SCOTT DIAMOND and EDWARD STREET HOLDINGS, LLC Plaintiffs, vs. WARREN DIAMOND, Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000346-23 SAT BELOW: Lisa M. Walsh, A.J.S.C. (Superior Court of New Jersey, Chancery Division, Union County)

MEMORANDUM OF LAW BY PLAINTIFFS/APPELLANTS SCOTT DIAMOND AND EDWARD STREET HOLDINGS, LLC

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PRELIMINARY STATEMENT

The Trial Court below erroneously dismissed the Complaint filed by plaintiffs Scott Diamond ("Scott") and Edward Street Holdings, LLC ("ESH") (collectively, "Plaintiffs"). Specifically, the Trial Court erred by: (i) re-writing the terms of a consent order to include nonexistent language; (ii) assuming facts unsupported by the record; and (iii) incorrectly applying New Jersey law. Based upon the irrefutable record below, this Court should reverse the decision of the Trial Court, and reinstate Plaintiffs' Complaint, in its entirety.

This case arises from defendant Warren Diamond's ("Warren") intentional misuse of the powers of this Court, to pursue baseless claims against his son, Scott. To that end, and in an effort to steal millions of dollars from Scott, Warren fabricated an agreement, forged Scott's signature, and sought to enforce that forged agreement in the Superior Court of New Jersey, Union County, in a matter entitled *Warren Diamond v. Edward Street Holdings, LLC, et al.*, Docket No. UNN-C-53-17 (the "Prior Litigation"). As part of his unabashed perversion of the courts to enforce the forged agreement in the Prior Litigation, Warren repeatedly committed and suborned perjury. Undeniably, Warren's repeated unlawful conduct was not only a waste of scarce judicial resources, but also constituted abuse of and malicious use of process.

In the Prior Litigation, the parties entered into a written consent order to dismiss their claims *without* prejudice and toll the limitations period, giving the

parties the option to refile their claims by a date certain – specifically, sixty (60) days after the conclusion of a separate arbitration - without the fear that those claims would be barred by the statutes of limitations or repose (the "Consent Order"). Importantly, nothing in the Consent Order bars the parties from filing claims *after* the date identified in the Consent Order. Instead, those claims would simply *not* benefit from the agreed-upon tolling, and would be subject to defenses based upon the statutes of limitations and repose.

While the Trial Court dismissed the instant Complaint - which sought to hold Warren accountable for his abuse of process in the Prior Litigation - the Trial Court's decision here constitutes reversible error. First, notwithstanding the clear language of the Consent Order, the Trial Court below re-wrote the Consent Order to include additional language that simply does not exist. In this regard, New Jersey law is clear, that a court lacks the authority to rewrite the express and unambiguous terms of a contract merely because it may be functionally desirable to draft it differently. As the Consent Order provides *only* that later-filed claims lack the protection of agreed-upon tolling of defenses, the Trial Court was precluded from re-writing the Consent Order, to argue that the claims asserted by Plaintiffs here, were dismissed with prejudice.

Second, the Trial Court erroneously misapplied the doctrine of *res judicata*, as a means to dismiss Plaintiffs' instant Complaint. Specifically, the Trial Court

found that, the Prior Litigation "was adjudicated on the merits once [a] final award was rendered" in separate arbitration. The Trial Court's finding is erroneous, however, because the separate arbitration did not adjudicate: (i) *any* claim raised in the Prior Litigation; (ii) any issue arising out of the same transactions at the core of the Prior Litigation; or (iii) the claims raised in Plaintiffs' Complaint, here. Thus, the Trial Court's application of the doctrine of *res judicata* constitutes a clear error.

Finally, the Trial Court erred by relying upon the Entire Controversy Doctrine, to bar Plaintiffs' instant Complaint. New Jersey law is clear, however, that where a prior lawsuit is dismissed *without* prejudice, the Entire Controversy Doctrine *does not* preclude successive lawsuits based upon the same core nexus of facts. As the Consent Order clearly provides that the Prior Litigation was dismissed *without* prejudice, the Trial Court's application of the Entire Controversy Doctrine was erroneous.

As set forth below, this Court should certainly reverse the order of dismissal entered by the Trial Court. But, equally important, it should send a message to Warren, a serial litigant, that he cannot knowingly assert false claims. Unquestionably, the New Jersey Courts should not be Warren's personal instrument to perpetuate a fraud. Accordingly, for the reasons set forth herein, this Court should reverse the decision of the Trial Court below, and reinstate Plaintiffs' Complaint, in its entirety.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. Warren Commenced Litigation Against Scott in Union County that was Without Probable Cause and Actuated by Malice

In 2017, as part of a years-long campaign to inflict harm upon his only son, Warren commenced the Prior Litigation in the Superior Court of New Jersey, Union County, Chancery Division, to unlawfully seize control of the parties' real estate venture, ESH, together with other limited liability companies. (*See* Pa19 at ¶30). In the Prior Litigation, Warren argued that he had taken control of 51% of the outstanding membership interests in ESH and, through an *ultra vires* Fourth Amendment to ESH's operating agreement, Warren claimed that he had replaced Scott as the manager of ESH. (Pa19 at ¶31). To manufacture the majority interest required to amend ESH's operating agreement, Warren created – out of whole cloth – a forged "agreement," dated January 14, 2014, between himself and Scott (the "Forged Agreement"). (Pa19 at ¶32). The Forged Agreement was purportedly "witnessed" by Warren's wife, Faith Diamond ("Faith") and Warren's attorney, Ellen Dorfman ("Dorfman"), who notarized the Forged Agreement. (Pa19 at ¶33).

Based upon the Forged Agreement – which Warren imaginatively used to unlawfully assert control over the majority of ESH's membership interests – Warren filed a *lis pendens* to prohibit a sale of ESH's property. (Pa20 at ¶37). Equally

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[1] The Statement of Procedural History and Statement of Facts have been combined in the interest of judicial economy and given the limited issues on appeal.

egregious, in the Prior Litigation, Warren requested that the Court *ratify* the Forged Agreement. (*Id.*).

B. The Evidence Adduced in the Prior Litigation Clarified with Absolute Certainty that the Alleged "Agreement" is a Forgery

Warren presented the Forged Agreement to the Court in the Prior Litigation, knowing that it contained Scott's forged signature. (Pa21 at ¶46). Indeed, while Warren commenced the Prior Litigation based almost entirely upon his promotion of the Forged Agreement, the evidence adduced in discovery clarified – for the first time – the true nature of the Forged Agreement. (Pa22 at ¶47).

Initially, Warren sought to enforce the Forged Agreement, Towards this end, Warren committed acts to maliciously abuse the legal process, when he submitted sworn certifications from himself, Faith, and Dorfman, all three of whom unequivocally stated that Warren, Faith, and Scott had arrived at Dorfman's Boca Raton office on January 14, 2014, and while there; (i) Warren and Scott executed the Forged Agreement; (ii) Dorfman and Faith served as witnesses to those signatures; and (iii) Dorfman, in her capacity as a notary public, "signed the bottom of the last page of the agreement, filled in the numerical date and the month, and affixed her notary stamp to the page." (Pa22 at ¶49). Additionally, both Warren and Faith offered perjured testimony at their depositions in the Prior Litigation, concerning the supposed events of January 14, 2014. To this end, Warren and Faith each testified that: (i) Scott and Faith drove together to Dorfman's Boca Raton office

after having played tennis earlier that day; (ii) Warren drove to Dorfman's office with Faith's son, Max; (iii) Warren, Faith and Scott met in the parking lot and walked into Dorfman's office together; and (iv) within ten (10) minutes of meeting, both Warren and Scott signed, with Dorfman and Faith serving as witnesses, and Dorfman signing and dating as a notary. (Pa22 at ¶50).

Initially, Dorfman echoed the same detailed narrative during the first half of her August 7, 2017 deposition in the Prior Litigation. (Pa23 at ¶51). During the second half of her testimony, however, details came to light that unequivocally demonstrated that Warren, Faith, and Dorfman had committed perjury in their depositions and sworn certifications in the Prior Litigation. (Pa23 at ¶52). Specifically, Dorfman was presented with evidence showing that the notary stamp that she had affixed to the Forged Agreement was not in Dorfman's possession until December 2014, at the earliest – eleven months after she allegedly affixed her notary stamp to the Forged Agreement on January 14, 2014. (Pa23 at ¶53 and 54). Presented with this evidence, Dorfman admitted, under oath, that she ***never*** actually witnessed Scott's execution of the Forged Agreement. (Pa23 at ¶55). Rather, Dorfman acknowledged that she had signed and notarized the Forged Agreement at some point in the last couple of years as a "favor" to Warren, when he showed up at her office alone with the document already bearing "Scott's" signature. (*Id.*). Dorfman admitted that, like Warren and Faith, she knowingly made false statements

under oath in both her certification and in her earlier deposition testimony. (Pa23 at ¶56). As a result of her perjury and forgery, Dorfman was disbarred from the practice of law. *See Matter of Tobak*, 199 A.D.3d 99 (1st Dep't 2021).

Notwithstanding clear evidence demonstrating Warren's attempts to use the Forged Agreement to pervert the legal process, Warren insisted that Scott's deposition in the Prior Litigation proceed, and that the case be brought to trial. (Pa24 at ¶58). During his deposition, Scott testified repeatedly that he never had seen, nor executed the Forged Agreement. (*Id.*).

On October 4, 2017, the parties proceeded to trial. (Pa24 at ¶60). As the trial was about to begin, Warren's counsel admitted that Warren could not meet his burden of proof, and that both the Forged Agreement and the purported Fourth Amended were "invalid." (Pa25 at ¶62).

C. Faced with Dorfman's Deposition Testimony, Warren Concocts a Facially Absurd Attempt to Revise his False Factual Narrative

After withdrawing his baseless claims based upon the Forged Agreement, Warren offered up a new version of his narrative. (Pa25 at ¶64). This time, Warren argued that he, Faith, Scott, and Dorfman met at Dorfman's office on January 14, 2014, that that Dorfman merely affixed her notary stamp at a later date. (*Id.*). In this regard, Warren took the facially absurd position, that he was *planning* to testify during his deposition about how "Ellen Dorfman witnessed [Warren] and Scott sign

the January 14, 2014 agreement on January 14, 2014, but that she did not stamp the agreement on that date, and she affixed her stamp on a later date." (Pa25 at ¶65).

On December 7, 2017, Dorfman provided a sworn affidavit to set the record straight and, in doing so, eviscerated Warren's *second* false narrative. (Pa26 at ¶66). In her affidavit, Dorfman unequivocally stated that "Warren, who I have represented in the past, met with me and asked me to witness and notarize his signature and that of his son Scott on the Agreement. **Scott was not with him**." (Pa26 at ¶67). Thus, there remains no ambiguity that Warren repeatedly and unrepentantly attempted to commit a fraud upon the Court in the Prior Litigation.

D. Warren Amends His Pleadings in the Prior Litigation and Scott and ESH Assert Counterclaims Against Warren

On December 4, 2017, Warren filed a Second Amended Complaint in the Prior Litigation that scrupulously avoided any mention of the Forged Agreement. (Pa26 at ¶70). Thereafter, Warren filed a Third Amended Complaint. On April 6, 2018, Scott and ESH filed an Answer to the Third Amended Complaint, Amended Counterclaim, and Third Party Complaint. (Pa51 – Pa100). In their Amended Counterclaim, Scott and ESH asserted claims for: (i) Violation of the New Jersey Revised Uniform Limited Liability Company Act (count one); (ii) breach of contract (count two); (iii) breach of the duty of good faith and fair dealing (count three); (iv) breach of fiduciary duty (count four); (v) breach of the duty of loyalty (count five); (vi) intentional misrepresentation (count six); (vii) negligent misrepresentation

(count seven); (viii) civil conspiracy (count eight); (ix) tortious interference with prospective economic advantage (count nine); (x) conversion (count ten); (xi) unjust enrichment (count eleven); and (xii) abuse of process (count twelve). (*Id.*). Importantly, neither Scott nor ESH asserted claims in the Prior Litigation for malicious abuse of process. (*Id.*).

E. The Parties Enter into the Consent Order to Dismiss Warren's Frivolous Claims

On or about November 14, 2018, the parties agreed to dismiss the claims asserted in the Prior Litigation *"without prejudice* pending the adjudication of the separate but related arbitration before the American Arbitration Association entitled Warren Diamond, on behalf of himself and Nacirema Management Associates, LLC v. Scott Diamond, American Cali Mgmt, LLC and the Scott Diamond Family Trust, AAA Case No. 01-18-0001-3768 (the "Nacirema Arbitration")." (Pa150 – Pa152). The parties memorialized their agreement in a Consent Order, which the Court entered on November 14, 2018. (*Id.*).

