Superior Court of New Jersey
Appellate Division

A-3063-21

MILL ROAD SOLAR PROJECT LLC,
NEW ENERGY VENTURES INC.,
GHG TRADING PLATFORMS, INC.,

Appellants,

v.

CEP SOLAR, LTD., MILFORD SOLAR FARM LLC,
FWH ASSOCIATES, P.A., PURE POWER ENGINEERING, INC.,
GARY R. CICERO, MARK BELLIN, ESQ.,
NEW JERSEY RESOURCES, TOWNSHIP OF HOLLAND &
ITS PLANNING BOARD, and FIBERVILLE ESTATES, LLC,

Respondents.

On Appeal From Orders of the Law Division, Bergen County, Hon. Robert C. Wilson, J.S.C., BER-L-2029-19

APPELLANTS' BRIEF

Michael S. Kimm, Esq. (#053881991)
KIMM LAW FIRM
333 Sylvan Avenue, Suite 106
Englewood Cliffs, NJ 07632
Tel 201-569-2880
Email msk@kimmlaw.com
Attorneys for Appellants-Plaintiffs

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INTRODUCTION

Appellants/plaintiffs respectfully submit this brief on appeal from the Law Division's various Orders dismissing all defendants named in the first amended complaint, either before amendment or after amendment, along with an Order denying Appellants' leave to file a second amended complaint.

The Orders adverse to Appellants were chronologically entered in the Table of Orders and Judgment Appealed from and are restated as follows:[1]

(1) Order filed 8-30-2019, granting dismissal and/or summary judgment in favor of defendant FWH Associates and defendant Pure Power, Pa972, Pa984

(2) Order filed 9-23-2021, granting summary judgment in favor of defendants CEP Solar, Milford Solar, Gary R. Cicero, and Mark Bellin, Pa3036

(3) Order filed 12-7-2021, granting dismissal "without prejudice" in favor of defendant Fiberville Estates,[2] and denying

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1 In addition to the Plaintiff's Appendix, transcripts have been filed as follows:
T1: 8-30-2019 motion; T2: 11-21-2019
T3: 9-10-21 motion; T4: 11-19-21 motion

2 Although the record reveals one or more "dismissal without prejudice" Orders, which appear not to have been typographical errors at the time of their entry, the motion judge ultimately entered a "final judgment." Pa3458. For further clarity, the Panel should consider related appeal number 3517-21, where the second amended complaint was essentially re-filed against Fiberville Estates, after leave to amend was denied without prejudice below. As discussed in appeal number 3517-21, the second action resulted in pre-answer dismissal under Rule 4:6-2(e), "with prejudice," based upon the prior pendency of this action, even though Fiberville had been dismissed from this action "without prejudice."

plaintiff's motion for leave to file a second amended complaint, Pa3298

(4) Order filed 4-5-2022, granting defendant Holland Township's motion to dismiss; along with Order filed March 7, 2022, vacating the March 3, 2022, declaratory judgment Order rendered against Holland Township, Pa3389

(5) Order filed 4-5-2022, dismissing defendant New Jersey Resources from the first amended complaint, Pa3419

The Panel should reverse and remand because the motion judge misunderstood the nature of the solar energy business and substituted the court's mistaken, narrow views regarding ownership and value in the components of the solar-energy business. Ultimately, because the motion judge disregarded significant fact issues, rather than submitting the case to a jury for determination of the pivotal, disputed facts, the dismissals were erroneous.

STATEMENT OF THE CASE

Appellants/plaintiffs have maintained throughout the dispute below that solar-energy developmental rights exist apart from an interest in the land (such as a leasehold interest or by fee ownership) and those solar-energy developmental rights are capable of being sold and traded as commodities, regardless of whether solar panels are, or are not, installed on any particular parcel of land. The motion judge held a fundamentally flawed view that, even though defendant Fiberville Estates had (1) sold certain solar-energy developmental rights to Appellants/Plaintiffs for approximately $700,000 and (2) had entered into a land/lease for

potential solar farm where the solar panels may ultimately be physically planted, the lack of a land/lease ipso facto results in forfeiture of the solar-energy development rights, and thereby disregarded their separate and independent existence and value apart from a land/lease. See Pa1 (complaint); Pa1604 (FAC); Lemus Cert. 8-31-21, Pa2532; Kimm Cert re SAC, 10-6-21, Pa3088.

Appellants maintain, as they argued below, that they paid approximately $1 million for two "bundles" of assets below from defendant Fiberville Estates: (1) Appellants acquired, in perpetuity, the absolute ownership/assignment of solar-developmental rights via the architectural and zoning plans, engineering study, an interconnection agreement with a regional power authority, and a power supply/purchase agreement with a local utility (namely PSE&G/NJ), at a one-time cost of approximately $700,000 reflected by an Assignment Agreement (hereinafter, "Solar Rights"); and (2) a 20 year lease agreement whereby Appellants were to pay an annual rent in September commencing 2016 (the "Leasehold Rights"), with a security deposit to cover any default of non-payment. Pa2532 to Pa2847.

Three years after selling the first category of rights, the so-called "Solar Rights," defendant Fiberville engaged in a fraudulent, unethical, and, indeed, unlawful act of purporting to re-sell those very same Solar Rights to Appellants' direct competitor and potential joint-venturer covered by a non-disclosure agreement. The basis of this shocking shell game whereby the Solar Rights purchased by Appellants in perpetuity were later sold again

to another purchaser was that defendant Fiberville Estates asserted that, because it owned the land where Appellants or Appellants' successors and/or assigns would have built a solar farm on defendant Fiberville Estate's land, somehow Fiberville Estates should be deemed to have the innate right to "re-sell" the Solar Rights that had been sold in perpetuity to Appellants. Pa1990 to Pa2273.

In the sample case of a restaurant that lost its store lease, or was evicted for non-payment of rent, it does not mean the tenant ipso facto forfeits its ownership to its liquor license, its tables and chairs, its equipment, its trademark and copyrights, its architectural and engineering plans to remodel and renovate the premises. Such basic principles of commerce and business law are understood and applied daily across the 50 states. Regrettably, the motion judge misunderstood this basic principle and held, ipso facto, that, because Appellants had "lost" the tenancy on Fiberville Estate's land, there was no remedy for Fiberville's re-sale of Appellants' Solar Rights; no remedy against the buyer who effectively asserted ownership over the Solar Rights paid-for and owned by Appellants; and no remedy for all the events that flowed from the deeply flawed analysis.

Because the case below was dismissed on multiple involuntary motions to dismiss, the allegations of the controlling pleading, i.e., the first amended complaint (FAC), along with all reasonable inferences perceived from it, should be deemed true. See Seidenberg v. Summit Bank, 348 N.J. Super. 243, 249-50, 791 A.2d 1068 (App.

Div. 2002). The FAC states essentially the following:

Plaintiffs Mill Road Solar Project, LLC, GHG Trading Platforms, Inc., and New Energy Ventures, Inc., are developers of solar energy rights.

While "solar energy" is often associated with "solar panels," solar panels are merely the physical manifestation of all the non-physical assets that have been compiled over a long process involving significant expense and efforts. One of the assets involved in the solar energy filed is known as Solar Renewable Energy Credits (SRECs) (pronounced s-recs). Pa6-7, Pa394 (CEP admission), Pa1055, Pa1128-29, Pa1407-26, Pa1471, Pa1487 (page 121), Pa1663, Pa1674-80, Pa1684, Pa1757, Pa2507-2575, Pa2776-92, Pa2816-17, Pa2839-41, Pa2876, Pa2925, Pa2931, Pa3091 (SAC, passim).

Another is known as the "interconnection" which is the right to distribute (sell) solar energy from a particular field through the regional "power grid" so that the solar energy that is cultivated on a particular solar farm can be sold throughout the region, locality, or even nationally. The process of obtaining SRECs and interconnection are complex, lengthy, and costly. The process of building a solar farm, to deploy those assets to the physical solar panels, is but a final stage in this lengthy and costly process. Pa6-7, Pa394 (CEP admission), Pa643, Pa681, Pa1004, Pa1025, Pa1040-43, Pa1128, Pa1135, Pa1409-12, Pa2915

Yet another tradeable, sellable asset is the Wholesale Market Participation Agreement (WMPA) (pronounced "wompa"). Pa1129, Pa1409-12, Pa2915.

In 2015 to 2017, plaintiffs were developing solar energy in New Jersey and came to learn that a land owner in Holland Township, Fiberville Estates, had been developing solar energy rights intending to use its own brownfield land (land otherwise useless) to ultimately develop a solar field. Plaintiffs entered into negotiations to purchase all of the solar energy assets and to lease the brownfield land from Fiberville Estates. Ultimately plaintiffs (1) purchased Fiberville Estates' solar energy rights in perpetuity for $600,000 plus costs and (2) leased the brownfield land for a term of years at an annual rent of $200,000.00. At the closing, plaintiffs paid $1,006,000.00 to Fiberville Estates. Pa2480.

In September 2015, plaintiffs entered into a Non-Disclosure Agreement (NDA) with CEP Solar. The purpose of the NDA was to protect confidential information regarding plaintiffs' solar project with Fiberville Estates as well as other potential projects plaintiffs were involved in. Pa2, Pa7, Pa396 (CEP admission), Pa1250, Pa1417-27, Pa1621, Pa2484.

In September 2017, plaintiffs were in the midst of negotiating an outright purchase of the brownfield land from Fiberville Estates. Pa2471-72; Pa2536. During these negotiations, plaintiffs learned that the CEP Defendants had approached Fiberville Estates directly, as early as June 2017, and induced Fiberville Estates to sell to CEP Defendants, the same set of solar rights that plaintiffs had already acquired in perpetuity as well as the land-leased of the brownfield from Fiberville Estates. CEP

Defendants thus essentially "acquired" the same set of rights that had been acquired by plaintiffs, and did so by using the information plaintiff had disclosed in the NDA. Pa2536 ff.

As facts developed, plaintiffs came to learn that, after entering into an identical solar-rights and land-rights agreement with Fiberville Estates, CEP Defendants then proceeded to retain the two engineering firm that had been servicing plaintiffs' needs before the Holland Township planning board and related proceedings. Pa2550-59.

Because the appeal implicates a series of involuntary dismissal Orders, the appropriate appellate review is non-deferential, de novo review. Smith v. Millville Rescue Squad, 225 N.J. 373, 397, 139 A.3d 1 (2016). As required by case law, the Panel should consider the merits of each issue presented the case with no deference paid to the motion judge Orders and analyses.

Ultimately, when each of the questions presented in this appeal are applied to the rigorous de novo review, Appellants maintain that the only rational conclusion is reversal and remand as a matter of law.

STATEMENT OF FACTS

Plaintiffs Mill Road Solar Project, LLC, GHG Trading Platforms, Inc., and New Energy Ventures, Inc., are developers of solar energy rights. While "solar energy" is often associated with "solar panels," solar panels are merely the physical manifestation of all the non-physical assets that have been compiled over a long process involving significant expense and efforts.

In 2015, plaintiffs came to learn that Fiberville Estates was in the process of completing the process of obtaining the three types of assets discussed above: Solar Renewable Energy Credits (SRECs);an "interconnection agreement"; and a WMPA, using a brownfield land it owned in Holland Township, New Jersey. The following allegations were set forth in the first amended complaint as well as in the proposed second amended complaint:

SRECs AS VALUABLE, TRADED COMMODITIES

Within the renewable energy field, it is common knowledge that certain renewable energy rights, known as Solar Renewable Energy Credits (SRECs or S-RECs) are tradeable commodities in their own right, without regard to any physical solar farm or solar energy generator systems. FAC ¶ 17, Pa1611; Pa2550-59 (Lemus Cert Opp SJ)

In its elemental concept, an SREC is an energy credit you can earn from your state for energy produced by your solar energy system, even those installed in residential property solar systems. According to https://www.solarpowerauthority.com/srecs-explained:

> When You can earn a single SREC when your solar panel system produces 1,000 kWhs of electricity. If you were to get 5,000 kWhs of solar energy in a year (a fair estimate for an average-size 5 kW system), you would earn five SRECs. Each SREC you earn can then be sold back to utilities.
>
> An SREC is separate from the electricity your home solar system produces. That means you can use all of your solar electricity and still receive SRECs.
>
> How much is an SREC worth?
>
> It depends. SRECs are a tradable commodity, so their sell price is determined by market supply and demand. An increase of SRECs will decrease prices; a shortage of SRECs will increase prices. Prices can range from less

> than $50 to more than $300 per SREC. Higher prices benefit you, but there are controls in place to ensure a (somewhat) stable market.

FAC ¶ 18, Pa1611; Pa2550-59 (Lemus Cert Opp SJ).

According to a SREC industry association, "SREC Trade," see https://www.srectrade.com/markets/rps/srec/new_jersey, the New Jersey SREC market said to be the largest in the United States and the State has been a pioneer in the renewable energy field for almost two decades. Companies engaged in the renewable energy field, both large and small, both publicly-traded and privately-held, strive to launch or acquire a presence and ability to trade in SRECs in New Jersey for years now. FAC ¶ 19, Pa1611; Pa2550-59 (Lemus Cert Opp SJ).

Defendant Cicero and his companies, along with their lawyer Bellin and his firm GTB Partners, scoured the State of New Jersey in search of SREC opportunities. FAC ¶ 20, id.

PLAINTIFFS' LONG-RUNNING INVESTMENT AND EFFORTS TO ESTABLISH SREC TRADING ENTERPRISE IN NEW JERSEY

Solar project development is a complex endeavor. Developers must juggle numerous interrelated development activities that are often carried out in parallel, such as: obtaining a suitable site; designing the plant; maximizing energy yield; securing power purchasers; obtaining all necessary permits, authorizations and permissions from the utilities, and local, state and federal agencies; negotiating and executing numerous contracts; and obtaining financing, which is generally contingent on the availability of tax incentives. It can take years to develop a

utility scale project and significant financial investment. FAC ¶ 21, Pa1612; Pa2550-59 (Lemus Cert Opp SJ).

Based upon years of study and data analyses, Lemus knew that New Jersey presented lucrative business opportunities in the solar energy field. In 2015, Lemus organized Mill Road Solar as a special purpose entity to develop a utility-scale solar energy farm of approximately 8.982 to 10 kw DC (the "Solar Project"). Based upon the availability of land at the Fiberville Estates, LLC, Mill Road was to be located on leased land at Block 2, Lot 1.02 and Block 4, Lot 1 in the Township of Holland, County of Hunterdon, State of New Jersey (the "Project Site" or the "Land"). FAC ¶ 22, Pa1612; Pa2550-59 (Lemus Cert Opp SJ).

The registration-certification process to obtain SREC trading rights is complex, costly, and with a high barrier to entry. Under the leadership of CEO Alex Lemus (Lemus), plaintiff Mill Road Solar began its quest to establish a SREC trading operation in New Jersey since approximately 2013. After investing extensive time in traveling from San Diego, California, and back, and visiting countless potential sites for the operation of a solar farm, Lemus identified and developed the site where Mill Road's business would be established, at the land owned by the Fiberville Estates, LLC, 10 Mill Road, in Milford, New Jersey. FAC ¶ 23, id.

Through hard work, investment of time, and diligence, on or about April 10, 2015, Lemus learned that Fiberville Estates, LLC, by its principal Stanley Sackowitz, filed an application, for

development of a solar farm at the Hughesville Mill Site, 10 Mill Road, Milford, New Jersey, Block 2, Lot 102, and Block 4, Lot 1, in the Township of Holland. Local electric distributor was identified as First Energy. This land was known at the time to be within an industrial zone with a utility scale power plant. FAC ¶ 24, Pa1623; Pa2550-59 (Lemus Cert Opp SJ).

While that application was pending, and before the Fiberville Estates could develop the conceptual solar farm, plaintiffs purchased and acquired those rights outright and, separately, leased the land from the Fiberville Estates, on which to operate a solar farm. FAC ¶ 25, id.

The subject land owned by Fiberville Estates was an industrial, brown-field, which had no other beneficial use, other than as a solar farm. The solar rights of Fiberville Estates were acquired on April 15, 2015, through GHG Trading Platforms under a written Sale/Purchase Agreement with Fiberville Estates LLC; and the contract recited the following essential elements:

> WHEREAS, Seller is the "Wholesale Market Participant" of the Wholesale Market Participation Agreement dated July 11, 2011, PJM Project Queue #W1-082 ("WMPA") between PJM Interconnection, LLC, Jersey Central Power & Light (JCPL), and FVE, and
>
> WHEREAS, Seller is the beneficiary of the FE Impact Study prepared by FirstEnergy Corp. and JCPL, dated October, 2011 for the Mill Road (W1-082) Generation Project (1A); and
>
> WHEREAS, Seller has agreed to sell to Purchaser, all of its right, title and interest in and to the WMPA and the lA, and any and all other assets related to construction and operation of a solar farm on Seller's real property (the "Project"; and

> WHEREAS, Purchaser has agreed to purchase the Project from Seller, all for a price, terms and conditions as set forth hereinafter; and
>
> WHEREAS, the Seller is the owner of certain real property located at 10 Mill Road, Milford Township, Hunterdon County, New Jersey 08804 consisting of approximately 74 non-contiguous acres, as described on the map attached hereto and made part hereof (the "Property"); and
>
> WHEREAS, Seller and Purchaser have agreed to enter into a long term lease agreement for the property in the form attached hereto and made part hereof (the "Lease").

Exhibit 1. FAC ¶ 26, Pa1613-14; Pa2550-59 (Lemus Cert Opp SJ).

The Sale/Purchase Agreement provided for consideration of $600,000 plus reimbursement "all of the costs and expenses incurred by Seller in bringing the Project to date, ..." Having tendered payment of the contract price, plaintiffs became the owner of the Wholesale Market Participation Agreement (WMPA). FAC ¶ 27, Pa1614; Pa2550-59 (Lemus Cert Opp SJ).

On June 17, 2015, Mill Road obtained the right to earn Solar Energy Renewable Credits ("SREC") from the New Jersey Board of Public Utilities ("BPU") pursuant to the New Jersey Solar Act, N.J.S.A. 48:3-87 Subsection (t), which is specific to brownfields. The SREC's are a separate and distinct asset that belongs to Mill Road and therefore plaintiffs. FAC ¶ 28, id.

On June 18, 2015, the NJ Public Board of Utilities issued a Clean Energy Order under the applicable three (3) docket numbers regarding the program to implement SRECs at the Hughesville Mill Site, and duly issued the following findings and conclusions, in relevant part, which effectively granted a certification upon the satisfaction of stated-conditions:

> The Board FINDS that NJDEP has not required additional remediation or conditions for construction of the proposed solar facility on area AOC K. The Board DIRECTS Staff to issue full certification to the project upon the applicant's demonstration that the project, as-built, does not go beyond the limits of AOC K, and that the project does not and will not disrupt or change, without prior written permission from the NJDEP, any engineering or institutional control that is part of a remedial action for the site, and does not otherwise interfere with any remediation at the site. The applicant shall file as-built documentation and allow for an on-site inspection. After the applicant has received full certification and satisfied all SRP requirements, the Board DIRECTS Staff to issue a New Jersey Certification Number to the project for purposes of SREC creation, provided that all requirements of N.J.A.C. 14:8-2.4 are met. [Emphasis added.]
>
> The Board WAIVES the provisions of the SREC Registration Program in the Renewable Portfolio Standard rules requiring submittal of an initial registration package within ten days of installation contract execution at

ADDRESSEE ONLY — CONFIDENTIAL & PRIVILEGED

> N.J.A.C. 14:8-2.4© and the registration length of one year at N.J.A.C. 14:8-2.4 (f) for the Hughesville Mill project. The Board FURTHER GRANTS a modification of the one year registration period provided in the current SRP to two years to accommodate the longer construction period for Subsection t projects. The Board DIRECTS the applicant to submit the SRP registration package within fourteen days of the effective date of this order. [Emphasis added.]

Exhibit 2, FAC ¶ 29, Pa1614-15; Pa2550-59 (Lemus Cert Opp SJ).

The three Docket Numbers established by plaintiffs In the Matter of the Implementation of L. 2012, C. 24; In the Matter of the Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(T)-A Proceeding to Establish a Program to Provide SRECS to Certified Brownfield, Historic Fill And Landfill Facilities; Fiberville Estates, LLC Hughesville Mill Site; were Docket Nos. EO12090832V, EO12090862V and QO15010070. These were assets of plaintiffs. FAC

¶ 30, Pa1615; Pa2550-59 (Lemus Cert Opp SJ).

On July 10, 2015, Fiberville Estates, LLC, by Stan Sackowitz, wrote a letter to Alex Lemus and GHG Trading Platforms, Inc., a letter memorializing that Fiberville had assigned its SREC Registration Application along with the solar site design drawings prepared by Horizon Solar Energy, to GHG Trading, which was countersigned by Alex Lemus for confirmation. Because GHG Trading Platform purchased those rights outright, under the Assignment Agreement discussed above, the attendant SRECs now became permanent rights of plaintiffs. FAC ¶ 31, id.

On August 5, 2015, the NJ Clean Energy Program administrator issued a letter confirmation to Fiberville Estates, LLC, advising that Registration No. SRP42661 had been accepted, for a 8,982 Mwdc solar electric system to be installed at 10 Mill Road, Milford, New Jersey, at the Hughesville Mill Site. FAC ¶ 32, Pa1616; Pa2550-59 (Lemus Cert Opp SJ).

On August 17, 2015, Mill Road obtained assignment of an Interconnection Agreement JCP&L (the "Interconnection Agreement") which allows the owner of the Solar Project to connect to the utility. The Interconnection Agreement is a separate and distinct asset that belongs to Mill Road and therefore to plaintiffs. FAC ¶ 33, id.

Contemporaneously, Mill Road obtained assignment of a Wholesale Market Participation Agreement (the "WMPA") with PJM Interconnection, LLC ("PJM"), and Jersey Central Power & Light Company ("JCP&L"), a FirstEnergy company, PJM Queue #W1-082, which

allows it to sell the electricity generated at the Project Site to the local utility. The WMPA is a separate and distinct asset belonging to Mill Road and therefore to plaintiffs. FAC ¶ 34, id.

The development of a solar farm implicates a new, different set of rights and facilities unrelated to the SRECs, including WMPA and an "Interconnection Agreement" and the land on which to operate the solar farm. FAC ¶ 35, id.

On September 1, 2015, independent of the WMPA sale/purchase transaction, the same parties, Fiberville Estates, LLC, as lessor, and Mill Road Solar Project, LLC, as tenant, entered into a written "Land Lease" for the Hughesville Mill Site's 70 acres. Plaintiffs intended to install and operate a solar energy facility on that land. The lease called for a 20 year term, in consideration of an annual rent of $200,000.00 per year, triple net with an annual escalation of 1.5% of the prior year's rent amount, due on each September 1. FAC ¶ 36, Pa1616-17; Pa2550-59 (Lemus Cert Opp SJ).

On September 21, 2015, Mill Road Solar and Fiberville Estates prepared a Closing Statement, apparently in anticipation of closing title to the assignment of SREC and commencement of the Land Lease. The Closing Statement showed a balance due to Fiberville Estates, LLC, in the sum of $1,006,000.00. As shown by the Bill of Sale, the consideration was paid, and the closing of title was concluded. Exhibit 3. FAC ¶ 37, Pa1617; Pa2550-59 (Lemus Cert Opp SJ).

On October 27, 2015, Mill Road Solar Project, LLC, filed a Milestone Reporting Form that revised the solar power system size from "Original 9782.06" to "Revised 8.982," with a forecast to

launch operations in 2016. FAC ¶ 38, id.

On October 27, 2015, the milestone report was transmitted to the NJ Clear Energy administrator's office, and that office, by staff worker, "Melissa," acknowledged:

> State of NJ]]Proof that SREC SRP #42661 belongs to Mill Road
> From: Melissa Zito
> Sent: Thursday, October 29, 2015 1:36 PM
> To: EvoEarth <alemus@evoearth.com>
> Subject: RE: SRP 42661 September 2015 Milestone reporting form
>
> Alex,
>
> I believe that my colleague, Andrew Lee responded to you that we did in fact receive the attachments for the milestone report. I wanted to follow up to make sure that you knew we have it and we have updated our system according to your submittal.
>
> Thank you!
> Best,
> Melissa

Exhibit 4; FAC ¶ 39, Pa617.

On November 17, 2015, Princeton Engineering was retained by a letter-retainer signed by plaintiff Mill Road Solar Project, LLC. FAC ¶ 40, Pa1617-18.

On January 15, 2016, Mill Road filed an application for a variance and preliminary and final site plan approval with the Holland Township Planning Board (the "Zoning Variance Application") seeking to use the industrial-zoned land as a solar energy farm. FAC ¶ 41, Pa1618.

Mill Road retained Princeton Engineering, which was later replaced by Pure Power and FWH in March, 2017, to prepare the engineering drawings and site plans (the "Site Plans"). Mill Road

retained counsel and other professionals to handle the Planning Board representation. The Zoning Variance Application and the Site Plans are marketable assets that belong to Mill Road. FAC ¶ 42, id.

On February 5, 2016, Mill Road Solar Project, LLC, received a memorandum from Masur Consulting, PA, as advisors for the Holland Township Planning Board, stating that it had reviewed Mill Road Solar Project, LLC's submissions, but due to alleged "incompleteness" the application for site plan approval should be "denied" by the Planning Board. FAC ¶ 43, id.

Eventually, the Planning Board's impasse was resolved, and a full set of site plan application was submitted. Mill Road and the professionals appeared before the Planning Board on 12 separate occasions. FAC ¶ 44, id.

At a meeting on May 8, 2017, the Planning Board granted preliminary and final site plan approval to the applicant Mill Road Solar Project LLC to construct and operate the Solar Project at the Project Site (the "Approval".) The Planning Board's Approval was based upon the Application and Site Plans and various AHI's owned by plaintiffs. On June 12, 2017, the Planning Board adopted a Resolution implementing its May 8, 2017, Approval, stating:

HOLLAND TOWNSHIP PLANNING BOARD RESOLUTION
MILL ROAD SOLAR PROJECT, LLC
BLOCK 2, LOT 1.02 AND BLOCK 4, LOT 1
Page 17
June 12, 2017

WHEREAS, on May 8, 2017, the Holland Township Planning Board voted with respect to the Application and the attendant requested relief, as follows:

A. TO GRANT THE FOLLOWING:

> 1. Variance relief pursuant to N.J.S.A. 40:55d-70c(2), from Section 100-21.M(2)(b) of the Holland Township Land Use Ordinance which requires that a 300' riparian buffer be provided on both sides of a C-1 designated waterway whereas the Applicant requests only a 150' riparian buffer.

Exhibit 5; FAC ¶ 45, Pa1619.

Of the 10 members of the Planning Board, the Approval was unanimously consented by nine and one member did not vote as "Absent/Ineligible." FAC ¶ 46, id.

As stated above, in the solar energy industry, the Application, Resolution, Lease, Site Plans, Planning Board Approval, WMPA, Interconnection Agreement and SREC's are all independently marketable assets and collectively comprise the "Solar Rights." These bundle of "Solar Rights" are contractual in nature and belong to the entity that contracted for or acquired those rights. Here, the only entity that acquired or contracted for those rights was plaintiff Mill Road Solar. FAC ¶ 49, Pa1620.

Not only are Solar Rights divisible and capable of being traded as rights and commodities when they are completed, they also can, and often are, sold at any time during the development process. FAC ¶ 50, id.

By July 2016, Mill Road had multiple written offers to purchase the Solar Rights for approximately Thirty Five Cents ($.35) per Watt. Annexed here is a Membership Interest Purchase Agreement (MIPA) with a third-party for $3 million, one of plaintiffs' written offers received in 2016, dated July 30, 2016. FAC ¶ 51, id.

After years of efforts by Lemus and his entities, the 2015 acquisition of solar rights from Fiberville Estates, the Planning Board filings and efforts that resulted in the May 8, 2017, Approval vote, followed by the June 12, 2017, Planning Board Resolution memorializing the Approval, it was a fact that by mid-2017, plaintiff Mill Road had completed the pre-construction establishment of the Solar Project. FAC ¶ 52, id.

