Association operates and manages the common elements of the Complex. (Compl. ¶ 2.) The Complaint specifically limits its scope to claims relating to the common elements. (Compl. ¶ 6.)

KHNC was a developer and/or general contractor responsible for supervising the construction of the Complex. (Compl. ¶ 9.) A Master Deed pertaining to the Complex establishes the Association and sets forth the rights and responsibilities of the Association, among other matters. (Compl. ¶ 3.) KHNC registered a Public Offering Statement ("POS") for the Complex with the State pursuant to PREDFDA—specifically, N.J.S.A. 45:22A-28. (Compl. ¶ 61.) The POS became effective on October 14, 2010. (Defs.' Motion, Exh. A, at 1.)

In addition to descriptions of the Units, common elements, and governance structure, the POS sets forth certain express warranties as to the workmanship and related matters. First, the document provides that KHNC "did not knowingly omit any material fact . . . nor make any untrue statements about material facts." (Compl. ¶ 62.) Second, the POS sets forth various warranties required by PREDFDA. Those warranties state, in relevant part:

> 2. The Developer warrants that the Unit is fit for its intended use.
>
> 3. The Developer warrants that the Common Elements will be free from substantial defects due to faulty materials or workmanship for a period of two years from completion of each improvement or facility.
>
> 4. The Developer warrants that the Common elements are fit for their intended use, and that within the two-year period set forth above, the Developer will correct any substantial defect within a reasonable time after notification of the defect. . . .
>
> 5. THE DEVELOPER WARRANTS THAT THE UNITS AND THE COMMON ELEMENTS WILL SUBSTANTIALLY CONFORM TO THE SALES MODELS, DESCRIPTIONS OR PLANS USED TO INDUCE PURCHASERS TO ENTER INTO CONTRACTS WITH THE DEVELOPER. . . .
>
> ********
>
> 7. The Developer warrants that on-site drainage of surface water runoff is proper and adequate.
>
> 8. The Developer warrants that all off-site improvements, if any, installed by it in constructing the Condominium will be free from defects due to faulty materials or workmanship for a period of one year from the date of the construction of the improvement(s).
>
> 9. The Developer warrants that the common facilities located outside of the Condominium, if any, installed or constructed by it are fit for their intended use, and that within the two (2) year period described above, the Developer will correct any substantial defect in a common facility installed by it within a reasonable time after notification of the defect.
>
> [(Defs.' Motion, Exh. A, at 48–49.)]

The POS contains a disclaimer, in capitalized text, of "any implied warranty or warranty arising by law with respect to the Unit, or which would arise by making an agreement to sell a Unit." (Id. at 49.) As a result, the "the only warranties, which are given by the Developer to an Owner, are those listed above." (Id. at 49–50.)

The Complaint alleges that the common elements "suffer extensive design and construction-related defects." (Compl. ¶ 65.) The Complaint alleges that several of the defects are latent—"not readily recognizable by people lacking special knowledge or training" but rather "hidden by components or finishes." (Compl. ¶ 66.) Given this latency, the Association discovered the existence and causes of the defects only after the construction and sale of Units. (Ibid.) However, the Complaint does not otherwise identify or delineate the defects.

After discovering the defects, the Association notified the Defendants and demanded repair. (Compl. ¶¶ 75, 104.) The Defendants failed to effect a cure. (Ibid.) This action followed.

KHNC, the developer, is affiliated with numerous corporate entities named herein as the Hovnanian Defendants. The POS lists KHNC as the developer and a wholly owned subsidiary of Enterprises, one of the moving Defendants. (Compl. ¶ 15.) Enterprises has no day-to-day expenses, customers, or employees, nor does it generate income save for through its affiliated companies. (Compl. ¶¶ 17–23.)

Two related corporate entities—KHC and KHE, the other moving Defendants—exist under Enterprises' umbrella. KHC is a wholly owned operating subsidiary of Enterprises. (Compl. ¶ 27.) It employs all employees that service Enterprises and its various affiliates and provides day-to-day operational services to Enterprises' affiliates through intercompany service agreements.[4] (Compl. ¶¶ 28, 38, 164.) KHC has the same officers as Enterprises. (Compl. ¶ 32.) Moreover, KHC has no outside customers or recurring expenses. (Compl. ¶¶ 30–31.)

KHE is a wholly owned financing subsidiary of Enterprises. (Compl. ¶ 40.) In this capacity, it provides financing for Enterprises' various affiliates—including KHNC, the

[4] One can read the Amended Complaint to state that KHE, not KHC, provided these services. However, when the Amended Complaint is examined in context, this appears to be a typographical error. (See Compl. ¶ 166.)

developer of the Complex—through revolving credit agreements. (Compl. ¶ 165.) Similar to KHC, KHE has the same officers as Enterprises, as well as no customers, recurring expenses, or employees. (Compl. ¶¶ 44–46.)

The Complaint lodges a range of allegations against varying combinations of Defendants.[5] Count One alleges that all Defendants, including the moving Defendants, "negligently developed, constructed, renovated and oversaw the construction of the [Complex] in a manner that deviates from acceptable standards of care and in violation of statutes and building codes . . . ." (Compl. ¶ 78.) It seeks to impose joint-and-several liability for damages, attorneys' fees, interest, and costs.

Count Four avers that the moving Defendants "actively aided, abetted and encouraged" the Developer Board Defendants in breaching their fiduciary duties in the manner alleged in Count Three (which Count is not before the Court on this motion). (Compl. ¶ 99.) It alleges that such Defendants are jointly and severally liable for damages, attorneys' fees, interest, and costs.

Count Five alleges that KHNC and the other fictitiously named "Developer Defendants," through their involvement in the development of the Complex, violated the implied-warranty provisions of PREDFDA, N.J.S.A. 45-22A-21, et seq.—a statute enacted to protect the interests of condominium purchasers. Specifically, this Count avers that these Defendants breached several PREDFDA-imposed warranty obligations relating to the absence of defects, fitness, and conformance to the initial design and marketing materials. This Count alleges the Defendants are

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[5] Counts Two and Three—which, respectively, allege professional negligence against all entities involved in the design, planning, supervision, inspection and approval of construction and breach of fiduciary duty against the individuals appointed to the Board of Trustees of the Plaintiff—are not at issue at this juncture.

required to repair the defects. This Count alleges entitlement to joint-and-several liability and seeks damages for past and future damages, attorneys' fees, interest, and costs.

Count Six alleges that the Developer Defendants named in Count Five further violated PREDFDA in their marketing and selling of Units in the Complex. Specifically, Count Six asseverates that the Developer Defendants made untrue and misleading statements of material facts, as well as omissions of material facts, in the POS and other marketing materials. The alleged misstatements and omissions relate to the absence of defects, compliance with applicable state and local laws and regulations, and the existence of adequate operation and maintenance budgets. Moreover, the Count alleges that the Plaintiff and its members justifiably and detrimentally relied on such misrepresentations and omissions and that the Developer Defendants are jointly and severally liable for double damages, attorneys' fees, interest, and costs.

Counts Seven and Eight aver that the Association and its individual members have suffered damages from the violation by all Defendants of several implied and statutorily imposed express warranties. Such warranties relate to the quality of the work; the quality, fitness, and freedom from defects of all materials and Units supplied and sold by the Defendants; and the conformance of the work with representations in the promotional materials for the Complex. These Counts seek to impose joint-and-several liability for the alleged damages, attorneys' fees, interest, and costs.

Count Nine alleges that the Developer Defendants violated the New Jersey Consumer Fraud Act, N.J.S.A 58:8-1, et seq. ("CFA") through the untrue/misleading statements and omissions of material facts alleged in Counts Five and Six. The Plaintiff further avers it suffered

ascertainable losses from the alleged violations, and that the Defendants should be jointly and severally liable for such losses, attorneys' fees, interest, and costs.

Count Ten avers that the misrepresentations, misleading statements, and omissions of material facts by the Developer Defendants alleged in all prior Counts constitute common-law fraud and that the Association and its members suffered damages resulting from their justifiable reliance on such misrepresentations, misleading statements, and omissions. The Count seeks to impose joint-and-several liability for the alleged damages, attorneys' fees, interest, and costs.

Count Eleven alleges that the Developer Defendants breached contractual obligations to the Plaintiff by "failing to properly plan, construct, preserve, control, maintain, supervise, operate and repair" the Complex. The Plaintiff further avers it suffered damages from such breach and seeks to impose joint-and-several liability for such damages, attorneys' fees, interest, and costs.