Indisputably, the Consent Order provides *only* that the claims asserted in the Prior Litigation would be dismissed *without* prejudice, pending completion of the Nacirema Arbitration. (Pa151, at ¶1). At any time following the Nacirema Arbitration, the parties were free to reinstate their claims, without restriction. To that end, the Consent Order states:

> Within sixty (60) days of the adjudication of the Nacirema Arbitration, Warren, Scott, and/or ESH **shall have the option to re-file**, as plaintiffs, a separate action in the Superior Court of New Jersey, Union County, Chancery Division, any of the affirmative claims, counterclaims, and/or third-party claims **that were advanced, and not dismissed,** by any respective party in this action (a "Refiled Action").

(Pa151 at ¶3 (*emphasis added*)). Importantly and indisputably, the Consent Order lacks any compulsory language, stating that a claim is abandoned or dismissed with prejudice, if not asserted within sixty (60) days following the adjudication of the Nacirema Arbitration. (Pa150 – Pa152). To this end, *nothing* in the Consent Order provides for a dismissal of any claims being *with* prejudice, at any time. (*Ibid.*).

To ensure that those claims asserted in the Prior Litigation would not be time-barred when later revived, the parties agreed that: (i) if the claims that were voluntarily dismissed under the Consent Order were re-filed within sixty (60) days after the adjudication of the Nacirema Arbitration, such claims would *not* be barred by any defense based upon the statutes of limitation or repose; and (ii) that any new claims *not* asserted in the Prior Litigation, but asserted as part of a re-filed action, would receive the same benefit of tolling. (*See* Pa152 at ¶5). Specifically, the Consent Order states:

> With respect to a Refiled Action or Responsive Pleadings in a Refiled Action, the parties hereby preserve and will be able to assert all rights, remedies, defenses, and claims for relief that he, she or it asserted, were seeking to obtain, or could have obtained in this action, including but not

> limited to requests for sanctions and/or attorneys' fees ("Claims, Relief or Defenses"), and **any and all applicable statutes of limitation, repose, or other defenses on limitations of actions, including, but not limited to laches, waiver, estoppel, res judicata, collateral estoppel, entire controversy, or any claim issue preclusion doctrine, or other time-based doctrine or defense, rule, law or statute otherwise limiting the parties' rights to reserve, assert, and/or prosecute any of the Claims, Relief, or Defenses that may applied to a Refiled Action or Responsive Pleadings in a Refiled Action, shall be tolled and suspended until sixty (60) days after the adjudication of the Nacirema Arbitration** or, with respect to Responsive Pleadings in a Refiled Action, until thirty (30) days after the time for responsive pleadings in a Refiled Action are due to be filed per the New Jersey Rules of Court.

(Pa152, at ¶5 (*emphasis added*)).

Undeniably, the Consent Order is devoid of *any* language stating that any party's claims would be dismissed *with prejudice*, if not asserted within sixty (60) days following the adjudication of the Nacirema Arbitration. Indeed, the words "with prejudice" are nowhere to be found in the Consent Order. (*See generally,* Pa150 – Pa152).

F. The Nacirema Arbitration

The Nacirema Arbitration was commenced by Warren, against Scott and another entity, American Cali Management, a successor entity to Nacirema Management Associates, LLC. (Pa132). Notably, **ESH was *not* a party to the Nacirema Arbitration, and no claims were asserted against ESH in the**

Nacirema Arbitration. (*Id.*). Instead, as the Nacirema Arbitration sought to wind up the affairs of Nacirema Management Associates, LLC ("Nacirema"), the decision of the Arbitration Panel had the potential to affect the litigants in the Prior Litigation because "Nacirema was set up to manage […] ESH. It had no other management contracts." (Pa141).

Certainly, the Nacirema Arbitration did not attempt to adjudicate the issues raised in the Prior Litigation. Indeed, neither the Forged Agreement nor disputes concerning the parties' respective interests in ESH were *considered* as part of the Nacirema Arbitration. (*See generally* Pa131 – Pa142). Instead, the Arbitration Panel in the Nacirema Arbitration adjudicated:

(i) whether distributions made by Nacirema were proper (Pa135 – Pa136);

(ii) whether Scott "failed to realize the value of the Nacirema Management Agreement when the ESH property was sold in 2018" (Pa136 – Pa137);

(iii) the distribution of funds that were held back by Nacirema in connection with management fees received. (Pa137 – Pa138);

(iv) the propriety of certain distributions made to Scott from Nacirema (Pa138); and

(v) whether certain payments made to vendors by Nacirema were appropriate (Pa138 – Pa139).

On July 15, 2021, the Arbitration Panel in the Nacirema Arbitration issued its decision[2]. (Pa131 – Pa142). In its decision, the Arbitration Panel awarded that

[2] A copy of the final decision in the Nacirema Arbitration was part of the motion record before the trial court, below.

certain sums be paid to Warren, and directed Scott to dissolve Nacirema and wind-up its affairs. (Pa141). Undeniably, the Nacirema Arbitration *did not* adjudicate issues concerning the Forged Agreement, the parties' respective membership interests in ESH, or Warren's unabashed abuse of process. (*See generally* Pa131 – Pa142). Indeed, the Nacirema Arbitration neither adjudicated *any* matter raised in the Prior Litigation, nor did it adjudicate issues arising out of the same transaction at the core of the Prior Litigation. (*Id.*). Thus, there can be no question that the doctrine of *res judicata*, or claim preclusion, is inapplicable to the matters adjudicated in the Nacirema Arbitration.

G. Scott and ESH Commence the Instant Litigation

On March 27, 2023, Scott and ESH filed the Complaint in this action. (Pa14 – Pa32). In their Complaint, Scott and ESH assert two causes of action: (i) abuse of process (count one); and (ii) malicious use of process (count two). (*Id.*). Undeniably, neither Scott nor ESH asserted a claim in the Prior Litigation for malicious use of process. (*Compare* Pa14 – Pa32 *with* Pa51 – Pa101).

The instant lawsuit was filed more than sixty (60) days following the Nacirema Arbitration. Nonetheless, the Consent Order has no effect upon the instant action, except to state that Warren is not constrained in the defenses he may assert to the Complaint. Indeed, the Consent Order lacks *any* provision stating that future

claims are automatically barred, if brought more than sixty (60) days after the completion of the Nacirema Arbitration. (Pa150 – Pa152).

In light of the clear language of the Consent Order, along with the irrefutable fact that *nothing* in the consent order bars claims brought more than sixty (60) days after the completion of the Nacirema Arbitration, Warren should not be permitted to escape liability for his clear and unabashed perversion of the judicial system.

H. The Court Grants Warren's Motion to Dismiss Plaintiffs' Complaint

On August 1, 2023, Warren filed a motion, seeking to dismiss the Complaint based upon the contents of the Consent Order. (Pa37). On August 29, 2023, Scott opposed Warren's motion. (Pa145 – Pa146). On September 29, 2023, after hearing oral argument, the Trial Court granted Warren's motion and dismissed Plaintiffs' Complaint with prejudice. (Pa1 – Pa2).

In its written decision, the Trial Court relied upon three bases to dismiss Plaintiffs' Complaint. First, the Trial Court found that the Consent Order, on its face, barred Scott from re-filing claims after the 60-day deadline. (Pa8). Second, the Trial Court found that the doctrine of *res judicata* precludes Scott from filing the instant action, finding that the Prior Litigation "was adjudicated on the merits once the final award was rendered in the Nacirema Arbitration." (Pa8). Third, the Trial Court found – *sua sponte,* as no party raised the argument in connection with Warren's motion – that the Entire Controversy Doctrine bars Plaintiffs' Complaint

because the Prior Litigation "has been adjudicated on the merits." (*See* Pa10 – Pa13).

Based upon the facts set forth herein and established New Jersey law, each predicate relied upon by the Trial Court to dismiss Plaintiffs' Complaint is without merit. Instead, there can be no question that Scott is entitled to proceed with the claims asserted in his Complaint. Accordingly, the Court should reverse the decision of the Trial Court below, and permit Scott to prosecute his claims against Warren.

STANDARD OF REVIEW

On appeals of orders dismissing a complaint under R. 4:6-2(e), the Appellate Division applies a *de novo* standard. *See Stop & Shop Supermarket Co., LLC v. Cnty. of Bergen*, 450 N.J. Super. 286, 290 (App. Div. 2017) (*quoting Teamsters Loc. 97 v. State*, 434 N.J. Super. 393, 413 (App. Div. 2014)). Under that standard, the Appellate Division does not owe any deference to the motion judge's conclusions. *Rezem Family Assocs., LP v. Borough of Millstone*, 423 N.J. Super. 103, 114 (App. Div. 2011). Instead, the appellate "inquiry is limited to examining the legal sufficiency of the facts alleged on the place of the complaint." *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 746 (1989) (*citing Rieder v. Dep't of Transp.*, 221 N.J. Super. 547, 552 (App. Div. 1987)).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED BY FINDING THAT THE CONSENT ORDER BARS THE INSTANT LITIGATION [Pa1 – Pa13]

New Jersey law is clear that a court lacks the authority to rewrite the express terms of a contract merely because it may be functionally desirable to draft it differently. *Brick Tp. Municipal Utilities Authority v. Diversified R. B. & T. Const. Co., Inc*., 171 N.J. Super. 397, 402 (App. Div. 1979). In that same light, a court may not alter a contract for the benefit of one party and to the detriment of the other. *James v. Federal Ins. Co*., 5 N.J. 21, 24 (1950); *Trinity Church v. Lawson-Bell*, 394 N.J. Super. 159, 170 (App. Div. 2007) ("Normally we will enforce a contract freely negotiated at arms' length and will not make a better contract for the parties than that for which they bargained"); *Kaur v. Assured Lending Corp*., 405 N.J. Super. 468, 477 (App. Div. 2009) (explaining that courts will "'not rewrite contracts in order to provide a better bargain than contained in [the parties] writing.'").

Certainly, the Consent Order cannot be "re-written," so as to help Warren avoid liability for his clear and unabashed abuse of our legal system. The contents of the Consent Order are clear. For the purpose of completing the Nacirema Arbitration, the parties agreed to dismiss their claims in the Prior Litigation *without prejudice*. (Pa150 – Pa152). To ensure that those dismissed claims would not be time-barred when later revived, the parties agreed that: (i) if the claims that were voluntarily dismissed under the Consent Order were re-filed within sixty (60) days

after the adjudication of the Nacirema Arbitration, such claims would *not* be barred by any defense based upon the statutes of limitation or repose; and (ii) that any new claims *not* asserted in the Prior Litigation, but asserted as part of a re-filed action, would receive the same benefit of tolling. (Pa152 at ¶5). Importantly, nothing in the Consent Order bars the parties from asserting claims *after* the sixty (60) day period. (Pa150 – Pa152). The claims asserted after the sixty (60) day period, however, would *not* benefit from the agreed-upon tolling, and would be subject to defenses based upon the statutes of limitations and repose. (*Id.*). The Consent Order says nothing more, and certainly does not mention the dismissal of *any* claim with prejudice.

Notwithstanding the clear contents of the Consent Order, the Trial Court below erred, by adding terms to the Consent Order that simply do not exist. Specifically, the Trial Court rejected the plain language of the Consent Order – which provides *only* that claims re-filed within sixty (60) days after the adjudication of the Nacirema Arbitration would *not* be barred by any defense based upon the statutes of limitation or repose – and found that Plaintiffs' Complaint is barred *entirely*, because Scott did not file the instant lawsuit within sixty (60) days following the adjudication of the Nacirema Arbitration. (*See* Pa8). Undeniably, the Trial Court's interpretation is without basis, as the Consent Order does not contain *any* language to that effect. In fact, the Consent Order is devoid of *any* agreement stating that any party's claims would be dismissed *with prejudice*, if not asserted

within sixty (60) days following the adjudication of the Nacirema Arbitration. (Pa150 – Pa152). Indeed, the words "with prejudice" are nowhere to be found in the Consent Order. (*Id.*). In the absence of any language dismissing claims *with* prejudice, the Rules of Court clearly provide that the claims dismissed under the Consent Order were dismissed only *without* prejudice. *See* R. 4:37-1(a) and (b).

Indisputably, the Consent Order lacks *any* provision stating that future claims are automatically barred, if brought more than sixty (60) days after the completion of the Nacirema Arbitration. The Consent Order provides only that later-filed claims lack the protection of agreed-upon tolling of defenses based upon limitations or repose. Consistent with established New Jersey law, the Trial Court cannot re-write the plain language of the Consent Order, to dismiss Plaintiffs' instant claims with prejudice. Accordingly, this Court should reverse the decision of the Trial Court below, reinstate Plaintiffs' Complaint in its entirety, and force Warren to face the consequences of his unabashed perjury, forgery, and abuse of the judicial process.