THE NON-DISCLOSURE AND NON-CIRCUMVENTION AGREEMENT BETWEEN PLAINTIFFS AND CEP-DEFENDANTS

In September 2015, while plaintiffs' million-dollar purchase-plus-land lease transaction had consummated with Fiberville Estates, and plaintiffs had received the $3 million offer, plaintiffs' principal Lemus was approached by defendant Gary Cicero for a possible sale of the rights. Cicero's company, defendant CEP, known to be one of the largest players in the solar energy industry, saw an attractive business opportunity to acquire a turn-key operation. FAC ¶ 53, Pa1621.

On September 28, 2015, plaintiff GHG Trading Platforms entered into a Non-Disclosure Agreement (NDA), with, and as induced by, defendant CEP Solar. Exhibit 6. The stated purpose of the NDA was to protect confidential information that GHG and its affiliates, including Mill Road and NEV, disclose to CEP Defendants "in connection with an investment in one or more solar renewable energy projects." Id., p. 1. FAC ¶ 54, id.

By its terms, the NDA provided for non-circumvention of plaintiffs' rights by limiting the use of the information disclosed

under the NDA to "carry out discussions concerning and furthering of any business relationship between the parties." (Section 2.) Any disclosure to third-parties or use of the materials for CEP-defendants' own gain were prohibited. (Sections 2, 3). CEP-Defendants were required to return all documents and information provided by plaintiff GHG Trading Platforms when the "discussions" were complete. (Section 6.) FAC ¶ 55, id.

Paragraphs 1 and 2 of the NDA/NCA state:

> 1. **Definitions.** "Confidential Information" means any and all information disclosed by either Party or the Party's agents, affiliates, employees, officers, managers, members, limited partners, directors, consultants, attorneys, accountants, advisors, and potential capital partners (collectively, while acting in such capacity, "Representatives") including but not limited to information related to financial models, cost estimates and analyses, financial or legal structuring approaches, financing techniques, customers, suppliers, investors, clients, potential clients, facilities, financial information, projections, business plans, marketing information, other operations, and any other information.
>
> 2. **Restriction.** The Receiving Party agrees not to use the Confidential Information disclosed to it by the Disclosing Party for any purpose except to carry out discussions concerning, and the furthering of, any business relationship between the Parties. . . .

FAC ¶ 56, Pa1621-22.

After the NDA/NCA was duly executed by the parties, in reliance upon it, between September 2015 and late 2017, plaintiff GHG Trading Platforms disclosed all aspects of its proprietary and confidential information pertaining to plaintiffs' ongoing establishment of a solar farm under the auspices of Mill Road Solar. Plaintiffs' confidential disclosures included plans, applications, contracts, negotiation histories, contact lists, and

other proprietary records pertaining to the acquisition of the Fiberville Estates' SREC rights and the separate 20-year lease for the land, municipal and state filings and permit applications, and other proprietary materials. FAC ¶ 57, Pa1622.

On October 9, 2017, the Planning Board granted a six month extension of the June 12, 2017, Resolution through June 12, 2018, based upon an application for extension filed by plaintiff Mill Road Solar. Exhibit 7. As the "discussions" between the parties continued, plaintiffs ensured that the Solar Rights remained viable. FAC ¶ 58, Pa_____.

During September to December 2017, Cicero held multiple discussions with Lemus in which Cicero stated that he and his entities would be interested in acquiring plaintiffs' SREC rights, and related assets, from plaintiffs and the two agreed to continue working towards such mutual goal. Several offers to buy from Cicero to Lemus were rejected by plaintiffs as grossly inadequate. FAC ¶ 59, Pa1622-23.

THE CONFIDENTIALITY COVENANT IN THE LAND-LEASE

In late September 2017, one of the pieces of proprietary information plaintiffs disclosed to CEP Defendants was the fact that the $200,000 annual rent payment which became due for September 1, 2017, was in arrearage. This disclosure was made in good faith during the "discussions" contemplated by the NDA so indicate that Mill Road was interested in being acquired but instead of using the disclosure for such "discussion," Cicero schemed to steal the Mill Road Solar Rights. FAC ¶ 60, Pa1623.

Plaintiffs were negotiating with Fiberville to purchase the land instead of continuing with the lease. Significantly, the land lease contained a "CONFIDENTIALITY" covenant in Section 10.9:

> 10.9. Confidentiality. Lessor shall maintain the strictest confidence (a) the terms of (including the amounts payable under) this Agreement; (b) any information regarding Lessee's operations; and (c) any other information that is proprietary or that Lessee requests be held confidential, in each such case whether disclosed by Lessee or discovered by Lessor ("Lessee Confidential Information"). . . . Lessor shall not use any Lessee Confidential Information for its own benefit or publish or otherwise disclose it to others; provided, however, that Lessor may disclose Lessee Confidential Information to (I) Lessor's personal advisors, (ii) any prospective purchase of the Property, (iii) in any legal proceeding to enforce Lessor's rights under this Agreement, or (iv) pursuant to lawful process, subpoena or court order; so long as in making such disclosure Lessor advises the person receiving the Lessee Confidential Information of the confidentiality thereof and obtains the agreement of said person not to disclose such Confidential Information. . . . The parties shall consult each other and use all reasonable efforts to agree on the content and manner of any public disclosure. [Emphasis added.]

SAC ¶ 228, Pa3143.

Rather than using all such confidential disclosures for the contemplated "discussions" toward his acquisition of plaintiffs' rights, defendant Cicero perceived an "open opportunity" to grab the Fiberville Estates' land by circumventing the very Non-Disclosure and Non-Circumvention Agreement his company's COO had executed, and perceived the ability to grab the SREC rights and related rights belonging to plaintiffs. FAC ¶ 62, Pa3106.

As Lemus and plaintiffs came to learn subsequently, while CEP-Defendants were playing the coy role of confidential business interlocutor, in reality they were the "wolf" disguised in the

"grandma" outfit ready to steal the bag of goods for "grandma." Cicero and his minions approached the owner of Fiberville Estates and began direct negotiations to "lease" the land that had been leased for 20 years to plaintiffs. CEP-Defendants were uniquely possessed of knowledge that, because of GHG Trading Platform's internal strife and suspended ability to pay the annual rent, a declaration of "default" under the lease by the landlord would likely enable them to thereafter obtain a same or similar lease from the Fiberville Estates. FAC ¶ 63, id.

Based upon the confidential disclosures and confidential interactions between plaintiffs and CEP-Defendants, Cicero and his minions knew that the Fiberville Estates' land was unsuited for any purpose other than for solar energy or open, undeveloped land, and that the potentiality of displacing plaintiffs from the land was readily available to them. FAC ¶ 64, id.

By late 2017, rather than pursuing their stated intentions of negotiating a price to acquire plaintiffs' solar rights, Cicero and his minions, including defendants' counsel Bellin, began to scheme to steal plaintiffs' business assets for nothing. FAC ¶ 65, id.

As facts developed, plaintiffs came to learn that, after entering into an identical solar-rights and land-rights agreement with Fiberville Estates, CEP Defendants then proceeded to retain the two engineering firm that had been servicing plaintiffs' needs before the Holland Township planning board and related proceedings. Those engineering firms, defendants FWH Associates and defendant Pure Power, were named in the original complaint for aiding and

abetting CEP Defendants and Fiberville's theft of plaintiffs' assets purchased outright from Fiberville. Despite the fact that these two engineering firms were charged with aiding and abetting theft of Appellants' business assets, which they held as custodians for Appellants, the motion judge erroneously held that the mere fact that they were "professionals," somehow necessitated the filing of an affidavit of merit, even though an AOM is not required for common knowledge matters and an AOM motion should not have been entertained without an antecedent Ferriro conference(s).

PROCEDURAL HISTORY

On March 18, 2019, plaintiffs filed this action and sought provisional relief by Order to show Cause, to enjoin the various defendants from interfering with plaintiffs' solar-energy developmental rights and land use rights. An Order to show cause was issued March 20, 2019, Pa42, but substantive relief was ultimately denied and the Order to show cause vacated, and the case was conferenced for discovery trial under Track 2 originally, modified to Track 3, and later modified to Track 4. Pa77, Pa372.

At various intervals, the case thereupon was litigated on papers and all defendants were dismissed pre-trial by motions to dismiss or by motions for summary judgment. The specific orders granting relief are appended to the notice of appeal, and will be explicated in detail in plaintiffs' brief.

On April 1, 2019, defendant FWH Associates filed an answer. Pa63.

On April 23, 2019, defendant Pure Power filed an answer.

On May 1, 2019, CEP Solar and Milford Solar filed their answer. Pa391.

On June 21, 2019, the court entered a case management Order. Pa495.

On July 19, 2019, FWH Associates filed a motion for summary judgment invoking the Affidavit of Merit Act. On August 2, 2019, defendant Pure Power also filed a motion to dismiss on the same ground. On August 30, 2019, those motions were granted. Pa496-999.

On September 26, 2019, CEP Solar and Milford Solar filed their motion for summary judgment. Pa1000. On November 12, 2019, plaintiffs opposed. Pa1079. On November 18, 2019, CEP/Milford filed their reply papers. On November 22, 2019, the court denied these defendants' motion for summary judgment. Pa1113.

The parties proceeded to pretrial discovery. During discovery, plaintiffs filed a motion to compel discovery and CEP/Milford defendants' motion to compel discovery, and the court granted those motions on September 25, 2020. Pa1382.

On June 15, 2021, plaintiffs substituted counsel and Kimm Law Firm appeared. Pa1397.

On June 23, 2021, plaintiffs filed a motion for leave to file their first amended complaint. That was opposed by CEP/Milford defendants on July 1, 2021. The court granted leave to file a first amended complaint on July 9, 2021. Pa1400.

Plaintiffs' first amended complaint was served and filed July 19, 2021. Pa1604.

On July 30, 2021, and August 5, 2021, CEP/Milford defendants,

along with newly served defendant Gari R. Cicero and Mark Bellin filed their motion for summary judgment and motion to dismiss. On August 30, 2021, plaintiffs opposed. On September 23, 2021, the court granted summary judgment and denied the new defendants' motion to dismiss as moot. Pa1781-3058.

On September 8, 2021, John DiLorio, Esq., appeared for newly-served defendant Fiberville Estates. On October 12, 2021, Fiberville Estates filed an answer. Pa3035.

On September 27, 2021, John P. Gallina, Esq., filed an answer on behalf of the Township of Holland. Pa3059.

On October 6, 2021, plaintiffs filed a motion for leave to file their second amended complaint. Pa3085.

On October 28, 2021, defendant Fiberville Estates filed a cross-motion to dismiss the complaint. Pa3217.

On December 7, 2021, the court granted Fiberville Estates's motion to dismiss, without prejudice, and denied plaintiff's motion to file a second amended complaint. Pa3312.

On February 14, 2022, plaintiff filed a motion to reinstate case to the active track and for declaratory judgment against Holland Township and New Jersey Resources. Pa3334.

On February 24, 2022, Holland Township filed a motion to dismiss. Pa3343.

On March 3, 2022, the court granted declaratory judgment against Holland Twp; and on March 7, 2022, the court vacated the declaratory judgment order. Pa3387, 3389.

On March 24, 2022, New Jersey Resources filed a "cross-motion

for sanctions." Pa 3390.

On March 29, 2022, plaintiffs opposed Holland Twp's motion and New Jersey Resources' motion. Pa3401.

On April 5, 2022, the court entered two orders dismissing the first amended complaint and denying New Jersey Resources' motion for sanctions. Pa3419, 3420, 3442.

On May 17, 2022, plaintiffs submitted a proposed final judgment; and on May 23, 2022, final judgment was entered. Pa3458.

QUESTIONS PRESENTED

1. Whether the motion judge erred by granting summary judgment dismissing defendants Pure Power and FWH Associates under the Affidavit of Merit Act.

2. Whether the motion judge erred by granting summary judgment dismissing defendants CEP Solar, Milford Solar, Gary R. Cicero and Mark Bellin on disputed facts.

3. Whether the motion judge erred by dismissing Fiberville Estates for failure to state a claim, without prejudice, only for the defendant to be dismissed with prejudice when a separate action was filed by Appellants/Plaintiffs following the dismissal without prejudice in the action below.

4. Whether the motion judge abused judicial discretion by denying Appellants' leave to file their second amended complaint.

5. Whether the other erroneous Orders should be deemed subsumed or moot upon reversal and remand.

Among these 5 chronologically-identified Orders, Issues 2 and 3 are clearly most important as those issues "set the stage" for

the other issues/Orders, even though Issue 1 arises from the first ruling adverse to Appellants/Plaintiffs. Based upon this distinction, Appellants' argument begins with a consideration of Issues 2 and 3 before the others.

ARGUMENT

I

BECAUSE APPELLANTS' BUNDLE OF SOLAR RIGHTS, SOLD IN PERPETUITY BY FIBERVILLE ESTATES AND ASSIGNED TO, AND OWNED SOLELY BY, APPELLANTS, WAS FRAUDULENTLY "RE-SOLD" BY FIBERVILLE, AND FRAUDULENTLY "BOUGHT" BY CEP DEFENDANTS, THE ORDERS DISMISSING THESE DEFENDANTS BELOW WERE GRAVELY ERRONEOUS AS A MATTER OF LAW [Pa3088, Pa2501]

The essence of the motion judge's rulings concerning defendant Fiberville Estates who re-sold the rights already sold to plaintiffs, and the CEP Defendants who claim to have "bought" plaintiffs' rights from Fiberville, is the mistaken assumption that, contrary to market principles, the solar-energy development rights could not exist separate and apart from the "solar panels" to be planted on a specific parcel of land. Stated differently, the motion judge was of the view that, because Fiberville owned the land which had been leased to plaintiffs, once the lease was claimed to have been "terminated" by plaintiffs' alleged breach of non-payment, all of the rights that had been sold in perpetuity to plaintiffs had, automatically, forfeited by plaintiffs.

A. Fiberville Estates Should be Reinstated

Fiberville sold plaintiffs the solar rights at a significant cost. Its land lease contained a confidentiality covenant.

Despite these facts, Fiberville claims that it had the right to re-sell the rights already acquired by plaintiffs and that it could sell plaintiff's rights by breaching the confidentiality covenant.

The original complaint, as filed March 18, 2019, by plaintiffs' predecessor attorneys, did not include Fiberville Estates. Fiberville was originally omitted as plaintiffs had no reason to suspect Fiberville had committed any unlawful acts against plaintiffs; and plaintiffs simply could not fathom that a seller who received $700,000 for assignment of the rights in perpetuity (quite apart from the separate, six-figure land lease) would have the criminal audacity to re-sell those very same rights to a second purchaser.

The first amended complaint (FAC), amended July 19, 2021, had added the name "Fiberville Estates" so as to see discovery but still had not stated direct, substantive counts for lack of evidence other than tangential suspicion because plaintiffs still had no real basis to overcome the fact that plaintiffs were "the owners" of the solar rights purchased from Fiberville Estates outright, in perpetuity, under an "assignment agreement" with a "bill of sale."

In late December 2021, however, plaintiffs went to the Holland Township Planning Board under an OPRA request and obtained 729 pages of documents, and obtained significant records that had been withheld or not reviewed in discovery with CEP Defendants; and it was then that plaintiffs added substantive counts against Fiberville Estates in the SAC. Pa3088 (motion to file SAC).

In the FAC and SAC, Counts 1 through 9 were retained as filed by plaintiffs through their prior counsel. In the FAC, Counts 10 to 15 were added. In the SAC, we then added Counts 16 to 18 based upon the evidenced-based suspicions and conclusions reached from the OPRA records.

The new counts in the SAC allege CEP defendants and Fiberville Estates conspired and acted in furtherance of their conspiracy. Indeed, Fiberville Estates enabled CEP to steal plaintiff's business assets by breaching the CONFIDENTIALITY covenant in the lease and feeding plaintiff's information to CEP Defendants in violation of the lease. Those facts are stated in the proposed Second Amended Complaint and explicated in the brief filed October 7, 2021.

Among the evidence shown in the SAC is an email dated December 1, 2017, in which CEP Defendants' counsel and co-defendant Mark Bellin, Esq., writing the Planning Board that "Millford acquired the rights to the Mill Road Solar Farm recently." SAC ¶ 104; this was the first discovery of "smoking gun" evidence showing that CEP Defendants were holding themselves out as the "new owners" of the solar-energy development rights that had been acquired by plaintiffs and for which these defendants were "negotiating" their stated intention to purchase from plaintiffs, while they deployed a scheme of duplicity.

Further, in paragraph 116 of the SAC, we quoted from a July 31, 2018 email of defendant Bellin to the Planning Board, "I am pleased to file with you a fully executed copy of an agreement

between the Milford Solar Farm developer, the Milford Solar farm landowner and the Historical Association regarding the disposition of the 6 acre lot to be created by the minor subdivision . . ." In SAC paragraph 117, we then showed that a certain "Memorandum of Understanding with the Pohatcong Heritage Society dated July 25, 2018, in the fourth recital, refers to a "lease," by reference:

> WHEREAS FE has entered into a Ground Lease with MSF dated October 17, 2017 pursuant to which MSF shall develop, construct and operate a 10 MW DC grid supply solar farm (the "Project") on portions of the Premises as the same are depicted on Exhibit 1 attached hereto and made a part hereof (the "Ground Lease"); and [emphasis in SAC ¶117.

It is from this revelation that we came to understand that "FE," Fiberville Estates had entered into a lease with CEP Defendants for the land covered by plaintiffs' land/lease, which was the subject of a "default notice letter," dated October 17, 2017, with no judicial declaration of breach or eviction then or thereafter.

Through hard work, investment of time, and diligence, it was plaintiffs (by their principal Lemus) who identified Fiberville Estates as being interested in selling its solar-energy developmental rights in perpetuity. It was plaintiffs that entered into the purchase agreement and paid $600,000 plus costs or almost $700,000. It was plaintiffs who entered into an independent land/lease with Fiberville.

Plaintiffs became the owners of the Wholesale Market Participation Agreement dated July 11, 2011, PJM Project Queue #W1-082 ("WMPA") between PJM Interconnection, LLC, Jersey Central

Power & Light (JCPL), and FVE. Fiberville had sold all of its right, title and interest in and to the WMPA and the lA, and any and all other assets related to construction and operation of a solar farm on Seller's real property; and those developmental rights were purchased in perpetuity without regard to the land/lease which was separately made by the parties.

Plaintiffs paid $600,000 plus reimbursement "all of the costs and expenses incurred by Seller in bringing the Project to date, ..." for the solar-energy developmental rights including the WMPA. They also came to own the Solar Energy Renewable Credits or "S-RECs" issued by the New Jersey Board of Public Utilities ("BPU") pursuant to the New Jersey Solar Act, N.J.S.A. 48:3-87 Subsection (t), which is specific to brownfields.

These solar-energy developmental rights including WMPA and S-Recs are commodities capable of being traded among industry participants and competitors and are valuable as commodities and assets. FAC ¶ 27, Pa_____.

Apart from those assets purchased outright, plaintiffs entered into a land/lease and paid $200,000 rent and $100,000 security deposit to Fiberville Estates.

On or about September 21, 2015, plaintiff GHG tendered a total of $1,006,000.00 for GHG's purchase of the Solar Rights ($706,000.00) and Mill Road's security deposit ($100,000.00) and the annual rent from September 1, 2015, to August 30, 2016 ($200,000.00). In September 2016, plaintiff Mill Road paid $200,000.00 for the annual rent under the land lease, through

August 31, 2017.

These dual transactions sale-and-lease were memorialized in a September 21, 2015, Closing Statement showing plaintiffs had paid Fiberville Estates, LLC, a total sum of $1,006,000.00. As shown by the Bill of Sale, the consideration was paid, and the closing of title was concluded. Exhibit 3.

The following facts are alleged in the second amended complaint in detail.

Beginning in approximately June 2017, defendant engaged in efforts to re-sell the Solar Rights it had "sold and assigned" in perpetuity; and began to seek a higher rent stream from a potential new "tenant" on its brownfield that had been leased to plaintiff Mill Road for 20 years, under the parties' land lease. SAC ¶ 10.

Between June 2017 and October 2017, the parties were engaged in negotiations for plaintiffs to purchase the subject brownfield outright from defendants, and negotiated the terms whereby the 20 year land lease would be converted to a purchase/sale of the land, and the parties were negotiating the price. SAC ¶ 11.

During this same period, rather than engaging in good faith negotiations with plaintiff, defendant sought and entertained "offers" from other suitors not only for the Solar Rights it had already sold but also for the land lease, or a sale/purchase of the brownfield. Such actions were in violation of plaintiffs' rights under the assignment of rights as to the Solar Rights and under the land lease. SAC ¶ 12.

In particular, the confidentiality covenant contained in the

land lease bound Fiberville from revealing any facts within the lease or about plaintiffs' purchase/acquisition of the solar-energy developmental rights at all. Fiberville Estates was expressly prohibited from disclosing the substantive information about plaintiffs' land/lease, and thus the secret negotiations with CEP Defendants to double sell and double lease was clearly unlawful, even criminal.

While Fiberville defendant and plaintiff Mill Road were engaged in negotiations to convert their land lease to a purchase/sale transaction, on or about September 5, 2017, defendant Fiberville Estates served a notice to cure for alleged nonpayment of annual rent due September 1, 2017, with a cure date of September 16, 2017; and thereupon on October 17, 2017,[3] Fiberville ultimately served a notice of breach, but has yet to obtain any judicial declaration of eviction from any tenancy court, and thereby engaged in self-help commercial eviction. SAC ¶ 14.

Fiberville's default letter/notice dated October 17, 2017, did not result in any subsequent tenancy action or judicial declaration of eviction or as to the rights of the parties under the yearly lease, which had been in negotiations for sale/purchase.

What is undisputed and clear in the record is that Fiberville Estates and CEP Defendants began to negotiate in June 2017 for Fiberville to re-sell and for CEP Defendants to purchase "anew" the

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2 In the first and second amended complaint, plaintiffs mistakenly stated their belief that an eviction action had been commenced. See SAC ¶ 66. In fact, no eviction action had been filed by Fiberville. Fiberville simply proceeded with self-help.

same set of solar-energy developmental rights including, importantly, the WMPA and S-recs which are, separately and together, tradeable commodities.

While CEP Defendants negotiated with Fiberville in secret, at around the same time, in late 2017 and early 2018, CEP Defendants continued to hold plaintiffs at bay with their stated intention to purchase plaintiff's solar-energy developmental rights from plaintiffs. That posture, and the words of inducement to plaintiff during that period, which induced plaintiffs to refrain from selling their solar-developmental rights to third-parties altogether, unfair, were fraudulent and in abject bad faith. SAC ¶ 67.

From approximately October 2017 through May 2018, and thereafter continuing for years through the present, Cicero, the CEP-Defendants and their cohorts created a false reality to "box in" plaintiffs with false inducements and statements that they were earnestly seeking to acquire plaintiffs' rights, while they schemed, deployed, executed a cynical, criminal plan of stealing valuable trade assets from plaintiffs in broad daylight. SAC ¶ 68.

By May 2018, defendants Cicero, Bellin, CEP Defendants' attorney, and others in CEP-Defendants' zone of authority, told third-parties that they would be receiving assignment of the solar-energy rights that had originally been reflected in Fiberville's filings which plaintiffs had acquired.

Defendants Cicero, Bellin and others in CEP-Defendants' zone of authority, conspired and agreed that Bellin and Cicero would

continue to lure plaintiffs into believing that they would acquire plaintiffs' Solar Rights for valuable consideration shortly, or eventually, and assured Lemus and plaintiffs that they were genuinely intending to pursue an acquisition as soon as the rights could be fully understood. SAC ¶ 71.

Defendants Cicero, Bellin and others in CEP-Defendants' zone of authority, conspired and agreed that Bellin and Cicero would destroy or hide their own "paper trail" such that even in the face of a lawsuit, and a mandatory duty to disclose relevant records pertaining to their actions, they would claim that certain records do not exist or are not in their possession, custody or control, so that plaintiffs will not expose the proverbial "smoking gun." SAC ¶ 72.

Based upon repeated assurance of intention to purchase plaintiffs' solar rights by CEP-Defendants, plaintiffs understood that CEP-Defendants were communicating with various persons and entities involved in plaintiffs' efforts including the Holland Township Planning Board, as part of their due diligence. SAC ¶ 74.

In fact, Plaintiffs had never authorized CEP-Defendants to hold themselves out to third-parties that they and plaintiff Mill Road Solar were "one and the same." Yet, behind the backs of plaintiffs, they had been using their subterfuge entity Milford Solar to act as "one and the same" with Mill Road Solar, and these defendants were holding themselves out to be "successor" to Mill Road Solar, having "acquired" Mill Road's Solar Rights, which was patently false. SAC ¶ 75.

After selling the subject solar-energy rights to plaintiffs, defendant Fiberville engaged in the oldest act of fraud recorded in the annals of history and in the case books of judicial decisions: Fiberville re-sold the same set of rights including the tradeable WMPA and S-recs to none other than CEP Defendants. By mid-2018, CEP Defendants stated that they had no need for plaintiffs because they had "already acquired" the solar-energy development assets owned by plaintiffs, from Fiberville Estates, in a high-risk move that wagered that their conduct would somehow pass judicial scrutiny.

Fiberville filed an answer on October 12, 2021, then filed an opposition to the SAC motion with a "cross-motion" that comprised a 187-page filing (including brief). Invoking Rule 4:6-2(e), Fiberville sought summary judgment under 4:46 with almost 200 pages of materials (187 pages, to be precise), and its papers sought relief inartfully as a motion to dismiss under Rule 4:6-2(e), which should have been overruled, and the SAC permitted. The order on the motion clearly stated that plaintiff's motion for leave to file SAC was "denied without prejudice."

It is settled that a motion invoking Rule 4:6-2(e) must address the facial sufficiency of the pleading, here, the proposed second amended complaint since Fiberville's motion was made after plaintiffs' motion for leave to file their second amended complaint was filed.

Where, as here, extraneous materials outside the pleadings are relied upon, as Fiberville did with its presentation of a 187 page

submission, Fiberville's motion to dismiss for alleged failure to state a claim may not be granted, unless it is converted to a summary judgment motion. See Lederman v. Prudential Life Ins., 385 N.J. Super. 324, 337 (App. Div. 2005), certif. denied 188 N.J. 353 (2006); Roa v. Roa, 402 N.J. Super. 529, 537 (App. Div. 2008), certif. granted 197 N.J. 477 (2009). Here, however, defendants have already submitted a separate summary judgment motion limited to their challenge of Counts 1 through 9 in their 263-page motion filed July 30, 2021. Thus, the Moving Defendants' motion to dismiss under Rule 4:6-2(e) is doomed at the outset.

To seek dismiss a complaint for failure to state claim, under Rule 4:6-2(e), the inquiry is limited to the facts alleged on the complaint. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739 (1989) and not in any extraneous matters. In addition, Printing Mart states that a complaint must be searched "in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. Every reasonable inference is therefore accorded the plaintiffs and the motion granted only in rare instances and ordinarily without prejudice." Id. at 746.; see also In re Contest of November 8, 2005, 192 N.J. 546 (2007).

A complaint should not be dismissed under Rule 4:6-2(e) when a cause of action is suggested by the facts and a "theory of actionability may be articulated by amendment of the complaint." Printing Mart v. Sharp Electronics, 116 N.J. at 746.(emphasis added). Furthermore, a court has discretionary powers to allow a

party to amend its complaint to allege additional facts to state a cause of action. Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009).

The inquiry is limited to the four corners of the complaint and, "[i]f, on a motion to dismiss based on the defense numbered (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment as provided by R. 4:46 . . ." and not by Rule 4:6-2.