Count Twelve alleges that misrepresentations and omissions of the Developer Defendants set forth in prior Count were "negligent and reckless." It asserts that the Association and its members reasonably and detrimentally relied on such misrepresentations and omissions. In this Count, the Plaintiff seeks to impose joint-and-several liability for the alleged damages, attorneys' fees, interest, and costs.

Count Thirteen alleges that the conduct of the Developer Defendants described in earlier Counts also constitutes a breach of the implied covenant of good faith and fair dealing. The Count alleges damages from such breach and seeks to impose joint-and-several liability for the alleged damages, attorneys' fees, interest, and costs.

Count Fourteen seeks a remedy of piercing the corporate veil of the Developer Defendants, KHC, and KHE to hold Enterprises liable for the alleged misconduct of the

Developer Defendants. This claim is supported by allegations that Enterprises, through a "corporate maze" utilized for all the Hovnanian developments in New Jersey, exercised "pervasive domination and control" over the Developer Defendants, KHC, and KHE such that each of them individually and collectively were "alter egos" of Enterprises.

The Count avers that Enterprises undercapitalized KHNC. It also alleges that Enterprises, the Developer Defendants, KHC, and KHE share many of the same directors and officers and are governed by escrow lending agreements and intercompany service agreements such that the Developer Defendants, KHC, and KHE "have no independent operations of their own." (Compl. ¶ 158.) The Plaintiff avers that this corporate structure is designed to "extract the proceeds from each . . . development[ ] and leave [KHNC] assetless and unable to answer for" legal liability arising from construction defects. (Compl. ¶ 169.) This Count seeks judgment piercing the corporate veil of the Developer Defendants, KHC, and KHE to hold Enterprises liable for the alleged damages in the Complaint, as well as attorneys' fees, interest, and costs.

Count Fifteen lodges a civil-conspiracy claim against the moving Defendants. Specifically, it avers that agents of Enterprises, KHC, and KHE conspired with agents of the Developer Defendants to create and disseminate the POS to the public knowing that the POS misrepresented that the Complex conformed to industry standards and was without defects. The Plaintiff alleges damages from detrimental reliance on such inaccurate marketing, for which it seeks to impose joint-and-several liability against the Developer Defendants and the remainder of the moving Defendants, as well as attorneys' fees, interest, and costs.

Count Sixteen alleges that Enterprises, KHC, and KHE aided and abetted the Developer Defendants in violating the CFA. The Count alleges that these Defendants facilitated such CFA violations by "participating in the marketing and sale" of the Units with "full knowledge" of the

defects and the misrepresentations and omissions of material facts related to those defects in the Complex set forth in the POS. (Compl. ¶ 177.) The Count further alleges that these Defendants suppressed such material facts "deliberately and with intent to deceive." (Ibid.) As such, the Count seeks to impose joint-and-several liability for damages, attorneys' fees, interest, and costs.

II

A motion to dismiss for failure to state a claim is disfavored and granted only in rare cases. In Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989), the Supreme Court stated that trial courts must accord such motions "meticulous and indulgent examination" and, accordingly, should grant them in only "the rarest of instances." See also Smith v. SBC Commc'ns, Inc., 178 N.J. 265, 282 (2004) (a motion to dismiss "should be granted only in rare instances and ordinarily without prejudice") (internal quotation marks omitted).

On a motion to dismiss a complaint pursuant to R. 4:6-2(e), the Court must determine whether "a cause of action is 'suggested' by the facts." Printing Mart-Morristown, 116 N.J. at 746 (quoting Velantzas v. Colgate-Palmolive Corp., 109 N.J. 189, 192 (1988)). The Court is required to examine the complaint "in depth and with liberality" to ascertain "whether the fundament of a cause of action may be gleaned from an obscure statement of claim." Ibid.

The Court must accept the facts alleged in the pleading as true. Velantzas, 109 N.J. at 192 (a court "must assume the facts as asserted by plaintiff are true and give her the benefit of all inferences that may be drawn in her favor") (internal quotation marks omitted); Malik v. Ruttenberg, 389 N.J. Super. 489, 494 (App. Div. 2008) (the court must "accept as true the facts alleged in the complaint, and credit all reasonable inferences therefrom"). The pleading party is entitled to "every reasonable inference of fact." Printing Mart-Morristown, 116 N.J. at 746. The

Court is "not concerned at this stage with whether the plaintiff can prove the facts averred in the Complaint," but merely with the legal sufficiency of the pleading. Ibid.

The examination of the complaint "should be one that is at once painstaking and undertaken with a generous and hospitable approach." Ibid. See also Piscitelli v. Classic Residence by Hyatt, 408 N.J. Super. 83, 103 (App. Div. 2009) (the court must review the complaint with "a generous and hospitable approach") (internal quotation marks omitted). The Court must "search the complaint in depth and with liberality" to identify the causes of action asserted. Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993) (internal quotation marks omitted). In addition, "[a] complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment." Rieder v. N.J. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987).

In examining a motion to dismiss, "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim," and therefore, "[t]he court may not consider anything other than whether the complaint states a cognizable cause of action." Ibid. (internal citation omitted). Thus, the Court may not examine materials extrinsic to the complaint itself in adjudicating a motion to dismiss. An exception exists for exhibits attached to the complaint, matters of public record, and materials that the plaintiff relies upon in the complaint or that are integral to the plaintiff's claims. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) ("In evaluating motions to dismiss, courts consider allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.") (internal quotation marks omitted).

III

The Court turns first to the portion of the moving Defendants' motion seeking to dismiss the Complaint in its entirety as against Enterprises, KHC, and KHE.[6] The Counts lodged against these three Defendants—and the Counts the Court therefore addresses here—are the following: Counts One (negligence), Four (aiding and abetting Breach of Fiduciary Duty), Seven (breach of express warranties), Eight (breach of implied warranties), Fifteen (civil conspiracy), and Sixteen (aiding and abetting CFA violations).

The Defendants argue that the Association fails to set forth more than conclusory allegations against Enterprises, KHC, and KHE, warranting their dismissal. For example, the Defendants note that the Complaint refers to a group defined as the "Hovnanian Defendants" (consisting of KHNC, Enterprises, KHC, and KHE). It then asserts these "Hovnanian Defendants" took certain actions without, in the moving Defendants' view, specifically describing the actions each individual entity within that group undertook.

The Plaintiff counters that the Complaint is sufficient by pointing to the allegations in each Count and that any allegation against a group of Defendants should be treated as an allegation against each of them individually. Moreover, the Association refers to the Complaint's description of the corporate relationship between the four named Defendant entities, arguing that such description constitutes "the facts which form the basis for the claims against Enterprises, [KHC,] and [KHE]."

[6] The Court addresses separately infra the claim lodged in Count Fourteen, in which the Plaintiff seeks to hold Enterprises liable for the obligations of the Developer Defendants, KHC, and KHE on a theory of piercing the corporate veil.

Based on even a liberal and hospitable review, the non-veil-piercing Counts of the Complaint do not sufficiently plead claims against the Defendants Enterprises, KHC, and KHE. The Court accordingly dismisses such Counts as to these Defendants.

First, the Complaint avers that both Enterprises and KHC were "involved in the creation . . . and construction of the [Complex]." (Compl. ¶¶ 15, 26.) In sections addressing Enterprises and KHC (as well as KHE), the Plaintiff does not indicate how any of these entities carried out or directed any of the alleged actions that give rise to the claims asserted in the non-veil-piercing Counts. (See Compl. ¶¶ 15–50.)

As noted, the Plaintiff combines these three Defendants—Enterprises, KHC, and KHE—with KHNC under the term "Hovnanian Defendants" and, throughout the Complaint, lodges allegations against this group. However, it does so without specific reference to any of these entities or their specific connection to the allegations or the various causes of action. For example, the Complaint alleges:

- "Developer Defendants and the Hovnanian Defendants knew about many of [the alleged defects] before they began [and while they were] marketing the [Complex] to the public[;] . . . had a duty to disclose the [d]efects before and during the marketing of the [Complex] to the public" but failed to do so; and "failed to correct and repair the [d]efects despite demand by the Association." (Compl. ¶¶ 67–75 (emphasis added).)
- "The Developer Defendants and Hovnanian Defendants had express knowledge that the Developer Board Defendants were breaching their fiduciary duties to the Association, and they actively aided, abetted and encouraged the Developer Board Defendants in doing so." (Compl. ¶ 99 (emphasis added).)