POINT II

THE TRIAL COURT ERRED BY FINDING THAT THE DOCTRINE OF *RES JUDICATA* BARS PLAINTIFFS' COMPLAINT [Pa1 – Pa13]

"The term '*res judicata*' refers broadly to the common-law doctrine barring re[-]litigation of claims or issues that have already been adjudicated." *Velasquez v. Franz*, 123 N.J. 498, 505 (1991). "In essence, the doctrine of *res judicata* provides

that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." *Id*. "For a judicial decision to be accorded *res judicata* effect, it must be a valid and final adjudication on the merits of the claim." *Id*. at 506. *See also Watkins v. Resorts Int'l Hotel & Casino, Inc*., 124 N.J. 398, 409 (1991) (holding that the doctrine of *res judicata* requires that "the judgment in the prior action must be valid, final, and on the merits").

The doctrine of *res judicata* does not apply to bar the instant Complaint. Indisputably, the court in the Prior Litigation did not adjudicate *any* facts on the merits, as the parties agreed to dismiss their claims in the Prior Litigation *without prejudice.* (*See* Pa150 – Pa152). In the same vein, it is clear that the Nacirema Arbitration *did not* adjudicate issues concerning the Forged Agreement, the parties' respective membership interests in ESH, or Warren's unabashed abuse of process. (*See generally* Pa131 – Pa142). Indeed, a plain reading of the decision emanating from the Nacirema Arbitration makes clear that the Nacirema Arbitration did not adjudicate: (i) *any* claim raised in the Prior Litigation; (ii) any issue arising out of the same transaction at the core of the Prior Litigation; or (iii) the claims raised in Plaintiffs' Complaint. (*Id.*).

Based upon the *actual* substance of the decision in the Nacirema Arbitration, the finding by the Trial Court below – that "the matter was adjudicated on the merits

once the final award was rendered in the Nacirema Arbitration[,]" – is entirely without factual support. (Pa8). Indeed, while the Trial Court below surmised that "if either party was unhappy with the outcome of the Nacirema Arbitration, they could have those claims heard in a court instead of in an arbitration hearing," the Trial Court's finding is erroneous. Indeed, the Trial Court's finding constitutes a clear error, as ESH was *not even a party* to the Nacirema Arbitration, and, therefore, would not have had standing to "have those claims heard in a court instead of in an arbitration hearing."

The Trial Court's finding is further belied by the irrefutable fact that the claims asserted in the Prior Litigation (and in Plaintiffs' instant Complaint) are entirely distinct from those adjudicated in the Nacirema Arbitration. (*Compare* Pa14 – Pa32 *with* Pa131 – Pa142). Thus, the "re-filing" of claims pursuant to the Consent Order would not have had *any* effect upon the "outcome of the Nacirema Arbitration," nor would an adjudication of claims in such a "re-filed" action altered the decision in the Nacirema Arbitration, in any way whatsoever.

While the Trial Court was provided with a copy of the decision in the Nacirema Arbitration in connection with the motion to dismiss, below, the Trial Court either did not understand, or did not appreciate, its contents. Undeniably, the Nacirema Arbitration did not adjudicate any matters raised in the Prior Litigation, nor did it adjudicate any matters raised in Plaintiffs' Complaint. Thus, by all

standards, the decision in the Nacirema Arbitration could ***not*** "operate[] as a valid and final judgment[,]" as it relates to the Prior Litigation. (*See* Pa9). Accordingly, this Court should reverse the decision of the Trial Court below, find the doctrine of *res judicata* inapplicable, and reinstate Plaintiffs' Complaint, in its entirety.

POINT III

THE TRIAL COURT ERRED BY FINDING THAT THE ENTIRE CONTROVERSY DOCTRINE BARS PLAINTIFFS' COMPLAINT [Pa1 – Pa13]

The Entire Controversy Doctrine "seeks to impel litigants to consolidate their claims arising from a single controversy whenever possible." *Thornton v. Potamkin Chevrolet*, 94 N.J. 1, 5 (1983) (*citation omitted*). "[T]he boundaries of the entire controversy doctrine are not limitless. It remains an equitable doctrine whose application is left to judicial discretion based on the factual circumstances of individual cases." *Brennan v. Orban*, 145 N.J. 282, 291 (1996) (*citing Mystic Isle Development Corp. v. Perskie & Nehmad*, 142 N.J. 310 (1995)).

Nonetheless, New Jersey law is clear, that "[t]he entire controversy doctrine does not affect a plaintiff's right to file a new action based on the same factual allegations as a prior action which has been dismissed without prejudice pursuant to Rule 4:37–1(a). The entire controversy doctrine bars a subsequent action **only when a prior action based on the same transactional facts has been tried to judgment**

or settled." *Arena v. Borough of Jamesburg, Middlesex County*, 309 N.J. Super. 106, 111 (App. Div. 1998) (*citing Kaselaan & D'Angelo Assocs., Inc. v. Soffian*, 290 N.J.Super. 293, 299 (App. Div. 1996)) (*emphasis added*).

Indisputably, Plaintiffs' Complaint is unaffected by the Entire Controversy Doctrine, as the Prior Litigation was dismissed by the parties *without prejudice.* (*See* Pa150 – Pa152). In the same manner that the Trial Court erred in applying the doctrine of *res judicata*, here too, the Trial Court erred by finding that the Entire Controversy Doctrine applies because "the Chancery Action has been adjudicated on the merits." (Pa12).

It is clear, from the face of the decision in the Nacirema Arbitration, that no claims asserted in Plaintiffs' Complaint or in the Prior Litigation were adjudicated, at all. (*Compare* Pa14 – Pa32 *with* Pa131 – Pa142). While Plaintiffs' claims here (and in the Prior Litigation) are premised upon Warren's abuse of the judicial system through the use of the Forged Agreement and unabashed perjury, the Nacirema Arbitration focused upon an *entirely separate nexus of facts.* In this regard, the Nacirema Arbitration focused upon: (i) whether distributions made by Nacirema were proper; (ii) whether Scott properly valued Nacirema; (iii) whether certain distributions from Nacirema were proper; and (iv) whether certain payments made by Nacirema were appropriate. (*See* Pa135 – Pa139).

Clearly, nothing adjudicated in the Nacirema Arbitration arises from the same core nexus of facts as those asserted in Plaintiffs' Complaint, or those asserted in the Prior Litigation, which was dismissed *without* prejudice. As such, the Trial Court's application of the Entire Controversy Doctrine was clearly erroneous. Accordingly, this Court should reverse the decision of the Trial Court below, find the Entire Controversy Doctrine inapplicable, and reinstate Plaintiffs' Complaint, in its entirety.

CONCLUSION

For the reasons set forth herein, this Court should reverse the decision of the Trial Court below, and reinstate Plaintiffs' Complaint, in its entirety.

Respectfully submitted,

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Dated: December 29, 2023

By: _____

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SCOTT DIAMOND and EDWARD STREET HOLDINGS LLC, Appellants/Plaintiffs, v. WARREN DIAMOND, Respondent/Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-000346-23 On Appeal from an Order of the Superior Court of New Jersey, Law Division, Union County Sat Below: Hon. Lisa M. Walsh, A.J.S.C. Docket No. Below: UNN-L-977-23

BRIEF OF RESPONDENT/DEFENDANT WARREN DIAMOND

On the Brief: Matthew K. Blaine, Esq.
Michael J. Connolly, Esq.

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Preliminary Statement

Defendant-Respondent, Warren Diamond ("Respondent"), respectfully submits that the appeal of Plaintiffs-Appellants, Scott Diamond and Edward Street Holdings, LLC ("Appellants"), must be denied and the order dated September 29, 2023 that Appellants are appealing must be affirmed because the Court below (the "**Trial Court**") properly granted Respondent's motion to dismiss Appellants' Complaint (the "**Complaint**") as untimely. The Complaint is therefore barred by the Consent Order (defined below), *res judicata*, and the entire controversy doctrine, as well as the doctrines of waiver, estoppel, and because Appellants failed to file the appropriate application under Rule 4:50-1 to vacate the Consent Order.

The Trial Court granted Respondent's motion to dismiss the Complaint on September 29, 2023 when it entered an Order (the "**Order**") and an accompanying Opinion (the "**Opinion**") finding, amongst other things, that Appellants' Complaint was untimely filed, in violation of a Consent Order (the "**Consent Order**") dated November 14, 2018 that resolved an earlier action in the Union County Chancery Division (the "**Chancery Action**"). (See Pa3a to Pa13 (Opinion)).

The Consent Order required Appellants to file their Complaint in the Union County Chancery Division within a sixty-day deadline. (Pa110 at ¶3 (Consent Order)). Rather than filing in the Chancery Division within the sixty-day deadline,

Appellants waited a staggering 620 days and filed the Complaint in the Law Division. (Pa3 at ¶ 2 (Opinion)).

The Trial Court properly dismissed the Complaint as untimely and in violation of the clear and unambiguous terms of the Consent Order, and for the alternative reasons of application of the doctrines of *res judicata* and entire controversy. The doctrines of waiver and estoppel, as well as Appellants' failure to file the required application under Rule 4:50-1 to vacate the Consent Order, also support the dismissal of the Complaint. So, too, does the extreme prejudice that Respondent would suffer if the Consent Order was vacated on account of Appellant Scott Diamond's spoliation of evidence, see, infra, at pp. 10-11 (No. 7 of Procedural History and Statement of Facts).

Procedural History and Statement of Facts[1]

1. Appellants Asserted the Same Claims in the Chancery Action

The origins of the instant appeal begin with the Chancery Action – a much earlier matter that was extensively litigated by the parties between April 2017 and November 14, 2018. The Chancery Action also involved a related arbitration proceeding between the parties called the Nacirema Arbitration that was pending when the Consent Order was entered.

[1] Like Appellants' brief (Pb4 at fn. 1) and given the limited issues on appeal, Respondent respectfully submits this combined Procedural History and Statement of Facts in the interest of judicial economy.

The Chancery Action was commenced by Respondent against Appellants in April of 2017 in the Union County Chancery Division. (Pa3 at ¶ 2 (Opinion); Pa104 to Pa106 (Docket Sheet of Chancery Action "**Docket Sheet**")). In the Chancery Action, Appellants asserted a plethora of twelve Counterclaims against Respondent, including a claim for malicious abuse of process (count 12), and even joined four additional individuals as third-party defendants. (See Pa51 to Pa99 (Appellants' Answer, Counterclaim and Third-Party Complaint in the Chancery Action)).

The contentious Chancery Action was extensively litigated by the parties between April 7, 2017 and November 14, 2018, when it was resolved by the filing of the Consent Order. (Pa42 at ¶5 (Certification of Matthew K. Blaine in Support of Notice of Motion to Dismiss Pursuant to Rule 4:6-2 ("**Blaine Cert.**") and Pa104-106 (Exhibit B thereto - Docket Sheet)). The parties engaged in substantial paper and electronic discovery, took numerous party and third-party depositions, including two depositions of Scott Diamond and two depositions of Warren Diamond, exchanged expert reports, and filed numerous motions and other applications with the Court. Id.

2. The Consent Order Dismissed the Chancery Action Pending the Nacirema Arbitration and Set a Deadline for Refiling Any Claims

On November 14, 2018, the Honorable Katherine R. Dupuis, Ret., entered the Consent Order that resolved and dismissed the Chancery Action. (Pa109 to Pa111 (Consent Order)). Through the Consent Order, the parties (including Appellants)

agreed to dismiss their respective claims, without prejudice, pending the adjudication of an arbitration between the parties that was then pending in the American Arbitration Association captioned *Warren Diamond, on behalf of himself and Nacirema Management Associates, LLC v. Scott Diamond, American Cali Mgmt. LLC and the Scott Diamond Family Trust*, AAA Case # 01-18-0001-3768 (the "**Nacirema Arbitration**"). (Pa42 (Blaine Cert. at ¶6) and Pa109-111 (Exhibit C thereto – Consent Order)).

The terms of the Consent Order were the product of lengthy discussions and negotiations between the parties and their counsel. After the terms were crafted and modified and the Consent Order was signed by counsel for the parties (including Appellants), the Consent Order was submitted by Appellants and entered by Judge Dupuis. (See, e.g., Pa44 at ¶¶12-18 (Blaine Cert.) and Pa109 to Pa111 (Exhibit C thereto – Consent Order), Pa114 to Pa124 (Exhibit D thereto - "**E-mail exchanges**") and Pa126 to Pa129 (Exhibit E thereto – "**Appellants' Consent Order Submission**")).