When materials outside the pleadings are relied upon, the motion to dismiss for failure to state a claim no longer viable as such, and should be refiled as a summary judgment motion. (Emphasis added). See, e.g., Lederman v. Prudential Life Ins., 385 N.J. Super. 324, 337 (App. Div. 2005), certif. denied 188 N.J. 353 (2006); Roa v. Roa, 402 N.J. Super. 529, 537 (App. Div. 2008), certif. granted 197 N.J. 477 (2009).

Under Rule 4:46-2, a motion for summary judgment requires a 28 day advance notice, not 16 day regular motion notice and:

> shall be served with briefs, a statement of material facts and with or without supporting affidavits. The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted.

R. 4:46-2(a).

Furthermore, a motion for summary judgment, "may be denied without prejudice for failure to file the required statement of material facts." Id.

Under New Jersey law, the standard applicable to summary judgment motions is whether there are any "genuine issue as to any material fact" in a case. R.4:46-2. The New Jersey state-court standard of summary judgments is "in line" with the federal standard under Rule 56 of the Federal Rules of Civil Procedure. Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995).

Summary judgment is only proper if, viewing all facts of record in a light most favorable to the non-moving party, no genuine issue of material fact remains for adjudication. Anderson v. Liberty Lobby, Inc. , 477 U.S. 242, 247-50 (1986); Nebraska v. Wyoming, 507 U.S. 584, 591 (1993). Finally, the moving party bears the initial burden of showing that no genuine issue of material fact exists, regardless of which party ultimately would have the burden of persuasion at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

The original complaint was filed March 18, 2019; and issue was joined in April 2019 when three separate answers were filed on behalf of defendants a few days apart. A first amended complaint was filed on July 19, 2021. Plaintiff filed the pending motion to file the Second Amended Complaint on October 7, 2021, and Counts 15, 16 and 17 are directed to defendant Fiberville Estates.

Fiberville Estate's motion invoking Rule 4:6-2(e), yet effectively seeking summary judgment by using extensive extraneous materials, was an impermissible attempt to maneuver a "trial by papers," and should have been denied out of hand. Such extraneous

matters, require the motion to dismiss be denied as one seeking summary judgment under Rule 4:46-2.

The SAC should have been permitted as the statutes of limitations governing Fiberville claims were not affected. The case law guiding amendments provide that amendments shall be freely granted with liberality. "Rule 4:9-1 requires that motions for leave to amend be granted liberally" and that "the granting of a motion to file an amended complaint always rests in the court's sound discretion." Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 500-01, 888 A.2d 464 (2006). In exercising that discretion, a court must go through "a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Id. at 501. The court determines whether the proposed amendment would be futile by asking "whether the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor." Id. at 501-02.

Before an amendment can be denied as futile, it must be so meritless that a motion to dismiss for failure to state a claim under Rule 4:6-2(e) would be granted. "Accordingly, the discretion to deny a motion to amend is not mistakenly exercised when it is clear that the amendment is so meritless that a motion to dismiss under R[ule] 4:6-2 would have to be granted, the so-called futility prong of the analysis." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2.1 on R. 4:9-1 (2019) (emphasis added).

It appears that the motion judge believed that the claims against Fiberville were futile because the lease had effectively

been deemed "terminated," without a judicial declaration and the CEP Defendants had every right to lie through their dual dealings with plaintiffs, even circumventing the NDA.

While a dismissal "without prejudice," by definition, means that it may be re-filed, further proceedings resulted in further confusion and self-contradictory rulings. In related Appeal No. A3517-21, Appellants/Plaintiffs will show that plaintiffs re-filed the SAC in this case as a new complaint under Docket BER-L-863-22.

Immediately after the new docket filing was commenced, Fiberville moved to dismiss based upon the SAC being dismissed. In a perplexing and shocking development, that motion was granted by the same motion judge and the new complaint in L-863-22 was dismissed "with prejudice." Both the dismissal of the FAC without prejudice and the dismissal of the SAC were unfair because the statute of limitations for breach of agreement and fraud, both six years, had yet to run at all. The motion judge's consideration of the extensive extraneous materials, only permissible under Rule 4:46, tainted this entire process, and thus the orders relating to Fiberville are readily resolved as erroneous as a matter of law.

B. CEP Defendants Should Be Reinstated

On September 25, 2019, CEP Defendants filed their first motion for summary judgment, and relief was denied by Order filed November 22, 2019. On July 30, 2021, CEP Defendants filed their second, impermissible summary judgment under Rule 4:46 while they also filed a motion for failure to state a valid claim under Rule 4:6-2(e) a week later on August 5, 2021. Their "second bite of the

apple" was procedurally unfair.

Substantively, the CEP defendants sought a "trial on the papers," and sought to weasel out of their exposure to trial based upon their fraudulent intentions. Because their fraudulent state of mind was implicated, any dismissal should have been denied as a fact issue. Their intentions are stated cryptically in their repeated false representations to the Holland Township Planning Board, following their deliberate breach of the Non-Disclosure Agreement made with plaintiffs. In defendant Mark Bellin's May 9, 2018, cryptic letter to the Planning Board, he stated in relevant part:

> . . . my client has acquired the development rights to the Mill Road Solar Field.

First Amended Compl. Exhibit 8.

Plaintiffs maintain, and their first amended complaint goes into 51 pages of pain-staking details demonstrating, that by those words defendant Bellin and the defendants whom he purports to represent conspired and engaged in a systematic theft of plaintiffs' solar rights purchased at a cost of $780,000 (see First Amended Compl., Exhibit 3); theft of plaintiffs' preliminary and final site plans obtained from the Planning Board at a significant expense (see First Amended Compl. Exhibit 5); and theft of plaintiffs' solar rights obtained from the various public agencies. According to these defendants, plaintiff spent over $1 million for an illusory, borrowed concept.

The CEP Defendants' notice of motion shows that they are

seeking dismissal of Counts 1 through 9 of either the original complaint or the first amended complaint, and the distinction is academic because the first amended complaint specifically re-stated the essential allegations in the original complaint and retained Counts 1 through 9 to distinguish the pre- and post-amendment matters.

The CEP Defendants' procedural tactic is perplexing in that, while seeking relief on Counts 1 through 9, they failed to file any response to the First Amended Complaint either by filing an amended answer or any other response that would be proper in light of an amended complaint. Instead, they filed a renewed motion for summary judgment, but limited their request for relief to the first 9 Counts, and thereby defaulted to the first amended complaint.

Plaintiffs' current counsel, Kimm Law Firm, filed their notice of appearance on June 15, 2021. In reviewing the prior procedural proceedings, there was a prior summary judgment practice by the Moving Defendants, which was DENIED by Judge Wilson's Order filed November 22, 2019, "for reasons stated on the record." A transcript regarding such a motion proceeding was not contained in the client-case file transferred from Douglas Cole, Esq., to Kimm, and thus, we must respectfully request that the Court rely upon its understanding of the November 22, 2019, Order to determine the "law of the case" doctrine to deny the CEP Defendants' current motion, without regard to plaintiffs' opposition papers, or deem the "law of the case" inapplicable and consider their current motion on its merits, and deny the motion based upon plaintiffs' substantial

opposition.

Paragraphs 55-75 and Exhibits 6 to the First Amended Complaint show defendants' brazen breach of the Non-Disclosure Agreement/Non-Circumvention Agreement (NDA) they had made with plaintiffs. Since those allegations in the complaint are not specifically disputed, and must be deemed admitted on this motion posture, defendants have no way of seeking relief for their breach of the NDA. The motion judge found that the NDA had expired when the breach occurred, but the court resolved a disputed fact issue in this regard. _____.

Both defendants Gary Cicero and the Moving Defendants' counsel and co-defendant Mark Bellin, Esq., who made the false representations to the Planning Board by stating that the defendants had "acquired the rights" from plaintiffs, admit in their depositions that they had not acquired anything at all from plaintiffs. All that they had "acquired" was actually they "obtained a new lease" from the land owner, Fiberville Estates, and never acquired any of plaintiffs' rights either to the solar rights or to the preliminary and final site plans issued to Mill Road Solar by the Holland Township Planning Board, in reliance upon the existence of the solar rights that plaintiffs had purchased from Fiberville for $700,000.00. See First Amended Compl., Exhibit 3 (Closing Statement) & Exhibit 5 (Granting Resolution).

Defendant Bellin states in his deposition that his clients, the Moving Defendants, "acquired the rights from Mill Road" by "[w]e signed a lease with the property owner." Tr. at 70:15.

Defendant Cicero also parroted Bellin's ridiculous assertion

of essentially asserting that the Moving Defendants acquired the solar rights by entering into a lease that displaced the antecedent lease held by plaintiff Mill Road, by specifically interfering with the land owner to accept a better cash outcome than remaining with plaintiffs as lessee. Thus, defendant Cicero states in his deposition at 75: "When we signed the lease agreement, we acquired the rights to the solar project."

Defendant Mark Bellin, an attorney with decades of experience and self proclaimed-expertise in the solar industry, never told the Planning Board that which he asserted in his deposition as to the term "acquired." Bellin knew that his clients had obtained information about plaintiff Mill Road's lease terms by obtaining the information under the pretext of an NDA. Bellin knew that his clients had persuaded Fiberville to terminate the antecedent lease with plaintiff and to cease negotiations to sell the land to plaintiffs. Bellin knew that all that Fiberville could provide to the Moving Defendants was the lease; but that plaintiffs had previously paid Fiberville $700,000 more money to purchase the solar rights, which were necessary for the land to be applied for use as a solar farm.

Indeed, Bellin's letter dated May 9, 2018, was intentionally deceptive to the Planning Board, in that Bellin and his clients clearly intended to say that the solar rights that had been previously purchased by plaintiffs from the land owner, the preliminary and final site plans applied for and obtained by plaintiffs at a great expense and professional efforts, time, and

fees; and the information disclosed by plaintiffs in good faith reliance upon the NDA entered into by defendants – by summarily stating "my client has acquired the development rights to the Mill Road Solar Field." First Amended Compl. Exhibit 8.

This is essentially a lawyer enabling a client to commit fraud and false statement to a tribunal where candor is required. Had Bellin told the Planning Board truthfully that his clients had signed a lease with the land owner after interfering with the antecedent lease held by plaintiffs; that his clients had not purchased the solar rights from the land owner for $700,000; and that his clients had not applied for the solar rights from the Public Utilities Commission and had not applied for the preliminary and final site plans that were granted to plaintiff Mill Road Solar Power, and not to the defendants, the defendants would have been laughed out of the Planning Board hearings until such time as they obtained those rights properly, and for valid consideration.

Plaintiffs maintain, and their first amended complaint goes into 51 pages of pain-staking details demonstrating, that by those words defendant Bellin and the defendants whom he purports to represent conspired and engaged in a systematic theft of plaintiffs' solar rights purchased at a cost of $780,000 (see First Amended Compl., Exhibit 3); theft of plaintiffs' preliminary and final site plans obtained from the Planning Board at a significant expense (see First Amended Compl. Exhibit 5); and theft of plaintiffs' solar rights obtained from the various public agencies.

On pages 46 - 51 of his deposition, see Kimm Cert., Pa2885-91,

defendant Gary Cicero engages in the litigation equivalent of a "triple somersault" concerning the NDA signed by his agents for benefit of him and his companies, the CEP defendants. He admits that NDA's are routinely used to share proprietary information in the solar energy field; admits that he himself had prepared and used NDA's; that he was a voluntary party to the NDA entered into with Alex Lemus, and admits that the NDA was to be used in "offering to purchase the project at that time?" "Probably, possibly." Tr. at 51. After more word gamesmanship, Cicero admits, "Correct, I think the confusion here is that he talked about different projects, multiple projects. So you are talking about this particular project and I would say yes, correct."

Defendant Cicero, for himself and the other CEP defendants, admits that he did not have any land at that time he entered into the NDA. Tr. at 52. More importantly, he admits that he "offered to purchase" plaintiffs' solar project from plaintiffs.

The CEP Defendants had only one condition: the project had to be "construction ready." Id. at 52. In fact, the project was made construction ready by plaintiffs; the preliminary and final site plans had been obtained by plaintiffs and all that was required was construction. See First Amended Compl. ¶¶ 42-45; 104.

In paragraph 51, we establish that a third-party had offered $3 million to plaintiffs for the turn-key rights that the CEP Defendants were reviewing from plaintiffs. Pa_____. Thus, at trial, plaintiffs would have established that their turn-key rights purchased from Fiberville Estates, and thereupon fully completed,

were worth in excess of $3 million and eventually the CEP Defendants obtained a windfall by not paying plaintiffs by stealing plaintiffs' rights, then selling plaintiffs' assets at a significant price to New Jersey Resources.

For purposes of summary judgment analysis, the opposing party's facts and fair inferences are required to be deemed true and in a light most favorable to plaintiffs as the non-moving parties. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995).

Where it is apparent that "intent" or "state of mind" is central to the dispute, it is well settled that courts will not weigh a party's intent or credibility on a mere documentary record without trial testimony and assessment of credibility on the witness stand. See McBarron v. Kipling Woods, L.L.C., 365 N.J. Super. 114, 117, 838 A.2d 490 (App. Div. 2004) (stating that "cases are legion that caution against the use of summary judgment to decide a case that turns on the intent and credibility of the parties"); Bruno v. Gale, Wentworth & Dillon Realty, 371 N.J. Super. 69, 76-77, 852 A.2d 198 (App. Div. 2004) (reversing and remanding for a plenary hearing where a motion ruling weighed conflicting papers and judge reached a "decision based on certifications containing conflicting factual assertions").

Here, the CEP Defendants impermissibly sought such a "trial on the papers" and thereby violated the very first principle of summary judgment motion practice that, as a matter of law, the facts presented by the non-moving party, along with all favorable

inferences, must be taken as true. If defendants' statements to the Planning Board and others, that they "acquired" rights belonging to plaintiffs, are taken as true, and all favorable inferences applied in plaintiffs' favor, it is readily evident that the Moving Defendants told the Planning Board and other governmental agencies false facts to support their frivolous statement that they had "acquired" the rights duly purchased by plaintiffs and as to which the CEP Defendants sought to purchase anew from plaintiffs under a confidential NDA.

The CEP Defendants asserted that, because they purchased their rights from Fiberville, plaintiffs suffered no damages. Pa____. However, the law is well settled in this regard. The New Jersey Supreme Court has held that proof of actual damages is not necessary to survive summary judgment on a breach of contract claim: "the general rule is that whenever there is a breach of contract, or an invasion of a legal right, the law ordinarily infers that damage ensued, and, in the absence of actual damages, the law vindicates the right by awarding nominal damages." Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 45-46, 477 A.2d 1224 (1984) (internal citations omitted) (citing Spiegel v. Evergreen Cemetery Co., 117 N.J.L. 90, 96-97, 186 A. 585 (1936) ("It is the established rule in this state that wherever there is a breach of contract, or the invasion of a legal right, the law ordinarily infers that damage has ensued.

The Supreme Court's reasoning follows the Second Restatement of Contracts, which states, "[i]f the breach caused no loss or if

the amount of the loss is not proved under the rules stated in this Chapter, a small sum fixed without regard to the amount of loss will be awarded as nominal damages." Restatement (Second) of Contracts § 346 (1981). The comment clarifies that, "[a]though a breach of contract by a party against whom it is enforceable always gives rise to a claim for damages, there are instances in which the breach causes no loss. . . In all these instances the injured party will nevertheless get judgment for nominal damages . . . ." Id.

Whether the damages must be nominal or measured, that issue is not ripe for consideration until trial. See also Norwood Lumber Corp. v. McKean, 153 F.2d 753, 755 (3d Cir. 1946) (citing Restatement (Second) of Contracts § 346); Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co., 988 F.2d 386, 409 (3d Cir. 1993); City of Trenton v. Cannon Cochran Mgmt. Servs., Inc., Civ. No. A-5576-09T1, 2011 N.J. Super. Unpub. LEXIS 2076, 2011 WL 3241579 (App. Div. Aug. 1, 2011) ("[L]iability for breach of contract does not require proof of damage beyond the breach itself."); Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 315, 265 A.2d 404 (Ch. Div. 1970) ("While actual damages will be awarded when they can be proved, nominal damages will be presumed from the encroachment of an established right.").

Accordingly Count 1 of the complaint was valid. Because Counts 5 (unjust enrichment) and Count 6 (breach of covenant of good faith) are quasi contractual, these should not be dismissed as well. Because Count 8 (injunctive relief) is still feasible and Count 9 (declaratory relief against CEP defendants) must await

final determination on all the claims against the CEP Defendants, those should not be dismissed at this premature stage, even though the CEP Defendants would like to receive a credibility determination on the basis of the conflicting papers filed in this motion sequence.

The Supreme Court has passed upon such flagrant conduct of a lawyer who deceives third-parties for benefit of his own clients, as Mark Bellin has done:

> This Court explained the concept of reliance with regard to third parties unknown to a lawyer in Banco Popular North America v. Gandi, where we stated that:
>
> > [i]f [an] attorney[']s actions are intended to induce a specific non-client[']s reasonable reliance on his or her representations, then there is a relationship between the attorney and the third party. Contrariwise, if the attorney does absolutely nothing to induce reasonable reliance by a third party, there is no relationship to substitute for the privity requirement.
>
> [184 N.J. 161, 180, 876 A.2d 253 (2005) (emphasis added).]

Meisels v. Fox Rothschild LLP, 240 N.J. 286, 302 (2020).

Mark Bellin made false statements to the Planning Board while his client used double-talk and trickery to use the NDA to obtain confidential information from plaintiffs which was then used to negotiate the "purchase" of the same set of rights from the same seller, Fiberville, that otherwise could not be attained.

The Supreme Court follows the Restatement (First) of Torts, published in 1939, in its cases in defining trade secrets. In later cases, the Appellate Division has similarly looked to the definition of trade secrets in the Restatement (Third) of Unfair

Competition, published in 1993, which superseded the Restatement (First) of Torts in this respect. See Commc'ns Workers of Am. v. Rousseau, 417 N.J. Super. 341, 9 A.3d 1064, 1076 (App. Div. 2010) (citing Restatement (Third) of Unfair Competition § 39).

Under the Restatement (Third) of Unfair Competition, "[t]he existence of an express or implied-in-fact contract protecting trade secrets does not preclude a separate cause of action in tort." Restatement (Third) of Unfair Competition § 40 cmt. a. This approach is also consistent with the Restatement (First) of Torts.

"The cause of action of 'misappropriation' is based on tort principles rather than on contract law," Baer v. Chase, 392 F.3d 609, 627 (3d Cir. 2004) (applying New Jersey law).

Where there is proof of either misappropriation or breach of a restrictive contract, the Restatement provides for damages and for injunctive relief. Damages for trade secret misappropriation can be awarded for the unfair advantage that defendants obtained by using plaintiffs' proprietary information. "Monetary remedies, whether measured by the loss to the plaintiff or the gain to the defendant, are appropriate only for the period of time that the information would have remained unavailable to the defendant in the absence of the appropriation." Restatement (Third) of Unfair Competition § 45 cmt. h.

In Adolph Gottscho, Inc. v. American Marking Corp., 18 N.J. 467, 114 A.2d 438 (N.J. 1955), the Supreme Court held that, even where the trade secrets had later became public knowledge, the Court "kn[ew] of no persuasive reason for depriving the plaintiff

of the benefits of its accrued cause of action because some of its secrets were later disclosed by the issuance of protective patents during the pendency of its action." Id. at 442.

In patent cases, where two or more parties share confidential information under NDA and one party's later filing of a patent renders some of the information voluntarily disclosed in the public domain, the courts may limit the measure of damages to the so-called "head start period," the period of time that it would have taken defendants to catch up to the plaintiffs' proprietary information. However, we are not dealing with that here and so no limitation applies because there would have been no disclosure of plaintiffs' proprietary information including (1) the proprietary data to the Preliminary and Final Site Plan Applications; (2) the lease made with Fiberville Estates, which contains its own confidentiality clause and (3) the purchasing terms of the WMPA and related solar assets from Fiberville Estates, whose details were never publicly disclosed except due to this lawsuit.

Because the fraud and deceit committed by the CEP Defendants require resolution of layers of factual deceit, the second summary judgment was procedurally and substantively unsupported.

II

BECAUSE THE "AFFIDAVIT OF MERIT" ACT IS INAPPLICABLE TO THE CLAIMS AGAINST THE ENGINEERS AND ARCHITECTS, FOR THEFT OF CLIENT WORK PRODUCT, THE GRANT OF SUMMARY JUDGMENT IN THEIR FAVOR WAS ERRONEOUS AS A MATTER OF LAW [Pa641-966]

After purchasing Fiberville Estate's solar-energy

developmental rights, which included a pending, incomplete Planning Board application, Appellants/Plaintiffs originally retained Princeton Engineering for its Planning Board support. Pa___ (Lemus Cert.) Princeton Engineering was subsequently substituted with defendants Pure Power and FWH; these entities acquired transfer of the client materials and work product file from Princeton. Pa (Lemus Cert). After they received Princeton's files, these defendants then added their own work product on behalf of plaintiffs and named those files "Revised Site Plans." Pa648ff. There is no dispute that plaintiffs paid for all of the revision work product.

These revised efforts and submissions resulted in the Planning Board's site plan hearing on May 8, 2017, and approval resolution on June 12, 2017. Plaintiffs owned all of the work product materials filed in advance of the May 8, 2017, hearing and the June 12, 2017, approval resolution. With these professionals' assignment completed, their role was concluded and plaintiffs sent a written reminder to maintain confidentiality of client information: "You are once again instructed not to speak [sic] anybody or share our work product from the Mill Road project or any other projects." Id.

Sometime after the CEP Defendants breached the NDA and Fiberville Estates breached the confidentiality clause in the lease and began to sell/purchase the same set of right already sold to/purchased by plaintiffs, plaintiffs came to learn that these two professional groups, FWT and Pure Power themselves "jumped into"

the same action. They effectively admit that they used plaintiffs' client data, but merely maintain that plaintiffs suffered no compensable "harm." They prevailed in their AOM argument so the damages issue was not fully resolved.

The motion judge dismissed the claims against these two defendants for plaintiffs' failure to file AOM's. The case docket, however, shows that no Ferreiro conference had been scheduled at any time. In A.T. v. Cohen, 231 N.J. 337, 175 A.3d 932 (2017), the Supreme Court reversed the grant of summary judgment involving a minor medical malpractice plaintiff because neither the lawyers nor the trial court complied with the requirement of holding an AOM compliance conference promptly upon commencement of action under Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 151, 836 A.2d 779 (2003) (the failure to provide an AOM being "deemed a failure to state a cause of action," N.J.S.A. 2A:53A-29, requiring dismissal with prejudice, the Supreme Court has recognized equitable exceptions to "temper the draconian results of an inflexible application of the statute," under Ferreira).

In A.T. v. Cohen, 231 N.J. at 353, the Supreme Court held:

> Going forward, advancements in our automated case management system will permit electronic notification of (1) the AOM filing obligation and (2) the scheduling of a Ferreira conference. The electronic case management system will be updated to issue notices to counsel and accomplish those tasks. Further details concerning those improvements will be provided through the Administrative Office of the Courts.

Apparently, defendants intended to use the AOM statute to seek relief, but they intentionally violated Ferreira and A.T. v. Cohen

by remaining silent and not filing any letter requesting a Ferreira conference with the trial judge. Under such circumstances, defendants' unseemly litigation tactic should have been met, out of hand, with judicial estoppel, see Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67, 85-88, 50 A.3d 649 (2012).

While these defendants should be saddled with the effects of their own dishonest litigation tactic, the overriding reason to have rejected their motions for summary judgment below is that the AOM is simply inapplicable because these professional defendants stole plaintiffs' client work product and data and deployed it for the benefit of a competing (therefore conflicting) new client concerning the same project, at the same site, before the same Planning Board, concerning the same subject matter, after plaintiffs had already succeeded through the Resolution stage.

Professional malfeasance cases, the Affidavit of Merit Act requires plaintiff to file an affidavit within a statutorily-set time limit (60 days of answer, extendable to 120) that the defendant/professional likely deviated from the applicable standard of care. See N.J.S.A. 2A:53A-27; Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 422, 997 A.2d 982 (2010) (citing Burns v. Belafsky, 166 N.J. 466, 475-77, 766 A.2d 1095 (2001)). The purpose of the statute is "to weed out frivolous claims against "licensed professionals" early in the litigation process." Meehan v. Antonellis, 226 N.J. 216, 228, 141 A.3d 1162 (2016) (citing Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 146, 836 A.2d 779 (2003)).

As most recently amended in 2019, the AOM N.J.S.A. 2A:53A-26 defines "licensed person" as "any person who is licensed as" one of 17 enumerated professions including an accountant, architect, attorney, engineer, land surveyor, pharmacist, veterinarian, insurance producer, midwife, site remediation professional, and a variety of medical professionals.

Where the facts are subject to a lay jury's common knowledge, an expert's opinions as to alleged deviation from a "standard of professional care" is not required. See Triarsi v. BSC Group Services, 422 N.J. Super. 104, 114 (App. Div. 2011). It is settled, a plaintiff need not produce an affidavit of merit if it is common knowledge that the alleged conduct constitutes negligence. Est. of Chin v. St. Barnabas Med. Ctr., 734 A.2d 778, 785-86 (N.J. 1999).

Under the common knowledge exception, a plaintiff need not serve an affidavit of merit if the negligence of the professional is "readily apparent to anyone of average intelligence and ordinary experience." Id., 734 A.2d at 785-86. Negligence is readily apparent to a person of average intelligence and ordinary experience when jurors can use their common knowledge as lay persons to determine the negligence of the defendant without the benefit of specialized or technical testimony from an expert witness. See Hubbard v. Reed, 168 N.J. 387, 395-97 (N.J. 2001); Bender v. Walgreen E. Co., 399 N.J. Super. 584, 590, 945 A.2d 120 (App. Div. 2008).

The common knowledge exception applies even to cases where AOM

would be required, and the question goes to the nature of the conduct in issue, not the licensure status of a defendant. Under the common knowledge doctrine, a malpractice case against a licensed professional may present triable issues without requiring the testimony of an expert. In such a case the jury itself is allowed "to supply the applicable standard of care and thus to obviate the necessity for expert testimony relative thereto." Sanzari v. Rosenfeld, 34 N.J. 128, 141, 167 A.2d 625 (1961). The trial of such a case is essentially no different from "an ordinary negligence case." Id.; see Buckelew v. Grossbard, 87 N.J. 512, 527, 435 A.2d 1150 (1981) other than the fact that it is against a professional for that person's professional conduct. See Hake v. Manchester Township, 98 N.J. 302, 313, 486 A.2d 836 (1985).

The basic rule for applying the common knowledge doctrine in a malpractice action "is that the issue of negligence is not related to technical matter peculiarly within the knowledge of the licensed practitioner." Sanzari, 34 N.J. at 142, 167 A.2d 625. The most appropriate application of the common knowledge doctrine involves situations "where the carelessness of the defendant is readily apparent to anyone of average intelligence and ordinary experience." Sanzari, 34 N.J. at 140, 167 A.2d 625.

Just as in Hubbard and its progeny, the acts of FWH Associates and Pure Power Engineering were well within the common knowledge of lay jurors as they were charged essentially with theft of clients' assets, i.e., the drawings, schematics, and related work papers and data contained within plaintiffs' client files. This was no

different from a lawyer using a client's information, gathered during the client's representation, to then provide the same representation to a competitor of the client. Not only would such brazen theft of client information be unethical, it is a deceptive, fraudulent act of stealing from the prior client to service the next client and should not be countenanced by any rational legal system.

Stealing from plaintiffs then using the same set of drawings, schematics, and underlying data to service the same Planning Board process on behalf of anyone, whether CEP Defendants or a totally new client, amounts to the same misconduct: theft of client information. The nature of the conduct, the breach of client confidentiality and loyalty is so readily appreciable that lay jurors need no professionals to set any standard or explicate the qualitative nature of the conduct involved. Lay jurors understand the "deviation" from honest practice; they can assess the evidence and call the "strike" without an "umpire." Defendants' conduct is plainly "a matter within the knowledge of the average citizen or juror." Aster v. Shoreline Behavioral Health, 346 N.J. Super. 536, 788 A.2d 821, 825 n. 4 (App.Div. 2002).