- The Hovnanian Defendants "participat[ed] in the marketing and sale of homes in the [Complex] with full knowledge that the [Complex] suffered from the [d]efects and the POS contained false representations and/or omitted material facts with respect to the [d]efects." (Compl. ¶ 125.)

Several Counts of the Complaint group the Hovnanian Defendants with all Defendants and similarly plead their causes of action as against Enterprises, KHC, and KHE without in any way specifying the role each entity had or the specific unlawful conduct in which each engaged. For instance:

- Count One (negligence) alleges that "[all] Defendants had a duty to exercise reasonable care in developing, designing, constructing, and supervising the construction of the [Complex]" but did so negligently. (Compl. ¶ 77–78.)
- Count Seven (breach of express warranties) avers that "[all] Defendants have breached [express] warranties by constructing the Development with construction defects and building code violations, and further by failing to remedy, replace, rectify or otherwise cure said construction defects." (Compl. ¶ 119.)
- Count Eight (breach of implied warranties) alleges that "[all] Defendants breached implied warranties by defectively constructing the Development, in violation of applicable building codes." (Compl. ¶ 127.)

Although the Court must not grant a motion to dismiss if "the fundament of a cause of action may be gleaned even from an obscure statement of claim," Printing Mart-Morristown, 116 N.J. at 746, R. 4:5-2 requires that a pleading must, at minimum, contain "a statement of the facts on which the claim is based, showing that the pleader is entitled to relief." There are simply no

such facts alleged here that specify the connection of each of these Defendants to any of the Counts alleging affirmative acts of wrongdoing.

There is nothing inherently wrong, as a matter of drafting convenience, with combining a number of parties into a single defined term. Certainly, this is a common convention in drafting of contracts and other instruments. But a pleader cannot use such a convention as a device to include multiple parties in a complaint without specific factual detail as to the role of each such party in the matters that are the subject of the complaint. Thus, it is impermissible to allege that the "Hovnanian Defendants"—and therefore each of them—owed duties of reasonable care to the Plaintiff simply because the pleader has lumped them together in a definition, without providing a factual basis for such an averment as to each such party. Put another way, the Plaintiff is not entitled to prosecute a claim assuming that multiple corporate entities, solely via their alleged control over or association with KHNC, themselves committed the various torts and other unlawful activities alleged in the Amended Complaint without pleading facts establishing the same.

The Court therefore dismisses all Counts except Count Fourteen (veil-piercing) as to Enterprises, KHC, and KHE.[7] This dismissal is without prejudice, however, to the right to re-plead should additional relevant facts exist or arise.

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[7] The dismissal of these parties warrants dismissal of Count Fifteen (civil conspiracy) in its entirety. For the same reasons set forth in the text, Count Fifteen fails to sufficiently allege the role each of the Hovnanian Defendants had in the alleged conspiracy. Without meaningful differentiation among these entities, the Court cannot discern a basis for a claim of civil conspiracy against each of them.

The only remaining Defendant against which the claim lodged in Count Fifteen is advanced is KHNC. Yet, a civil conspiracy claim requires "a combination of two or more persons acting in concert to commit an unlawful act . . . ," Morgan v. Union County Board of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993), certif. denied, 135 N.J. 468 (1994) (quoting Rotermund v. U.S. Steel Corp., 474 F.2d 1139, 1145 (8th Cir. 1973) (internal quotations omitted)). It is a legal impossibility, given the dismissal of the above parties, that the

IV

Based on the facts presently alleged in the Complaint, KHNC is and should be the sole remaining moving Defendant as to all non-veil-piercing Counts. Therefore, the Court now addresses the Defendants' motion to dismiss each such Count on the basis of that it fails to state a claim as to KHNC.

1. Economic-Loss Doctrine

The moving Defendants first seek dismissal of what it deems the tort-based claims—specifically, Counts One (negligence), Nine (CFA violations), Ten (common-law fraud), Twelve (negligent misrepresentation), and Sixteen (aiding and abetting CFA violations) —based on the economic-loss doctrine ("ELD"). The Defendants argue that the ELD precludes the Association's tort-based claims as the claims essentially seek relief for economic losses for which its contractual relations with the Defendants—namely, the POS—already provide recourse. In short, the Plaintiff may not, in the moving Defendants' view, recover in tort for damages arising from a contractual relationship. Moreover, the moving Defendants aver that the parties against which these Counts are asserted did not owe a duty to the Association separate from those arising under contract.

The Plaintiff counters that the Defendants did have duties independent of the POS—including those arising under the CFA and common law—rendering the ELD inapplicable to these Counts. The Association further argues that invoking the ELD would contravene public policy, as the Association was not free to negotiate or alter the terms of the POS.

Plaintiff can allege a civil conspiracy against only one party. Accordingly, the Court dismisses this Count without prejudice to the right to re-plead.

Undergirding the ELD is the idea that "tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident," while "[c]ontract principles . . . are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement." Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 579–80 (1985). In this way, the ELD embodies "an effort to establish the boundary lines between contract and tort remedies." Dean v. Barrett Homes, Inc., 204 N.J. 286, 295 (2010).

The doctrine is inapplicable in certain circumstances. It generally does not extend to claims arising from unforeseeable, tortious injuries, including personal injury and third-party property damage. See New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 494 (App. Div. 1985). Moreover, New Jersey courts have declined to apply the ELD to common-law fraud and CFA claims arising from transactions in goods governed by the Uniform Commercial Code ("UCC"). See Alloway v. General Marine Indus., L.P., 149 N.J. 620, 639–40 (1997).

The doctrine is also inapplicable when there exists an independent duty imposed by law. Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2002). For instance, tort-based claims implicating relationships that "conceivably sound in both tort and contract"—such as those between physician and patient, lawyer and client, and accountant and customer—survive notwithstanding the ELD. Ibid.

Based on these principles, the Court finds that the ELD does not bar the fraud-based claims in Counts Nine and Ten (and therefore Sixteen). Although the Court is unaware of any cases addressing the application of the ELD to intentional torts within the construction-defect context, it sees no reason why the logic of Alloway, 149 N.J. at 639–40, should not apply here. Both Counts allege fraud—intentional conduct that surely is not "consequential damage that the

parties have, or could have, addressed in their agreement." Spring Motors Distributors, Inc., 98 N.J. at 579–80. Moreover, the CFA claim involves "an independent duty imposed by law," Saltiel, 170 N.J. at 316, as that claim for relief arises by statute.

The Court concludes that the ELD also does not apply to the negligent-misrepresentation claim lodged in Count Twelve. When read with liberality, Velantzas, 109 N.J. at 192, this Count may allege a breach of a duty with respect to misrepresentation arising separately from the parties' contractual relations.

What remains is the Association's negligence claim. In Aronsohn v. Mandara, 98 N.J. 92, 98 (1984), the Supreme Court held that the ELD bars negligence claims arising from building defects in the residential-construction context. In that case, the plaintiff homeowners sued the defendant contractors after they had discovered defects in the patio built before they purchased the home. Id. at 96–97. The plaintiffs alleged strict liability, negligence, and breaches of express and implied warranties. Ibid. Regarding the negligence claim, the court noted that

> what is involved here is essentially a commercial transaction, and plaintiffs' claim [rests] on the violation of the implied contractual provision that the patio would be constructed in a workmanlike fashion. We do not intend to exclude the possibility that a cause of action in negligence would be maintainable. See Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968) (holding valid a negligence suit in which a consumer of water supplied by the city sued the manufacturer of a defective meter which allegedly caused water damage to the meter as well as to his home). However, we do not need to decide the validity of plaintiffs' negligence claim, since, as discussed above, the contractor's negligence would constitute a breach of the contractor's implied promise to construct the patio in a workmanlike manner.
>
> [Ibid.]

The Complaint here, as currently drafted, does not specify the nature or extent of the alleged damages. Rather, it only avers that the common elements "suffer extensive design and

construction-related defects" and that several of those defects are "hidden by components or finishes." (Compl. ¶¶ 65–66.) Further, in the negligence Count, the Association alleges only that "the Association has sustained and will . . . continue to sustain damages." (Compl. ¶ 80.)