The Consent Order provides clear terms regarding how the parties' Chancery Action claims were to be dismissed and the limited means by which they could be revived through any party's prompt action following the adjudication of the Nacirema Arbitration. Paragraphs 2 and 3 of the Consent Order restrict Appellants' ability to assert a "Refiled Action" and similarly restrict Respondent's ability to file

a "Refiled Action".[2] Specifically, the Consent Order requires any party who wanted to pursue the dismissed Chancery Action claims to re-file, in the Chancery Division, a Refiled Action within sixty days following the adjudication of the Nacirema Arbitration. (Pa110 at ¶¶ 2-3 (Consent Order)).

The Consent Order defines the adjudication of the Nacirema Arbitration as the date on which the AAA would issue a final award terminating the Nacirema Arbitration (the "**Nacirema Award**"). (Id. at ¶2). The Consent Order therefore restricts the parties' ability to file a "Refiled Action" outside the limited window of 60 days from the issuance of the Nacirema Award:

> Within sixty (60) days of the adjudication of the Nacirema Arbitration, Warren, Scott, and/or ESH shall have the option to re-file, as plaintiffs, a separate action in the Superior Court of New Jersey, Union County, Chancery Division, any of the affirmative claims, counterclaims, and/or third-party claims that were advanced, and not dismissed, by any respective party in this action (a "Refiled Action").

Pa110 at ¶ 3 (Consent Order).

The Consent Order similarly restricts the pleading ability of the party that responds to a Refiled Action: "If any party files a Refiled Action in accordance with paragraph 3 of this Order, then as part of his, her, or its responsive pleading, the defendant party or parties in such a Refiled Action shall have option to re-file their

[2] The term "Refiled Action" is defined in paragraph 3 of the Consent Order. See Pa110 at ¶3.

respective defenses, affirmative claims, counterclaims, or third-party claims that were advanced and not dismissed by any respective party in this action." (Pa110 at ¶4 (Consent Order)). The Consent Order defines the responding party's re-filed defenses, affirmative claims, counterclaims, or third-party claims as "Responsive Pleadings in a Refiled Action." (Id.)

The Consent Order further restricts the ability of the parties to pursue their "Claims, Relief, or Defenses", which term the Consent Order defines as any of the rights, remedies, defenses, and claims for relief that they asserted, were seeking to obtain, **or could have obtained in the Chancery Action,** including but not limited to requests for sanctions and/or attorneys' fees. (Pa111 at ¶5 (Consent Order)).

The Consent Order restricts the parties' ability to assert their Claims, Relief, or Defenses by preserving them only with respect to a "Refiled Action" or "Responsive Pleadings in a Refiled Action". (Pa111 at ¶5(Consent Order)). Both defined terms – a Refiled Action and Responsive Pleadings in a Refiled Action – require the initiation of a Refiled Action within the filing deadline: sixty days from the adjudication of the Nacirema Arbitration. (Pa110 at ¶¶3-4 (Consent Order)).

The Consent Order ensured the parties' ability to timely pursue their claims within the 60-day deadline by providing that if any party in a Refiled Action or as Responsive Pleadings in a Refiled Action opted to re-file their respective Claims, Relief or Defenses, then in relation to a Refiled Action, the defenses of laches,

waiver, estoppel, res judicata, entire controversy, or any claim issue preclusion doctrine or other time-based doctrine or defense, rule, law or statute otherwise limiting the parties' rights to preserve, assert, and/or prosecute any of the Claims, Relief, or Defenses that may apply to a Refiled Action were tolled and suspended until sixty days after the adjudication of the Nacirema Arbitration. (Pa111 at ¶5 (Consent Order)). In relation to Responsive Pleadings in a Refiled Action, the same defenses were also tolled and suspended until thirty days after the time responsive pleadings in a Refiled Action were due to be filed per the New Jersey Rules of Court. (Id.).

3. Appellants Disregard the 60-Day Deadline by Refiling Their Claims 560 Days After Its Expiration

The Nacirema Award was rendered on July 15, 2021. (Pa46 at ¶19 (Blaine Cert.) and Pa132 to Pa142 (Exhibit F thereto - Nacirema Award)).

September 13, 2021 was sixty days after the issuance of the Nacirema Award. The Consent Order's mandatory filing deadline for commencing a Refiled Action was therefore September 13, 2021.

Appellants did *not* commence a Refiled Action by September 13, 2021. Instead, Appellants waited 620 days – 560 days longer than the 60-day deadline – before attempting to resurrect their long-expired Chancery Action claims that were dismissed in November of 2018 by the Consent Order. It was not until March 27, 2023 that Appellants initiated the matter at hand by filing the Complaint in the

Union Count Law Division rather than Chancery. (Pa42 at ¶5 (Blaine Cert.) and Pa104 to Pa106 (Exhibit B thereto - Docket Sheet)). Thus, not only did Appellants violate the Consent Order because they filed the Complaint tremendously late, but they also violated the Consent Order by filing the Complaint in the wrong forum.

The Complaint references the Consent Order, acknowledging that the claims asserted in the Complaint were subject to re-filing after the adjudication of the Nacirema Arbitration (referred to in the Complaint as "a tangentially related arbitration.") (Pa27 at ¶¶73-74 (Complaint)).

Yet, in their submissions below and to date in this appeal, Appellants have failed to provide any explanation whatsoever for disregarding the deadline, let alone an explanation that could justify their decision to re-file the Complaint 560 days beyond the 60-day deadline for Refiled Actions.

4. Appellants' Claims Are the Same

The allegations and claims asserted in the instant matter are subsumed within those that Appellants earlier asserted in the Chancery Action via their twelve-count Counterclaim that was dismissed by the Consent Order. (Pa46 at ¶21 (Blaine Cert. citing March 27, 2023 filed Complaint available on eCourts at Trans ID: LCV20231042998 and set forth in Appellants' Appendix at Pa14-29, Pa58-Pa73, and Pa95-97 (Appellants' Chancery Action Answer, Counterclaim and Third-Party Complaint at pp. 8-23 and pp. 45-47, Twelfth Count)). During argument below,

Appellants' counsel acknowledged that the facts and two operative counts of the Complaint were also asserted by Appellants in the Chancery Action.[3] (1T12:12 to 13:6).[4]

Indeed, the Trial Court characterized the factual nexus between Appellants' claims in the two matters as "overwhelming." (Pa11 at ¶4 (Opinion)).

5. The Consent Order Is the Basis for the Dismissal of Appellants' Complaint

Given the plain terms of the Consent Order, and Appellants' gross violation of the sixty-day deadline, Respondent filed a motion to dismiss the present matter on August 1, 2023. (Pa37 to Pa144). Appellants filed opposition to the motion. (Pa145 to Pa149). Respondent filed a reply brief and supplemental Certification from counsel. (Da01 to Da18 (Supplemental Certification of Matthew K. Blaine in Support of Notice of Motion to Dismiss Pursuant to Rule 4:6-2 ("**Blaine Supp. Cert.**") and Da19 to Da26 (portion of Reply Brief)).

The parties appeared for oral argument on September 29, 2023. (1T). After hearing argument, the Honorable Lisa M. Walsh, A.J.S.C. issued the Order and

[3] The only immaterial difference is that, in the Chancery Action, Appellants asserted a claim for malicious abuse of process, and in the Complaint, Appellants asserted claims for malicious abuse of process and malicious use of process. (1T12:12 to 13:6 and compare Pa195-196 at Twelfth Count (Chancery Action Counterclaim) with Pa27-29 at First and Second Counts (Complaint)).

[4] The September 29, 2023 transcript of the Trial Court proceedings below is referred to herein as "1T".

Opinion dated September 29, 2023 that granted Respondent's motion to dismiss. (Pa1 to Pa13 (Order and Opinion)).

Appellants filed a timely Notice of Appeal on October 4, 2023. (Pa154 (Notice of Appeal)). Appellants filed their amended preliminary brief in connection with this appeal on December 29, 2023.

6. Respondent's Appendix

Appellants' Appendix failed to include the Blaine Suppl. Cert. filed by Respondent's counsel with Respondents' reply papers below. This Certification is set forth in Respondent's Appendix at Da1 to Da18.

Similarly, Appellants did not include Respondent's Reply Brief in the Appendix. Respondent respectfully refers this Court to a portion of the Reply Brief solely to demonstrate that he raised an argument below concerning Rule 4:50-1 which, while referenced in the Opinion (Pa4 at top) but not analyzed, is another reason why the Order must be affirmed. See Rule 2:6-1(a)(2). The pertinent portion of the Reply Brief is set forth in Respondent's Appendix at Da19 to Da26.

7. Appellants' Failure to Move to Vacate the Consent Order Under R. 4:50-1 and Their Inability to Meet Their Extraordinary Burden

As Respondent illustrated below, after the sixty-day filing deadline expired on September 13, 2021, the parties' only avenue for resuscitating the claims they asserted (or for pursuing claims they could have asserted) in the Chancery Action was an application to vacate the Consent Order pursuant to Rule 4:50-1.

Appellants failed to file a motion to vacate the Consent Order as required by Rule 4:50-1 and have failed to present any circumstances at all to vacate or modify the Consent Order, let alone those extraordinary circumstances that Appellants would have to show to vacate or modify the Consent Order pursuant to Rule 4:50-1(f).

It is, in fact, impossible for Appellants to satisfy this burden. Even if Appellants made such an application in the Union County Chancery Division as of the time the Complaint was filed on March 23, 2023, it would undoubtedly have been denied on account of (a) the over four-year period that elapsed following the November 14, 2018 filing of the Consent Order and March 23, 2023; (b) Appellants' wholesale failure to try to explain or otherwise justify their extraordinary delay; (c) the Consent Order and its September 13, 2021 filing deadline were mutually drafted in November of 2018 while Appellants, at least as of March 16, 2021 and as acknowledged in paragraphs 72 and 73 of the Complaint, were fully aware of the restrictions placed on the parties' ability to pursue a Refiled Action, and (d) Respondent would sustain substantial prejudice.

The most substantial element of prejudice is established by Appellant Scott Diamond's continued pattern of concealment and spoliation of numerous relevant and material audio recordings of conversations between Appellant Scott Diamond, Respondent, and others that occurred during the relevant and material time period of

2014 and 2015 but which Appellant Scott Diamond admits are inaccessible because they are on a locked iPhone that, as of December 2019, he can no longer unlock. (Da2 at ¶4 (Blaine Supp. Cert. at Ex. B, p. 4) (citing Da13 - Dec. 16, 2019 opinion and order from the United States District Court for the Southern District of Florida (the "**Dec. 2019 SDFL Order & Opinion**")). "The iPhone became inaccessible when Scott, a computer science major and former IT consultant, inputted the wrong password multiple times and despite the manufacturer's popup warnings that users would be locked out if repeated incorrect attempts are made. There is reason to question whether this lock out is accidental." (Da13 at n.1 (Dec. 2019 SDFL Order & Opinion)).

Respondent's prejudice is therefore firmly established by the opinion and order entered in a separate case by the United States District Court for the Southern District of Florida on December 16, 2019 that struck Appellant Scott Diamond's answer, affirmative defenses, and counterclaim with prejudice due to his "clear pattern of repeated, willful disobedience of Court orders requiring Scott to produce all recordings and devices," because "no other reasonable sanction . . . would result in the full production of Scott's devices and recordings," and because "no sanction short of dismissal would adequately punish Scott for his disregard for the Court's multiple orders." (Da11-14 and Da16-18 (Dec. 2019 SDFL Order & Opinion)).

Legal Argument

Point I

The Trial Court Correctly Interpreted and Enforced the Consent Order.

The Trial Court carefully considered the terms of the negotiated Consent Order and correctly determined that the Consent Order "precludes the filing of plaintiff Scott's March 27, 2023 complaint." Pa7 (Opinion at p. 5). Appellants, in arguing otherwise, seek to distort the meaning of the plain and unambiguous terms of the Consent Order and to render the provisions of paragraphs 3 and 4 of the Consent Order meaningless. The Trial Court properly rejected these arguments, acknowledging that, "[i]f taken as true, any deadline would have no meaning. The Consent Order is clear that the sixty-day deadline applied to both the tolling of the statute of limitations and to the opportunity to re-file 'any of the affirmative claims, counterclaims, and/or third-party claims.'" (Pa6 (Opinion)(quoting Aug. 29, 2023 Cert. of Jordan B. Kaplan, Ex. C, Consent Order at pp. 2-3, available at Pa151-152)).