Because these defendants' theft of plaintiffs' client work product, for which they had been fully paid, can be transparently understood as theft of client's paid-for work product, and clearly improper and unethical in the view of any lay person, the grant of summary judgment by reference to the AOM Act should be reversed as a matter of law.

III

THE REMAINING DEFENDANTS SHOULD BE REINSTATED UPON REMAND SINCE THE SECOND AMENDED COMPLAINT STATES REASONABLE, VALID CLAIMS AGAINST THESE DEFENDANTS [Pa3334]

Defendants Holland Township and New Jersey Resources were added in the first amended complaint as nominal defendants, whose ultimate responsibilities were dependent upon the CEP Defendants' roles. The June 23, 2021, Kimm Certification in support of motion for leave to amend states:

> 6. Defendant New Jersey Resources (NJR) is an entity engaged in the solar power business and is believed to have purchased solar rights from defendant CEP/Cicero, without eviewing records and without proper due diligence. The relief we seek regard to NJR is essentially declaratory so no new discovery is necessary at this time.
>
> 7. Defendant Holland Township and/or its Planning Board is a municipal government that facilitated and recognized certain fraudulent representations of CEP/Cicero/Bellin without reviewing records and without properly verifying CEP Defendants' claims of ownership and "acquisition" of plaintiffs' solar rights. The relief we seek regard to NJR is essentially declaratory so no new discovery is necessary at this time.
>
> 8. Even if discovery was required or some of these defendants had sought discovery, no more than 60 days would be required to turnover the discovery already developed by the parties.

After they were served, these defendants failed to respond to the FAC; after passage of the 35 day period after service of the FAC, plaintiffs eventually sought entry of declaratory judgment by default. Eventually a default judgment was entered against Holland Township and vacated; a default judgment was denied without prejudice as against New Jersey Resources, and the case terminated.

Somewhere in this procedural mix, New Jersey Resources retained counsel and sought "contempt" and "Rule 1:4-8" relief against plaintiffs, with no antecedent order predicating any such relief in its favor. Those requests were denied out of hand by the motion judge. Pa3430 (4-5-2022). McCarter & English, as counsel for New Jersey Resources, appears to have filed a cross-notice of appeal.

When the substantive dismissals are reversed and remanded, ultimately these two defendants will have to return to the case as well, for completion of the technical result that the acts they committed (approval of CEP Defendants' site plan, in the case of Holland Township; and purchase of plaintiffs' solar-energy development rights from CEP Defendants in the case of New Jersey Resources) as such acts will be null and void.

CONCLUSION

For the reasons stated above, the Panel should reverse the dismissal Orders appealed by Appellants/Plaintiffs and remand this matter to the Law Division for prompt trial by a jury.

Dated: September 22, 2022

Respectfully submitted,

/s/ Michael Kimm

Michael S. Kimm
KIMM LAW FIRM
Attorneys for
Appellants-Plaintiffs

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003063-21

MILL ROAD SOLAR PROJECT, LLC, NEW ENERGY VENTURES INC., GHG TRADING PLATFORMS, INC. Appellants/Plaintiffs, v. CEP SOLAR LTD., MILFORD SOLAR FARM LLC, FWH ASSOCIATES, P.A., PURE POWER ENGINEERING, INC., GARY R. CICERO, MARK BELLIN, ESQ., NEW JERSEY RESOURCES, TOWNSHIP OF HOLLAND & ITS PLANNING BOARD AND FIBERVILLE ESTATES, LLC, Respondents/Defendant(s).	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION – CIVIL ACTION BERGEN COUNTY DOCKET NO. BER-L-002029-19 SAT BELOW: Hon. Robert C. Wilson, J.S.C.

RESPONDENT/DEFENDANT, PURE POWER ENGINEERING, INC.'S BRIEF IN OPPOSITION TO APPEAL

FAZZIO LAW OFFICES
5 Marine View Plaza, Ste. 218
Hoboken, NJ 07030
Phone: (201) 529-8024
Attorneys for Respondent/Defendant

Counsel of Record and On the Brief:
John P. Fazzio, Esq, (048172005)
jfazzio@fazziolaw.com

On the Brief:
John J. Boulton, Esq. (241742018)
jboulton@fazziolaw.com
November 22, 2022

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PRELIMINARY STATEMENT

The Appellate Court should affirm the Trial Court's August 30, 2019 Order granting dismissal of Appellant's Complaint and Crossclaims against Pure Power Engineering, Inc. ("Respondent" or "Pure Power").

Pure Power was joined as a Defendant, along with FWH Associates, P.A. ("FWH") based on those entities providing engineering services to the CEP Solar, Ltd. and Milford Solar Farm, LLC ("CEP"), for the development and construction of the solar farm after CEP took possession of the project. However, Appellants' claims are primarily unrelated to Pure Power's services provided for the solar project ("Project") and in fact, Pure Power subcontracted the project to FWH, who handled the engineering and site development of the solar project. Mill Road Solar Project, LLC and CEP entered into a non-disclosure agreement ("NDA"), which Pure Power was not a party to. In late 2017, Pure Power was no longer involved with the solar project and had no responsibilities with the solar project by the time Appellant's complained of damages allegedly occurred. In fact, Pure Power was terminated by Appellant on or about November 14, 2017.

Appellant filed a Complaint against Defendants/Respondents and brought one (1) count against Pure Power and FWH alleging that Pure Power breached ethical and professional duties to Plaintiffs. However, Appellant failed to obtain an Affidavit of Merit in accordance with N.J.S.A. 2A:53A-27 in order to sustain their professional malpractice claim that Pure Power breached its ethical and professional duties to Plaintiffs by continuing to provide professional engineering services to CEP on the solar project. Pure Power filed a Motion to Dismiss the Complaint and Crossclaims for Appellants failure to obtain an Affidavit of Merit in accordance with N.J.S.A. 2A:53A-27. The Trial Court granted Pure Power's Motion to Dismiss. Now, Appellants are appealing the aforementioned Order alleging again that an Affidavit of Merit was not required,

which is meritless (no pun intended). As only Section II of Appellant's Brief pertains to the Affidavit of Merit issue and Pure Power, Pure Power will solely address this section.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY

This matter arises from Appellants' claims for damages related to the ownership and development rights to a solar project located in Holland Township, NJ. Appellants assert this action against Respondents/Defendants CEP, essentially claiming CEP stole the solar project from Mill Road. Pure Power and FWH were joined as Defendants for providing engineering services to CEP. First and foremost, Appellants claims are primarily unrelated to Pure Power's services provided for the solar project. Pure Power was retained to replace Princeton Engineering, the original engineer on the Project, to provide certain engineering services through the design of the Project. Pure Power subcontracted the project to FWH, who handled the engineering and site development of the Project. Subsequently, Mill Road and CEP entered into a non-disclosure agreement ("NDA") to explore a potential sale of the project. At some point thereafter, CEP gained control of the project and advised FWH accordingly. As is apparent from the documents presented in the Trial Court record, it is clear Mill Road defaulted on its lease payments to the property owner, thereby ending its ability to develop the Project. No evidence exists that any of the defendants caused Mill Road to default on the lease, let alone Pure Power, who was not even involved with the engineering project after November 14, 2017 and had no responsibilities vis-à-vis project by the time these developments and the complained of damages allegedly occurred.

Moreover, Pure Power, who was not a member to the NDA, was terminated by Appellants from the Project on or about November 14, 2017, which ended the contractual relationship with Appellants. Since Pure Power's termination, FWH was handling the engineering and all engineering services for the Project. As of November 14, 2017, Pure Power did not have any

involvement or control over the use or the dissemination of the Project Plans, including at all of the times since termination and the filing of the Complaint on or about March 28, 2019. Additionally, since Pure Power subcontracted the project to FWH, FWH handled the engineering and site development of the Project, including, retaining ownership of the Project Plans and other work product, which Pure Power no longer had any control over.

Upon termination, Pure Power had absolutely no involvement in the Project. Moreover, Pure Power, who was never party to any NDA, owed no professional duty outside of its previous work capacity and did not direct the use of or discuss or disseminate the project. As the events giving rise to the allegedly complained of damages occurred after Pure Power's termination, Pure Power was wholly uninvolved and owed no further professional duties to Mill Road under which it could be liable for damages. Thus, Pure Power's dismissal would have been proper due to the absence of any allegations of wrongdoing by them. This is assuming *arguendo* that the complained of use of the Project Plans would make out a claim for negligence in the first place; but, this is something we will never know, since Appellant never obtained an Affidavit of Merit (*or* was unable to find any professional engineer willing to opine that a breach of professional duties occurred on these facts).

On or about March 28, 2019, Appellant filed a Complaint against Defendants/Respondents and brought one (1) count against Pure Power and FWH alleging that Pure Power breached ethical and professional duties to Plaintiffs. However, it is undisputed that Appellant failed to obtain an Affidavit of Merit in accordance with N.J.S.A. 2A:53A-27 in order to sustain their professional malpractice claim that Pure Power breached its ethical and professional duties to Plaintiffs by continuing to provide professional engineering services to CEP on the solar project.

On or about August 14, 2019, Pure Power filed a Motion to Dismiss of the Complaint and

Crossclaims for Appellants failure to obtain an Affidavit of Merit in accordance with N.J.S.A. 2A:53A-27. On or about August 30, 2019, the Trial Court granted Pure Power's Motion to Dismiss. Now, Appellants are appealing the aforementioned Order granting dismissal alleging that an Affidavits of Merit was not required. However, it is evident that Appellants have failed to demonstrate any justifiable grounds for their failure to comply with statutory requirements in accordance with N.J.S.A. 2A:53A-27 for filing a case of professional malpractice against Pure Power and FWH.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

The standard of review for statutory interpretation of whether a cause of action is subject to the Affidavit of Merit Statute is de novo. See Cowley v. Virtua Health Sys., 242 N.J. 1, 14 (N.J. 2020); Triarisi v. BSC Group Servs., LLC, 422 N.J. Super. 104, 113 (App Div. 2011).

II. THE TRIAL COURT PROPERLY DISMISSED THE COMPLAINT AGAINST PURE POWER ENGINEERING IN ACCORDANCE WITH THE AFFIDAVIT OF MERIT STATUTE, N.J.S.A. 2A:53A-27.

A. The Factual Allegations by Appellant in the Trial Court Complaint Implicate that an Affidavit of Merit Was Required and Appellant's Complaint and Crossclaims Against Pure Power Engineering, Inc. were Properly Dismissed as Appellant Failed to Obtain an Affidavit of Merit in Accordance with N.J.S.A. 2A:53A-27.

The factual allegations by Appellant in the Trial Court Complaint implicate that an Affidavit of Merit was required and Appellant's Complaint and Crossclaims against Pure Power Engineering, Inc. were properly dismissed as Appellant failed to obtain an Affidavit of Merit in accordance with N.J.S.A. 2A:53A-27. N.J.S.A. 2A:53A-27 requires that a moving party file and serve an Affidavit of Merit for claims of professional malpractice. Specifically, N.J.S.A. 2A:53A-27 states in pertinent part that:

> In any action for damages for personal injuries, wrongful death or property damage resulting from ***an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall***, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.
>
> (emphasis added).

The Affidavit of Merit Statute requires a Plaintiff bringing a professional malpractice case "to make as showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early state of litigation." In re Hall, 147 N.J. 379, 391 (1997). The purpose of the affidavit of merit statute "is to weed out frivolous lawsuits early in the litigation while, at the same time, ensuring that plaintiffs with meritorious claims will have their day in court." Triarsi v. BSC Group Servs., LLC, 442 N.J. Super. 104, 114 (App. Div. 2011) (quoting Hubbard v. Reed, 168 N.J. 387, 395 (App. Div. 2001). The failure to provide an affidavit or its legal equivalent is deemed a failure to state a cause of action and the New Jersey Supreme Court has construed N.J.S.A. 2A:53A-27 to require dismissal with prejudice for noncompliance. Cowley v. Virtua Health Sys., 242 N.J. 1, 8 (2020).

Courts have held that the affidavit of merit statute generally applies to all actions for damages based on professional malpractice and not just specifically limited to "personal injuries, wrongful death or property damage." Paragon Contractors, Inc. v. Peachtree Condominium Ass'n, 202 N.J. 415, 421 (2010) (citing Charles A. Managanaro Consulting Eng'rs, Inc. v. Carneys Point Twp. Sewerage Auth., 344 N.J. Super. 343, 347 (App. Div. 2001). To support claims of malpractice or negligence liability, the affidavit of merit must be issued by an affiant who is licensed within the same profession as the defendant and that like-licensed requirement applies even in matters involving architects and engineers, the relevant professional licensure laws overlap

to some degree. See Hill Intern., Inc. v. Atlantic City Bd. of Educ., 438 N.J. Super. 562 (App. Div. 2014). The statute requires that a duty of care existed, and that the defendant breached that duty. Bender v. Walgreen Eastern Co. Inc., 399 N.J. Super. 584, 590 (App. Div. 2008).

Additionally, failure to serve the affidavit within 120 days of the filing of the answer is considered tantamount to the failure to state a cause of action, subjecting the complaint to dismissal with prejudice. Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 146 (2003). The sanction for failing to serve an Affidavit of Merit in compliance with the statute is a finding that the complaint "fails to state a cause of action." N.J.S.A. 2A:53A-29. The New Jersey Supreme Court has held that "[a] dismissal for failure to comply with the statute should be with prejudice in all but exceptional circumstances." Cornblatt v. Barow, 153 N.J. 218, 242 (1988).

Here, Appellant filed a Complaint against Defendants/Respondents and brought one (1) count against Pure Power alleging that Pure Power breached ethical and professional duties to Plaintiffs. Specifically, Appellant alleged that "[a]ccording to the New Jersey Code of Ethics for Engineers, 'Engineers shall act for each employer or client as faithful agents or trustees.' The Code of Ethics further provides that 'Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties' and that "Pure Power and FWH ***breached their professional and ethical duties*** to Plaintiffs by selling the engineering site plans and drawings to CEP Defendants." (Pa19) (emphasis added).

Despite Appellants' baseless assertions that Pure Power "sold the plans" to CEP, Pure Power's involvement in the project was solely based on providing professional engineering services throughout the Project, until its termination. (Pa1, Pa104). Moreover, Appellant specifically referenced the New Jersey Code of Ethics for Engineers in its Complaint evidencing

that engineers are licensed professionals with their own ethical code, which is beyond the scope of the average lay person.

It is axiomatic that Appellants cannot prevail in its claim against Pure Power without providing an expert report from an engineer establishing the appropriate standard of care or any breach thereof of an engineer and that Pure Power "breached their professional and ethical duties" as an engineer by providing professional engineering services throughout the Project. As such, Appellant was required to obtain an Affidavit of Merit by a licensed engineer, the same profession as Pure Power.

Moreover, Appellants' contention that "because the "Affidavit of Merit" statute is inapplicable to the claims against the engineers and architects, for theft of client work product," is erroneous and inconsistent with N.J.S.A. 2A:53A-27 and applicable caselaw. First and foremost, Appellant has failed to provide a scintilla of evidence or a cite to the record that Pure Power committed theft of client work product, let alone had any involvement or control over the use or the dissemination of the Project Plans. In fact, on or about November 14, 2017, Appellants terminated all existing contractual relationships with Appellee and as such, Pure Power had no custody or control, let alone ownership of the Project Plans nor other work product that Appellants allege was converted.

Additionally, any purported conversion or theft of Project Plans raises questions of professional and ethical duties, as referenced by Appellant in the Complaint, that can only be evaluated by a professional engineer with experience regarding the customary practices related to the custody and control of Project Plans. As the Trial Court properly reasoned, "[i]n the field of professional engineering, the proper use, and determination of ownership of particular engineering plans and designs is a complex issue that requires expert opinion and determination, pursuant to

the factual circumstances of the individual case." (Pa972).

Accordingly, Appellants were required to obtain an affidavit of merit to sustain the allegations in the Complaint that "Pure Power and FWH ***breached their professional and ethical duties*** to Plaintiffs by selling the engineering site plans and drawings to CEP Defendants." (Pa19) (emphasis added).

The factual record is clear that no Affidavit of Merit was obtained by Appellants and served on Pure Power within 120 days after Pure Power filed its Answer to the Complaint on or about April 23, 2019. Accordingly, Pure Power filed a Motion to Dismiss of the Complaint and Crossclaims for Appellants failure to obtain an Affidavit of Merit in accordance with N.J.S.A. 2A:53A-27. On or about August 30, 2019, the Trial Court granted Pure Power's Motion to Dismiss.

B. The Limited Common Knowledge Exception is Inapplicable because the Average Lay Juror Does Not Have Knowledge of the Duties of Professional Engineers' Code of Ethics or their Professional Standard of Care.

The limited common knowledge exception is inapplicable because the average lay juror does not have knowledge of the duties of professional engineers' code of ethics or their professional standard of care. The common knowledge exception provides that an affidavit of merit is not required to support a claim of malpractice where a person of reasonable intelligence can use common knowledge to determine that there was a deviation from the acceptable standard of care. Cowley v. Virtua Health System, 242 N.J. 1, 9 (2020). There are rare exceptions in which the common knowledge exception applies and this is only "where the carelessness of the defendant is readily apparent to anyone of average intelligence." Rosenberg v. Cahill, 99 N.J. 318 (1985). The primary purpose of the affidavit of merit statute is to "require plaintiffs . . . to make a threshold showing that their claim is meritorious," however, "[i]f jurors, using ordinary understanding and

experience and without the assistance of an expert, can determine whether a defendant has been negligent, the threshold of merit should be readily apparent from a reading of plaintiff's complaint." Cowley v. Virtua Health Sys., 242 N.J. 1, 17 (2020).

Accordingly, the common knowledge exception is applied only when expert testimony is not required to prove a professional defendant's negligence. However, Appellant's allegations pertaining to the Project Plans are that "Pure Power and FWH breached their professional and ethical duties to Plaintiffs by selling the engineering site plans and drawings to CEP Defendants." (Pa19).

Clearly, these allegations relate to the proper use and determination of the ownership rights of the Project Plans and drawings, which are outside of the realm of a lay juror and would require a factual determination by an engineering professional. *See* Pa972. Moreover, Appellants' Brief cites to the New Jersey Code of Ethics for Engineers, which evidences that the legal/factual inquiry of the professional duties owed by a professional engineer with respect to Project Plans is outside the scope of experience of an average juror. An average juror with no knowledge of the New Jersey Code of Ethics for Engineers or engineering practices generally could not be reasonably expected to determine the professional responsibilities and standard of care applicable to a professional engineer from their common knowledge.

Therefore, the limited common knowledge exception to obtaining an Affidavit of Merit is inapplicable because the average lay juror does not have knowledge of the duties of professional engineers' code of ethics or their professional standard of care.

C. The Limited Extraordinary Circumstances is Inapplicable to the Facts Alleged by Appellant.

The limited extraordinary circumstances exception is inapplicable to the facts alleged by Appellant. Specifically, Appellants allege that they should be entitled to the limited circumstances

exception based on the flawed theory that no Ferreira conference was conducted. See Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003). Moreover, and fatal to Appellants' allegations, is that the absence of a Ferreira conference does not toll the running of the statutory period in which an affidavit of merit should be filed and served on defendants. See Paragon Contractors, Inc. v. Peachtree Condominium Assoc., 202 N.J. 415, 419 (2010).

The New Jersey Supreme Court in Paragon held that "lawyers and litigants should understand that, going forward, a reliance on the scheduling of a Ferreira conference to avoid the strictures of the Affidavit of Merit Statute is entirely unwarranted and will not serve to toll the statutory time frames." Id. at 426. Therefore, Appellants' flawed argument based on the absence of the Ferreira conference is unwarranted. Equally as unwarranted is Appellants' reliance on the A.T. v. Cohen case, in which the Court found extraordinary circumstances existed when there was the absence of a Ferreira conference and the crucial fact that an affidavit of merit was filed in response to a motion for summary judgment after the 120-day period. A.T. v. Cohen, 213 N.J. 342, 348 (2017).

Here, Appellants never obtained, filed, or served an Affidavit of Merit within the applicable timeframes in N.J.S.A 2A:53A-27 or in response to Pure Power's Motion to Dismiss. Appellants simply never did what they were required to do to pursue a professional malpractice claim against Pure Power. As such, no "extraordinary circumstances" exist that would alleviate the need for Appellants to obtain an Affidavit of Merit. The absence of a Ferreira conference does not "toll the running of the statutory period" in which an Affidavit of Merit should be filed and served on defendants. Paragon Contractors, Inc. v. Peachtree Condominium Assoc., 202 N.J. 415,419 (2010).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Appellate Court affirm the Trial Court's August 30, 2019 Order granting dismissal of Appellant's Complaint and Crossclaims against Respondent.

Respectfully submitted,

FAZZIO LAW OFFICES
Attorneys for Respondent/Defendant, Pure Power Engineering, Inc.

By: /s/ John P. Fazzio
John P. Fazzio, Esq.

Dated: November 23, 2022

MILL ROAD SOLAR PROJECT LLC, NEW ENERGY VENTURES INC., GHG TRADING PLATFORMS, INC., Appellants, v. CEP SOLAR LTD., MILFORD SOLAR FARM LLC, FWH ASSOCIATES, P.A., PURE POWER ENGINEERING, INC., GARY R. CICERO, MARK BELLIN, ESQ., NEW JERSEY RESOURCES, TOWNSHIP OF HOLLAND & ITS PLANNING BOARD, AND FIBERVILLE ESTATES, LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003063-21 Civil Action ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION - CIVIL ACTION BERGEN COUNTY DOCKET NO. BER-L-2029-19 SAT BELOW: Hon. Robert C. Wilson, J.S.C.

BRIEF OF DEFENDANTS/RESPONDENTS CEP SOLAR LTD., MILFORD SOLAR FARM LLC, GARY R. CICERO, AND MARK BELLIN, ESQ.'S IN OPPOSITION TO APPEAL

BYRNES, O'HERN & HEUGLE, LLC
SEAN F. BYRNES, ESQ.
(Attorney ID 0329211992)
sbyrnes@byrnesohern.com
JOHN F. BYRNES, ESQ.
(Attorney ID 412952022)
jbyrnes@byrnesohern.com
195 East Bergen Place,
Red Bank, New Jersey 07701
(732) 219-7711

Attorneys for Defendants/Respondents, CEP Solar, Ltd., Milford Solar Farm LLC, Gary R. Cicero, and Mark Bellin, Esq.

On the Brief:
Sean F. Byrnes, Esq.
John F. Byrnes, Esq.

Date Submitted: November 23, 2022

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Statutes

Other Authorities

Rules

QUESTIONS PRESENTED

Defendants/Respondents CEP Solar Ltd., Milford Solar Farm, LLC, Mark Bellin, Esq., and Gary Cicero (collectively, "CEP Respondents") oppose Plaintiffs/Appellants Mill Road Solar Project LLC and GHG Trading Platforms, Inc.'s (collectively, "Appellants") attempt to resurrect the legally and factually deficient claims against them. CEP Respondents focus their submission on the question presented that impacts their proper dismissal from this case:

2. Did the trial court properly dismiss the claims against the CEP Respondents where (1) Appellants lost their interest in the property and its land approvals by failing to make lease payments under a subsequently terminated lease, (2) the land approvals run with the land under New Jersey law; and (3) none of the CEP Respondents' alleged conduct occurred during the term of the subject NDA?

PRELIMINARY STATEMENT

This Panel should not permit a solar developer to continue exercising control over land the developer lost when it refused to pay rent on its lease. CEP Respondents ask that this Panel deny this appeal. Appellants cannot sustain any of their claims where (1) Appellants defaulted under their lease, refused to make payments, and lost land control; (2) the land approvals ran with the land under New Jersey law; and (3) none of the CEP Respondents' alleged conduct occurred during the term of the parties' non-disclosure agreement ("NDA").

None of Appellants' claims against the CEP Respondents can proceed. Appellants remain physically and legally unable to establish proximate cause. Appellants defaulted on their Lease, plain and simple, through no fault of the CEP Respondents. The loss of the alleged Solar Rights, the loss of the anticipated economic advantage from the solar project, and all other damages claimed by Appellants in this matter are the direct and proximate result of Appellants' own

inaction. Appellants have only themselves to blame. Appellants even admitted in sworn deposition testimony that they lost the land because they failed to pay. The Fiberville Landlord's ("Fiberville") representative, Stanley Sackowitz, also confirmed that Appellants lost the land because they refused to pay for it.

The parties already completed discovery, and nothing will change these admitted facts. After two years of discovery and the end of the discovery period, Appellants got desperate and -- whether intentionally or negligently -- created a narrative rooted in falsehoods. No closer to proving their original claims, Appellants invented facts to support new claims, going as far as to sue the CEP Respondents' transactional lawyer under the banner of civil RICO for writing a letter to a planning board. Appellants' late claims all failed on the law and the facts: (1) Appellants have no damages; (2) there is no misrepresentation upon which to base these new claims; (3) Appellants filled their Amended Complaint with demonstrable falsehoods; and (4) Appellants' new claims fail to establish their respective elements.

For all the foregoing reasons, the Panel should uphold the trial court's well-reasoned decision. Resurrecting these claims will only protract an already lengthy litigation, and the end result will be the same. Appellants have had two years to prove their damages here, and they cannot. Appellants regret losing their Lease, but even they admit that the CEP Respondents are not at fault for that. There are no facts at issue, no additional discovery to be had. Alex Lemus already testified that CEP Respondents did not cause him to default under the Lease with Fiberville, so no other documents or testimony will change the simple fact that Appellants' damages are Appellants' fault here. Therefore, the Panel should affirm the decision below.

STATEMENT OF THE CASE

The record demonstrates that all of Appellants' claims fail as a matter of law because Appellants lost all the solar development rights for which they now seek damages when they refused to make their lease payments. Although the landowner, Fiberville, in conjunction with Appellants entering into a lease for the Property, had assigned the rights under its regulatory approvals to Appellants, including its wholesale market participation agreement, the independent regulatory entities involved terminated Appellants' rights to develop this solar project and connect it to the power grid once Appellants lost land control. Appellants also lost their right to act upon their land use approvals received from the Township of Holland when Fiberville terminated the Lease, because all land use approvals ran with the land under New Jersey law.

Thus, Mark Bellin did not misrepresent anything when he stated that his client, Respondent Milford Solar Farm, had acquired the development rights at issue here. His client's Lease with Fiberville envisions and provides for the construction of a solar facility on the Property. Appellants could not construct the solar facility because the regulatory entities involved would not let them.

A. Fiberville Begins Developing Its Solar Project.

At all times relevant to the allegations set forth in Appellants' Verified Complaint, Fiberville Estates, LLC ("Fiberville") owned certain real property in Holland Township, Hunterdon County, State of New Jersey, consisting of approximately 70 plus or minus non-contiguous acres (the "Property"). The Property is also known as part of Block 2, Lot 1.02, and Block 4, Lot 1.00, Holland Township, Hunterdon County, State of New Jersey. (Pa1008 – 1009)

In 2011, Fiberville took steps to develop a solar facility on the Property. (Pa002047 – 002065). For any solar project in New Jersey that seeks to connect to the existing power grid, the approvals consist of an agreement with PJM Interconnection L.L.C. ("PJM") known as a Wholesale Market Participation Agreement ("WMPA"), an agreement with the utility power company, such as Jersey Central Power and Light ("JCPL"), and registrations with the New Jersey Board of Public Utilities ("BPU"). However, to finalize and rely upon these approvals, the developer must have a recognized possessory interest in the land, as well as local land use approval. If a developer does not have this land interest, its approvals to connect to the grid are voidable if the PJM, JCPL or the BPU learn that the entity does not exercise control over the land. Moreover, if a solar developer fails to obtain or loses one of the approvals comprising this bundle (as in this case), it cannot move forward with the solar project. (Pa001996 – 001997)

In 2011, Fiberville entered into a WMPA with PJM for a solar facility on the Property. (Pa002047 – 002065). PJM filed the executed WMPA with the Federal Energy Commission on Fiberville's behalf on August 4, 2011. (Pa002067 - Pa002077). In 2012, Fiberville entered into a Construction Agreement with Jersey Central Power & Light ("JCP&L") for the solar facility to be constructed on the Property. (Pa002079 - Pa002119). These agreements would later be assigned by Fiberville, typically to a solar developer who agreed to lease or purchase the Property and finish the work of constructing a solar facility there.