At its core, the Complaint appears to allege a "violation of the implied contractual provision that the [Complex] would be constructed in a workmanlike fashion," Aronsohn, 98 N.J. at 96–97—a claim that is barred by the ELD. Though the Court must read the Complaint "in depth and with liberality," Velantzas, 109 N.J. at 192, as well as "credit all reasonable inferences therefrom," Malik, 389 N.J. Super. at 494, the Complaint contains simply no factual averments that the defects include damages outside the scope of the parties' contractual relations. It does not allege, for example, damage to third-party property or personal injuries suffered by Association members.

Rather, this Count seeks to recover the benefit of the bargain between the Association and KHNC. It seeks recompense for the Defendants' alleged breach of warranties stemming by implication from a contractual relationship. Such remedy is more appropriately pursued in the Association's Counts for breach of contract and breach of implied and express contractual warranties.

Accordingly, the Court dismisses Count One as to KHNC only. However, it dismisses this Count without prejudice to the Association's right to re-plead should additional facts bringing the alleged damages outside the scope of the ELD exist or arise at a later date.

2. Fraud-Based Claims

The Court now addresses the remaining Counts that sound in fraud. Specifically, the Defendants seek to dismiss Count Nine (violation of the CFA), Count Ten (common-law fraud), and Count Sixteen (aiding and abetting CFA violations).

KHNC asserts a failure to plead with the requisite particularity. R. 4:5-8(a) provides:

> In all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable. Malice, intent, knowledge, and other condition of mind of a person may be alleged generally.
>
> [(emphasis added).]

KHNC avers that the Court should dismiss all fraud-related claims pursuant to this Rule, as the Plaintiff does not allege the elements of the various causes of action with the requisite particularity.

Conversely, the Plaintiff asserts that the Complaint has pleaded "particularized" facts establishing the unlawful conduct of the Defendants "in painstaking detail." (Pl.'s Br. at 18.) The Court addresses each claim below.

Claims "sounding in fraud" must satisfy the "heightened fraud pleading requirement" in R. 4:5-8(a). N.J. Dep't of Treasury ex rel. McCormac v. Qwest Commc'ns Int'l. Inc., 387 N.J. Super. 469, 484 (App. Div. 2006). Under that Rule, a court may dismiss a complaint alleging fraud if "the allegations do not set forth with specificity, nor do they constitute as pleaded, satisfaction of the elements of legal or equitable fraud." Levinson v. D'Alfonso & Stein, 320 N.J. Super. 312, 315 (App. Div. 1999).

The Court first addresses Plaintiff's CFA claim (Count Nine). A claim under the CFA is subject to the specificity requirement of R. 4:5-8(a), as it is "essentially a fraud claim." Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 112 (App. Div. 2009). The CFA provides, among other things, that it is unlawful for persons to use or employ:

> any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or

> omission, in connection with the sale or advertisement of any merchandise . . . whether or not any person has in fact been misled, deceived or damaged thereby[.]
>
> [N.J.S.A. 56:8-2.]

To state a claim under the CFA, a litigant must allege specific facts that, if proven, would establish the following: "(1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendant's unlawful conduct and the plaintiff's ascertainable loss." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009). Given the Supreme Court's direction that "the [CFA] should be construed liberally in favor of consumers," Cox v. Sears Roebuck & Co., 138 N.J. 2, 15 (1994), certif. denied, 178 N.J. 249 (2003), a plaintiff need not show reliance so long as it can demonstrate an ascertainable loss and a causal connection between it and the unlawful practice. See Gennari, 148 N.J. at 607–08; see also Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 246 (2005).

The Plaintiff's Complaint fails to satisfy the first element of this test. Count Nine does not itself contain any factual allegations. Even looking elsewhere in the Complaint—namely, the allegations mentioned infra in the discussion of PREDFDA—the Complaint contains no facts as to the alleged defects in the Complex that the Defendant failed to disclose or as to which the Defendant is otherwise (allegedly) guilty of misrepresentation. The Complaint only avers that the common elements "suffer extensive design and construction-related defects" and that several of those defects are "hidden by components or finishes." (Compl. ¶¶ 65–66.) This falls short of pleading the "particulars" of the misrepresentations that form the basis for the alleged consumer fraud suffered by the Association, as is required under the CFA. As pleaded, the Complaint is simply devoid of any evidence, let alone particularized evidence, that the Defendant committed an unconscionable commercial practice via misrepresentation of conditions at the Complex.

The Complaint also does not adequately plead an "ascertainable loss." To satisfy this element, a plaintiff must present evidence that shows it suffered "a quantifiable or otherwise measurable loss as a result of the alleged CFA unlawful practice[.]" Thiedemann, 183 N.J. at 238. Because the Complaint fails to allege any of the specific defects at the Complex that the Plaintiff asserts are the basis for its claim, it necessarily fails to allege with requisite particularity "quantifiable or otherwise measurable" loss suffered by the Association.

This Count also fails to allege facts establishing a causal connection between the alleged unlawful practice and losses suffered. Count Nine itself contains no allegation whatsoever linking the claimed unlawful business practice to the alleged loss. Elsewhere, the Plaintiff alleges that its members "justifiably relied upon the truth and accuracy of [KHNC's] representations and omissions" and have suffered damages as a direct result of such representations and omissions. (Compl. ¶¶ 115–16.) However, this language states bare legal conclusions without any underpinning factual allegations that satisfy the heightened "particularity" pleading requirement.

Accordingly, the Court dismisses Count Nine subject to a right to re-plead. As the Plaintiff has not sufficiently pled a CFA violation, the Court also dismisses Count Sixteen (aiding and abetting a violation of the CFA).

The Plaintiff's common-law fraud claim in Count Ten, also subject to the heightened "particularity" standard, suffers from the same deficiencies as the CFA claim. The elements the Assocation must establish to state a prima facie claim of fraud are as follows:

> (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.
>
> [Banco Popular N. Am. v. Gandi, 184 N.J. 161, 172–73 (2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)).]

Like Count Nine, Count Ten of the Complaint contains no factual allegations that establish the elements of common-law fraud, relying instead on the allegations incorporated by reference into the Count. Although that is, of course, a permissible—and commonly used—practice, it only passes muster under R. 4:6-2(e) and R. 4:5-8 if such facts establish the elements of the fraud claim with particularity. Here, even when construed liberally, Printing Mart-Morristown, 116 N.J. at 746, the allegations contained elsewhere in the Complaint still do not state a cognizable claim of common-law fraud.

The Plaintiff does not set forth an adequate factual basis to support an allegation of misrepresentation or omission of material facts. Moreover, as noted, the Complaint contains no allegations as to the nature, extent, or location of the defects.

The Plaintiff also has not pled the element of reliance with sufficient particularity. The Count itself simply sets forth the same conclusory allegation that "[t]he Association and its members justifiably relied upon the accuracy and truthfulness of the Developer Defendants' representations . . . ." (Compl. ¶ 141.) A plaintiff alleging common-law fraud must do more than assert justifiable reliance in such conclusory terms.

The Court finds that Plaintiff's claim for fraud is insufficiently pled under R. 4:5-8(a). It dismisses this Count subject to a right to re-plead.

3. PREDFDA Claims

The Court turns next to the PREDFDA-related claims (Counts Five and Six). As a threshold matter, KHNC contests the issue of the Association's ability to bring claims under PREDFDA.

The section of PREDFDA under which these Counts arise—N.J.S.A. 45:22A-37—provides that any developer that violates the act "shall be liable to the purchaser for double

damages suffered . . . ." (emphasis added). The Act defines "purchaser" as "any person or persons who acquires a legal or equitable interest in a unit, lot, or parcel in a planned real estate development . . . ." N.J.S.A. 45:22A-23(d) (emphasis added). A "person" may be any of the descriptors listed in N.J.S.A. 1:1-2—"corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals . . ." (emphasis added). The statute separately defines "association" as an association for the management of common elements and facilities, organized pursuant to section 1 of P.L.1993, c.30 (C.45:22A-43)." N.J.S.A. 45:22A-23(n).

KHNC argues that a plain reading of the statute indicates a legislative intent to permit only the individual unit owners—not the Association—to bring PREDFDA claims. It highlights that the statute separately defines "purchaser" and "association." KHNC also contends that "association" is mentioned elsewhere in the statute, yet is not referred to explicitly in the provision under which the Association brings its claims. Moreover, KHNC avers that the Complaint does not allege the Association has any "legal or equitable interest in a unit" that would qualify it as a "purchaser" under N.J.S.A. 45:22A-23.