Appellants are not arguing that the Trial Court overlooked or misunderstood the arguments below. Instead, they simply disagree with the Trial Court's ultimate conclusion to enforce the Consent Order's mandatory sixty-day refiling deadline.

The Trial Court correctly acknowledged that a "consent order is an agreement of the parties that has been approved by the court. As such, a consent order operates as a contract between the parties. Therefore, in construing a consent order, a court

'examine[s] the plain language of the contract and the parties' intent, as evidenced by the contract's purpose and surrounding circumstances.'" (Pa6-7 (Opinion at pp. 4-5)(quoting Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269, 292 (App. Div. 2014)).

The Opinion sets forth the appropriate standards for interpreting clear and unambiguous contracts like the Consent Order.[5] In fact, Appellants concede that, "[t]he contents of the Consent Order are clear." Pb. at p. 16, par. 2.

The Trial Court also correctly held that

> [c]ourts should read contracts "as a whole in a fair and common sense manner" and enforce them "based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract." Pascarella v. Bruck, 190 N.J. Super. 118 (App. Div.), cert. denied, 94 N.J. 600 (1983)(quoting Hardy ex. Rel. Dowdell v. Abdul-Martin, 198 N.J. 95, 103 (2009); Caruso v. Ravenswood Developers, Inc., 337 N.J. 499, 506 (App. Div. 2001)). The language of the contract, by itself, must determine the agreements force and effect if it "is plain and capable of legal construction." Id. (quoting Township of White v. Castle Ridge Dev. Corp., 419 N.J. Super. 68, 74-75 (App. Div. 2011).
>
> [Pa7 (Opinion at p. 5)].

[5] The Trial Court found the Consent Order was clear and unambiguous when it determined it did not need to consider parole evidence in connection with the motion to dismiss. See Pa6 (Opinion at p. 4)(citing precedent that parole evidence should not be considered in interpreting language that is "plain and capable of legal construction", "clear and unambiguous.").

The Trial Court properly considered all of the pertinent terms of the Consent Order. See Pa7 (Opinion at p. 5, quoting pertinent provisions of the Consent Order). Again, Appellants do not even claim that the Trial Court somehow overlooked any of the Consent Order's pertinent provisions.

In addition, Appellants are *not* challenging any of the Trial Court's factual conclusions that support the Order and the Opinion. The following factual conclusions are therefore settled for purposes of this appeal:

- "It is uncontested that the Nacirema Arbitration proceeded, and a final award was issued on July 15, 2021." See Pa7 (Opinion at p. 5, citing to Blaine Cert. (Pa41 to Pa47) which includes as Exhibit F the Nacirema Award (Pa131)). Appellants acknowledge that the arbitrator issued a "final decision" on July 15, 2021 and that the final decision was "part of the motion record." Pb12.
- "The Consent Order . . . provided each party with the option of re-filing, within sixty (60) days, a 'separate action . . . any of the affirmative claims, counterclaims, and/or third-party claims that were advanced, and not dismissed, by any respective party in this action (a 'Refiled Action')." (Pa7 (Opinion)).
- "[S]ixty days after the July 15 award was September 13, 2021." (Pa7 (Opinion)). Appellants do not challenge this factual finding.

- Appellants did not file the Complaint until March 27, 2023. (Pa3 (Opinion)). Appellants do not challenge this finding and the filed copy of the Complaint substantiates it. (Pa14 (Complaint file stamped on March 27, 2023)).
- Appellants filed the Complaint "nearly two years after" September 13, 2021. (Pa7 (Opinion)). This finding is also undisputed.

The Trial Court acknowledged that Appellants and Respondent disputed the meaning of the term "without prejudice" in the context of the Consent Order. (Pa7). In carefully considering the parties' positions, the Trial Court properly summarized (and considered) Respondent's argument – that Appellant Scott Diamond "is barred from bringing this action since he filed the instant complaint nearly two years after the September 13, 2021 deadline." (Pa7). The Trial Court also properly summarized (and considered) Appellants' argument – that "since the Consent Order dismissed the claims 'without prejudice,' 'nothing in the Consent Order bars the parties from asserting claims *after* the date identified in the Consent Order.'" (Pa8 (citing Appellants' opposition brief below at p. 1). The Trial Court also acknowledged Appellant's position "that the sixty-day deadline related only to the statute of limitations tolling." (Pa8).

The Trial Court carefully considered each of Appellants' arguments and properly rejected them in concluding that Appellants were required to file the

Complaint within sixty days of the Nacirema Award: "[Appellants'] argument is unpersuasive. If taken as true, any deadline would have no meaning. The Consent Order is clear that the sixty-day deadline applied to both the tolling of the statute of limitations and to the opportunity to re-file 'any of the affirmative claims, counterclaims, and/or third party claims." (Pa6 (Opinion)(quoting Aug. 29, 2023 Cert. of Jordan B. Kaplan, Ex. C, Consent Order at pp. 2-3, available at Pa151-152)).

This is precisely what paragraphs 1 through 5 of the Consent Order provide. Appellants' arguments otherwise are illogical distortions that seek to deviate from the plain meaning of the Consent Order's terms.

The plain meaning of paragraphs one through four of the Consent Order is manifest. First, paragraphs one through four dismiss the parties' claims pending the adjudication of the Nacirema Arbitration. Second, they define the adjudication of the Nacirema Arbitration as the date when the Nacirema Award was rendered. Third, paragraphs one through four ensure that following the adjudication of the Nacirema Arbitration, if any party opted to refile the claims they had asserted in the Chancery Action, then they were required to do so within sixty days. Fourth, they provide that if a party commenced a "Refiled Action" within the sixty-day deadline, then the responding party(ies) had the right to assert defenses, affirmative claims, counterclaims and third party claims that were raised in the Chancery Action as "Responsive Pleadings to a Refiled Action." (See Pa109-111 (Consent Order)).

The plain meaning of the first portion of paragraph five of the Consent Order is consistent with the plain meaning of paragraphs one through four: it restricts the ability of the parties to refile any claims that were or could have been asserted in the Chancery Action by ensuring that a party's Claims, Relief, or Defenses would only be preserved in the event of (i) a "Refiled Action", which is defined in paragraphs 2 and 3 to require its commencement within the mandatory filing deadline: sixty days from the issuance of the Nacirema Award; or (ii) "Responsive Pleadings in a Refiled Action," which are defined in paragraph 4 to be responsive pleadings that are filed following the commencement of a "Refiled Action". (Pa110-111 (Consent Order)).

The balance of Paragraph 5 of the Consent Order reinforces the 60-day refiling deadline by restricting any party's ability to raise defenses such as waiver, estoppel, and any other time-based doctrines or defenses, during the same limited 60-day window. (Pa111 (Consent Order)).

The Trial Court properly rejected the argument which Appellants raise once again on appeal – that "nothing in the Consent Order bars the parties from asserting claims after the sixty (60) day period." Pb. at 2. The Trial Court properly held that Appellants' argument was "unpersuasive" (Pa8 (Opinion)). The Trial Court correctly recognized that if Appellants' argument was correct, "any deadline would have no meaning." (Pa8 (Opinion)). Rather than engaging in such an unsupportable interpretation, the Trial Court found that the Consent Order "is clear that the sixty-

day deadline applied to both the tolling of that statute of limitation and to the opportunity to refile 'any of the affirmative claims, counterclaims or third party claims.'" (Pa8 at ¶ 1 (Opinion)).

The Trial Court's ruling follows the well-established rule that a contract "should not be interpreted to render one of its terms meaningless." Porreca v. City of Millville, 419 N.J. Super. 212,233 (App. Div. 2011)(quoting Cumberland County Improvement Auth. v. GSP Recycling Co., Inc., 358 N.J. Super. 484, 497 (App. Div.), certif. denied, 177 N.J. 222 (2003)). Appellants' position was rejected below, and should be rejected again now, because it would render meaningless the sixty-day refiling deadline set forth in paragraphs 1-4 and the preservation terms of the beginning of paragraph 5.

Indeed, if the parties were not concerned about imposing a specific deadline to purse a "Refiled Action" after the Nacirema Arbitration, then they would never have included a sixty-day deadline, or any other deadline, in paragraphs 1-4 of the Consent Order and the preservation terms in the beginning of paragraph 5 in the first place.

Not only did the parties include the 60-day deadline, they went through the painstaking task of describing when and how the 60 days would be triggered: within 60 days of the issuance of the Nacirema Award.

Unless a word is specifically defined in a contract, "words must be interpreted in accordance with their ordinary, plain and usual meaning." Daus v. Marble, 270 N.J. Super. 241, 251 (App. Div. 1994). The term "within" is a preposition "to indicate a situation or circumstance **in the limits or compass of**: such as (a) **before the end of** ('gone **within** a week') and (b)(1) **not beyond** the quantity, degree, or limitations of ('live **within** your income'). (See "Within," Merriam-Webster Online Dictionary).[6] Thus, the plain meaning of "within sixty (60) days" set forth in paragraph 3 of the Consent Order means "before the end of" sixty days or "not beyond" sixty days. Appellants' contention that "within" means "at any time after" sixty days runs afoul of the plain, ordinary and usual meaning of the term. Indeed, Respondent's interpretation renders "within sixty days" entirely meaningless, and imposes a completely opposition construction than the words actually used.

Thus, Appellants' continued argument begs the questions: If the Consent Order's sixty-day period is not a deadline, why was it included in the first place? Second, if the sixty-day period is not a refiling deadline, then why would the parties take the time and effort to specifically define the events that would have to occur in relation to the Nacirema Arbitration to trigger it? Third, while not considered by the

[6] https://www.merriam-webster.com/dictionary/within (emphasis added)(last visited Feb. 26, 2024).

Trial Court, why did the Appellants' counsel call the sixty-day period a "filing deadline" when drafting the order, if it was not, in fact, a filing deadline?

The answer to each of these questions is the same: because the sixty-day period is a mandatory refiling deadline. Appellants ignored it and filed the Complaint 620 days after the Nacirema Arbitration was adjudicated and 560 days after the expiration of the deadline. Thus, by the plain meaning of the Consent Order, the Complaint was properly dismissed and the Order must be affirmed.

Point II

The Trial Court's Alternative Rulings Supporting Dismissal Due to Res Judicata and Entire Controversy Are Also Correct.

The Order should also be affirmed because the Trial Court was correct in dismissing the Complaint for the two alternative reasons of res judicata and entire controversy.

A. Res Judicata Bars the Complaint.

The Trial Court carefully considered the parties' arguments and properly held that the Complaint is barred by the doctrine of res judicata. In reaching this conclusion, the Trial Court properly determined that Appellants voluntarily agreed to be bound by the Consent Order which: (a) dismissed the Chancery Action without prejudice; (b) deferred further action pending resolution of the Nacirema Arbitration; and (c) imposed a sixty-day deadline to revive the Chancery Action claims if the

parties so chose. The Court also correctly determined that the arbitration award in the Nacirema Arbitration constituted a valid and final judgment of the Nacirema Arbitration. Finally, the Court correctly determined that the Nacirema Award triggered the sixty-day refiling deadline and Appellants failed to file the Complaint within that time. (Pa3-9 (Opinion)).

Applying these facts, the Court correctly determined that the Chancery Action's claims were adjudicated "once the final award was rendered in the Nacirema Arbitration" and the "sixty-day refiling deadline" passed. (Pa8 to Pa9 (Opinion)).

Appellants' argument against the application of res judicata incorrectly places emphasis solely upon what issues were resolved in the Nacirema Arbitration and whether they were the same as those that Appellants have attempted to assert here through the Complaint. Appellants' argument misses the point.

Pursuant to the terms of the Consent Order, it does not matter what claims were decided in the Nacirema Arbitration, or even how they were decided. Instead, what matters is that the Consent Order imposes a sixty-day deadline to refile "<u>any</u> of the affirmative claims, counterclaims and/or third-party claims" that were pending in the Chancery Action when they were dismissed via the Consent Order in 2018. (Pa110 at ¶3 (Consent Order)(emphasis added)). The Consent Order fully and finally resolved how, <u>where,</u> and <u>when</u> Appellants could refile their Chancery Action

claims. The deadline for doing so commenced upon the "adjudication" of the Nacirema Arbitration, which the Trial Court properly determined to have taken place upon entry of the Nacirema Award. (Pa8 (Opinion)). Thus, once the sixty-day deadline passed, the Consent Order barred the institution of the present action. Moreover, the Consent Order required the action to be brought in the Chancery Division, not the Law Division.