B. Fiberville Assigns Its Development Agreements to Appellants When Appellants Enter Into a Lease.

On August 17, 2015, Fiberville assigned its rights under the WMPA to Mill Road, and Mill Road agreed "to be bound by the WMPA Agreement[.]" (Pa001033 – 001034). On August 25, Fiberville, Mill Road, and JCP&L executed an Assignment Agreement under which Mill

Road assumed Fiberville's obligations and liabilities for the Interconnection Agreement and Construction Agreement between Fiberville and JCP&L. (Pa001035 – 001038).

Fiberville then entered into a land lease contract with Mill Road on or about September 1, 2015 (the "Lease"). (Pa000207 - Pa000222). The Lease also expressly stated that Mill Road was to "use the property solely to install and operate a Photovoltaic Energy Facility." (Pa000208). One of the material terms of the Lease was that Appellant Mill Road Solar Project, LLC would make an annual rent payment on September 1 of each year. (Pa000207). The Lease also incorporated Fiberville's assignment of the rights and obligations under the WMPA to Mill Road. (Pa000207).

C. Appellant Loses Control of the Land and Loses Its Solar Rights Because It Defaults Under Its Lease and Is Terminated.

One of the material terms of the Lease was that Appellant Mill Road would make an annual rent payment on September 1 of each year. (Pa000207). On September 1, 2017, Mill Road failed to make the annual rent payment due under the Lease in the amount of $206,045.00. (Pa002135 – 002136; Pa002154 – 002155). On September 5, 2017, counsel for Fiberville sent a notice to Mill Road that it was in default of its payment obligations under Section 1.2 of the Land Lease dated September 1, 2015. (Pa002154 – 002155). The notice further informed Mill Road that it was required to make payment in the amount of $206,045.00 within ten (10) days from the date of the notice, in accordance with Section 8(a) of the Lease. (*Id.*). The notice further informed Mill Road that Fiberville had the right to terminate the Lease under Section 8 of same if payment was not received within the timeframe indicated. In the event of termination, Mill Road would be required to surrender and return the Property to Fiberville. (*Id.*).

Mill Road never made the required payment under the Lease. Fiberville terminated the Lease with Mill Road on October 17, 2017. Representatives of Fiberville testified during

depositions that if Mill Road had made its payment under the lease, Fiberville would not have terminated the Lease. (Pa002137). ("Q: And given your frequent contact with [Fiberville's counsel] and familiarity with the situation, had Mr. Lemus made his rent payment, would Mr. Bogatz have proceeded with the lease and gone forward? A: Yes."). In fact, a Fiberville representative testified that Alex Lemus told him after they sent the notice of default that "he didn't have the money." (Pa002138).

Appellants' admissions, moreover, nullify all claims asserted by the Appellants in the Verified Complaint. Appellants admit that the Lease default, which led to the loss of the solar project, was their own doing. During his deposition, Alex Lemus, Managing Member of Mill Road Solar Project LLC and GHG Trading Platforms, Inc. ("GHG"), acknowledged that the rent due under the Lease was $200,000 per year. (Pa001824). He admitted that Appellants' default under the Lease arose from a dispute with his partners not any actions of the CEP Respondents. Specifically, Mr. Lemus testified:

Q: But for 2016/2017 as you're negotiating with Harold you are trying to find someone who can provide you with the end date to get this done: right? I mean you don't have the ability to buy this property?

A. Why would you say that?

Q. Because you let the lease lapse and the project die?

A. One has nothing to do with the other.

Q. Well, if you didn't – if you didn't have – if you didn't have $200,000 to keep the lease alive, how could you possibly have purchased this property?

MR. COLE: That assumes – I'm going to object to the form of the question.

A. So the question is. Is that you - - as you know we were in a dispute with my partners at that time. so it was very difficult when we were fighting each other to move forward on the transaction. But closing on the transaction is not a problem.

Q. Okay. But as of September 2017 you didn't have $200,000 to keep this lease going forward?

A. You don't know that.

Q. Well, so you let the lease die while you had $200,000 in the bank?

A. My – my problem with the lease was my partner. It was not the money.

Q. Yeah. But you need your partners for money, don't you?

A. No. You've always alleged that. I didn't.

Q. So you had the money? You could have made the payment?

A. Sean. I've answered your question. That the reason we didn't move forward was because the problem with NEV. We paid the project in full. We paid $1.6 million - - $1.1 million. We put another $500,000 into it.

Q. Buy you've alleged in this lawsuit that my client is the cause of your not being able to move forward, not NEV, am I right?

A. I am alleging that they stole the project rights. That's different than there being a problem with NEV. . . .

(Pa001825 – 001826) *(emphasis added).*

Q. So I just want to make sure I understand. The scenario that you've laid out is that you're in a fight with your partners that's why you don't go forward with the lease but –

A. Yes. We are having a disagreement. Yes.

Q. -- but the disagreement is significant enough that - - and you know how important land control is - - you're going to let the lease that give you land control a default, right?

A. We were - - we were looking at buying the property in September and early October of 2017.

Q. But when were you going to close on that sale?

A. When - - I can't really say when we were going to close. Sean, but as you know from development it's hard to give you a date, but there were certainly challenges with the project.

(Pa001826).

* * *

Q. And even though that person or that entity was in contact with you, the decision was still made to let the lease default.

A. I don't know that I would put it that way, Sean. We were - - we were having a very difficult time, the other managing members and I, so we weren't really communicating, as you know we were both pursuing it a different way, and it was a difficulty time to move the project forward until we as members resolved our issues.

(Pa001826).

Q. Okay. But certainly by October 2nd you'd been put on notice that you were in default of the lease for not paying rent, right?

A. We - - we had been given notice in September - - I think we got our first notice in August.

Q. Okay.

A. And we were negotiating to buy the land, and we had - - we were in discussion with some capital partners to come in with us on it, and we didn't think anybody else would buy the land.

Q. Okay. So you're fighting with your partners, but at the same time you're negotiating to purchase the land. Was that going to be something done separate from your partners?

A. I can't do anything separate from my partners but - -

(Pa001827).

This factual history was corroborated by Stanley Sackowitz, the representative of the landlord, Fiberville Estate, who testified as follows in his deposition (his references to Bogatz are to Harold Bogatz, inhouse counsel for Fiberville Estates):

Q. So as of this date, the folks at Fiberville Estates are preparing that the rent payment will not be paid by Mr. Lemus; is that right?

A. Yes.

Q. And given your frequent contact with Mr. Bogatz and familiarity with the situation, had Mr. Lemus made his rent payment, would Mr. Bogatz have proceeded with the lease and gone forward?

A. Yes.

Q. And after the initial notice, which was previously marked and is dated September 5th, do you recall whether you heard from or had any conversations with Alex Lemus after the notice had been sent out?

A. Yes.

Q. And what was he saying at that point in time?

A. Well, I guess he just wanted to get his partners to put up the money and he and Alex discussed that for quite a while, and he was trying to get money from the partners.

Q. Did he provide you with anything concrete as far as that goes, anything that you could take back to Harold to give confidence to Harold that there was going to be a payment made?

A. No, nothing concrete, just that he didn't have the money.

Q. He basically told you he didn't have the money?

A. Yes.

(Pa001803 – 001804).

Mr. Sackowitz also made clear that the CEP Respondents had nothing to do with the termination of the Lease with Appellant:

Q. Now, in the complaint in this case, the Plaintiff, Mill Road, asserts that CEP or Milford Solar Farm, which are the entities owned by Mr. Cicero, induced Fiberville Estates to terminate the lease with Mr. Lemus or his company. Is there any truth to that?

A. No, in fact, the opposite.

(Pa001805 – 001806).

As noted above, Appellants admit they defaulted under the Lease due to a dispute with their partners. Simply put, the CEP Respondents were not the cause of the Appellants' default,

and the CEP Respondents did not and could not "steal" the Solar Rights from the Appellants. The Appellants defaulted on the Lease, lost control of the property and lost the ability to use their solar right. End of story.

The Appellants understand this. Alex Lemus admitted that Fiberville had the right to terminate the Lease when they failed to make the annual rent payments. (Pa001828). ("If they own the land and somebody defaults, then they can do what they want from there."). Indeed, Mr. Lemus himself understood the importance of site control admitting that "[w]e would not move forward and spend the serious money without having site control or an option for site control." (Pa001831). Moreover, when pressed as to whether an entity would purchase Mill Road's "development rights" without land control, Mr. Lemus admitted "[y]ou need site control to build a project, that is correct." (Pa001832).

Mr. Lemus also knew that PJM, a solar regulatory agency, had terminated the Wholesale Market Participation Agreement ("WMPA") with Mill Road by January of 2018. (Pa001830). ("I know that PJM gave us notice."). In a similar move, upon learning of the loss of land control, JCP&L terminated its interconnection agreement with Mill Road in March of 2018. (*Id*.).

D. The Regulatory Entities Terminate Appellants' Development Rights Because They Lose Land Control.

In a letter dated January 31, 2018, to the Honorable Kimberly D. Bose, Secretary of the Federal Energy Regulatory Commission ("FERC"), counsel for PJM notified Secretary Bose that PJM was cancelling the Mill Road WMPA. Specifically, this letter advised Secretary Bose that the Mill Road Solar WMPA was being cancelled because:

> material terms and conditions of the Mill Road Solar WMPA, including the loss of site control, were breached and were not cured, resulting in the default of the Mill Road Solar WMPA. The Mill Road Solar WMPA is thus terminated pursuant to section 1.1 therein.

PJM and FERC gave the Appellants months of advance written notice of the termination as required by law. On a successive basis over a period of months, each agency provided notice and then gave Appellants an opportunity to cure. The Appellants did nothing, taking no legal action to remedy the breach or challenge its legitimacy. With the breach uncured, the approvals were terminated. (Pa001999; Pa002011 – 002014).

Mr. Lemus also admitted knowing that PJM, a solar regulatory agency, had terminated the Wholesale Market Participation Agreement ("WMPA") with Mill Road by January of 2018, **four months before Mark Bellin sent his letter to the Planning Board in May**. (Pa002161) ("I know that PJM gave us notice."). Moreover, JCP&L terminated its interconnection agreement with Mill Road in March of 2018. (*Id.*). The termination of the interconnection agreement took place before Mr. Bellin notified the Holland Township Planning Board that his client would now be moving forward on the project.

E. Respondent Milford Solar Acquires the Development Rights for the Project from the Landlord.

On October 17, 2017, Respondent Milford executed a Land Lease with Fiberville for the Property. (Pa002167 - Pa002189). Fiberville leased the Property to Milford granting it exclusive occupancy. (Pa002168). Milford agreed to "use the Property solely to install and operate a Photovoltaic Solar Energy Facility." (Pa002168). Milford also agreed to obtain a system impact study from PJM. (Pa002176). As a party with legal possession of the Property, Milford began the work, including significant expense, of completing the approvals for a solar facility.

Indeed, in his deposition testimony, Mr. Cicero, principal of Milford, confirmed that Milford acquired the development rights from Fiberville when it executed the Lease: "When we obtain land rights and secure the land, then it is synonymous with obtaining solar rights. Land rights, when you secure the land, goes with the solar rights." (Pa002208). Mr. Cicero also

testified that "The WMPAs run with the land. It demonstrates land control. The same with the DEP, it is the land control. All of those rights belong to the owner of the land." (Pa002209). When asked directly when Milford acquired the solar rights here, Mr. Cicero testified that "[w]hen we signed the lease agreement, we acquired the rights to the solar project. The day we signed the lease agreement was the day the solar rights belonged to whoever owned the land." (*Id.*). Mr. Cicero testified that in his experience of the solar industry, it is typical for developers to "sign the lease and move forward" because all development rights are acquired through the lease. (*Id.*).

Ultimately, Respondent Mark Bellin sent a letter to the Holland Township Planning Board advising the Board that his client Milford had acquired the right to develop the Property through its lease with Fiberville, a lease that specifically provided for Milford's development of a solar facility. (Pa002231). When questioned as to his understanding of when his client actually acquired the development rights, Mr. Bellin testified that his client acquired the development rights to the Property when it "signed a lease with the property owner." (Pa002250). Furthermore, Mr. Bellin testified that the land use approvals under consideration by the Planning Board "ran with the property, so we were obligated to finish those[.]" (Pa002236). Mr. Bellin further described his letter: "[u]nder the Municipal Land Use act, I wrote this letter to the Planning Board Secretary and I am speaking about the preliminary and final site plan approval, which is all I can do. What I am saying to her is that we have the right to continue. We have the right to continue the application." (Pa002250).

So, Milford acquired the development rights to the Property because it entered into a lease and assumed "the obligation to complete the project." (*Id.*). The lease gave Bellin's client, Milford, "exclusive possession and control" of the Property and left Milford to "complete the

project." (*Id.*). The opportunity for Mr. Bellin's client to "complete the project" arose when the Appellants lost their lease.

Mr. Bellin further described how his client needed to do significant work to obtain approvals once it had acquired development rights for the Property through its lease with Fiberville. (Pa002251). ("We paid the engineers to get site plan approval. The site plan approval on the property disappeared."). Indeed, "every aspect of the project required work. There were no third-party approvals at all[.]" (*Id.*). By November 21, 2017, Milford obtained SREC approval for the solar facility it would develop on the Property. (Pa002252). Milford made the application for SREC eligibility itself. (Pa002251).

F. Respondents Produce Bellin's Letter to the Planning Board and Related Documents in November of 2019.

During the pendency of this litigation, on November 11, 2019, CEP Respondents produced 921 pages of discovery documents, a supplemental document production that followed the 602 pages previously produced by CEP Respondents. (Pa002255). This production included the very letter that Mill Road claimed in its Amended Complaint had been concealed during discovery. Mill Road touted this untrue assertion as a linchpin for allowing the filing of an amended pleading. (Pa002231). In fact, the CEP Respondents had produced this letter and other documents Mill Road falsely claims to have been withheld. For example, CEP Respondents produced the agreement with the Pohatcong History and Heritage Society that Mill Road referenced in its Amended Complaint. (Pa002263 - Pa002273). Finally, CEP Respondents produced a copy of their Lease with Fiberville in the same production in November of 2019. (Pa002167 - Pa002189). Despite all the proof to the contrary, Appellants continue to rely upon this false narrative.

G. The NDA at Issue Expired Before Any of the Conduct Alleged, and the Landlord Was Terminating this Lease Regardless of any Offer From Respondents.

The language of the NDA is clear. It states that the NDA's term extends only one year from the date of the last services performed: "Term. The term of this Agreement shall be during services performed and one year from the date of the last services performed." (Pa002645 - Pa002646). The parties executed the NDA on September 28, 2015. (*Id.*). When Mr. Lemus refused the offer made by Respondents, the discussions ended. Mr. Cicero, in turn, confirmed during his deposition that the NDA's term had long expired by the time his company entered into a lease with Fiberville for the subject property. (Pa002204). ("The NDA was signed in December of 2015. It had already expired [in 2017]"). Indeed, Respondents waited until "[a]fter the expiration of the NDA" to speak with Fiberville representatives. (Pa2205).

Thus, by its own terms, the confidentiality provisions of the NDA expired well before June of 2017, the earliest date on which the conduct Appellants now complain of occurred. If any documents demonstrating subsequent due diligence or "services performed" existed, Appellants would produce them. They have not.

Moreover, the record indicates that Fiberville was entertaining offers from multiple solar developers at the time. After all, Fiberville had advertised this project before Appellants even entered into their lease. This was a well-known solar opportunity, and Fiberville took numerous steps to warn Appellants of the dire consequences that would flow from their failure to pay rent. Appellants ignored the warnings, and they lost land control. The Respondent's signing of a new lease is not proof of a misuse of confidential information. Fiberville representative Mr. Sackowitz made clear that the Respondents had nothing to do with the termination of the Lease:

> Q. Now, in the complaint in this case, the Plaintiff, Mill Road, asserts that CEP or Milford Solar Farm, which are the entities owned by Mr. Cicero,

> induced Fiberville Estates to terminate the lease with Mr. Lemus or his company. Is there any truth to that?
>
> **A. No, in fact, the opposite.**

(Pa001805 - 001806).

Moreover, Respondents already knew about the Fiberville solar development opportunity from their conversations with Fiberville representatives in 2015, before Appellants ever took on the project. (Pa002204-002205). Mr. Cicero testified that he "originally spoke to [Fiberville] in 2015 about this land. . . before a lease was signed. When the project was still available within the market." (Pa002204).

The record simply does not support Appellants' version of events here. They cannot rely on bare allegations in their pleadings. Appellants had two years to develop their case and failed to do so.

PERTINENT PROCEDURAL HISTORY

On March 18, 2019, Appellants filed an Order to Show Cause. After argument, the Court vacated the Order and denied the preliminary restraints sought.

On May 1, 2019, Respondents CEP Solar and Milford Solar filed their Answer. (Pa000391).

Recognizing that Appellants could not prevail on claims arising from a lease they failed to pay, Respondents CEP Solar and Milford Solar filed their first motion for summary judgment on September 26, 2019. (Pa001000).

On November 22, 2019, the court denied Respondents' motion for summary judgment, giving Appellants an opportunity to develop discovery to support their claims. (Pa001113).

Plaintiff New Energy Ventures ("NEV") dismissed its claims against Respondents on April 24, 2020.

After the parties took depositions and discovery ended, Appellants filed a motion for leave to file a first amended complaint on June 23, 2021. Respondents opposed, but the trial court granted the motion to amend under the liberal standard for such motions. (Pa001603).

Appellants filed a First Amended Complaint on July 19, 2021, after discovery had ended. The First Amended Complaint added individual defendants Gary Cicero and Mark Bellin, Esq., the owner and transactional counsel for the CEP Respondent entities. (Pa001604).

Recognizing that the litigation had failed to produce any discovery that could support the new or pre-existing claims, the CEP Respondents filed a motion for summary judgment. (Pa001781).

Within the same week, CEP Respondents also filed a motion to dismiss seeking dismissal of all the newly added claims and dismissal of the newly-added individual defendants. (Pa001987).

On September 23, 2021, the trial court granted CEP Respondents' motion for summary judgment and denied the motion to dismiss as moot. (Pa001781-003058).

DECISION BELOW

The trial court denied the CEP Respondents' first motion for summary judgment because the parties had not conducted discovery yet. 2T 18:9-25. The Court specifically told Appellants that they would "have to produce [an expert]" during discovery to prove their assertion that the solar rights had independent value. *Id.* at 14:16-25 (stating that Appellants would need an expert if the court did not "throw out [their] case right now.").

After the parties completed discovery and Appellants failed to retain or produce an expert to support their dubious assertion that land approvals somehow exist independently of the land itself, the trial court considered CEP Respondents' second motion for summary judgment. CEP

Respondents argued, *inter alia*, (1) that the regulatory approvals run with the land for which the approvals are granted; (2) that the Appellants lost land control by failing to pay rent; and (3) that the Appellants could not establish causation where they lost land control by refusing to pay rent. 3T 8:17-16:13.

In opposition, Appellants admitted that they never paid the rent due for the land. *Id.* 18:1-11 ("THE COURT: I'm going to ask the question a lot of times, Mr. Kimm, so I would appreciate an answer to it and then I won't have to keep asking it. Do you hear? MR. KIMM: I hear. THE COURT: You paid the rent? MR. KIMM: No, Judge."). Appellants instead tried to cite the expired NDA as a basis to proceed with their claims.

The Court observed that "the NDA ran out long before the lease was then terminated." *Id.* at 20:2-19. The Court also observed that the "rules and regulations" governing the solar industry are not trade secrets because the industry is "so highly regulated." *Id.* In fact, the Court correctly reasoned that the information concerning the site size and panel layout were public knowledge because Appellants had to file their plans with regulators. *Id.* at 20:2-23:15. Though the Court pressed Appellants to identify what secrets were wrongfully used by CEP Respondents, Appellants returned to their argument that the solar rights somehow had value independent of the land to which they were attached. *Id.* at 23:1-24:7.

On September 23, 2021, the trial court dismissed all counts against the CEP Respondents and issued a written opinion. The trial court held that all of Appellants' claimed damages "relate directly to their loss of the Solar Project." (Pa003045). Indeed, the trial court reasoned that if Appellants "had not defaulted under the Lease, they would have the Solar Rights and the Solar Project, and the subject action would be moot." (*Id.*). In the end, the "loss of the Property was the direct and proximate result of Plaintiffs' failure to cure the default under the Lease with

Fiberville." (*Id.*)

For the solar rights asserted by the Appellants, the trial court found that "CEP Defendants did not void the [solar] rights; PJM did so once Plaintiffs lost control of the Property where the Solar Project was to be built." (Pa003046). The trial court also reasoned that Appellants failed to "establish the requisite causal link between a breach of the NDA and Plaintiffs' default under the Lease and subsequent loss of their Solar Rights." (*Id.*). "If a developer does not have this land interest, its approvals to connect to the grid are voidable if the PJM, JCPL, or the BPU learn that the entity does not exercise control over that land." (*Id.*)

The Court also dismissed the remaining counts for the same reasons. (Pa003048-003055). In the end, the trial court found that "CEP Defendants are not the cause for Plaintiffs' loss." (Pa3055). "The termination of the Lease was due simply because of Plaintiff's own default." (*Id.*). "That event enabled CEP Defendants to become successors to this solar farm development." (*Id.*) Therefore, the trial court dismissed all claims against the CEP Respondents for failure to establish causation.

STANDARD OF REVIEW

The Appellate Division reviews grants of summary judgment de novo. *Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 224 N.J. 189, 199 (2016). The Appellate Division applies the same standard used by the trial court. *Id.* Here, the trial court applied a summary judgment standard because discovery had ended.

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); *see Brill v. Guardian Life Ins. Co. of*

America, 142 N.J. 520, 540 (1995). The "essence of the inquiry" is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Brill*, 142 N.J. at 536 (*quoting Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251-52 (1986)).

To avoid summary judgment, "the moving party must identify the evidence on file in the case, which establishes the absence of any genuine issue of material fact." *Sch. All. Ins. Fund v. Fama Const. Co.*, 353 N.J. Super. 131, 135-36 (Super. Ct. 2001). "Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment; the party defending against a motion for summary judgment cannot defeat the motion unless it provides specific facts that show the case presents a genuine issue of material fact, such that a jury might return a verdict in its favor." *Id.* "Conclusory assertions, unsupported by specific facts, presented in affidavits opposing the motion for summary judgement are likewise insufficient to defeat a proper motion for summary judgment." *Id*. "However, if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case on which it will bear the burden of proof at trial, summary judgment must be granted." *Id.* Even if there is a denial of essential fact, the court should grant summary judgment if the rest of the record viewed most favorably to the party opposing the motion demonstrates the absence of a material and genuine factual dispute. *See Rankin v. Sowinski*, 119 N.J. Super. 393, 399-400 (App. Div. 1972).

Even under a motion to dismiss standard, Appellants' spurious claims still fail. Pursuant to Rule 4:6-2(e), a court may dismiss an action for failure to state a claim upon which relief may be granted. In considering a motion to dismiss, the court must examine the legal sufficiency of the allegations, conducting an examination "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim."

Sammarone v. Bovino, 195 N.J. Super. 132, 137-38 (App. Div. 2007) (*quoting Printing Mart v. Sharp Electronics*, 116 N.J. 739, 746 (1989)).

A motion under Rule 4:6-2(e), however, "may not be denied based on the possibility that discovery may establish a requisite claim; rather, the legal requisites for [a party's] claim must be apparent from the complaint itself." *Teamsters Local 97 v. State of New Jersey*, 434 N.J. Super. 393, 413 (App. Div. 2014) [citing *Edwards v. Prudential Prop. & Cas. Co.*, 357 N.J. Super. 196, 202 (App. Div.), *certif. denied*, 176 N.J. 278 (2003)]. If, after a thorough review of the legal sufficiency of the alleged facts of the claims, "the allegations are 'palpably insufficient to support a claim upon which relief can be granted,' the court must dismiss the complaint." *N.J. Assoc. of Health Plans v. Farmer*, 342 N.J. Super. 536, 550 (App. Div. 2000) (quoting *Rieder v. State Dep't of Transp.*, 221 N.J. Super. 547, 552 (App. Div. 1987); *Camden Cnty Emergency Recovery Assoc. v. N.J. Dep't of Envtl. Prot.*, 320 N.J. Super. 59, 64 (App. Div. 1999), *aff'd o.b.* 170 N.J. 246 (2002) (where there is no legal basis for relief and further discovery would not provide one, dismissal is proper under R. 4:6-2(e)).

The court must dismiss a plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief. *Camden County Energy Recovery Assocs., L.P. v. New Jersey Dep't of Envtl. Prot.*, 320 N.J. Super. 59, 64 (App.Div.1999). "A motion to dismiss a complaint under Rule 4:6-2(e) for failure to state a claim upon which relief can be granted must be evaluated in light of the legal sufficiency of the facts alleged in the complaint." *Donato v. Moldow*, 374 N.J. Super. 475, 482 (App.Div.2005).

LEGAL ARGUMENT

POINT I

THIS APPEAL SHOULD BE DENIED IN ITS ENTIRETY (Pa003036 - Pa003055)

The CEP Respondents ask that this Panel deny Appellants' remarkable attempt to recover damages for a project they could never pursue, because they failed to pay their rent and thereby lost control over the land upon which this project was to be constructed. First, land approvals run with the land. If you lose control over the land, you lose the ability to act on your approvals. Second, Appellants cannot establish proximate cause. They stopped paying rent, defaulted on their lease and lost their land. The failure to pay rent caused their loss. Finally, Appellants cannot bring a claim for breach of an NDA when it expired well before the conduct underpinning the alleged breach. Therefore, the Panel should affirm the decision below and prevent further litigation gamesmanship by Appellants.

A. The Trial Court Properly Found that Appellants Could Not Successfully Claim Ownership of Land Approvals After Losing Control of the Land, Because Those Approvals Run With the Land. (Pa003039 – 003055)

Evicted commercial tenants have no right to continue controlling real property after their lease terminates. Our legal jurisprudence recognizes that approvals run with the land. This prevents parties who receive approvals from interfering with or encumbering development after they lose their possessory rights. A decision to the contrary would, in effect, create a lien against the real property preventing any other developer from continuing the solar project that Fiberville, the landlord, started.

Alex Lemus admitted that Fiberville could terminate Appellants' Lease when he failed to make the annual rent payments. (Pa001828). ("If they own the land and somebody defaults, then they can do what they want from there."). Of equal importance, Mr. Lemus acknowledged the

crucial importance of site control when he admitted that "[w]e would not move forward and spend the serious money without having site control or an option for site control." (Pa001831). Moreover, when pressed as to whether an entity would purchase Mill Road's "development rights" without land control, Mr. Lemus admitted "[y]ou need site control to build a project, that is correct." (Pa001832).

Mr. Lemus was also aware that PJM, a solar regulatory agency, had terminated the Wholesale Market Participation Agreement ("WMPA") with Mill Road by January of 2018. (Pa001830). ("I know that PJM gave us notice."). Moreover, JCP&L terminated its interconnection agreement with Mill Road for the solar project after Mill Road lost land control, in March of 2018. (*Id.*).

Under New Jersey law, variances and approvals travel with the land and belong to the landowner. This rule is not unique to New Jersey but rather is a facet of zoning law across the United States. Thus, when Appellants failed to pay their Lease and lost land control, they also lost the ability to act upon the approvals or development rights, including those at issue here.