In contrast, the Plaintiff highlights the inclusion of "associations" in the definition of "person" under N.J.S.A. 1:1-2. The Plaintiff cites several New Jersey decisions recognizing the ability of condominium associations to bring action on behalf of their members. It argues that it likewise represents the interests of its individual-unit-owner members such that it may sue in their stead.

KHNC's argument is certainly grounded in a plausible construction of the statute. The exclusion of "associations" from the PREDFDA provision creating a right of action but inclusion elsewhere in the statute suggests that a developer cannot be liable to an association for statutory

damages under PREDFDA. The inclusion of separate definitions for "purchaser" and "association" and the Association's apparent lack of legal or equitable title in the common elements of the Complex provide further textual basis for the Defendants' position.

However, the converse argument is also meritorious, grounded in the text and purpose of the statutory scheme. The definition of "purchaser" explicitly incorporates the general definition of "person" applicable to all New Jersey statutes—and that definition includes "associations."

Moreover, PREDFDA includes the following provision in the section delineating the powers and functions of a governing association: "The association may assert tort claims concerning the common elements and facilities of the development as if the claims were asserted directly by the unit owners individually." N.J.S.A. 45:22A-44(d). This is critical, as the right of action at issue sounds in tort—specifically, the action asserts a remedy for material misrepresentation. <u>See</u> N.J.S.A. 45:22A-37(a) (developer is liable under PREDFDA when, in disposing property in a planned real estate development, it "<u>makes an untrue statement of material fact or omits a material fact</u> from any application for registration, or amendment thereto, or from any public offering statement," or "<u>makes a misleading statement</u> with regard to such disposition"). As there are no remedies offered by PREDFDA other than the remedy of double damages to "purchasers" for material misstatements, there would be little purpose for including section 44(d) in the statute save for making clear that associations have the right to bring claims on behalf of members, including the claim authorized by the statute itself.

This suggests that the Association may step into the shoes of its members to bring tort-based claims, including a claim under PREDFDA, so long as the members themselves qualify as "purchasers." Stated differently, it is immaterial that the Association here may not have a legal or equitable interest in the common elements, as its members hold that interest.

When faced with plausible alternative constructions of a statutory scheme, "the intent of the Legislature must be deduced." Jimenez v. Baglieri, 152 N.J. 337, 346 (1998) (quoting Martin v. Home Ins. Co., 141 N.J. 279, 285 (1995)) (alterations omitted). Therefore, "[i]n the absence of specific guidance," the Court must "discern the intent of the Legislature not only from the terms" of the statute "but also from its structure, history and purpose." Id. at 346–47. At bottom, "[i]t is not the words but the internal sense of the law that controls." Id. at 347 (quoting Roig v. Kelsey, 135 N.J. 500, 516 (1994)). The Court may look to several sources to discern the Legislature's intent:

> [t]he language of a statute, the policy behind the statute, concepts of reasonableness and legislative history. . . . It is a general principle of statutory construction that "statutes are to be read sensibly rather than literally and the controlling legislative intent is to be presumed as consonant to reason and good discretion."
>
> [James v. Torres, 354 N.J. Super. 586, 594–95 (App. Div. 2002) (quoting Parker v. Esposito, 291 N.J. Super. 560, 566 (App. Div.), certif. denied, 146 N.J. 566, 683 (1996)).]

Guided by these principles, the Court finds that construing the statute to permit the Association to sue on its members' behalf more closely adheres to the goals of the Legislature in enacting PREDFDA. PREDFDA "is a consumer-oriented statute remedial in nature." Tung v. Briant Park Homes, Inc., 287 N.J. Super. 232, 237 (App. Div. 1996). As such, it "must be interpreted expansively rather than narrowly, and liberally construed in favor of protecting consumers." Ibid. (citing Cox v. Sears Roebuck & Co., 138 N.J. 2, 15 (1994)).

Moreover, the statute's self-described legislative purpose is as follows:

> The Legislature in recognition of the increased popularity of various forms of real estate development in which owners share common facilities, units, parcels, lots, areas, or interests, and taking notice of the underlying complexities of these new and proliferating forms, deems it necessary in the interest of the public health, safety, and welfare, and in the effort to provide decent, safe and affordable

> housing, and to foster public understanding and trust, that dispositions in these developments be regulated by the State pursuant to the provisions of this act.
>
> [N.J.S.A. 45:22A-22 (emphasis added).]

The Legislature specifically tailored the statute—and thus its remedies—for residential developments with the unique trait of common elements.

Accordingly, foreclosing a condominium association from PREDFDA remedies contradicts the "internal sense" of the statute. It is intended to protect purchasers of units in residential developments with common elements. Liberally and sensibly construed in this way, the drafters explicitly granted an association the right to "assert tort claims concerning the common elements and facilities of the development as if the claims were asserted directly by the unit owners individually." N.J.S.A. 45:22A-44(d). To interpret the statute otherwise would in effect force individual owners to bring separate PREDFDA actions—even if arising from conduct relating to common elements that an association exists to manage.

An Appellate Division decision cited by the Plaintiff—Belmont Condominium Association, Inc. v. Geibel, 432 N.J. Super. 52 (App. Div. 2013)—came to a similar conclusion within the context of a consumer-protection statute akin to PREDFDA: the CFA. In Geibel a condominium association asserted various claims, including negligence, fraud, and violations of the CFA and PREDFDA, arising from the sale and construction of a condominium building in Hoboken. Id. at 60.

The court held that the NJCA—a statutory scheme predating PREDFDA that defines the status, rights, and responsibilities of condominiums and their governing associations, among other related procedures—authorized the plaintiff's CFA claims. Id. at 74. In so holding, it determined that the NJCA designates a condominium association as "responsible for the

administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners." N.J.S.A. 46:8B-12. As a result, as under PREDFDA, an association "may assert tort claims concerning the common elements and facilities of the development as if the claims were asserted directly by the unit owners individually." N.J.S.A. 46:8B-16(a) (emphasis added).

The court also cited the Supreme Court's holding in Siller v. Hartz Mountain Associates, 93 N.J. 370, 377, cert. denied, 464 U.S. 961 (1983). In that case, the Supreme Court concluded that "the clear import, express and implied, of the [NJCA] is that the association may sue third parties for damages to the common elements, collect the funds when successful, and apply the proceeds for repair of the property." Ibid.

In extending this logic to the CFA, the Geibel court found that a condominium association has the "exclusive right to sue a developer for construction defects related to the common elements," as individual unit owners are barred from doing so under the statute. Geibel, 432 N.J. Super. at 72 (emphasis in original). Accordingly, the court held that the NJCA provided the plaintiff with standing to sue under the CFA. The Geibel court summarized its reasoning on the issue of standing in the following manner: "[B]ecause the Association, through its construction defect and CFA claims, sought to recover for damages to the common elements, it is unquestionably the real party in interest and therefore has standing to pursue its complaint against defendant." Ibid.

The reasoning in Geibel is directly apposite to the claims asserted here under PREDFDA. Although PREDFDA was not at issue in Geibel, several parallels between the CFA and PREDFDA favor a determination that the Association may also bring PREDFDA claims relating to common elements. Like PREDFDA, the CFA is a tort-based statutory scheme that seeks to

accomplish a remedial purpose by holding defendants to account for exemplary damages for certain proscribed acts. Although the CFA does not explicitly permit condominium associations to recover for such acts, it does permit "[a]ny person who suffers any ascertainable loss of moneys or property" to bring an action. N.J.S.A. 56:8-19 (emphasis added). The CFA then defines "person" as "corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals," N.J.S.A. 56:8-26 (emphasis added)—a definition that is identical to PREDFDA's definition of the same term.

Finally, both statutes provide for the recovery of multiple damages. The CFA mandates treble damages, see id., and PREDFDA permits double damages. These similarities suggest that a condominium association organized under the law, in part, for the purpose of representing the interests of its members in certain litigation ought to have the same standing to prosecute construction-defect-related tort claims under PREDFDA that it has under the CFA.

Other policy considerations that weighed in favor of an association's right to sue under the CFA in Geibel likewise support the same right under PREDFDA. These include judicial economy—avoiding multiple suits (and their associated costs) and contradictory adjudications—and providing a means for recovery when it might otherwise be too costly for an individual owner to proceed with litigation on his or her own. Geibel, 432 N.J. Super. at 71 (citing Siller, 93 N.J. at 378).