There is no doubt the Consent Order is a valid and final adjudication as to when Appellants claims would be time barred and where Appellants had to go within the fixed time to preserve their claims. Once that sixty-day time period passed, the claims could no longer be asserted based upon the final ruling embodied in the Consent Order. Such a final ruling is precisely the stuff to which res judicata applies. The Trial Court did not err in this alternative finding to support dismissal of Appellants' claims.

B. The Entire Controversy Doctrine Is Applicable, and Justly Applied.

The Trial Court was also correct in concluding that the Complaint is barred by the Entire Controversy Doctrine. (Pa10 -13 (Opinion)).

The Trial Court correctly found that Appellants could have brought all of the claims in the instant matter to trial while the Chancery Action was pending. The Trial Court characterized the factual nexus between the Complaint and Appellants' dismissed claims in the Chancery Action to be "overwhelming." (Pa11). The Trial

Court also found that the claims in the instant matter were "known at the time of the original Chancery Action or were discovered throughout the extensive litigation process or known by the conclusion of the Nacirema Arbitration, which was over two years after the Consent Order was entered. At that time, [Appellants] had a sixty-day window to re-file his claim of malicious abuse of process, or to file related claims." (Pa12). Indeed, the Trial Court correctly determined that at "oral argument, counsel for [Appellants] seemingly acknowledged that most of the allegations in the instant complaint were known at the time of the Chancery litigation." (Pa12).

The Trial Court also properly concluded that the Chancery Action was "adjudicated on the merits" given "the final effect of the Nacirema Arbitration and the Consent Order which set forth a mandatory deadline for bringing a refiled action." (Pa12-13).

Thus, the Trial Court properly determined that the key elements for application of the entire controversy doctrine existed: (A) a factual or transactional nexus between two matters; (B) that the component claims were known at the time of the earlier matter; and (C) an adjudication on the merits. (Pa11 (citing, Pressler & Verniero, Current N.J Court Rules, cmt. 1 on R. 4:30A (2023), Garvey v. Township of Wall, 303 N.J. Super. 93, 100 (App. Div. 1997), K-Land v Landis Sewerage, 173 N.J. 59, 70 (2002), Arena v. Borough of Jamesburg, 309 N.J. Super. 106 (App. Div. 1998)). Indeed, Appellants concede that "an adjudication on the merits" for entire

controversy doctrine purposes occurs when "a prior action based on the same transactional facts has been tried to judgment or settled." (Pb21 (citing or quoting Arena, 309 N.J. Super. at 111 and Kaselaan & D'Angelo Assocs., Inc. v. Soffian, 290 N.J. Super. 293, 299 (App. Div. 1996)(emphasis added)).

Moreover, because the Consent Order constituted a consent judgment, it is the equivalent of an adjudication on the merits. A "consent judgment has equal adjudicative effect as one entered after trial or other judicial determination." Community Realty Mgmt., Inc. for Wrightstown Arms Apartments v. Harris, 155 N.J. 212, 226 (1998)(quoting Stonehurst at Freehold v. Township Comm. Of Freehold Twp., 139 N.J. Super. 311, 313 (Law Div. 1976)); Pope v. Kingsley, 40 N.J. 168, 173 (1963).

The Trial Court likewise properly determined that dismissal of the Complaint based upon entire controversy grounds was a fair exercise of judicial discretion. The Court properly ruled: "Here, plaintiff Scott had every opportunity to assert the instant claims at any time prior to the consent order being entered, or within the 60 days following the Nacirema arbitration award." (Pa13 (Opinion)). This is especially true given the inexplicably long delay by Appellants of 560 days beyond the deadline in attempting to revive their Chancery Action claims – a delay that, again, Appellants have never attempted to explain or otherwise justify.

As noted below, the purposes of the entire controversy doctrine include the aim to avoid "fragmentation of litigation" and "to promote fairness and judicial economy and efficiency." (Pa10 (citing Pressler & Verniero, supra, R. 4:30A at cmt. 1 and Hobart Bros. Co. v. Nat. Union Fire Ins. Co., 354 N.J. Super. 229, 241 (App. Div.), certif. denied, 175 N.J. 170 (2002)). Certainly, allowing a woefully belated revival of the claims asserted almost two years after the expiration of the mandatory sixty-day refiling deadline in brazen violation of the Consent Order without even attempting to provide any explanation or justification for their undue delay, is antithetical to the goals of the entire controversy doctrine and the interests of justice.

The Trial Court further acknowledged that if Appellants "were able to plead sufficient facts, although related to the Chancery Action, but 'unknown, unarisen or unaccrued at the time of the original action,' then these claims would not be barred under the entire controversy doctrine. But given the factual allegations of the instant complaint, and [Appellants'] prior knowledge thereof, the present claims are likewise barred under the entire controversy doctrine." (Pa11).

Point III

The Order Should Be Affirmed On the Additional Grounds of: the Consideration of Parole Evidence, Waiver, Estoppel, and Appellants' Failure to Seek to Vacate the Consent Order Under R. 4:50-1.

This Court has the ability to affirm on grounds not resolved or considered by the court below. See e.g., Isko v. Planning Bd. of Livingston Twp., 51 N.J. 162, 175 (1968) ("Although we affirm for different reasons, a judgment will be affirmed on appeal if it is correct, even though 'it was predicated upon an incorrect basis.'"), rev'd on other grounds, 183 N.J. 508 (2005).

Here, additional grounds raised by Respondent below but not relied upon by the Trial Court also warrant dismissal of the Complaint and present additional reasons to affirm the Order.

A. The Trial Court's Interpretation Of The Order Is Further Supported By Parole Evidence.

The Trial Court declined to consider parole evidence based upon well-settled law that such evidence is unnecessary to interpret a clear and unambiguous document. (Pa6 (Opinion)). While Respondent agrees that the plain language of the Consent Order establishes the Complaint was properly dismissed as untimely, the parole evidence in this matter further substantiates this conclusion.

The record below shows that on November 1, 2018, while the parties were negotiating the terms of the Consent Order, a question arose as to the Nacirema Arbitration procedure that would trigger the running of the mandatory sixty day

refiling deadline. Therefore, on November 1, 2018, Mr. Blaine (counsel for Respondent) wrote Jordan Kaplan, Esq. (counsel for Appellants) to ensure clarity on the events concerning the Nacirema Arbitration that would trigger the mandatory filing deadline. Mr. Blaine specifically asked Mr. Kaplan: "does the 60 days trigger from the final award or a judgment on the final award? We should button that up so there is no question." (Pa44-45 (Blaine Cert. at ¶13) and Pa116 (Exhibit D thereto at p. 3, # 1 E-mail Exchange)).

Later in the day on November 1, 2018, Mr. Kaplan responded and confirmed that the Consent Order set a sixty day filing deadline for Refiled Actions following a final award or other judgment terminating the Nacirema Arbitration:

> We should add language indicating a "final award or other judgment terminating the arbitration" **would trigger the filing deadline**.
>
> [Pa45 (Blaine Cert. at ¶14) and Pa115 (Ex. D thereto at p. 2 – Email Exchange) (emphasis added)].

Mr. Blaine responded later that day that he was changing the term "award" to "final award" in the Consent Order because the parties did not want a preliminary award "to trigger it," with "it" referring to the sixty-day refiling deadline. (Pa45 (Blaine Cert. at ¶15) and Pa114 (Ex. D thereto at p. 1 – Email Exchange)).

The parties made this change to the terms of the Consent Order's triggering events for the 60-day refiling deadline and concluded their negotiations over the Consent Order. (Pa45 (Blaine Cert. at ¶16)).

Twelve days later, on November 12, 2018, counsel for Appellants submitted the Consent Order to Judge Dupuis for filing. (Pa45 (Blaine Cert. at ¶17) and Pa126-129 (Exhibit E thereto - Appellants' Consent Order Submission). In so doing, counsel for Appellants acknowledged that the parties were dismissing the Chancery Action without prejudice pending the adjudication of the Nacirema Arbitration and were "preserving all rights, claims, and defenses of the party **in the event of a re-filed action**." Id. at Pa126 (emphasis added)). However, the Complaint does *not* constitute a Refiled Action as defined by paragraph 3 of the Consent Order because it was filed long after the expiration of the September 13, 2021 re-filing deadline.

Moreover, during the Nacirema Arbitration, Appellants specifically acknowledged the terms of the Consent Order when, on March 16, 2021, they explained that the Chancery Action was "dismissed without prejudice to allow this action to be adjudicated. The litigation – we're able to recommence it as soon as this litigation is adjudicated." (Da6 to Da7 (portion of Transcript of Nacirema Arbitration proceedings, attached as Exhibit A to Blaine Supp. Cert.)). In addition, the Complaint references the Consent Order, acknowledging that the claims asserted in the Complaint were subject to re-filing after the adjudication of the Nacirema Arbitration (referred to in the Complaint as "a tangentially related arbitration.") (Pa27 at ¶¶73-74 (Complaint)).

While the Trial Court did not consider this parole evidence, it was free to do so. "Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement." Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 269 (2006) (quoting Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301–302 (1953)). In Conway, the Supreme Court elaborated:

> This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety, and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded. The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance.

Conway, 187 N.J. at 269.

This parole evidence readily supports the ruling below. The parties indisputably agreed to a sixty-day refiling deadline for commencing a Refiled Action. Moreover, the parties affirmatively discussed the phrasing of the Consent Order to confirm the sixty-day period was, in fact a "filing deadline." (Pa115). Indeed, it was Appellants' counsel that used the term "deadline" while drafting the Consent Order with Respondent's counsel.

B. The Doctrine Of Waiver Supports Dismissal.

Appellants waived the right to pursue the claims set forth in Complaint due to their file to refile the Chancery Action claims before September 13, 2021. The

Consent Order (and the negotiations leading to its entry) clearly and unequivocally establish that the parties each voluntarily and intentionally waived the known right of refiling their respective claims or filing claims they could have asserted in the Chancery Action following the September 13, 2021 expiration of the Consent Order's mandatory sixty-day filing deadline.

Waiver "involves the intentional relinquishment of a known right and thus it must be shown that the party charged with the waiver knew of his or her legal rights and deliberately intended to relinquish them." Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008)(quotation omitted). It "must be supported by either an agreement with adequate consideration, or by such conduct as to estop the waiving party from denying the intent to waive." Petrillo v. Bachenberg, 263 N.J. Super. 472, 480 (App. Div. 1993), aff'd, 139 N.J. 472 (1995). Waiver does not have to be expressed, but "can occur implicitly if 'the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276-77 (2013)(quotation omitted). "Such a waiver must be done 'clearly, unequivocally, and decisively.'" Id. at 277 (quotation omitted).

Here, Appellants knowingly entered into the Consent Order through which they, along with Respondent, agreed to intentionally relinquish their known legal rights to bring the claims asserted in the Chancery Action, including those set forth

in the Complaint, after September 13, 2021. Thus, the doctrine of waiver also supports dismissal.

Notably, the Trial Court determined that the doctrine of waiver was inapplicable because the parties retained the right to commence a re-filed action in the Consent Order. (Pa9 to Pa10 (Opinion)). While the Trial Court is correct that such a right was retained, the right to commence a refiled action was confined to the sixty-day period. Appellants, knowingly and voluntarily agreed to relinquish their rights to bring the refiled claims beyond this sixty-day period. Similarly, as set forth in Point III.B., above, Appellants knowingly and voluntarily failed to institute suit within the sixty-day period. By failing to act within the sixty day period, Appellants waived the right to do so at a later time.

C. The Doctrine of Judicial Estoppel Justifies Dismissal of the Complaint.

The Trial Court also could have dismissed the matter on the basis of judicial estoppel. The Trial Court did not apply judicial estoppel as it felt Appellants were not asserting causes of action that were inconsistent with those raised in the Chancery Action. (Pa9 (Opinion)). While the claims in both matters are basically the same, Respondent contends judicial estoppel is applicable for another reason: Appellants represented in the Chancery Action that the right to assert refiled claims was limited to a sixty-day period whereas Appellants now assert that their right to

assert refiled claims has no such limit. Therein lies the inconsistency that triggers judicial estoppel.

In general, "in the absence of fraud or mistake, parties to stipulations and agreements entered into in the course of judicial proceedings are ordinarily estopped to take positions inconsistent therewith." Trenton Oil Co., Inc. v. Dries, 30 N.J. Super. 122, 128–29 (Law. Div. 1954) (quoting 31 C.J.S. Estoppel, s 120, page 384). Parties are not "permitted to 'blow both hot and cold,' taking a position inconsistent with prior conduct, if this would injure another, regardless of whether that person has actually relied thereon." Heuer v. Heuer, 152 N.J. 226, 237 (1998) (quotation omitted).