In *Stop & Shop Supermarket Co. v. Bd. of Adjustment of Springfield*, 162 N.J. 418 (1998), the Supreme Court of New Jersey outlined this body of case law:

> Other New Jersey cases have emphasized that use variances adhere to the property and are not personal to the applicant. *See, e.g., Soho Park Land Co. v. Board of Adj. of Belleville*, 6 N.J. Misc. 686, 687 (Sup. Ct. 1928) (invalidating condition attached to use variance allowing construction of industrial building in residential zone that limited building to use "solely as a wire factory" by applicant for variance, noting that condition constituted "restraint on alienation" that would affect value of property); *Aldrich v. Schwartz*, 258 N.J. Super. 300, 308 (App. Div. 1992) (noting that "[v]ariances run with the land and are not personal to the property owner who obtained the grant"); *Berninger v. Board of Adj. of Midland Park*, 254 N.J. Super. 401, 405 (App. Div. 1991), aff'd 127 N.J. 226, 603 A.2d 946 (1992) (noting that "a condition [that] limits the life of a variance to ownership by a particular individual is patently illegal, as it advances no legitimate land use purpose"); *DeFelice v. Board of Adj. of Point Pleasant Beach*, 216 N.J. Super. 377, 383 (App. Div. 1987) (holding that "a variance runs with the

> land and is not personal to the property owner"); *Farrell v. Estell Manor Zoning Bd. of Adj.*, 193 N.J. Super. 554, 558 (Law Div. 1984) (stating that "[a] variance granted is not personal to the owner to whom granted but is available to the grantee's successors").

Id. at 432-33.

Appellants' loss of land control resulted in a concomitant loss of municipal and state land use approvals. Furthermore, loss of site control amounted to a breach of the obligations undertaken by Appellants in their WMPA and Interconnection Agreements. As a result of these breaches, the Appellants lost the right to develop the land. All of these losses flowed directly from Appellants' own refusal or inability to simply make the payment due under their Lease.

B. The Trial Court Correctly Held that Appellants Could Not Recover Damages for a Development Project When Appellants Lost Land Control by Refusing To Make Lease Payments. (Pa003044-003055)

Appellants cannot establish the elements of any of their claims. Respondents tackle each count in turn for ease of the Court's review, but chain of proximate cause cannot be established for any of these claims. All of the damages alleged spring from the loss of the solar project. The root cause of the Appellants' inability to develop this solar project is the Appellants failure to pay rent under its Lease and the subsequent loss of its right to possess and develop the site for the planned project.

"Proximate cause consists of 'any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred.' *Townsend v. Pierre*, 221 N.J. 36, 51-52 (2015) (citing *Conklin v. Hannoch Weisman*, 145 N.J. 395, 418, 678 A.2d 1060 (1996).

Here, the cascade of events leading inevitably to Mill Road losing the ability to develop this project starts with Mill Road failing to make a rent payment. Fiberville, a landlord owed $206,045.00 in rent by its tenant Mill Road, terminated the Lease on October 17, 2017.

Representatives of Fiberville testified during depositions that if Mill Road had made its payment under the lease, Fiberville would not have terminated it. (Pa001803). ("Q: And given your frequent contact with [Fiberville's counsel] and familiarity with the situation, had Mr. Lemus made his rent payment, would Mr. Bogatz have proceeded with the lease and gone forward? A: Yes."). In fact, a Fiberville representative testified that Alex Lemus told them after they sent the notice of default that "he didn't have the money." (Pa001804).

There is no question that Appellant Mill Road lost its Lease due to its failure to pay rent. There is no question that Appellant admitted it failed to pay rent due to internal strife between Mr. Lemus and his partners. Thus, Appellants cannot -- and will never be able to -- tie their damages to the CEP Respondents. All Appellant Mill Road needed to do was pay its Lease, and none of this would have occurred.

Each of the asserted new claims requires proof that the damages alleged were proximately caused by the CEP Respondents. Because all of the Appellants' damages inevitably flow from the loss of land control, resulting from Appellants' failure to pay rent, each and every one of the Appellants' claims fail as a matter of law because Appellants have no damages attributable to the CEP Respondents.

1. Appellants Fail To Show a Contractual Breach Resulting in Damages (Pa003044 -Pa003047).

Here, Appellants cannot establish a crucial element to support a breach of contract claim against the CEP Respondents: resulting damages.

A party bringing a claim of breach of contract has the burden of proving all elements of its cause of action. *Cumberland Cnty. Improvement Auth. v. GSP Recycling Co.*, 358 N.J Super. 484, 503 (App. Div. 2003). Under New Jersey law, a plaintiff must plead and prove the following elements for a valid breach of contract claim:

> "(1) a contract between the parties;
>
> (2) a breach of that contract;
>
> (3) **damages flowing therefrom**; and
>
> (4) that the party stating the claim performed its own contractual obligations."

Frederico v. Home Depot, 507 F.3d 188, 203 (3d Cir. 2007)(emphasis added).

"A party bringing a claim for breach of contract has **the burden of proof to establish all elements of its cause of action, including damage**s." *Improvement Authority v. GSP Recycling Co., Inc*., 352 N.J. Super 484, 503 (App. Div. 2003) (citation omitted)(emphasis added). The essential elements of a *prima facie* claim for breach of contract are: (i) a valid contract, (ii) defective performance by the defendant, and (iii) **resulting damages**. *Coyle v. Alexander's*, 199 N.J. Super. 212, 223 (App. Div. 1985)(emphasis added).

Appellants cannot prove that any breach of contract by the CEP Respondents resulted in the damages Appellants allege. At all times relevant to the allegations set forth in Appellants' Verified/First Amended Verified Complaint, Fiberville owned the Property. Fiberville entered into the Lease with Mill Road, which contained a material term requiring Respondent Mill Road to make an annual rental payment to Fiberville on September 1 of each year. (Pa001008 – 001009). On September 1, 2017, Mill Road failed to make this annual rent payment due under the Lease in the amount of $206,045.00. (Pa001009). On September 5, 2017, counsel for Fiberville sent a notice of default to Mill Road stating that Mill Road was in default of its payment obligations under Section 1.2 of the Lease. (Pa001009 – 001010; Pa001020). The notice further informed Mill Road that it was required to make payment in the amount of $206,045.00 within ten (10) days from the date of the notice, in accordance with Section 8(a) of the Lease. The notice further informed Mill Road that Fiberville had the right to terminate the Lease under

Section 8 of same if payment were not received within the timeframe indicated. In the event of termination, Mill Road would be required to surrender and return the Property to Fiberville. (*Id.*). **Mill Road Solar Project, LLC never made the payment under the Lease. As a result, Fiberville terminated the Lease with Mill Road on October 17, 2017.** (Pa001010; Pa001022 – 001021).

Therefore, the Appellants' failure to cure their own default under the Lease with Fiberville was admittedly the direct and proximate result of their damages. Appellants have not pled a cause of action that links the CEP Respondents to this default, nor could they. No amount of discovery will cure the fatal defect at the heart of Appellants' case -- Appellants lost the solar project due to their own failures. Once Appellants lost land control of the Property, PJM voided the Solar Rights for which Appellants now seek a declaratory judgement and resulting damages. No solar developer can connect a project to the electrical grid without PJM approval. The CEP Respondents did not void Appellants' Solar Rights; PJM did. PJM took this unusual step when Appellants, admittedly by their own inaction, lost land control of the Property where the solar project was to be built. Appellants cannot now seek damages against a blameless third party simply because CEP Respondents signed an NDA.

For any solar project in New Jersey that seeks to connect to the existing power grid, the approvals consist of an agreement with PJM known as a Wholesale Market Participation Agreement (WMPA), an agreement with the utility power company, such as Jersey Central Power and Light ("JCPL"), and registrations with the New Jersey Board of Public Utilities ("BPU"). However, to finalize and rely upon these approvals, the developer must have a recognized possessory interest in the land, as well as local land use approval. If a developer does not have this land interest, its approvals to connect to the grid are voidable if PJM, JCPL or the

BPU learn that the entity does not exercise control over the land. Moreover, if a solar developer fails to obtain or lose one of the approvals comprising this bundle (as in this case), it cannot move forward with the solar project. (Pa001025 – 001026).

Appellants' default under the Lease for the subject Property is a superseding and/or intervening act that negates any liability of CEP Respondents for Appellants' loss of the Property, the Solar Rights, or the solar project. A superseding or intervening act is one that breaks the chain of causation linking a defendant's wrongful act and an injury suffered by a plaintiff. *Cowan v. Doering*, 111 N.J. 451, 465 (1988). A superseding or intervening act is one that is the immediate and sole cause of the injury or harm. *Model Jury Charge* (Civil) 6.14; *see also Davis v. Brooks*, 280 N.J. Super. 406, 412 (App. Div. 1993).

CEP Respondents had nothing to do with Appellants' default under their Lease. Had Appellants made their Lease payment as required to do under said Lease, they would still control the Property and would have retained their approvals. Appellants, in short, would have no damages if they had simply paid their Lease. The Panel therefore should not permit these claims to continue to trial when they can clearly be decided now as a matter of law

2. Appellants Fail To Show How CEP Respondents Caused Damage Through Tortious Interference (Pa003047 – Pa003049).

Under New Jersey law, the tort of interference with a prospective economic advantage (tortious interference) contains four elements: (1) a protectable interest; (2) malice-the defendant's intentional interference without justification; (3) a reasonable likelihood that the interference caused the loss of a prospective gain; and (4) **resulting damages**. *See Printing Mart v. Sharp Electronics.* 116 N.J. 739, 751-752 (1989); *accord DiMaria Constr., Inc. v. Interarch*, 351 N.J. Super. 558, 567 (App. Div. 2001), *aff'd*, 172 N.J. 182 (2002). A plaintiff proves causation by showing that he or she would have had a **reasonable probability of economic gain**

in the absence of the alleged interference. *Printing Mart, supra*, 116 N.J. at 759 (emphasis added). Damages must be illustrated by facts showing that the plaintiff has suffered or will suffer pecuniary damage. *Id*. at 760.

Appellants' rest their claim for tortious interference with a prospective economic advantage on an assertion that the CEP Respondents acted in a manner that was "both injurious and transgressive of generally accepted standards of commonly morality or of law." *Harper-Lawrence, Inc. v. United Merchants & Mfrs., Inc.*, 261 N.J. Super. 554, 568 (App. Div. 1993) (*quoting Di Christofaro v. Laurel Grove Memorial Park*, 43 N.J. Super. 244, 255 (App. Div. 1875)). Specifically, Appellants assert that the CEP Respondents used confidential information under the NDA to negotiate a competing deal with the owners of the Property. Appellants further allege that the CEP Respondents "undercut Appellants' deal" and, had they not done so, "Plaintiffs would have received the economic benefit of having the Solar Project at the Project Site." (Pa001644 - 001645). The facts underpinning these alleged claims simply ignore Appellants' payment default under the Lease and consequent loss of site control over the Property. Appellants' default led inevitably to their loss of the Solar Rights tied to the Property. As a result of Appellants' own failures, Appellants lost the ability to continue with the Solar Project at the Property. Therefore, Appellants cannot establish the "resulting damages" required to maintain a cause of action for tortious interference.

In the typical tort case, a plaintiff must prove tortious conduct, injury and proximate cause. W. Keeton, D. Dobbs, R. Keeton D. Owen, *Prosser Keeton on the Law of Torts* § 30, at p. 164-65 (5th ed.1984). Proximate cause is defined as "'any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred.'" *Conklin v. Hannoch Weisman*, 145

N.J. 395, 418 (N.J. 1996) (internal citations omitted). Fundamentally, for a plaintiff to impute tort liability upon a defendant a "plaintiff must prove tortious conduct, injury and **proximate cause**." *Ayers v. Jackson Township*, 106 N.J. 557, 585 (1987) (emphasis added).

Here, there exists no proximate cause between Appellants' loss of their solar project, the land, and/or the Solar Rights and any actions of the CEP Respondents. Appellants defaulted under their Lease and subsequently lost their interest in the Property when the landowner, Fiberville, exercised its rights under the Lease to terminate. Appellants have admitted losing their lease due to an inability to pay their rent arising from some dispute among their partners. PJM then terminated Appellants' application, which resulted in the loss of Appellants' Solar Rights. Even if Appellants were to prove that CEP Respondents behaved as alleged in the Verified Complaint, something CEP Respondents strenuously deny, Appellants would still be unable to demonstrate a direct causal link between the actions of CEP Respondents and Appellants' loss of the solar project.

3. Appellants Fail To Establish a Cause of Action for Fraud, Conversion, or Breach of Implied Covenant (Pa003049 – Pa0051).

The trial court properly dismissed Appellants' claims for fraud, conversion, and breach of the implied covenant. Appellants cannot meet the required elements because these claims require Appellants to show a continuing right to develop the Solar Project. After missing their rent payment, Appellants had no ability to develop the Solar Project after the termination of the Lease and Solar Rights. As a result, Appellants lost any right to assert any claim for damages stemming from their own inaction.

To state a claim for common law fraud, Appellants are required to allege: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the

other person; and (5) **resulting damages**." *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997)(emphasis added). "Fraud is not presumed; it must be proven through clear and convincing evidence." *Stoecker v. Echevarria*, 408 N.J. Super. 597, 617 (App. Div. 2009).

Again, for all the reasons set forth herein, Appellants cannot possibly establish the "resulting damages" necessary to sustain their fraud claims against the CEP Respondents. Appellants defaulted under their Lease when they failed to make the annual rent payment due to a dispute among their members.[2] Appellants could have made that payment and continued developing their solar project, but they admittedly chose not to. CEP Respondents should not bear the costs and damages flowing from Appellants' own breach of their Lease. These arguments also apply to the other claims brought by Appellants herein.

Similarly, trial court properly dismissed the Appellants' claim for conversion (Count 4). Under New Jersey law, conversion is defined as the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the execution of an owner's rights. *LaPlace v. Briere,* 404 N.J. Super. 585, 595 (App. Div. 2009). The elements of conversion are: (1) "the property and right to immediate possession thereof belong to the Respondent;" and (2) "the wrongful act of interference with that right by the defendant." *First Nat'l Bank v. North Jersey Trust Co.,* 18 N.J. Misc. 449, 452 (1940).

In asserting a claim for conversion, Appellants allege that the CEP Respondents "have intentionally exercised a right over the Solar Rights inconsistent with the Plaintiffs' ownership rights creating an exclusion of these rights." (Pa001646). Appellants claim as a result thereof, Appellants" have lost the value of the Solar Rights, the value of the development, and the sale of

[2] It is worth noting that the dispute among the partners resulted in federal litigation, *New Energy Ventures, Inc. v. Renewable Energy Capital, LLC*, No. 3:17-cv-06167, that was settled.

the Solar Project on account of the [CEP] Defendants." (*Id.*). The Appellants, however, did not "own" the Solar Rights. After the Appellants lost site control of the Property, PJM voided the Solar Rights, and Appellants lost all rights to develop the Solar Project. The CEP Respondents, and anyone else for that matter, were free to pursue a development relying upon the approvals, or "Solar Rights", thereafter. For this reason, the CEP Respondents could not have assumed control of assets (the Solar Rights) owned by the Appellants because the Appellants had no ownership interests in the Solar Rights. Accordingly, Appellants' claim for conversion fails.

Appellants' cause of action for breach of implied covenant of good faith and fair dealing (Count 6) also fails. "[T]he breach of the implied covenant arises when the other party has acted consistent with the contract's literal terms, but has done so in such a manner so as to have **the effect of destroying or injuring the right of the other party to receive the fruits of the contract**[.]" *Wade v. Kessler Inst*., 172 N.J. 327, 345 (2002) (citations and quotations omitted).

Herein, the actions of the CEP Respondents as alleged did nothing to "destroy" Appellants' rights to receive the "fruits" of the contract. The "fruits" at issue in this case would be the profits Appellants would earn from their development and/or sale of a solar project. However, Appellants lost that opportunity when they lost land control due to their own default under the Lease. As a matter of law, Appellants will never be able to establish that they would have received "fruits" from the solar project because Appellants themselves lost control of the Property on which the solar project was to be built. Therefore, the trial court properly dismissed these claims as against the CEP Respondents.

4. CEP Defendants Were Not Unjustly Enriched (Pa003051 – 003052).

Appellants cannot sustain a cause of action for unjust enrichment because Appellants damages, if any, were the result of their own inactions. "The doctrine of unjust enrichment rests

on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." *Assocs. Commercial Corp. v. Wallia*, 211 N. J. Super. 231, 243 (App. Div. 1986). "A cause of action for unjust enrichment requires proof that 'defendant[s] received a benefit and that retention of that benefit without payment would be unjust.'" *County of Essex v. First Union Nat. Bank*, 373 N. J. Super. 543, 549-50 (App. Div. 2004). "Unjust enrichment is not an independent theory of liability but is the basis for a claim of quasi-contractual liability." *Nat'l Amusements, Inc. v. New Jersey Tpk.* Auth., 261 N. J. Super. 468, 478 (Law Div.1992), *aff'd*, 275 N.J. Super. 134 (App. Div.), *certif. denied*, 138 N. J. 269 (1994). Courts have recognized, however, that a claim for unjust enrichment may arise outside the usual quasi-contractual setting. *County of Essex, supra,* 373 N.J. Super. at 550.

In the present case, the CEP Respondents did not receive any "benefit" from the Appellants for which compensation is due. Appellants failed to make the required payment(s) due on the Lease with a third party and, as a result, the Lease was terminated, and the Appellants lost site control of the Property. Appellants cannot claim that the CEP Respondents were unjustly enriched when Appellants lost their own solar rights.

5. Appellants Cannot Pierce the Corporate Veil Here Without Damages or Wrongful Acts (Pa003052 – 003054).

The trial court correctly prevented Appellants from piercing the corporate veil where Appellants failed to show any wrongdoing. A corporation and a limited liability company are each a legal person or entity that exists separately from its shareholders. *Lyon v. Barrett*, 89 N.J. 294, 300 (1982). In this case, both CEP Respondents are corporate structures that shield their shareholders and/or members from personal liability. The Appellants, however, have asserted a cause of action seeking to pierce the corporate veil and hold the shareholders and members of the CEP Respondents personally liable. "[P]iercing the corporate veil is not technically a mechanism

for imposing 'legal' liability, but for remedying the 'fundamental unfairness [that] will result from a failure to disregard the corporate form.'*" Verni ex rel. Burstein v. Harry M. Stevens, Inc.*, 387 N.J. Super. 160, 199 (App. Div. 2006).

In *State, Dept. of Environmental Protection v. Ventron Corp*., 94 N.J. 473 (N.J. 1983), our Supreme Court addressed those circumstances that allow for piercing of the corporate veil:

> Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil. *Lyon v. Barrett*, 89 N.J. at 300, 445 A.2d 1153. The purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, *Telis v. Telis*, 132 N.J. Eq. 25, 26 A.2d 249 (E. & A.1942), **to perpetrate fraud**, to accomplish a crime, or otherwise to evade the law, *Trachman v. Trugman*, 117 N.J. Eq. 167, 170, 175 A. 147 (Ch.1934). [*emphasis added*]

A party seeking to pierce the corporate veil must establish: (1) that the entity was "dominated" by the individual owner, and (2) "that adherence to the fiction of separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law." *Verni*, 387 N.J. Super. at 199-200 (*citing Ventron*, supra, 94 N.J. at 500-01). These circumstances, however, do not apply in this case.

Appellants' claim of veil piercing is based solely on the fact that the CEP Respondents share officers and directors and allegedly "do not observe corporate formalities", which amounts to a fraud or injustice upon the Appellants. (Pa001647). As set forth above, the CEP Respondents did not perpetrate a fraud or other injustice upon the Appellants. The mere fact that the CEP Respondents share officers and directors does not in any way amount to a fraud or injustice upon the Appellants. Again, for all the reasons set forth herein, the trial court properly dismissed this count.

6. Appellant's Claim for Injunctive Relief Similarly Fails (Pa003054).

Similarly, the trial court properly dismissed the claim for injunctive relief. Count 8 of Appellants' Verified/First Amended Complaint seeks temporary and permanent injunctive relief

pursuant to the NDA and Equity to "prevent irreparable injury." (Pa001648). Injunctive relief is remedy, not an independent cause of action and therefore, Count 8 of Appellants' Verified Complaint seeking injunctive relief was properly dismissed.

A court will grant injunctive relief where the moving party demonstrates: (1) a reasonable probability of success on the merits based on well-settled law, (2) that a balance of hardships and equities favors injunctive relief, (3) that the moving party will suffer irreparable harm in the absence of injunctive relief, and (4) that the public interest will not be harmed. *Waste Mgmt. of New Jersey v. Union Cty. Util. Auth.,* 399 N.J. Super. 508, 519-20 (App. Div. 2008) (*citing Crowe V. DeGioia*, 90 N.J. 126, 132-34 (1982)). The movant must demonstrate each factor by clear and convincing evidence. *Garden State Equality v. Dow*, 216 N.J. 314, 320 (2013) (*citing Brown v. City of Paterson*, 424 N.J. Super 176, 183 (App. Div. 2012).

As set forth in detail above, Appellants have no reasonable probability of success on the merits because Appellants' damages, if any, are the direct and proximate result of the Appellants' failure to make the payment(s) due on the Lease. Therefore, the trial court properly dismissed this claim.

7. Appellant's Claim for Declaratory Relief Similarly Fails (Pa003054).

The trial court also properly dismissed the claim for declaratory relief. In Count 9 of Appellants' Verified/First Amended Verified Complaint, Appellants seek a declaration that they are the owners of the subject Solar Rights. There is no factual or legal basis to support a finding that the Appellants own the Solar Rights.

The following facts are undisputed:

- A developer of a solar project must have a legal right to possess the land where the solar project will be constructed.

- Appellant Mill Road had entered into a Lease with Fiberville to lease the land tied to the Solar Project.

- Appellant Mill Road defaulted in the payment of the rent due under the Lease and, the Landlord exercised its right to terminate the Lease.

- Appellants' payment default was the result of the Appellants' disagreements among the owner members.
- By failing to maintain site control of the Property, among other things, the Appellants left themselves unable to abide by the obligations in their contracts, including the WMPA with PJM, resulting in a breach of the WMPA.
- After losing site control of the Property, PJM voided the Solar Rights for which Appellants now seek a declaratory judgement and resulting damages.

Based on these undisputed facts, Appellants cannot establish as a matter of law that they owned the Solar Rights. Accordingly, the trial court properly dismissed Appellant's claim for a declaratory judgment.

8. Appellants Failed to Show a Pattern of Racketeering Activity Where They Only Point to a Single Victim and Single Transaction (Pa003056 - Pa003058).

The trial court also properly dismissed the civil RICO claim. Appellants cannot prevail on a RICO claim based on a single transaction that did not damage Appellants because they had already lost the land and development agreements. Appellants seek to recover damages and relief provided for in 18 U.S.C. § 1964(c). Section 1964(c) provides a civil remedy to "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . ." 18 U.S.C. § 1964(c) . Under this section, a "**plaintiff only has standing if**, and can only recover to the extent that, **he has been injured in his business or property by the conduct constituting the violation**." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (emphasis added).

To establish standing under section 1964(c), "a RICO plaintiff [must] make two related but analytically distinct threshold showings . . . : (1) that the plaintiff suffered an injury to business or property; and (2) **that the plaintiff's injury was proximately caused by the**

defendant's violation of 18 U.S.C. § 1962." *Maio v. Aetna, Inc*., 221 F.3d 472, 483 (3d Cir. 2000) (emphasis added). Although "RICO is to be read broadly, . . . section 1964(c)'s limitation of RICO standing to persons injured in their business or property has a restrictive significance[.]" *Id.* "That limitation 'helps to assure that RICO is not expanded to provide a federal cause of action and treble damages to every tort plaintiff[,]' and focuses the inquiry of injury to the Respondent's financial position." *Twp. of Marlboro v. Scannapieco*, 545 F. Supp. 2d 452, 457-58 (D.N.J. 2008) (quoting *West Virginia v. Moore*, 895 F. Supp. 864, 871 (S.D.W.Va. 1995) (applying nearly identical two-pronged standard to establish standing)). "Therefore**, a plaintiff**, to make a showing of standing under 18 U.S.C. § 1964(c), **must proffer 'proof of a concrete financial loss and not mere injury to a valuable intangible property interest.**'" *Id.* (quoting *Maio*, 221 F.3d at 483) (emphasis added).

Here, Appellants did not have standing to bring a civil RICO claim because they had no "proof of a concrete financial loss." *See id.* As set forth in the preceding sections of argument, Appellants defaulted under their Lease, were terminated, and subsequently had their WMPA terminated by PJM. Even in their own pleading, Appellants do not tie those losses to the CEP Respondents' conduct. Had Appellants simply made their annual lease payment, Fiberville would have permitted them to continue developing the solar project. Instead, Appellants lost land control and lost their development rights. Thus, even if Appellants were somehow successful in proving that CEP Respondents committed wire or mail fraud (which they did not), Appellants still would not have standing to seek civil RICO damages because they do not have any "concrete financial loss" here. *See id.* In essence, Appellants seek to expand RICO to provide a federal cause of action for a tort plaintiff, an expansion the District of New Jersey prohibits. *See Twp. of Marlboro*, 545 F. Supp. 2d at 457-58.

Second, Appellants cannot establish the predicate acts, wire and mail fraud, necessary to support their RICO claim because Mark Bellin spoke the truth. To establish wire or mail fraud, Plaintiff must allege that Defendants "acted with an intent to defraud, which is to act knowingly and with the intention to deceive or to cheat." *Levine v. First Am. Title Ins. Co*., 682 F. Supp. 2d 442, 462 (E.D. Pa. 2010) (citing *United States v. Hoffecker*, 530 F.3d 137, 181 (3d Cir. 2008)). "**[M]ateriality of falsehood is an element of the federal … wire fraud statute**[]." *Neder v. United States*, 527 U.S. 1, 25 (1999).

Here, as discussed in the preceding sections, Mark Bellin simply informed the Planning Board of his client's acquisition of the development rights for the Property through its execution of an exclusive lease for the Property. There can be no "material[]. . . falsehood" upon which to base a mail or wire fraud claim where the underlying statement accurately represented Bellin's client's interest. *See Neder*, 527 U.S. at 25. Fiberville leased the Property to Milford and conveyed exclusive occupancy of the Property to Milford. (Pa002168). The parties expressly agreed that Milford would "use the Property solely to install and operate a Photovoltaic Solar Energy Facility." (*Id.*). Thus, Mark Bellin did not misrepresent his client's status when he wrote his letter to the Planning Board.

Moreover, Appellants cannot prove the intent necessary to sustain a claim for wire or mail fraud where Mr. Bellin testified as to his understanding that the land use approvals under consideration by the Planning Board "ran with the property, so we were obligated to finish those[.]" (Pa002250). So, Milford acquired the development rights to the Property because it entered into a lease and assumed "the obligation to complete the project." (*Id.*). The lease gave Bellin's client, Milford, "exclusive possession and control" of the Property and left Milford to

"complete the project." (*Id.*). Thus, Appellants cannot even establish the predicate acts of wire or mail fraud to support its civil RICO claim here.

Third, Appellants cannot demonstrate a pattern of racketeering activity, which requires "at least two acts of racketeering activity." 18 U.S.C. § 1961(5). Appellants must also show "that the racketeering acts are related, and that they amount to or pose a threat of continued criminal activity." *Kehr Packages v. Fidelcor, Inc*., 926 F.2d 1406, 1412 (3d Cir. 1991). The Third Circuit considers the following factors in determining whether a pattern of racketeering activity has been alleged: "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity." *Id.* at 1412-13 (quoting *Barticheck v. Fid. Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987)). Predicate acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics." *Zahl v. New Jersey Dep't of Law & Pub. Safety Div. of Consumer Affairs*, 428 F. App'x 205, 211 (3d Cir. 2011) (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)).