The Court therefore concludes that the Association may assert the PREDFDA claims alleged in Counts Five and Six of the Complaint. The Plaintiff, like the association in Geibel, is a condominium association established pursuant to the NJCA. That statute empowers the Association to prosecute tort-based claims on its members' behalf regarding common elements. Indeed, it has exclusive authority to pursue such claims.

This action involves alleged defects related exclusively to the Complex's common elements. Though the Association itself may not have "acquired a legal or equitable interest" in the Complex, as required to qualify as a purchaser under PREDFDA, the association in Geibel similarly did not itself suffer an "ascertainable loss," as required under the CFA. Rather, the key detail was that the association, in its representative capacity pursuant to the NJCA, sought to recover for the ascertainable loss suffered by its members. Geibel, 432 N.J. Super. at 74. The Association seeks to do the same here, on behalf of members who themselves are purchasers.

If the Association does not have a right to sue on behalf of unit owners under PREDFDA, it is highly unlikely that any claim respecting defects in the common elements would be brought. Such a holding would in practical effect, if not as a matter of law, mean that PREDFDA remedies do not extend to construction defects affecting the common elements. Given the statutory purpose of PREDFDA—and its explicit recognition of the importance of common elements in any of the regulated developments—it is highly unlikely in this Court's estimation that the Legislature intended this result.

The Court now turns to whether the Association has stated a viable claim against KHNC under PREDFDA. The relevant portion of PREDFDA provides that a developer selling an interest in a planned real estate development:

> who in disposing of such property makes an untrue statement of material fact or omits a material fact from any application for registration, or amendment thereto, or from any public offering statement, or who makes a misleading statement with regard to such disposition, shall be liable to the purchaser for double damages suffered, and court costs expended, including reasonable attorney's fees, unless in case of an untruth, omission, or misleading statement such developer sustains the burden of proving that the purchaser knew of the untruth, omission or misleading statement, or that he did not rely on such information, or that the developer did not know and in the exercise of reasonable care could not have known of the untruth, omission, or misleading statement.

[N.J.S.A. 45:22A-37(a).]

Thus, a claim brought under this section of PREDFDA is, at its core, an "allegation[ ] of misrepresentation," subject to the heightened pleading requirement: a plaintiff must allege "particulars of the wrong." R. 4:5-8(a). Moreover, as PREDFDA allows the purchaser to recover "double damages suffered," such purchaser must plead damages with particularity.

Yet, for the reasons stated earlier, the Association fails to allege the particulars of the misrepresentations that were made and resulting damages it claims to have suffered. Simply put, one cannot discern what the defects are from the Complaint at this time. The Court therefore dismisses the PREDFDA Counts (Counts Five and Six) as to KHNC without prejudice to the right to re-plead with adequate details as to the specific defects the Plaintiff claims are the subject matter of the alleged misrepresentations.

4. Negligent-Misrepresentation Claim

The Court finds that the Association's negligent-misrepresentation claim fails under R. 4:5-8(a). A cause of action for negligent misrepresentation lies when the defendant "negligently made an incorrect statement of a past or existing fact, that the plaintiff justifiably relied on and that his reliance caused a loss or injury." Masone v. Levine, 382 N.J. Super. 181, 187 (App. Div. 2005) (citing Kaufman v. i-Stat Corp., 165 N.J. 94, 109 (2000)).

This Count alleges no specific facts to establish the specific defects that are the basis for the claim of misrepresentation. As a result, the pleading is deficient as to the element of material misrepresentation of fact.

The pleading also does not establish with required particularity the element of reliance. Instead, it simply concludes that "[t]he Association and its members reasonably relied to their

detriment on the Developer Defendants' negligent and reckless misrepresentations." (Compl. ¶ 148.) The Amended Complaint contains no specific facts that support this assertion.

Moreover, the assertion advanced in passing elsewhere in the Amended Complaint that "[p]ersons that purchased homes relying on the POS and amendments thereto . . . ." (Compl. ¶ 175) is inadequate here. There is no indication of whether any of the persons who purchased Units in reliance on the POS are the same individuals who currently reside in the Complex and are thus represented by the Association in this case.

More generally, the Plaintiff neglects to draw a particularized connection between KHNC's alleged misrepresentations, purchasers' reliance on those alleged misstatements, and the alleged damages. The Court must therefore dismiss this Count without prejudice to the right to re-plead.

5. Breach of Implied Warranties

The Court next addresses the Defendants' motion to dismiss Count Eight (breach of the implied warranties of workmanship and fitness for intended purpose). The moving Defendants argue that this Count should be dismissed because the POS contains an explicit, enforceable disclaimer of implied warranties as to the common elements. The Plaintiff responds that the disclaimer in the POS only applies to the individual Units, rather than the Complex's common elements. Alternatively, the Plaintiff avers that the disclaimer is not sufficiently specific, as it omits the words "habitability" and "workmanship."

The relevant disclaimer provisions of the POS read as follows:

> This warranty will constitute the sole obligation of the Developer to the purchasers and owners of Units with respect to the Common Elements.

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> THE DEVELOPER DISCLAIMS ANY IMPLIED WARRANTY OR WARRANTY ARISING BY LAW WITH RESPECT TO THE UNIT, OR WHICH WOULD ARISE BY MAKING AN AGREEMENT TO SELL A UNIT. THIS MEANS THAT THE ONLY WARRANRIES WHICH ARE GIVEN BY THE DEVELOPER TO A UNIT OWNER, ARE THOSE LISTED ABOVE.
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> [(Defs.' Mot., Exh. A at 45–46.)]

The Supreme Court has held that implied warranties of reasonable workmanship and habitability "arise[ ] whenever a consumer purchases from an individual who holds himself out as a builder-vendor of new homes." McDonald v. Mianecki, 79 N.J. 275, 293 (1979). However, the Court is not aware of any New Jersey cases addressing the disclaimer of implied warranties in the residential-construction context.[8]

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[8] The moving Defendants raise the applicability of New Jersey's codification of the UCC. The UCC in New Jersey permits the disclaimer of the implied warranty of fitness, provided that such disclaimer is "conspicuous." N.J.S.A. 12A:2-316. However, as the Defendants point out, the UCC likely does not apply to transactions involving the purchase of condominium units.

The "Sales" Chapter of the Code—containing the warranty provision cited above—states that it pertains only to "transactions in goods." N.J.S.A. 12A: 2-102. "Goods" is defined as:

> all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Chapter 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (12A:2-107).
>
> [N.J.S.A. 12A:2-105(1).]

Condominium units do not conform to this definition. They are not "movable at the time of identification." Nor does the "section on goods to be severed from realty"—N.J.S.A. 12A:2-107—mention condominium units, let alone any form of residential real estate.

The Court will therefore examine the warranty provisions at issue using common-law rules of contractual interpretation. As discussed infra, the Court finds that such rules preclude dismissal of the breach-of-warranty claim at this stage.

General rules of contractual interpretation nevertheless apply here, as the above language relates to warranties between parties in a contractual relationship. It is axiomatic under New Jersey law that "contracting parties are afforded the liberty to bind themselves [via contracts] as they see fit." Stelluti v. Casapenn Enters., 203 N.J. 286, 302 (2010). Accordingly, "when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result." Quinn v. Quinn, 225 N.J. 34, 45 (2016).

Guided by these principles, the Court cannot dismiss this Count as a matter of law for failure to state a claim on the basis of this disclaimer. The disclaimer language quoted above refers only to implied warranties as to the Units and does not appear to encompass the common elements. The preceding language, specifically referring to the common elements, does not employ disclaimer language. Read together, these provisions are far from "clear and ambiguous" and hardly indicate that "the intent of the parties is plain." Ibid. At minimum, it creates an ambiguity as to the scope and intendment of the disclaimer. The Plaintiff is permitted to explore, via discovery and further motion practice, whether this text read as a whole operates to disclaim implied warranties as to the common elements.

Moreover, the Plaintiff has sufficiently pled the allegations of this Count against KHNC. Viewed with a "generous and hospitable approach," the Count alleges defects in the common elements that a court could determine breach an implied warranty of habitability or workmanship, as well as KHNC's alleged role as the developer of the Complex.[9] Such

[9] The Court notes that, in the prior discussion, it finds the Complaint does not delineate the specific defects on which the Plaintiff relies. It determined this failure to plead such defects renders the pleading of fraud-related claims insufficient. That is so because our Rules of Court establish a heightened pleading standard for such claims. As no such standard applies with

allegations establish that "the fundament of a cause of action may be gleaned even from an obscure statement . . . ." Printing Mart-Morristown, 116 N.J. at 746.