Although judicial estoppel normally does not apply to matters resolved by consent because such resolution often does not "impl[y] judicial endorsement of either party's claims or theories," Kimball Intern., Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 608 (App. Div. 2000), certif. denied, 167 N.J. 88 (2001), the Consent Order is different. This is because "[a] consent order is, in essence, an agreement of the parties that has been approved by the court." Hurwitz, 438 N.J. Super. at 292. A consent order is "an agreement of the parties under the sanction of the court as to what the decision shall be." Harris, 155 N.J. at 226. It therefore "has equal adjudicative effect as one entered after trial or other judicial determination." Ibid.; see also, DEG, LLC v. Township of Fairfield, 198 N.J. 242, 261 (2009).

The Consent Order is a judicial endorsement of terms negotiated and drafted by counsel for all parties. Appellants appeared in the Chancery Action requesting entry of the Consent Order and affirmatively agreeing to abide by the terms of the Consent Order that they themselves helped draft and thereafter submitted to the Chancery Court for filing. Appellants were successful having the Chancery Court, in November of 2018, enter the Consent Order and thereby agree with their position regarding the disposition of the Chancery Action and the limitations placed upon all parties' ability to revive their claims.

Where, as here, "a party successfully asserts a position in a prior legal proceeding, that party cannot assert a contrary position in subsequent litigation arising out of the same events." Kress v. La Villa, 335 N.J. Super. 400, 412 (App. Div. 2000), certif. denied, 168 N.J. 289 (2001).

Here, Appellant voluntarily asked the Chancery Court to affix its rights and responsibilities in resolution of the earlier Chancery Action. The Chancery Court provided the requested relief and entered the final, non-appealable Consent Order. As a result, Appellant is judicially estopped from now seeking to ignore or alter the terms of the Consent Order.

D. Appellants Failed To File a Motion To Vacate Required By Rule 4:50- 1 Because the Application Would Have Been Denied.

The finality of the Consent Order's sixty-day deadline could not be disturbed absent Appellants' timely and proper request to vacate the Consent Order under Rule

4:50-1. Even if Appellants filed an application to vacate the Consent Order, it would have been denied on account of (a) the over four-year period that elapsed between the November 14, 2018 entry of the Consent Order and March 23, 2023, when Appellants filed the Complaint; (b) Appellants' inability to justify the delay and their wholesale failure to provide any explanation whatsoever as to the reason why they waited 620 days to refile the Chancery Action claims in the Complaint; (c) the Consent Order and its September 13, 2021 filing deadline were mutually drafted in November of 2018 while Appellants were fully aware of the restrictions placed on the parties' ability to pursue a Refiled Action; and (d) the substantial prejudice that Respondent would sustain because of Appellant Scott Diamond's spoliation of evidence. (See supra, Procedural History at Statements of Facts, No. 7, at pp. 10-11).

As Appellants incorrectly filed the Complaint in the Law Division instead of filing a motion to vacate in the Chancery Division as the Consent Order required, dismissal of the Complaint was further warranted. Respondent notes that this argument, along with each of the above points, were raised below and generally referenced by the Trial Court in its framing of the parties' arguments (Pa4 at top) but not otherwise addressed in the Trial Court's Opinion. (See Da19 to Da26 (portion of Respondent's Reply Brief raising argument in issue below) and 1T17:5-18 and 1T19:19 to 20:25).

"**A consent judgment 'is** an agreement that the parties desire and expect will be reflected in, and be enforceable as, **a judicial decree that is subject to the rules generally applicable to other judgments and decrees**.'" DEG, 198 N.J. at 261 (2009)(quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992)(Emphasis added). Consent judgments are authorized by Rule 4:42-1. Midland Funding, LLC v. Giambanco, 422 N.J. Super. 301, 310-11 (App. Div. 2011).

A consent judgment is "an agreement of the parties under the sanction of the court as to what the decision shall be." Harris, 155 N.J. at 226 (quotation omitted). "[A] consent judgment has equal adjudicative effect as one entered after trial or other judicial determination. As such, **a consent judgment may only be vacated in accordance with R. 4:50-1**." Ibid. (quoting Stonehurst at Freehold, 139 N.J. Super. at 313 and other quotations omitted (emphasis added)); Pope, 40 N.J. at 173.

Following the July 15, 2021 adjudication of the Nacirema Arbitration, the September 13, 2021 sixty-day filing deadline for a Refiled Action passed without any of the parties filing a Refiled Action. Appellants admit this. Therefore, as of September 14, 2021, the parties no longer had the ability to file a Refiled Action without seeking to vacate the Consent Order under Rule 4:50-1.

Appellants failed to seek such relief. Further, in opposing the motion to dismiss, Appellants failed to show that they were entitled to such relief under the exacting standards of Rule 4:50-1. Indeed, Appellants have chosen not to offer any

explanation, whatsoever, for their extreme delay. There was no evidence of mistake, inadvertence, surprise, or excusable neglect. And no such request was timely made. Cf. Deutsche Bank Trust Co. Ams. v. Angeles, 428 N.J. Super. 315, 319 (App. Div. 2012)(time deadlines); DEG, 198 N.J. at 263 (standards for "mistake"); Mancini v. EDS, 132 N.J. 330, 335 (1993) (standards for "excusable neglect").

Conclusion

For the foregoing reasons, it is respectfully submitted that the Appellate Division dismiss Appellants' appeal and affirm the Order entered below.

Respectfully submitted,

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Attorneys for Respondent Warren Diamond

/s/ Matthew K. Blaine
By:_____
Matthew K. Blaine, Esq.

Dated: February 26, 2024

SCOTT DIAMOND and EDWARD STREET HOLDINGS, LLC Plaintiffs, vs. WARREN DIAMOND, Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000346-23 SAT BELOW: Lisa M. Walsh, A.J.S.C. (Superior Court of New Jersey, Chancery Division, Union County)

REPLY MEMORANDUM OF LAW BY PLAINTIFFS/APPELLANTS SCOTT DIAMOND AND EDWARD STREET HOLDINGS, LLC

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PRELIMINARY STATEMENT

Trial Courts are not infallible and have the capacity to reach erroneous conclusions. That irrefutable truth is the reason why our judicial process includes appellate review. This case represents the precise circumstance, where our Appellate Court should reverse an erroneous decision of the Trial Court below.

This appeal focuses upon the narrow issue, as to whether a Consent Order entered in the Prior Litigation bars Plaintiffs' Complaint in this action. While the Trial Court erroneously concluded that the Consent Order *did* bar Plaintiffs' Complaint in this lawsuit, the Trial Court's decision is wrong for multiple reasons, each of which were set forth, in detail, in Plaintiffs' initial Appellate Brief.

Rather than oppose Plaintiffs' instant appeal by addressing each material error committed by Trial Court, Warren merely parrots the same arguments that he made below, and baldly asserts that the Trial Court's decision should be affirmed. With respect to certain arguments advanced in Plaintiffs' Appellate Brief, however, Warren ignored them entirely, tacitly acknowledging that the Trial Court's decision lacks substantive support. Nonetheless, each of Warren's arguments are without merit, and should be, ultimately, disregarded.

There is nothing complex or mysterious about the set of facts now under review. The Trial Court committed reversible error by: (i) re-writing the terms of the Consent order to include nonexistent language; (ii) assuming facts unsupported

by the record; and (iii) incorrectly applying New Jersey law. As the decision of the Trial Court is manifestly incorrect and contrary to New Jersey law, this Court should exercise its de novo appellate review to reverse the order below, dismissing Plaintiffs' Complaint, and ensure that a miscarriage of justice does not occur in this case.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Plaintiffs rely upon the procedural history and statement of facts set forth in their moving papers, and incorporate those statements, as if fully set forth herein.

[1] As was the case with Plaintiffs' initial Appellate Brief, the Procedural History and Statement of Facts have been combined in the interest of judicial economy and given the limited issues on appeal.

LEGAL ARGUMENT

POINT I

THE DECISION BELOW SHOULD BE REVERSED BECAUSE THE TRIAL COURT IMPROPERLY ADDED NONEXISTENT TERMS TO THE CONSENT ORDER [Pa1 – Pa13]

The Trial Court committed a reversible error when it dismissed Plaintiffs' Complaint based upon the Consent Order. Specifically, the Trial Court ignored established New Jersey law by re-writing the Consent Order, in two key respects.

First, the Trial Court improperly supplemented the Consent Order, so as to provide that the failure to file claims within the "sixty-day deadline" resulted in a dismissal of Plaintiffs' claims *with prejudice*. The Trial Court committed a clear error because the phrase "with prejudice," is wholly absent from the Consent Order. (Pa150 - Pa152). As such, it was improper under the Rules of Court to find that the Consent Order resulted in a dismissal of Plaintiffs' claims *with* prejudice. *See* R. 4:37-1 ("**Unless otherwise specified in the order**, the dismissal is **without** prejudice.") (*emphasis added*). Importantly, Plaintiffs' Appellate Brief addressed this critical error. (*See e.g.* Pb18). Warren, however, ignored this issue and offered no argument to the contrary, so as to avoid highlighting the prevailing Rule of Court and accompanying judicial policy. Warren's choice to ignore that unassailable fact, however, does not make it go away. New Jersey law is clear: where the phrase "with prejudice" is absent, a court *cannot* find that the consent order resulted in a dismissal

with prejudice. Accordingly, the Trial Court erred by finding that the parties agreed to dismiss *any* successive claims – whether filed before or after the sixty-day deadline - with prejudice.

Second, the Trial Court erred when it re-wrote the Consent Order to find that "any deadline [regarding the re-filing of claims] would have no meaning[,]" unless "the sixty-day deadline applied to both the tolling of the statute of limitations and the opportunity to re-file 'any of the affirmative claims, counterclaims, and/or third-party claims.'" (Pa8). While Warren echoes the Trial Court's finding, without any substantive explanation, there can be no question that the Trial Court's finding lacks substantive basis. Indeed, *this Court* has analyzed comparable consent orders in other lawsuits, and concluded that language similar to that which is present in the Consent Order - concerning the re-filing of dismissed claims – may be interpreted as applying *only* to the tolling of the statute of limitations or repose, without affecting a parties' ability to re-file such claims after the stated deadline. Specifically, in *O'Loughlin v. National Community Bank*, 338 N.J. Super 592 (App. Div. 2001), this Court analyzed a consent order that dismissed a prior lawsuit *without* prejudice and permitted the plaintiff to re-file its claims in a new action within a stated period. The consent order in *O'Loughlin* provided that "[i]f the plaintiffs file another complaint (the "New Action"), exactly the same as the First Complaint, within 15 days of the signing of this Order, then the defendants will waive any additional defenses of

Statute of Limitations and Laches solely to the extent they could have been raised as defenses to the New Action." *Id.* at 600. Importantly, nothing in the consent order analyzed in *O'Loughlin*, like in the case here, stated that any claims filed beyond the 15 day deadline would be barred. *Ibid.* Thus, when the plaintiff in *O'Loughlin* filed a new complaint well after the 15 day deadline, this Court noted that "[t]he judge did not prevent plaintiffs from filing a new complaint." *Id.* at 601. Rather, this Court held that "[i]t is elementary that **a dismissal without prejudice adjudicates nothing and does not constitute a bar to re-institution of the action**, subject to the constraint imposed by the statute of limitations. *Id.* at 603 (*emphasis added*). Stated differently, this Court concluded that the consent order in *O'Loughlin* was enforceable, in that it established deadlines where a party could re-file claims under the benefit of a tolling agreement, but that any claims filed after that deadline *could* be filed, but without the benefit of the agreed-upon tolling.

O'Loughlin conclusively demonstrates that the Trial Court below erred, when it found that the Consent Order would "have no meaning" if it were interpreted to apply only to the tolling of the statutes of limitations and repose. Indeed, this Court, in *O'Loughlin*, clearly found "meaning" in a consent order that is nearly identical to that at issue here. Thus, as was the case in *O'Loughlin*, the Consent Order here should be interpreted strictly, based upon its clear language: that claims asserted after the sixty (60) day period do not benefit from the agreed-upon tolling, and are subject

to defenses based upon the statutes of limitations and repose. (Pa150 - Pa152). Any contrary interpretation would run afoul of the reasoning in *O'Loughlin* and constitute reversible error.