However, it is well settled that allegations of a single fraudulent scheme designed to deprive a single victim of his property on a single occasion do not adequately allege a RICO violation. *See Zahl, M.D. v. New Jersey Dep't of Law & Pub. Safety*, No. 06-3749(JLL), 2009 U.S. Dist. LEXIS 25327, 2009 WL 806540, at *7 (D.N.J. Mar. 27, 2009) *aff'd sub nom*., *Zahl v. New Jersey Dep't of Law & Pub. Safety Div. of Consumer Affairs*, 428 F. App'x 205 (3d Cir. 2011); *see also Ross v. Celtron Int'l, Inc*., 494 F. Supp. 2d 288, 303 (D.N.J. 2007); *Banks v. Wolk*, 918 F.2d 418, 422-23 (3d Cir. 1990).

Racketeering predicates must be "related, and . . . amount to or **pose a threat of continued criminal activity**," *H.J. Ins. v. Northwestern Bell Telephone Co*., 492 U.S. 175, 239 (1989) (emphasis added). "Long-term racketeering activity or the threat thereof is the touchstone of the continuity concept." *Swistock v. Jones*, 884 F.2d 755, 757 (3d Cir. 1989). As the Third Circuit observed, "virtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are 'related' by purpose and are spread over a period of at least several months." *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593, 597 (3d Cir. 1987). "**Congress enacted RICO to prevent organized crime from infiltrating businesses and other economic entities, not to subject ordinary crimes to heightened punishment**, absent proof that the defendants participated in the affairs of an enterprise through a pattern of racketeering activity." *Vitamin Specialties Co. v. Vita Pure, Inc*., CIVIL ACTION NO. 91-0455, 1992 U.S. Dist. LEXIS 12040, at *6 (E.D. Pa. Aug. 10, 1992) (citing *Genty v. Resolution Trust Corp*., 937 F.2d 899, 910 (3d Cir. 1991); *United States v. Lemm*, 680 F.2d 1193 (8th Cir. 1982)) (emphasis added).

Here, the racketeering predicates upon which Appellants based their civil RICO claim did not demonstrate "a threat of continued criminal activity" because they involved a single solar project and a single dispute over ownership of development rights. Where "Congress enacted RICO to prevent organized crime from infiltrating businesses and other economic entities," here, the trial court properly prevented Appellants from wielding RICO like a cudgel against the CEP Respondents and convert a commercial dispute over a solar development project into an interstate criminal enterprise. *See Vitamin Specialties*, 1992 U.S. Dist. LEXIS 12040 at *6 (citing *Genty*, 937 F.2d at 910). Moreover, where Appellants only plead activities pertaining to a single solar development project, the Panel should not find a pattern of racketeering activity because it is well-settled that a single scheme directed against a single defendant does not give rise to a

RICO claim. *See Ross*, 494 F. Supp. at 303. If anything, Appellants have only presented the "garden variety fraud" upon which the Third Circuit does not permit a civil RICO claim to proceed. *See Marshall-Silver Constr. Co*, 894 F.2d at 597. All of the acts that Appellants describe in their Amended Complaint were directed toward a single purported misrepresentation, so the Amended Complaint does not state a claim upon which relief can be granted.

9. Appellants Failed to Plead Trade Secrets Claim Where the NDA Term Had Expired and Where They Do Not Identify a Protectable Trade Secret in Their Complaint.(Pa003056 – 003058).

The trial court properly dismissed the threadbare trade secret claim. Appellants cannot demonstrate that they held a protectable trade secret and most importantly cannot establish any damages flowing from the conduct alleged. Appellant Mill Road admits it lost its Lease with Fiberville because it was fighting with its own partners. There is no alleged trade secret at issue, so there can be no trade secret claim.

In New Jersey, "a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business" and may include "a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers." *King Transcription Servs., LLC v. Phx. Transcription, LLC*, 2019 N.J. Super. Unpub. LEXIS 621, at 40-41 (App. Div. Mar. 19, 2019)(*citing Rycoline Prods., Inc. v. Walsh*, 334 N.J. Super. 62, 72 (App. Div. 2000)). **Courts dismiss actions where the plaintiff fails to point to "a specific action, process, or formula" that might be protectable**. *E.g., Oakwood Labs., LLC v. Bagavathikanun Thanoo,* 2017 U.S. Dist. LEXIS 194935, at 4 (D.N.J. 2017); *see also Givaudan Fragrances Corp. v. Krivda*, 2013 U.S. Dist. LEXIS 153437, at 5 (D.N.J. Oct. 25, 2013) (holding that "[g]enerally, a plaintiff in a misappropriation of trade secrets case must identify with precision the trade secrets at issue at the

outset of the litigation."). In *Oakwood Laboratories*, the court dismissed plaintiff's complaint where it alleged misappropriation of its microsphere system technology by defendant but did not identify any specific process as a trade secret. *Id.*

Here, Appellants did not plead a single allegation defining the trade secret it sought to protect. (Pa001608 - Pa001659). Moreover, Appellants cannot establish a protectable trade secret here. Appellants might be arguing that the amount it paid under its Lease with Fiberville was a protectable trade secret, but lease payments are not "a specific action, process, or formula" that are protected by New Jersey trade secret law. *See Oakwood Laboratories*, 2017 U.S. Dist. LEXIS 194935 at 4. Appellants did not spend monies researching or developing a specific amount to pay under their Lease with Fiberville, and this is not the type of information trade secret law protects in New Jersey. The lease payment is merely a term negotiated with Fiberville, not a trade secret protected from third parties by Appellants. Unlike a customer list or a proprietary process, the amount paid in rent does not provide a unique competitive advantage to Appellants. Thus, Appellants cannot establish a critical element.

10. Appellants Cannot Show a Civil Conspiracy Because Bellin acted as an Attorney for Milford, and There was no Unlawful Act, and Therefore No Valid Tort Here (Pa003056 – 003058).

The trial court properly dismissed Appellants' civil conspiracy claim. Appellants did not plead a civil conspiracy claim upon which relief could be granted because they alleged a conspiracy comprised of a corporation and its agents. Furthermore, Appellants cannot show any damages attributable to the purported conspiracy. Because there were no assets to "steal," there can be no conspiracy here.

In New Jersey, a civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal

element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." *Morgan v. Union County Bd. of Chosen Freeholders*, 268 N.J. Super. 337, 364 (App. Div. 1993), *certif. denied*, 135 N.J. 468 (1994). Most importantly, the "gist of the claim is not the unlawful agreement, 'but the underlying wrong which, absent the conspiracy, would give a right of action.'" *Id.* at 364.

However, "a corporation which acts through authorized agents and employees . . . cannot conspire with itself." *Tynan v. Gen. Motors Corp*., 248 N.J. Super. 654, 668 (App. Div.), *certif. denied*, 127 N.J. 548 (1991), *rev'd in part*, 127 N.J. 269 (1992). "A corporation and its employees are not separate persons for the purpose of civil conspiracy, and a conspiracy cannot exist in the absence of two or more persons acting in concert." *Nat'l Auto Div., LLC v. Collector's All., Inc.*, No. A-3178-14T3, 2017 N.J. Super. Unpub. LEXIS 234, at *13 (App. Div. Jan. 31, 2017).

Here, Appellants cannot establish a conspiracy where they allege that CEP Solar, Mark Bellin, and Gary Cicero conspired to create Milford because that alleged conspiracy consists of a corporation, its principal, and its agent. Where there can be no "conspiracy by a corporation. . . with its own officers, agents or employees, who are performing their usual job of formulating and carrying out [the corporation's] managerial policy," here, the trial court properly found that Appellants failed to state a claim for conspiracy where they alleged that Cicero, Bellin, and the corporation CEP Solar conspired to create Milford and pursue solar development at the Property. *See id.* When Bellin wrote his letter to the Planning Board, he was acting as a corporate agent. When Gary Cicero communicated with Alex Lemus, he was communicating on behalf of CEP Solar.

Furthermore, civil conspiracy is not an independent cause of action, but rather a "liability expanding mechanism" which exists only if a plaintiff can prove the underlying "independent wrong." *Farris v. Cnty. of Camden*, 61 F. Supp. 2d 307, 326 (D.N.J. 1999). "The gist of an action in civil conspiracy is not the conspiracy itself but the underlying wrong, which absent the conspiracy, would give a right of action." *Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank*, 163 N.J. Super. 463, 491 (App. Div. 1978). "**The essential element of the tort is not the conspiracy[,] but the damage inflicted pursuant to it**." *Id.*

Here, Appellants did not state a valid claim for civil conspiracy because they cannot show any damage inflicted by the conspiracy. *See id.* Where the "essential element" of civil conspiracy is the "damage inflicted pursuant to it," Appellants did not present a valid claim for conspiracy because all their injuries flowed directly from their own failure to make their lease payments. Fiberville testified that it would have let Appellants continue developing the Property if they had only made their lease payments. (Pa001803 – 001804). Yet, Appellants refused to do so, and their solar agreements, including the WMPA they had purportedly acquired from Fiberville, were terminated by the regulatory entities. Even if the CEP Respondents conspired to mislead the Planning Board (which they did not), Appellants would *still* not have a valid claim because they would have no damages attributable to the statements made to the Planning Board.

11. Appellants Cannot Obtain a Declaratory Judgment for a Project they Abandoned When They Refused to Pay Rent.(Pa003056 – 003058).

The trial court properly prevents Appellants from seeking a declaratory judgment in a damages suit they litigated for over two years. The right to a declaratory judgment is statutory in nature. *N.J. Dept. of Envtl. Prot. v. Occidental Chem. Corp.*, 2015 N.J. Super. LEXIS 230 at *26 (N.J. Sup. Ct. Jan. 13, 2015) (*citing* N.J.S.A. 2A:16-50, et seq.). "While a declaratory judgment is not precluded where another remedy is available, the relief 'can be denied where another

remedy would be more effective or appropriate.'" *Id.* at *26-27 (*quoting 966 Video, Inc. v. Mayor and Twp. Committee of Hazlet Twp.*, 299 N.J. Super. 501, 512 (Law. Div. 1995). In *Occidental*, the court dismissed defendant's claim for declaratory judgment where the claim was "based on the same underlying causes of action in the counts alleging its contract claims." *Id.* at *28. The court found that "[i]t makes no sense to treat this issue in a separate count of the complaint." *Id.*

Furthermore, **courts do not permit claims for declaratory judgment where the controversy has already ripened and the parties seek other judgments against each other**. *E.g.*, *Rego Industries, Inc. v. Am. Modern Metals Corp.*, 91 N.J. Super. 447, 452-53 (App. Div. 1966). In *Rego*, the court upheld dismissal of the plaintiff's claim for declaratory judgment confirming that defendant breached a contract where the plaintiff also sought judgment for damages, rescission, and/or replevin. *Id.* at 450-53. The court reasoned:

> The purpose of a declaratory judgment proceeding is to provide a means by which rights, obligations and status may be adjudicated in cases involving a controversy **that has not yet reached the stage at which either party may seek a coercive remedy**. Such proceeding is intended to serve as **an instrument of preventive justice**, to relieve litigants of the common law rule that no declaration of right may be judicially adjudged until that right has been violated, and to permit adjudication of rights or status without the necessity of a prior breach. Stated in another way, there is ordinarily no reason to invoke the provisions of the Declaratory Judgments Act where another adequate remedy is available.
>
> *Id*. at 452-53 (emphasis added).

The Appellate Division upheld the dismissal, recognizing that "the relationship between the parties had already progressed to a point where granting declaratory relief would not serve the purpose intended by that legislation." *Id.* at 454.

Here, Appellants could not obtain a declaratory judgment because they litigated this case for years and sought a damages judgment against the CEP Respondents. Just as in *Rego*

Industries, where the Appellate Division dismissed a claim for declaratory judgment because "another adequate remedy" was available and because declaratory judgment proceedings are only intended as "preventative justice" mechanisms, here, Appellants have been seeking the coercive remedy of a money judgment for years now. *See id.* at 452-53. This case has progressed well beyond the point where a declaratory judgment would resolve the issues or prevent further litigation; if anything, a declaratory judgment in favor of Appellants would give rise to numerous new claims because Appellants would be disrupting a settled solar facility that they did nothing to build.

C. The Trial Court Correctly Dismissed the Claims Against CEP Respondents Where Appellants Admitted Their Causes of Action Arose After the NDA Expired.(Pa003036 – 003058)

The Panel should affirm the decision below because the NDA expired well before the conduct alleged and Appellants failed to show any conduct that would breach the NDA. Appellants cannot use an NDA as a shield to ward off competitors from a project they abandoned. CEP Respondents abided by its terms, and Appellants introduce no evidence to the contrary.

1. The NDA Expired Before Any Conduct Alleged. (Pa002645 – 002646).

Appellants cannot maintain a breach of contract claim where the NDA term ended a year before the events at issue. Appellants cannot point to any document or record outside of the bare allegations in their pleading to support an extension of the NDA in this matter, and the terms of the NDA clearly state that it terminated a year after Appellants produced documents in due diligence. Thus, the trial court properly entered summary judgment because the NDA terminated well before any of the events Appellants describe in their Amended Complaint.

A party bringing a claim of breach of contract has the burden of proving all elements of its cause of action. *Cumberland Cnty. Improvement Auth. v. GSP Recycling Co.*, 358 N.J Super. 484, 503 (App. Div. 2003). Under New Jersey law, a plaintiff must plead and prove the following elements for a valid breach of contract claim: "(1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations." *Frederico v. Home Depot*, 507 F.3d 188, 203 (3d Cir. 2007) (applying N.J. law).

"The interpretation or construction of a [written] contract is usually a legal question for the court[.]" *Driscoll Constr. Co. v. State of N.J., Dep't of Transp.*, 371 N.J. Super. 304, 313-14 (App. Div. 2014). "Where the terms of a contract and clear and unambiguous there is no room for interpretation or construction and [courts] must enforce those terms as written." *Kutzin v. Pirnie*, 124 N.J. 500, 507 (1991) (citation omitted). "If the terms of a contract are clear, [courts] must enforce the contract as written and not make a better contract for either party." *Graziano v. Grant*, 326 N.J. Super. 328, 342 (App. Div. 1999).

Here, the language of the NDA is clear. It states that the NDA's term extends only one year from the date of the last services performed: "Term. The term of this Agreement shall be during services performed and one year from the date of the last services performed." (Pa002645 – 002646). The NDA itself was executed on September 28, 2015. (*Id.*). When Mr. Lemus refused the offer made by the Defendant, the discussions ended. Mr. Cicero, in turn, confirmed during his deposition that the NDA's term had long expired by the time his company entered into a lease with Fiberville for the subject property. (Pa002204). ("The NDA was signed in December of 2015. It had already expired [in 2017]"). Indeed, Respondents waited until "[a]fter the expiration of the NDA" to speak with Fiberville representatives. (Pa2205).

Thus, by its own terms, the confidentiality provisions of the NDA expired well before June of 2017, the earliest date on which the conduct Appellants now complain of occurred. If any documents demonstrating subsequent due diligence or "services performed" existed, Appellants would produce them. They have not.

So, at best, the NDA expired in early 2017, one year after the last "services performed," which were Appellants' provision of due diligence documents. Appellants have not demonstrated that any due diligence occurred in the latter half of 2016, or that the parties agreed to extend the term of the NDA. Thus, by its own terms, the NDA terminated well before June of 2017, the earliest date on which the conduct Appellants now complain of occurred. Appellants do not have a single demonstrable fact that would allow the Panel to extend the term of the NDA into the summer of 2017. **Given that all the acts of which Appellants complain occurred in the summer of 2017, there can be no breach of the NDA**. (Pa001638 – 001639). (**alleging that Defendants approached Fiberville to negotiate a lease in "August 2017"**) (emphasis added). Thus, the Panel should affirm the decision below.

2. Appellants Have Not Produced a Shred of Evidence that Defendants Ever Used Any Confidential Information.

Furthermore, Appellants failed to produce a single document or piece of actual evidence supporting their theory that the Defendants misused confidential information. Instead, all Appellants can do is state that Defendants entered into a lease with Fiberville.

Yet, the record indicates that Fiberville was entertaining offers from multiple solar developers at the time. After all, Fiberville had advertised this project before Appellants even entered into their lease. This was a well-known solar opportunity, and Fiberville took numerous steps to warn Appellants of the dire consequences that would flow from their failure to pay rent. Appellants ignored the warnings, and they lost land control. The mere fact that CEP Respondents

entered into their own lease for the subject property is not enough to show any misuse of confidential information. Fiberville representative Mr. Sackowitz also made clear that the Defendants had nothing to do with the termination of the Lease with Appellant:

> Q. Now, in the complaint in this case, the Plaintiff, Mill Road, asserts that CEP or Milford Solar Farm, which are the entities owned by Mr. Cicero, induced Fiberville Estates to terminate the lease with Mr. Lemus or his company. Is there any truth to that?
>
> **A. No, in fact, the opposite.**

(Pa001805 – 001806) (emphasis added).

The record simply does not support Appellants' version of events here. They cannot continue to rely on bare allegations in their pleadings. Without actual evidence of misappropriation, the Court must grant summary judgment on these claims. Appellants have had two years to develop their case and have failed to do so. They should not be rewarded for advancing these baseless claims. Thus, summary judgment was appropriate, and the Panel should affirm the decision below.

3. The Court Does Not Need to Determine Mark Bellin's State of Mind Where His Statement Is Objectively True and Where Appellants Failed to Show Causation or Damages for Their Claims, Where the NDA Term Expired, and Where There Is No Evidence of Any Misuse of Confidential Information.

Lastly, Appellants' argument that the Court needs to probe the mind of Mark Bellin before making a decision on the merits of this case is inapposite and even absurd. Appellants cannot establish causation or damages for any of their newfound claims because they refused to make payments under their Lease and were terminated by Fiberville. Where Fiberville itself testified that it would have permitted Appellants to continue their development work if they had only paid their Lease, and where Appellants themselves admit that the CEP Respondents had

nothing to do with Appellants' default, Appellants have only themselves to blame for their damages.

Moreover, as stated at length above, the term of the NDA had expired. Appellants do not even have a breach of contract upon which to predicate their other claims here. No matter what Mark Bellin's interior motivations were, the facts in this case will not change. Nothing will change how Appellants refused to pay rent because their partners were fighting. Nothing will change how Fiberville repeatedly warned Appellants that they needed to pay rent to keep the project. Nothing will change how Appellants' development approvals were cancelled when they lost land control.

Appellants have only themselves to blame here, and they should not be permitted to use the judicial mechanisms of this State as a cudgel to spitefully bludgeon their competitor. The time has come to dismiss these claims. Appellants cannot hide behind their baseless allegations in their pleadings anymore. After two and a half years, enough is enough.

CONCLUSION

The Court should not permit Appellants to bring claims for damages arising out of a lease they failed to pay. Appellants ceded all interest in the solar project on the property when they refused to pay the landlord. Permitting Appellants to sue for their purported interest in solar rights would, in effect, create a lien on the property held by an evicted commercial tenant. The law in New Jersey prohibits such a result. Absent damages or a legal cause of action, the Panel should affirm the dismissal of CEP Respondents from this case.

Dated: November 23, 2022

Respectfully submitted,

s/Sean F. Byrnes
SEAN F. BYRNES, ESQ.
Attorneys for Defendants/Respondents, CEP Solar, Ltd., Milford Solar Farm LLC, Gary R. Cicero, and Mark Bellin, Esq.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003063-21

MILL ROAD SOLAR PROJECT LLC, NEW ENERGY VENTURES INC., GHG TRADING PLATFORMS, INC., Appellants/Plaintiffs, **v.** CEP SOLAR LTD., MILFORD SOLAR FARM LLC, FWH ASSOCIATES, P.A., PURE POWER ENGINEERING, INC., GARY R. CICERO, MARK BELLIN, ESQ., NEW JERSEY RESOURCES, TOWNSHIP OF HOLLAND & ITS PLANNING BOARD AND FIBERVILLE ESTATES, LLC, Respondents/Defendants.	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION - CIVIL ACTION BERGEN COUNTY DOCKET NO. BER-L-2029-19 SAT BELOW: Hon. Robert C. Wilson, J.S.C.

RESPONDENT/DEFENDANT, FWH ASSOCIATES, P.A. BRIEF IN OPPOSITION TO APPEAL

THOMPSON BECKER, L.L.C.
Ten Melrose Avenue, Suite 400
Cherry Hill, New Jersey 08003
Phone: (856) 616-8886
Attorneys for Respondent/Defendant, FWH Associates, P.A.

Counsel of Record and On the Brief:
Frederick T. Mahar, Esquire (I.D. #062462013)
fmahar@thompsonbeckerlaw.com
On the Brief:
Jason A. Peterson, Esquire (I.D. #407932022)
jpeterson@thompsonbeckerlaw.com

November 17, 2022

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PRELIMINARY STATEMENT

Respondent FWH Associates, PA (hereinafter "FWH") is involved in this dispute solely based on the engineering services that it provided throughout the course of the solar farm project that is the subject of the underlying litigation (hereinafter "the Project"). FWH provided those services for some of the defendants-respondents, but never contracted with the plaintiffs-appellants Mill Road Solar Project, LLC, New Energy Ventures, Inc., and GHG Trading Platforms, Inc. (collectively hereinafter "Appellants"), nor was FWH a part to the non-disclosure agreement entered into by Appellants and some of the other parties related to the Project.

In its complaint in the underlying case, Appellants brought one count against FWH, wherein Appellants claimed that FWH had breached its professional and ethical duties in conjunction with the engineering services provided on the Project. Appellants failed to serve an affidavit of merit in support of their claim pursuant to New Jersey law and FWH moved for a dismissal under the applicable statute. The trial court granted FWH's motion to dismiss and Appellants now appeal that ruling and assert that no affidavit of merit was required. This respondent brief focuses only on the affidavit of merit issue, as all other aspects of Appellants' voluminous submission are not relevant to FWH or its dismissal from the underlying case.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS

The underlying case arises from Appellants' claim for damages related to the ownership and development rights to a solar farm project located in Holland Township, NJ (the "Project"). (Pa1). Appellants asserted that they were the rightful owner of the Project and brought suit against defendants-respondents CEP Solar, Ltd. and Milford Solar Farm, LLC (collectively referred to hereinafter as "CEP") claiming that CEP stole the Project from Appellants. (Pa1). Appellants alleged that after it and CEP entered into a non-disclosure agreement ("NDA") to discuss the possible sale of the Project rights, CEP took action to secure the property on which the Project was to be constructed, in breach of the NDA. (Pa7-12).

FWH provided site engineering services throughout the design and construction of the Project first as a subconsultant to respondent Pure Power (who was contracted with Appellants) and later as a direct consultant to CEP. (Pa1; Pa83; and Pa104). FWH never entered into a contract with Appellants, nor did FWH receive any payments from Appellants for the services it provided on the Project. (Pa79 and Pa80). Further, FWH was not a party to the NDA between Appellants and CEP, nor was it consulted on the potential sale of the Project by Appellants. (Pa79). FWH was never aware of any dispute

between Appellants and CEP related to control of the property and/or the Project. (Pa79).

Several months after Appellants obtained site approval for the Holland site, Pure Power advised FWH that Appellants had become unresponsive with respect to the Project. (Pa80). Shortly thereafter, Pure Power received notice from the owner of the property that Appellants' lease had been terminated for failure to make payment. (Pa80 and Pa81). Pure Power and FWH were further advised by the property owner that CEP had obtained rights to the Project and would continue toward constructing the solar farm at the Holland site. (Pa80 and Pa81).

Once FWH was informed that CEP had obtained rights to the Project, it was engaged directly by CEP to continue performance of engineering services on the Project, specific to the Holland, NJ property (to which Appellants no longer possessed any rights) (Pa81). At that time, FWH had the consent of its client, Pure Power, to perform services for the new Project owner, CEP. (Pa79). Accordingly, FWH continued to develop its site engineering drawings to advance the Project for CEP. (Pa79). FWH never sold the Project plans, or any other documents, to CEP. (Pa80 and Pa81).

Appellants named FWH and Pure Power as defendants when it filed the complaint against CEP. (Pa1). Appellants alleged in the complaint that FWH

"breached [its] professional and ethical duties to [Appellants] by selling the engineering site plans and drawings to CEP." (Pa19). However, FWH had never entered into a contract with Appellants and thus owed them no duty regarding the Project. Further, Appellants' falsely claimed that they "owned all of the work product" prepared by FWH for the Project despite the fact that FWH's contracts with both Pure Power and CEP included a provision that explicitly stated that FWH retained ownership of such work product (i.e. the engineering plans).[1] (Pa82; Pa104). Likewise, Appellants' falsely contended that FWH "sold" the engineering plans to CEP. (Pa508). Rather, FWH simply continued to provide site engineering services to CEP after the change in ownership of the Project and continued to develop the engineering plans for purposes of completing the Project. (Pa104; Pa509).

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[1] It is Respondent's position that ownership of the engineering plans in question is not relevant to the analysis of the applicability of the Affidavit of Merit Statute. However, for additional context and information, FWH retained ownership of its plans under both its contract as a consultant to Pure Power and its contract with CEP.

> Instruments of Service … drawings, specifications, and other documents furnished by FWH Associates are instruments of service and shall not become property of the owner whether or not the project is commenced.

(Pa92).

On April 1, 2019, defendant FWH Associates, P.A. filed an answer to plaintiffs' complaint. The Civil Case Information Statement filed with FWH's answer identified the action as professional malpractice. (Pa63; Pa506). FWH's answer also listed the Affidavit of Merit Statute as a separate defense (Pa71). Pursuant to N.J.S.A. 2A:53A-27 *et seq.*, an affidavit of merit was required to be filed with the court and served on FWH in support of Appellants' professional malpractice claim against FWH. Appellants did not file or serve an affidavit of merit within the statutory period of 120 days from the date that FWH's answer was filed.

FWH moved to dismiss Appellants' complaint with prejudice for failure to state a claim under R. 4:6-2(e) based on Appellants' failure to serve an affidavit of merit against FWH pursuant to N.J.S.A. 2A:53A-27 *et seq*. The Honorable Robert C. Wilson, J.S.C. granted FWH's motion to dismiss and issued a written opinion explaining the basis and rationale for FWH's dismissal. (Pa984; Pa986). Appellants now seek to overturn FWH's dismissal in the underlying matter.

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

The standard of review for statutory interpretation of whether a cause of action is subject to the Affidavit of Merit Statute is de novo. See Cowley v. Virtua Health Sys., 242 N.J. 1, 14 (N.J. 2020); Triarsi v. BSC Group Servs., LLC, 422 N.J. Super. 104, 113 (App. Div. 2011).

II. THE TRIAL COURT PROPERLY APPLIED THE AFFIDAVIT OF MERIT STATUTE IN DISMISSING THE COMPLAINT AND ALL CROSSCLAIMS AGAINST FWH.

A. Appellants' Factual Allegations in the Underlying Case Implicate the Need for Expert Testimony and thus the Affidavit of Merit Statute Applies.

The Affidavit of Merit Statue requires a plaintiff bringing a professional malpractice case "to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early state of litigation." In re Hall, 147 N.J. 379, 391 (1997). In effect, "the affidavit of merit statute serves a gate-keeping function so that only those cases that meet a threshold of merit proceed through the litigation stream." Hubbard v. Reed, 331 N.J. Super. 283, 292 (App. Div. 2000). If the plaintiff fails to provide an affidavit pursuant to the statute, it shall be deemed a failure to state a cause of action. N.J.S.A. 2A:53A-29.

The Legislature rationale for the statute was not concerned with a plaintiff's ability to prove the allegations contained in the complaint, but rather "with whether there is some objective threshold merit to the allegations." Hubbard v. Reed, 168 N.J. 387, 394 (quoting Hubbard v. Reed, 331 N.J. Super. 283, 292-93, (App. Div. 2000)); Cowley v. Virtua Health Sys., 242 N.J. 1 (N.J. 2020). The Supreme Court has described the threshold of the statute as one that "requires plaintiffs to provide an expert opinion, given under oath, that a duty of care existed and that the defendant breached that duty." Hubbard, 168 N.J. at 394. The statute applies only to the duty of care and breach of duty, not to causation or damages; an affidavit need only prove that "the care, skill or knowledge … fell outside acceptable professional or occupational standards or treatment practices." Id. at 390, (quoting N.J.S.A. 2A:53A-27).