It also appears that additional discovery could provide a basis for relief, militating against dismissal. Accordingly, the Court denies the motion as to Count Eight (as asserted against KHNC).

6. Piercing the Corporate Veil

The remaining issue before the Court relates to Count Fourteen of the Complaint (piercing the corporate veil). In this Count the Plaintiff claims a right to pierce the corporate veil of the Developer Defendants, KHC, and KHE to hold Enterprises liable for any liabilities or obligations of those entities imposed via this lawsuit.

The moving Defendants argue that this Count is unripe for judicial consideration. The Defendants aver that a veil-piercing claim is more appropriately brought after the Plaintiff secures a judgment against the entities whose corporate veils the Association seeks to pierce. The Defendants further assert that they are not collaterally estopped by prior judicial rulings from re-litigating this issue. Lastly, they argue that the pleading fails to state a claim.

The Plaintiff asserts that there is no precedent for confining the remedy to the post-judgment phase. It argues that the doctrine of collateral estoppel precludes the Defendants from challenging the Count seeking to pierce the corporate veil. Moreover, it asserts that, substantively, its claim should survive this motion.

The Court first addresses the contention that the Plaintiff's claim is unripe for review. To the Court's knowledge, there are no New Jersey decisions addressing whether a claim to pierce

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respect to the claim of breach of warranty, the failure to specify the defects at issue does not render the pleading insufficient.

the corporate veil may lie only after a judgment is entered. To be sure, the moving Defendants' argument seems meritorious on its face. As a matter of logic, a Court cannot disregard the corporate form to hold a parent liable for the actions of its subsidiary unless there has been a proven wrong perpetrated by the subsidiary. That necessarily is not determined unless and until there is a judgment indicating as much. In addition, in most cases it is difficult to conceive that a party seeking to pierce the corporate veil of a subsidiary would have sufficient knowledge of the subsidiary's internal operations and financial condition and its relationship to its parent to be able to plead and prove a veil-piercing claim until after it secures a judgment and has the ability to explore the pertinent facts through post-judgment discovery.

Yet it is also true that the Plaintiffs here rely on testimony and evidence from two recent cases before the Honorable Jeffrey R. Jablonski, J.S.C. in the Superior Court of New Jersey, Hudson County, that were, in fact, tried to judgment on the issue of veil-piercing as to these very Defendants. Specifically, Grandview I[10] resulted in a jury verdict to pierce the corporate veil to hold the Hovnanian Defendants liable, and in Grandview II,[11] the Court entered partial summary judgment on the same issue regarding the same entities. The Plaintiff asserts this evidence establishes that Enterprises employed a scheme in all its development projects—including the Complex—to abuse the corporate form. This suggests that the veil-piercing Count may be ripe for judicial consideration at this pre-judgment stage of the litigation.

However, the Court need not decide the issue at this juncture. It holds infra that the claim fails on the merits.

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[10] Grandview at Riverwalk Port Imperial Condominium Ass'n, Inc. v. K. Hovnanian at Port Imperial Urban Renewal II, LLC, et al., Docket No. HUD-L-2560-13 ("Grandview I").

[11] Grandview II at Riverwalk Port Imperial Condominium Ass'n v. K. Hovnanian at Port Imperial Urban Renewal III, LLC, et al., Docket No. HUD-L-2839-14 ("Grandview II").

The Plaintiff argues that the judgments rendered in Grandview I and Grandview II collaterally estop the Defendants from even defending against the Association's veil-piercing claim. Grandview I arose from the construction of a condominium building in West New York. The plaintiff in that case named as defendants the developer, K. Hovnanian at Port Imperial Urban Renewal II, LLC, and Hovnanian Enterprises, Inc. (Enterprises as defined herein), among other entities. The Plaintiff argues that the jury verdict in that case—piercing the developer's corporate veil to hold Enterprises liable for the obligations of the developer relating to building's construction defects—should preclude the moving Defendants from re-litigating the same issue in this case.

The Plaintiff also points to Grandview II, which involved a building adjacent to that in Grandview I, developed by K. Hovnanian at Port Imperial Urban Renewal III, LLC. That entity was linked with Enterprises and created through the same partnership between affiliates of Enterprises and Lehman Brothers. In Grandview II, Judge Jablonski found that the verdict in Grandview I collaterally estopped the defendants from re-litigating the veil-piercing claim adjudicated in Grandview I, entitling the plaintiff to partial summary judgment on that issue.

Collateral estoppel, or issue preclusion, is "that branch of the broader law of res judicata which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." State v. Gonzalez, 75 N.J. 181, 186 (1977). As such, the party asserting collateral estoppel must establish the five elements articulated in In re Estate of Dawson, 136 N.J. 1, 20–21 (1994):

> (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.

Even when the five factors are met, a court will not apply the doctrine, rooted in equity, "when it is unfair to do so." Ibid. (quoting Pace v. Kuchinsky, 347 N.J. Super. 202, 215 (App. Div. 2002)). Indeed, "[e]fficiency is subordinated to fairness and, consequently, if the court is satisfied that efficiency would lead to an unjust result, its application should not be tolerated." Barker v. Brinegar, 346 N.J. Super. 558, 566 (App. Div. 2002).

The Association seeks to bar the Defendants from litigating the issue of whether the Court may pierce the corporate veil of the Developer Defendants, KHC, and KHE and tax Enterprises with liability for those entities' obligations arising from the alleged construction defects at the Complex. However, the Court finds that the final judgments in Grandview I and Grandview II do not meet the five requirements for collateral estoppel here.

First, the issues in this case are not "identical" to those decided in Grandview I and Grandview II. In considering the first Dawson factor, the Court must determine

> (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.
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> [First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 353 (2007) (quoting United States v. Athlone Indus. Inc., 746 F.2d 977, 984 (3d Cir. 1984)) (citations omitted).]

It is true that, as a general matter, the Plaintiff seeks to hold Enterprises accountable under the same legal theory, by virtue of what is alleged to be a similar profile of corporate relationships with the developer in this case, and with similar evidence as in Grandview I and

Grandview II. However, those cases did not consider whether the Court should pierce KHNC's corporate veil with respect to the Complex at issue here.

The Four Seasons at North Caldwell is a separate project, in a separate location, and commenced at a different time than the projects in Grandview I and Grandview II. It does not necessarily follow that the Court should pierce the corporate veil of KHNC (as well as KHC and KHE) because another court determined to pierce the veil of a different developer on a different project, even though the prior case also involved the Hovnanian corporate family and similar claims of abuse of the corporate form.

More importantly, KHNC is a separate legal entity from the developers in those prior actions and, as such, has a potentially different relationship with its parent entity, warranting a separate evidential inquiry. Neither the jury in Grandview I nor the judge in Grandview II had occasion to consider whether Enterprises abused KHNC's corporate form in marketing and developing the Complex such that veil-piercing is an appropriate remedy here.

In addition, there was a factual connection between the development projects in Grandview I and Grandview II to warrant Judge Jablonski's determination that the doctrine of collateral estoppel applied in the latter case. No such connection between the project here and the project in Grandview I is apparent on the present record. Thus, the "wrong for which redress is sought" is not the same as in either Grandview I or Grandview II. Penn Salem Marina, Inc., 190 N.J. at 353.

It follows that the second and fourth Dawson factors are similarly absent here. Given the factual differences noted above—mainly, that this case involves a separate condominium project and a different corporate developer—it is not conceivable that KHNC's relationship with Enterprises regarding the Complex was "actually litigated" in Grandview I or Grandview II.

Those cases only considered Enterprises' relationship with two other developer entities relating to two adjacent condominium buildings in West New York. Thus, Enterprises' role in forming and operating KHNC and in the development of the Complex, and whether its role requires piercing of the corporate veil of KHNC, KHC, and KHE, was neither actually litigated nor "essential to the judgment" in the two prior cases.

Moreover, even if the Court were to find that the five Dawson factors are met, and even if matters of judicial efficiency further support application of collateral estoppel, a court will not invoke the doctrine "if the court is satisfied that efficiency would lead to an unjust result . . . ." Barker, 346 N.J. Super. at 566. Such an unjust result could be present here, as invoking collateral estoppel for the sake of efficiency would be unfair to the moving Defendants. The Defendants should have the opportunity, through proper discovery and, if necessary, a trial, to distinguish this case—involving a different developer and thus a different corporate structure, as well as a different condominium project—from Grandview I and Grandview II.