On its face, the Consent Order is a mechanism by which the parties agreed *only* to toll applicable statutes of limitation and repose, pending adjudication of a tangentially related arbitration. (Pa150 - Pa152). As all parties agree, the Consent Order is clear and unambiguous. By improperly adding nonexistent terms to the Consent Order, so as to dismiss Plaintiffs' instant Complaint *with prejudice*, the Trial Court disregarded both the Rules of Court and New Jersey law, so as to unnecessarily limit Plaintiffs' "free access to courts." *See Banach v. Cannon*, 356 N.J. Super. 342 (Ch. Div. Mon. Cty. 2002) ("The court also must be careful that in protecting a plaintiff's rights by issuing such relief it does not unnecessarily limit any affected parties' free access to courts."). As the Trial Court's decision is inconsistent with established New Jersey law, this Court should reverse the decision of the Trial Court and reinstate Plaintiffs' Complaint in its entirety.

POINT II

THE DECISION BELOW SHOULD BE REVERSED BECAUSE THE TRIAL COURT'S ALTERNATIVE JUSTIFICATION FOR DISMISSING PLAINTIFFS' COMPLAINT LACKS SUPPORT UNDER NEW JERSEY LAW [Pa1 – Pa13]

A. The Trial Court Erroneously Found that the Doctrine of *Res Judicata* Bars the Complaint

As set forth in Plaintiffs' Appellate Brief, the doctrine of *res judicata* applies **only** where there was a valid and final adjudication on the **merits of a claim asserted** between specific parties. (*See* Pb18 – Pb19 (*citing Velasquez v. Franz,* 123 N.J. 498 (1991)). Indeed, Plaintiffs' Appellate Brief is replete with citations to New Jersey Supreme Court precedent, setting forth the bounds of the doctrine of *res judicata*, and demonstrating that the doctrine cannot apply here, as: (i) the Prior Litigation did not adjudicate any claims on their merits; and (ii) the Nacirema Arbitration did not adjudicate issues concerning the Forged Agreement, the parties' respective membership interests in ESH, or Warren's unabashed abuse of process. (*See* Pb18 – Pb19). Warren fails to cite any law to the contrary, and he cannot do so.

Faced with the indisputable truth, that the doctrine of *res judicata* is inapplicable, Warren asks this Court to "re-define" the doctrine of *res judicata* entirely, such that "it does not matter what claims were decided in the Nacirema Arbitration, or even how they were decided." (Db22). Warren's proposition is antithetical to New Jersey law, and should be rejected. *See e.g. Central R. Co. of*

N.J. v. Needl, 26 N.J. 172 (1958) ("The doctrine of Res judicata is well designed to preclude the relitigation of issues which have been fairly and finally determined, **but it ordinarily does not come into play where the parties have not had an adjudication on the ultimate merits**.") (*citing Meier Credit Co. v. Yeo,* 129 N.J.L. 82, 86 (E. & A. 1942)*; Longo v. Reilly,* 35 N.J. Super. 405, 410 (App. Div. 1955)).

Warren further attempts to stretch the bounds of the doctrine of *res judicata* by arguing – without a single citation to New Jersey law – that the "Consent Order is a valid and final adjudication as to when Appellants claims would be time barred and where Appellate has to go within the fixed time to preserve their claims." (Db23). Warren's unsupported argument is erroneous as a matter of law. As set forth above, there is no provision in the clear and unambiguous terms of the Consent Order requiring the Prior Litigation to be dismissed *with* prejudice if not re-filed within 60 days after the Nacirema Arbitration. Regardless, the doctrine of *res judicata* applies only to a valid and final adjudication **on the merits of a claim**, not as to the "when" or "where" a successive claim could be filed. *See e.g. Velasquez v. Franz,* 123 N.J. 498 (1991)). Thus, Warren's argument wholly lacks merit, and should be rejected in its entirety.

It is undisputed that ESH was not a party to the Nacirema Arbitration, rendering the doctrine of *res judicata* inapplicable. Moreover, it is undisputed that, neither the Nacirema Arbitration nor the Consent Order resulted in an adjudication

on the merits of claims raised in the Prior Litigation, rendering the doctrine of *res judicata* inapplicable. As such, this Court should reverse the decision of the Trial Court below, find the doctrine of *res judicata* inapplicable to the instant matter, and reinstate Plaintiffs' Complaint in its entirety.

B. The Trial Court Erroneously Applied the Entire Controversy Doctrine

In *Woodward-Clyde Consultants v. Chemical and Pollution Sciences, Inc.*, 105 N.J. 464 (1987), the New Jersey Supreme Court held that "a dismissal without prejudice is not an adjudication on the merits and does not bar reinstitution of the same claim a later action." *Id.* (*citing Malhame v. Borough of Demarest,* 174 N.J. Super. 28 (App. Div. 1980)). As such, the Entire Controversy Doctrine cannot serve to bar a successive claim based upon a prior lawsuit that was dismissed without prejudice. *Id.*

While the Trial Court and Warren repeat, *ad nauseam*, the contention that the Consent Order constituted a dismissal of the Prior Litigation *with* prejudice, or that the Nacirema Arbitration somehow constituted an adjudication of the Prior Litigation on its merits (despite no overlap between the issues decided in the Nacirema Arbitration and the claims in the Prior Litigation), their repetition does not convert those arguments into a fact. Instead, as set forth above, it is clear that the Trial Court committed reversible error, as the Consent Order constitutes *only* a dismissal *without* prejudice as to the Prior Litigation, and because *nothing* decided

in the Nacirema Arbitration constituted an adjudication on the merits of any claim asserted in this lawsuit or in the Prior Litigation. Thus, consistent with established New Jersey law, the Entire Controversy Doctrine cannot serve to bar Plaintiffs' successive lawsuit.

As Warren acknowledges, the Entire Controversy Doctrine is intended "to promote fairness and judicial economy and efficiency." (Db26). Certainly, it would be manifestly *unfair* to apply the Entire Controversy Doctrine to this case, as the Doctrine, as a matter of law, does not serve as a bar to claims that were dismissed *without* prejudice. Accordingly, this Court should reverse the decision of the Trial Court below, find the Entire Controversy Doctrine inapplicable, and reinstate Plaintiffs' Complaint in its entirety.

POINT III

THE COURT SHOULD REJECT WARREN'S ALTERNATE ARGUMENTS FOR DISMISSAL AS UNSUPPORTED BY NEW JERSEY LAW

A. The Court Should Reject Warren's Attempt to Invoke the Doctrine of Judicial Estoppel

The purpose of judicial estoppel is to protect "the integrity of the judicial process." *Cummings v. Bahr*, 295 N.J. Super. 374, 387 (App. Div. 1996). Thus, the doctrine of judicial estoppel *only* arises when a party advocates a position contrary to a position it successfully asserted in the same or a prior proceeding. *Chattin v. Cape May Greene, Inc*., 243 N.J. Super. 590, 620 (App. Div. 1990). As a result, if

the court in a prior lawsuit *did not* accept an inconsistent position, or if no such position was ever advanced in a prior lawsuit, "application of [judicial estoppel] is unwarranted because no risk of inconsistent results exists. Thus, the integrity of the judicial process is unaffected; the perception that either the first or second court was misled is not present." *See Kimball Intern., Inc. v. Northfield Metal Products*, 334 N.J. Super. 596, 607 (App. Div. 2000) (alteration in original) (*quoting Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982).

As set forth above, the Consent Order lacks *any* provision, stating that future claims are barred, if brought more than sixty (60) days after the completion of the Nacirema Arbitration. (Pa150 - Pa152). Indeed, nothing in the Consent Order provides that any of Plaintiffs' claims – now or in the future - should be dismissed with prejudice. (*Id.*). Thus, as it relates to the Consent Order, Plaintiffs' position in the Prior Litigation is *identical* to the position Plaintiffs take here. As a result, Warren cannot identify any position or representation in the Prior Litigation that is inconsistent. Accordingly, the doctrine of judicial estoppel in inapplicable to the instant facts, and should not serve as a basis to dismiss Plaintiffs' Complaint.

B. The Court Should Reject Warren's Attempt to Invoke the Doctrine of Waiver

Under New Jersey law, "[w]aiver is the voluntary and intentional relinquishment of a known right," *Knorr v. Smeal*, 178 N.J. 169 (2003). Thus, "when a contract contains a waiver of rights … the waiver 'must be clearly and

unmistakably established.'" *Morgan v. Sanford Brown Inst.*, 225 N.J. 289, 308-309 (2016) (*quoting Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2014)). The contractual waiver of rights provision "must reflect that [the party] has agreed clearly and unambiguously to its terms." *Atalese*, 219 N.J. at 443 (alteration in original) (*quoting Leodori v. CIGNA Corp*., 175 N.J. 293 (2003)).

Undeniably, *nothing* in the Consent Order constitutes an intentional waiver of rights, or any waiver of rights whatsoever. Instead, the Consent Order serves a specific purpose: it establishes a mechanism to toll the statutes of limitation and repose during the pendency the Nacirema Arbitration. In this regard, the Consent Order clearly provides, that any claim filed after the sixty (60) day period would *not* benefit from the agreed-upon tolling, and would be subject to defenses based upon the statutes of limitations and repose. (Pa150 - Pa152). Indisputably, ***nothing in the Consent Order states that any claims asserted after the sixty (60) day period would automatically be subject to dismissal***. Indeed, as set forth above, the concept of any dismissal "with prejudice" is absent from the Consent Order. Importantly, despite Warren's argument to the contrary – that the parties "contractually agreed to voluntarily relinquish their known legal rights[,]"– *no facts* support Warren's conclusion, and he fails to cite to any evidence in the record to support that claim.

As was the case when Warren instituted litigation and offered perjured testimony based upon a document he knowingly forged, here, Warren is once again

attempting to deceive the Court and pervert the judicial process. Without question, the plain language of the Consent Order is abundantly clear, that it is devoid of any "waiver of legal rights." Accordingly, the doctrine of waiver in inapplicable to the instant facts, and should not serve as a basis to dismiss Plaintiffs' Complaint.

C. The Court Should Reject Warren's Attempt to Invoke the Parol Evidence Rule

While the parties agree that the express language of the Consent Order is clear and unambiguous, Warren nonetheless attempts a "Hail Mary" to craft an alternative narrative, in the event that this Court properly reverses the decision of the Trial Court. Specifically, Warren argues that the Court should consider parol evidence to change the contents of the Consent Order. Warren's argument is without merit, and should be rejected for two reasons.

First, as the Consent Order is clear and unambiguous, the Parol Evidence Rule bars Warren from introducing extrinsic evidence in an attempt to vary **the terms** of the Consent Order. *See e.g. Atlantic Northern Airlines v. Schwimmer*, 12 N.J. 293 (1953) ("The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance.").

Second, even if the Court were to consider the e-mail attached to counsel's certification, which it should not, that document fails to create an ambiguity in the clear language of the Consent Order, which would permit the Court to consider

evidence outside of the four corners of the Consent Order. *See e.g. Conway v. 287 Corporate Ctr. Assocs.,* 187 N.J. 259, 268–70 (2006) (holding that resorting to parol evidence is improper where, as here, a contract is clear an unambiguous). Warren argues that counsel's statement – referencing a "filing deadline" – operates as a term in the Consent Order. (*See* Pa115). It does not. Instead, consistent with Plaintiffs' position throughout this litigation, counsel's e-mail statement – concerning a "filing deadline" – references the deadline to file a new action under the Consent Order *while still receiving the benefit of tolling.* (*See* Pa115). As such, counsel's statement is consistent, does not alter the plain meaning of the Consent Order, and should not serve as a basis to dismiss Plaintiffs' Complaint.

D. The Court Should Disregard Warren's Arguments Concerning Vacating the Consent Order Under R. 4:50-1 as Irrelevant

As set forth at length herein and in Plaintiffs' initial Appellate Brief, the Consent Order served only to dismiss claims in the Prior Litigation *without* prejudice and toll the limitations period, giving the parties the option to refile their claims by a date certain, without the fear that those claims would be barred by the statutes of limitations or repose. (Pa150 – Pa152).

Based upon clear language of the Consent Order, Warren's repeated argument – that Plaintiffs should have moved to vacate the Consent Order under R. 4:50-1 – constitutes a "red herring," and should be disregarded. Indeed, nothing in the Consent Order bars the parties from filing claims *after* the dates set forth in the

Consent Order. (Pa150 – Pa152). Thus, it is clear that, the filing the instant Complaint neither ran afoul of the Consent Order, nor required vacating the Consent Order. As such, Warren's insistence that Plaintiffs should have filed a motion under R. 4:50-1 (which the Trial Court correctly disregarded), wholly lacks merit, and should be rejected in its entirety.

CONCLUSION

For the reasons set forth herein, along with those advanced in Plaintiffs' initial Appellate Brief, this Court should reverse the decision of the Trial Court below, and reinstate Plaintiffs' Complaint, in its entirety.

Respectfully submitted,

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Dated: March 11, 2024 By: _____

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