Given the potential differences between this case and Grandview I and Grandview II, the interests of efficiency must give way to those of fairness. Ibid. Accordingly, the Court denies the Plaintiff's argument that the Defendants are collaterally estopped from challenging its veil-piercing claim.

The Court now addresses the Defendants' motion to dismiss the veil-piercing Count in its entirety. Under New Jersey law, the doctrine of piercing the corporate veil is a narrow exception to the fundamental principle of limited liability. "Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil." State Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 500 (1983). To secure the equitable remedy of veil piercing, a plaintiff must establish (1) that "the subsidiary was dominated by the parent" and (2) that "adherence to the fiction of

separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law." Verni v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 160 (App. Div. 2006) (citation omitted).

The first factor requires that a plaintiff plead and prove that a parent "so dominated" its subsidiary that the subsidiary had "no separate existence" from the parent and was "merely" its "conduit." Ventron, 94 N.J. at 501. The factors the Court can consider in this inquiry include: (1) the extent of the "day-to-day involvement" of the parent's directors, officers, and personnel in the subsidiary's operations, as well as whether the subsidiary (2) was "grossly undercapitalized," (3) "pays no dividends," (4) is insolvent, (5) is "merely a façade," and (6) failed to observe corporate formalities or lacked corporate records. Verni, 387 N.J. Super. at 200.

As to the first factor, the Complaint, liberally construed, suggests that Enterprises, through its officers and legal arrangements, exerts a degree of control over KHE's, KHC's, and KHNC's routine activities. For example, the Plaintiff alleges that Enterprises dominates KHNC through its two wholly owned operational subsidiaries—KHC and KHE. KHC employs all of Enterprises' 3,827 full-time employees. KHE provides "all day-to-day operational services" for Enterprises' various holdings—including KHNC—through intercompany service agreements. (Compl. ¶ 166.) Such services include the following:

> (a) human resources; (b) payroll obligations; (c) advertising and public relations; (d) architectural services related to the construction and design of homes; (e) financial advice and services; (f) accounting services; (g) information management services; (h) insurance and risk management advice and services; (i) legal advice and counsel with respect to general business operations; (j) ordinary and necessary audit services; (k) ordinary and necessary tax compliance services; (l) regulatory assistance; and (m) any other services mutually agreed upon.
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> [(Compl. ¶ 38.)]

Enterprises also has executed similar agreements through KHE to provide "all financing activities" to KHNC. (Compl. ¶ 167.)

The Plaintiff also alleges that KHC, which supplies all of KHNC's employees, shares many of the same officers as Enterprises. The Plaintiff highlights the same commonality as between KHE and Enterprises.

Yet "[a] parent's domination or control of its subsidiary cannot be established by overlapping boards of directors." Verni, 387 N.J. Super. at 201 (quoting Seltzer v. I.C. Optics, Ltd., 339 F. Supp. 2d 601, 610 (D.N.J. 2004)). That is why Verni requires examination of other factors.

Here, the Complaint is lacking in meaningful factual detail as to such other factors as whether KHNC is undercapitalized. The Association asserts that "Hovnanian Enterprises undercapitalized the Developer." (Compl. ¶ 159.) However, this contention is entirely conclusory. The Complaint contains no factual support for this assertion.

The Plaintiff further avers KHNC "could not have operated" without the intercompany service and financing agreements executed by Enterprises through KHE and KHC. (Compl. ¶¶ 164–68.) On the one hand, this may suggest that KHNC was undercapitalized and is able to operate only via its intercompany agreements with KHE and Enterprises.

Without more, however, this is insufficient evidence of undercapitalization to survive a motion to dismiss. Namely, the Complaint contains no allegation as to the solvency of KHNC or its ability vel non to meet its financial obligations, including to this Plaintiff—the critical factors with respect to undercapitalization. There is simply no assertion that KHNC, even with its dependence on intercompany agreements with Enterprises and KHE, is insolvent or unable to pay its debts when due.

It is not wrongful for a subsidiary to rely on corporate affiliates for services and obtaining financing for its operations so long as the capital supplied or obtained is sufficient for the subsidiary to operate its business and satisfy its obligations. Thus, absent facts supporting the conclusory allegation of undercapitalization of KHNC, this factor is insufficiently pled.

Examining the allegations pertaining to the other indicia of domination further demonstrates that facts establishing this element are lacking here. The Complaint entirely fails to address three of the remaining four factors—dividends, insolvency, and observance of corporate formalities and record-keeping. Specifically, the Association alleges no facts implicating the issuance of dividends by, or the solvency of, KHNC or the other Defendants whose veils the Plaintiff seeks to pierce.

The Plaintiff likewise neglects to allege how Enterprises failed to observe corporate formalities. The Complaint does not mention whether KHNC lacked corporate records. Rather, the Association's sole allegation on this issue—that KHE, KHC, and Enterprises use the same oracle accounting system—does not suggest that KHE, KHC, <u>or</u> KHNC lack corporate records. If anything, it establishes the opposite. It states that KHE and KHC <u>do</u> keep electronic accounting records.

However, even if facts establishing corporate dominance are set forth here, the Association fails to establish the second element of a veil-piercing claim—that the parent "has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law." <u>Ventron</u>, 94 N.J. at 501. The "hallmarks" of such abuse are "the engagement of the subsidiary in no independent business of its own but exclusively the performance of a service for the parent and, even more importantly, the undercapitalization of

the subsidiary rendering it judgment-proof." OTR Assocs. v. IBC Servs., Inc., 353 N.J. Super. 48, 52 (App. Div. 2002) (citing Ventron, 94 N.J. at 501).

Here, there is some indication that KHC and KHE do not engage in business of their own but rather only that of Enterprises. For example, the Plaintiff alleges that neither entity has any customers, clientele, or expenses. Moreover, the Plaintiff avers that KHE's income consists solely of interest charged on financing it provides to the various Hovnanian entities, while KHC's consists of payments by affiliated companies for services provided by KHC's employees. (Compl. ¶¶ 29, 42.)

However, there is no such averment with respect to KHNC. Moreover, as discussed above, there are insufficient facts supplied permitting the conclusion that KHNC is undercapitalized, the key "hallmark" of abuse of the corporate form. Ibid. In addition to the averment that KHNC is "undercapitalized," the Plaintiff advances the equally bare assertion that the Hovnanian corporate form "is devised to extract the proceeds from each of these developments and leave the nominal development entities assetless and unable to answer for" its liabilities. (Compl. ¶ 169.) It avers the existence of a plan to strip the development entities of assets, rendering them unable to satisfy their obligations. (Compl. ¶ 161.) But there is inadequate factual averment that Enterprises actually carried out this plan as to KHNC or the manner in which it did so. In the end, therefore, the only factual averment in the present Complaint specifically pertaining to the operation and financial condition of KHNC is the entirely conclusory averment that it was "undercapitalized."

The Court thus finds that the Complaint fails to plead a cause of action to pierce the corporate veils of KHNC, KHE, and KHC to hold Enterprises liable for KHNC's liabilities and obligations stemming from this suit. Accordingly, the Court dismisses Count Fourteen, but

without prejudice to the right to re-plead or re-assert a veil-piercing claim against the Hovnanian entities, including at a later time.

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Withal, the Court holds as follows: It dismisses all Counts of the Complaint as to KHC, KHE, and Enterprises without prejudice to the right to re-plead. It dismisses Counts One, Five, Six, Nine, Ten, Twelve, Fourteen, Fifteen, and Sixteen in their entirety without prejudice to the right to re-plead.

The Court does not dismiss Count Eight (breach of implied warranties) as against KHNC and the remainder of the non-moving Defendants. Moreover, save for the dismissal of the Hovnanian-related Defendants listed above, this motion does not require the Court to address, and this Order does not affect, the following: Count Two (professional malpractice) as against the Design Defendants; Count Three (breach of fiduciary duty against the Developer Board Defendants); Count Seven (breach of express warranties) as against KHNC and all other non-moving Defendants; Count Eleven (breach of contract) as against KHNC; and Count Thirteen (breach of the duty of good faith and fair dealing) as against KHNC. An Order accompanies this Statement of Reasons.