N.J.S.A. 2A:53A-27 provides that:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside the acceptable professional or occupational standards or treatment practices.

N.J.S.A. 2A:53A-27.

If the plaintiff fails to provide an affidavit of merit pursuant to N.J.S.A. 2A:53A-27, it shall be deemed a failure to state a cause of action. See Cornblatt v. Barrow, 153 N.J. 218 (1998). To determine if the Affidavit of Merit Statute applies, courts have considered the following three factors:

> 1) [W]hether the action is for "damages for personal injuries, wrongful death or property damage" (nature of injury);
> 2) [W]hether the action is for "malpractice or negligence" (cause of action); and
> 3) [W]hether the "care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint [] fell outside acceptable professional or occupation standards or treatment practices" (standard of care).

Triarsi v. BSC Group Servs., LLC, 422 N.J. Super. 104, 114 (App. Div. 2011) (quoting Couri v. Gardner, 173 N.J. 328, 334 (2002)).

Relating to the first factor, courts have held that the statute generally applies to all actions for damages based on professional malpractice and not just specifically limited to "personal injuries, wrongful death or property damage." Paragon Contractors, Inc. v. Peachtree Condominium Ass'n, 202 N.J. 415, 421 (2010) (citing Charles A. Manganaro Consulting Eng'rs, Inc. v. Carneys Point Twp. Sewerage Auth., 344 N.J. Super. 343, 347 (App. Div. 2001).

The second factor has been held by courts to be more encompassing than limited only to an action for malpractice or negligence. See Couri v. Gardner, 173 N.J. 328 (2002) (held in a breach of contract action that whether in contract or in tort, a claimant should determine if the underlying factual allegations of the claim require proof of a deviation from the professional standard of care for that specific profession). Accordingly, courts look to "the underlying factual allegations, and not how the claim is captioned in the complaint." Triarsi v. BSC Group Services, LLC, 422 N.J. Super. at 114. Courts have further found that that even when a plaintiff has asserted an intentional tort, that too can require an affidavit of merit. Nuveen Mun. Trust v. Withumsmith Brown P.C., 752 F.3d 600, 605-06 (3d Cir. 2014) (ruled that even through Nuveen's allegations of fraud against Withum were styled as intentional torts, rather than negligence or malpractice claims, they nonetheless required proof that Withum deviated from professional standards of care for an accountant).

The third factor focuses on whether the factual allegations implicate the care exercised by the professional and whether it fell outside the acceptable standards of practice in the industry. See Alpert, Goldberg, Butler, Norton & Weiss, P.C., v. Quinn, 410 N.J. Super. 510, (App. Div. 2009) (required an affidavit of merit in breach-of-contract claim against an attorney because the

pleadings alleged that "the quality of work product was not sufficient" and that the attorney "failed to do a complete and competent job", and those allegations required "proof of a deviation from the professional standard of care applicable to attorneys"); and see Charles A. Manganaro Consulting Eng'rs., Inc. v. Carneys Point Twp. Sewerage Auth., 344 N.J. Super. 343, (App. Div. 2001) (found that an affidavit of merit was required for a breach of contract claim because the factual allegations were that the engineering firm failed to properly prepare the plans and specifications, which was professional malpractice).

On the other hand, there are instances where intentional torts, specifically relating to fraud and misrepresentation, do not require an affidavit of merit. See Stoecker v. Echevarria, 408 N.J. Super. 597, at 619 (2009) (to prevail on the fraud claim, plaintiff did not need to present proof of the deviation from the applicable standard of care because expert testimony is not needed to determine whether a made statement is false and were known to be false); but see (St. Anargyroi, IXI, Inc. v. Atlantic Title Agency, Inc., No. L-10056-09 (N.J. Super. May 20, 2012) (a claim of negligent misrepresentation that arose directly from the defendant's services as an attorney representing plaintiffs directly implicated whether there was a violation of the professional standard of care). (Da1).

Applying these principals to the dispute at hand, Appellants' factual allegations in the underlying matter clearly implicate the standard of care for a professional engineer. The first factor relating to the damages alleged, and the subsequent interpretation of the statute in Paragon, conclude that the statute generally applies to money damage cases. In the underlying matter, Appellants alleged compensatory damages, punitive damages, and costs, interests, and attorney's fees against FWH which were clearly within the ambit of the affidavit of merit as they all relate to FWH's alleged malpractice and/or negligence.

Regarding the second factor relating to the allegations, Appellants alleged that FWH "converted Plaintiffs' property by selling the site plans and drawings to the CEP Defendants." Despite Appellants' incorrect characterization that FWH "sold the plans" to CEP, FWH's involvement in the project and transition in ownership was solely based it providing professional engineering services throughout the course of the Project from one owner to the next.[2] (Pa1, Pa104). Accordingly, Appellants aptly describe their precise grievance as to FWH within their complaint as the following: "… FWH breached their professional and ethical duties to Plaintiffs …" (Pa19).

[2] During which time, it is important to reiterate that FWH technically remained the owner of the site plans it prepared, pursuant to the terms of both of its contracts on the Project. (Pa83; and Pa104)

Appellants went so far as to specifically reference the New Jersey Code of Ethics for Engineers noting that "Engineers shall act for each employer or client as faithful agents or trustees[]'" and that "Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties." (Pa19). Thus, the cause of action directly relates to FWH's practice of professional engineering regarding the Project.

As to the third factor, applying the reasoning as laid out in precedent cited above, and looking at the underlying factual allegations as opposed to the face of the general overall claim, it is clear that Appellants are asserting that FWH, by virtue of providing engineering services on the Project for multiple owners, deviated from the acceptable standard of care. Appellants cannot prove their claim without providing an engineer expert to explain the appropriate standard of care that would apply to FWH in the circumstances of the subject Project, and to describe how FWH breached their professional and ethical duties, resulting in a deviation from that standard of care.

Unlike the Stoecker case where the court ruled that an affidavit of merit was not necessary to prove a case of fraud when a professional defendant had made a false statement, FWH made no misrepresentations or willful deceit of

the parties involved here. FWH simply continued to provide engineering services on a Project where it was completely unaware of any dispute over ownership of the Project. Indeed, Appellants' allegations in the complaint go straight to the core of the issue at hand – whether FWH breached its professional and ethical duties in providing engineering services on this Project. (Pa19). FWH's continued development of engineering plans and services on the Project, from one owner to the next, raises questions of professional and ethical duties that can only be evaluated and answered by a professional engineer familiar with the customary practice in the industry under those circumstances. Accordingly, an affidavit of merit was required, absent some recognized exception to the statute.

There is no published precedent related to the specific issue of whether use and ownership of engineering plans through a transition in ownership of a project implicates the professional standard of care, invoking the Affidavit of Merit Statute. The absence of any published opinions directly on point did not prevent the underlying trial court from ruling that an affidavit of merit was required to support Appellants' claim against FWH. (Pa984). Additionally, the underlying case is not the first time that a court has held that allegations related to the proper use and ownership of engineering plans requires an affidavit of merit in order for a plaintiff to sustain its claim against a

professional engineer. See the unpublished opinion in Stonebridge Manor, LLC v. Hubschman Engineering, P.A., et al., No. L-7960-14 (Superior Ct. of N.J. April 10, 2015) (held that in the field of professional engineering, the proper use of, and determination of ownership of engineering plans and designs is a complex issue that requires expert opinion and determination, pursuant to the factual circumstances of the individual case). (Da7).

B. The Appellants' Complaint was Properly Dismissed as to FWH due to Appellants' Failure to Serve an Affidavit of Merit Pursuant to the Statute.

The Supreme Court, in the case of Cornblatt v. Barrow, 153 N.J. 218 (1998), held that a plaintiff's failure to submit an affidavit of merit required by N.J.S.A. 2A:53A-27, is deemed a failure to state a cause of action, resulting in dismissal of the complaint with prejudice. See also Cowley v. Virtua Health System, 242 N.J. 1, 16 (2020) (citing A.T. v. Cohen, 231 N.J. 337, 346 (2017).

While it has subsequently been held that a plaintiff may be given some leeway to produce an affidavit of merit after the 60-day period, but before the 120-day period provided in N.J.S.A. 2A:53A-27, upon a showing of excusable neglect, no additional or further extensions can be granted in excess of 120 days from the date of the filing of the professional defendant's answer. Burns v. Belfasky, 326 N.J. Super. 462 (App. Div. 1999), *aff'd*, 166 N.J. 466 (2001); Palanque v. Lambert-Woolley, 327 N.J. Super. 158 (App. Div. 2000) *rev'd* on

other grounds, 168 N.J. 398 (2001). The statute specifically states that after the first 60-day period "a court may grant no more than one additional period, not to exceed sixty (60) days, to file the affidavit pursuant to this section, upon a finding of good cause." N.J.S.A. 2A:53A-27.

In this case, as discussed in the previous section, Appellants' claim that FWH breached professional and ethical duties could only be proven by evidence of professional malpractice to establish a deviation from the applicable standard of care. Therefore, an affidavit of merit was required. FWH filed its answer to the Appellants' complaint in the underlying matter on April 1, 2019. (Pa63). After the passage of 120 days (based on the 60 days provided in the statute and the generally accepted 60-day extension) Appellants had not served an Affidavit of Merit by a licensed professional against FWH. Accordingly, FWH moved for dismissal of Appellants' complaint with prejudice pursuant to N.J.S.A. 2A:53A-29. On August 30, 2019, the trial court ruled that an affidavit of merit was required and dismissed Appellants' complaint and all crossclaims thereto against FWH with prejudice.[3] (Pa969; and Pa984).

[3] The crossclaims of the co-defendants were dismissed with the understanding that the crossclaims would be considered in accordance with Burt v. West Jersey Health Systems, 339 N.J. Super. 296 (App. Div. 2001) at the time of trial, which is consistent with precedent for a dismissal under the Affidavit of Merit statute.

C. The Common Knowledge Exception Does Not Apply because FWH's Professional and Ethical Duties are Not Known to Average Jurors.

Appellants' arguments on appeal of the affidavit of merit issue are confused and contradictory. First, they argue that the Affidavit of Merit Statute does not apply to their claim against FWH as pled (discussed above). Appellants then go on to argue that the "common knowledge" exception to the Affidavit of Merit Statute applies to alleviate their obligation to serve one against FWH. Appellants ignore that by asserting the common knowledge exception, that are inherently accepting that the Affidavit of Merit Statute applies to their claim. Appellants' two arguments cannot be reconciled. Regardless, we address the common knowledge exception argument in this section in the event that this Court is inclined to consider it in the analysis of the appeal.

The common knowledge exception to the Affidavit of Merit Statute provides that no affidavit is required to support a malpractice claim where a person of reasonable intelligence can use common knowledge to determine that there was a deviation from the acceptable standard of care. Cowley v. Virtua Health System, 242 N.J. 1, 9 (2020). The exception therefore is not triggered by the type of claim being brought, but rather, by the simplicity of the required analysis of whether there was a deviation from the standard of

care. In other words, the common knowledge exception applies when an expert is no more qualified to attest to the merit of a plaintiff's malpractice claim than a non-expert. Id.

The common knowledge exception applies only in exceptionally rare cases and only when the "carelessness of the defendant is readily apparent to anyone of average intelligence." Id. at 17 (citing Rosenberg v. Cahill, 99 N.J. 318, 325 (1985). Specifically, it only applies where it is apparent that "the issue of negligence is not related to technical matters peculiarly within the knowledge of [the licensed] practitioner[]." Id. (citing Sanzari v. Rosenfeld, 34 N.J. 128, 142 (1961); See also Hubbard v. Reed, 331 N.J. Super. 283 (App. v. 2000) (common knowledge exception existed where the doctor pulled out the wrong tooth from his patient's mouth); Palanque v. Lambert-Woolley, 168 N.J. 398, 400 (2001) (common knowledge exception applied where identification numbers on a pregnancy test were mistaken twice for actual readings that indicated whether the patient was pregnant or not); and Estate of Chin v. Saint Barnabas Medical Center, 160 N.J. 460 (1999) (common knowledge exception applied where a gas line was connected to a patient's uterus rather than a fluid line).

Applying this principle and specific examples to the underlying case, it is clear that the common knowledge exception to the Affidavit of Merit Statute

does not apply. The very fact that Appellant alleged that FWH breached a professional duty, with citation to the professional engineer's code of ethics, should be sufficient to establish that expert testimony is required to substantiate their claim.

Specifically, Appellants alleged that "FWH breached their professional and ethical duties to Plaintiffs by selling the engineering plans and drawings to CEP Defendants." (Pa1). The Court is reminded again of the undisputed fact that FWH did not sell plans to CEP, but rather simply continued development of its engineering plans (which FWH consistently retained ownership of throughout the entire Project) for purposes of completing the Project. (Pa509). The questions for purposes of whether the common knowledge exception applies are therefore: 1) would a person of reasonable intelligence be able to determine whether FWH owed a professional duty to the Appellants regarding the professional engineering services? and 2) whether FWH breached that duty by continuing to develop its engineering plans for the Project once ownership of the Project transferred to CEP? The questions involve the evaluation of the proper use, and determination of ownership and rights to engineering plans and designs in the field of professional engineering under the complex factual circumstances of the underlying case. No average person could be expected to

perform such an evaluation without a professional engineer providing an opinion on the standard of care under those complex circumstances.

Thus, Appellants' claim against FWH in the underlying case implicates "technical matters peculiarly within the knowledge of [the licensed] practitioner[]." Cowley v. Virtua Health System, 242 N.J. at 17. Appellants admitted in their complaint that their claim against FWH was premised upon professional and ethical duties that they alleged FWH owed to them. (Pa19). Those professional and ethical duties are clearly beyond the ken of the average juror without the aid of expert testimony detailing what those ethical and professional duties are, and how FWH breached them. The underlying case is not analogous to ones where the common knowledge exception applied, such as a dentist pulling the wrong tooth or a medical professional giving a patient gas instead of fluid. Since the common knowledge exception does not apply, Appellants' failure to obtain and serve an affidavit of merit within the statutory time properly resulted in dismissal of the claim against FWH with prejudice. The ruling of the Trial Court should therefore be affirmed.

III. THERE WERE NO EXTRAORDINARY CIRCUMSTANCES THAT ALLEVIATED APPELLANTS' OBLIGATION TO OBTAIN AN AFFIDAVIT OF MERIT AGAINST FWH.

Finally, Appellants argue that they should be entitled to an exemption from the Affidavit of Merit Statute requirements due to the fact that no

Ferreira conference was conducted in the underlying case (which amounts to a request for relief for "extraordinary circumstances"). Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003). More specifically, Appellants argue that since FWH never requested a Ferreira conference to address the issue of an affidavit of merit, it should not be required to serve one. Appellants' argument is contradictory to established case, which provides that the absence of a Ferreira conference does not toll the running of the statutory period in which an affidavit of merit should be filed and served on defendants. See Paragon Contractors, Inc. v. Peachtree Condominium Association, 202 N.J. 415, 419 (2010).

The New Jersey Supreme Court held in Paragon that "lawyers and litigants should understand that, going forward, a reliance on the scheduling of a Ferreira conference to avoid the strictures of the Affidavit of Merit Statute is entirely unwarranted and will not serve to toll the statutory time frames." Id. at 426. Thus, Appellants' argument that the absence of a Ferreira conference somehow relieved them of filing an affidavit of merit is absolutely unfounded.

Appellants also improperly look to the case of A.T. v. Cohen, 231 N.J. 337 (2017) in furtherance of their claim to an exemption. In A.T. v. Cohen, the Court found that there were extraordinary circumstances, and that the complaint should not have been dismissed because there was **both** a lack of a

Ferreira conference and "when defendants filed a motion for summary judgment at the conclusion of the 120-day period, plaintiff included an AOM with her response to the motion[]" after plaintiff received medical records necessary to secure the affidavit or merit which were only received after defendants first filed their motion for summary judgment. Id. at 342, 348. The Court ruled: "We presume from plaintiff's swift compliance upon the filing of the motion that we are dealing with a non-frivolous matter, not the type of case that the AMS intended to weed out." A.T. v. Cohen, 231 N.J. at 349.

Appellants argue that the A.T. v. Cohen holding means that by not filing any letter requesting a Ferreira conference and "remaining silent" FWH effectively gave Appellants an exemption to the Affidavit of Merit Statute. However, the result in A.T. v. Cohen is easily distinguishable from the underlying case. Appellants ignored that the court there found that it was a combination of multiple factors, including: the failure to hold the Ferreira conference; plaintiff's counsel's inexperience with the Affidavit of Merit Statute; delayed receipt of records from the defendant; followed with a reply brief that contained the requisite affidavit of merit that taken together ultimately constituted extraordinary circumstances. Id. at 340-50. The court in A.T. Cohen specifically stated that the "failure to conduct a Ferreira

conference alone may not demonstrate extraordinary circumstances[.]" A.T. v. Cohen, 231 N.J. at 348.

Applied here, Appellants did not file an affidavit of merit at any point, either before or after the motion to dismiss, and are relying entirely on the purported failure of FWH to request a Ferreira conference to establish extraordinary circumstances.[4] Appellants' arguments are disingenuous for several reasons. First, when FWH filed its answer to Appellants' complaint, it identified the case as one of professional malpractice on the accompanying Case Information Statement. (Pa75). Secondly, FWH specifically included in its answer, as its twenty-first separate defense, citation to the Affidavit of Merit Statute. (Pa71). Finally, although the case was ultimately set on a discovery track for Complex Construction, FWH requested at the time that it filed its answer that the case be moved to the appropriate track for professional malpractice. (Pa77). Each of those items gave Appellants ample notice that FWH considered this a case of professional malpractice and planned to avail itself of all applicable defenses, including the Affidavit of Merit Statute.

[4] It should be noted that there is no authority whatsoever to support the position that a defendant seeking to rely upon the Affidavit of Merit Statute is required to request a Ferreira conference as a predicate to filing a motion based upon the statute. Appellants' description of this as a "dishonest litigation tactic" and belief that it is a valid basis for relief from the statute makes clear their lack of understanding of the statute and the interpreting precedent.

CONCLUSION

For all of the foregoing reasons, the trial court's order dismissing the complaint as to FWH, and all crossclaims thereto, with prejudice, should be affirmed.

Respectfully submitted,

THOMPSON BECKER, LLC
Attorneys for Respondent/Defendant,
FWH Associates, P.A.

By: /s/ Frederick T. Mahar
Frederick T. Mahar, Esquire

Dated: November 17, 2022

MILL ROAD SOLAR PROJECT, LLC NEW ENERGY VENTURES, INC GHG TRADING PLATFORMS, INC.	:	**SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO A-3063-21**
Plaintiffs/Appellants	:	
vs.	:	**Civil Action**
CEP SOLAR, LLC., MILFORD SOLAR FARM, LLC, FWH ASSOCIATES, P.A. PURE POWER ENGINEERING, INC., GARY R. CICERO, MARK BELLIN, ESQ. NEW JERSEY RESOURCES; TOWNSHIP OF HOLLAND & ITS PLANNING BOARD and FIBERVILLE ESTATES, LLC	:	**On Appeal From: Superior Court of New Jersey / Law Division/Bergen County Docket #Ber-L-2029-19**
Defendants/Respondents	:	**Sat Below: Hon. Robert C. Wilson, J.S.C.**

BRIEF OF DEFENDANT/RESPONDENT HOLLAND TOWNSHIP IN OPPOSITION TO APPEAL

JOHN P. GALLINA, ESQ.
012651981
260 Route 202, Suite 1100
Flemington, New Jersey 08822
(908) 782-4988
Attorney for Defendants
Holland Township and Holland
Township Planning Board

JOHN P. GALLINA, ESQ.
jpgesq@embarqmail.com
On the Brief

Date Submitted: 11/16/22

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Plaintiffs filed a Verified Complaint in this matter on or about March 19, 2019. (Pa 1).

A First Amended Complaint was filed on July 19, 2021, naming "Holland Township and its Planning Board" as Defendants. (Pa 1608). The First Amended Complaint makes no claims or demands for relief against Holland Township.

Neither Holland Township nor the Holland Township Planning Board were properly served with the Summons and Complaint. According to the proof of service, the Holland Township Clerk was not available to accept service, and the pleadings were then deposited in a mail drop box attached to the wall on the front of the building (Pa 3331; Pa 3340). An Answer was filed on behalf of Holland Township and the Holland Township Planning Board on September 27, 2021 (Pa 3059).

On February 14, 2022, Appellant filed a Motion for Default Judgment against the Township of Holland and also against the Defendant NJR. (Pa 3334). However, Appellant had not made a prior motion for entry of default as required under Rule 4:43-2. A Cross Motion on behalf of the Township of Holland was filed, seeking

[1] The procedural history and statement of facts have been combined

to deny Appellant's Motion and to dismiss Holland Township as a Defendant. (Pa 3346).

An Order Granting Default Judgment against Holland Township was entered as "unopposed " on March 4, 2022 (Pa3387). However, the Court was notified that the Crossmotion had been filed (Pa 3388). The Order Granting Default Judgment was then vacated as having been entered erroneously, and a new return date on the Motion and Crossmotion was scheduled (Pa 3389).

On April 5, 2022, the Honorable Robert C. Wilson, J.S.C. entered an Order denying Appellant's Motion for Entry of Default Judgment against Holland Township, and dismissing the First Amended Complaint against Holland Township (Pa 3442). In his opinion, Judge Wilson noted that the First amended Complaint asserted no claims or relief from Holland Township, and therefore, failed to state a claim upon which relief could be granted. (Pa 3451).

On May 23, 2022, at Plaintiffs' request, (Pa 3456), the Trial Court entered an Order dismissing this action as to all parties (Pa 3460). Plaintiffs filed a Notice of Appeal on June 8, 2022 (Pa 3461) and an Amended Notice of Appeal on June 15, 2022 (Pa 3467).

LEGAL ARGUMENT

I. PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENT AGAINST HOLLAND TOWNSHIP WAS PROPERLY DENIED, SINCE THE SUMMONS AND COMPLAINT WERE NOT PROPERLY SERVED AND DEFAULT WAS NOT PEVIOUSLY ENTERED.

Plaintiff's Motion for Entry of Default Judgment sought to have default judgment entered against Holland Township. In its supporting Certification, Plaintiff attached a Proof of Service of Process, dated 8/12/21 (Pa. 3331). According to the proof of service, the Holland Township Clerk was not available to accept service, and the pleadings were then deposited in a mail drop box attached to the wall on the front of the building. This does not constitute effective service. Under Rule 4:4-4(a)(8), for serviced on a public body, the pleadings must be served as required by Rule 4:4-1(a)(1), which requires personal service. Under Rule 4:43-2 final judgment by default may only be entered after default has been entered under Rule 4:43-1. As noted by the Trial Court (Pa 3451), default may not be entered against a Defendant who fails to answer where service is improperly made. In any event, an Answer was filed on behalf of Holland Township and the Holland

Township Planning Board September 27, 2022 (Pa 3059).[2]

The First Amended Complaint makes no allegations against Holland Township nor any claim for relief from Holland Township (Pa 1604). The only request for relief in the First Amended Complaint is for declaratory relief regarding the Holland Township Planning Board as set forth in Count 13, which seeks to set aside the approval granted by the Planning Board due to alleged fraudulent representations made to the Board (Pa 3278).

[2] Since the First Amended Complaint made no claim against Holland Township, and since Holland Township had no involvement in the proceedings before the Holland Township Planning Board, the Defendants were designated as "Holland Township Planning Board (pleaded as Township of Holland and its Planning Board)". The Crossmotion to Dismiss requested alternate relief for leave to file an Amended Answer in the event the Court required Holland Township to be specifically named as a Defendant (Pa 3344). This was not required by the Trial Court.

II. THE FIRST AMENDED COMPLAINT WAS PROPERLY DISMISSED AGAINST HOLLAND TOWNSHIP, SINCE IT FAILS TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED.

In Paragraph 16 of the First Amended Complaint (Pa 1604), it is stated that: "Defendant Township of Holland and its Planning Board are municipality and its subdivision". This statement is inaccurate. The Township of Holland is a municipality, a political subdivision of the State of New Jersey. The Holland Township Planning Board is not a "subdivision" of the Township. Rather, it is a quasi-judicial land use agency created under the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-23 et seq. As such, it operates independently of the Township, and the Township had no statutory or other authority to act on the Planning Board application.

The First Amended Complaint makes no claims against Holland Township or any demand for relief from the Township. As such, it was properly dismissed pursuant to Rule 4:6-2(e).

As noted in the opinion of the Trial Court, (PA 3452), a complaint must do more than give vague notice of a claim; it must state the essentials of a cause of action. Cusseaux v. Pickett, 279 N.J. Super 335 (Law Div. 1994), citing Schantz v. Rachlin, 101 N.J. Super 334 (Ch. Div 1961). A claim must state on its face a

cognizable cause upon which relief may be granted. Cusseax, 279 N.J. Super at 338.

Since the First Amended Complaint asserted no claims against Holland Township and makes no claim for damages or other relief no relief against it, the First Amended Complaint was properly dismissed at to Holland Township for failure to state a claim upon which relief may be granted.

CONCLUSION

For the forgoing reasons, Counsel for Holland Township and the Holland Township Planning Board (pleaded as Township Holland and its Planning Board), respectfully submits that the Order of the Trial Court denying Plaintiff's Motion for Entry of Default Judgment against Holland Township and dismissing the First Amended Complaint as to Holland Township for failure to state a claim upon which relief may be granted be affirmed.

Respectfully submitted,

s/John P. Gallina
JOHN P. GALLINA
Attorney for
Defendants/Respondents
Holland Township and the
Holland Township Planning
Board

Dated: November 16, 2022

MILL ROAD SOLAR PROJECT LLC, NEW ENERGY VENTURES INC., GHG TRADING PLATFORMS, INC., Plaintiffs-Appellants, v. CEP SOLAR, LTD., MILFORD SOLAR FARM LLC, FWH ASSOCIATES, P.A., PURE POWER ENGINEERING, INC., GARY R. CICERO, MARK BELLIN, ESQ., NEW JERSEY RESOURCES, TOWNSHIP OF HOLLAND & ITS PLANNING BOARD, and FIBERVILLE ESTATES, LLC, Defendants-Respondents,	SUPERIOR COURT OF NEW JERSEY: APPELLATE DIVISION DOCKET NO. A-3063-21 Civil Action On Appeal From: SUPERIOR COURT OF NEW JERSEY: LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-2029-19 Sat Below: Hon. Robert C. Wilson, J.S.C.

BRIEF OF DEFENDANT-RESPONDENT NEW JERSEY RESOURCES CORPORATION IN OPPOSITION TO APPEAL AND IN SUPPORT OF CROSS-APPEAL

McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4056
(973) 622-4444
Attorneys for Respondent
New Jersey Resources Corporation

Of Counsel and on the Brief
Lisa S. Bonsall (#044381988)
lbonsall@mccarter.com

On the Brief:
John R. Stoelker (#032502011)
jstoelker@mccarter.com

Dated: October 24, 2022

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PRELIMINARY STATEMENT

Plaintiffs-Appellants Mill Road Solar Project LLC, New Energy Ventures Inc. and GHG Trading Platforms, Inc. (collectively, "Appellants") appeal from the trial court's Order denying their Motion for Default Judgment against New Jersey Resources Corporation ("NJR"). Included among the facts omitted from Appellants' 28-page Statement of Facts [Pb7] are the following:

(a) Appellants never served NJR with any complaint;

(b) NJR was dismissed from the action due to Appellants' failure to prosecute, and was never reinstated as a party; and

(c) default was never entered against NJR pursuant to R. 4:43-1, nor was the entry of default ever requested by Appellants.

Despite the foregoing facts, Appellants nonetheless filed a Motion for Default Judgment against NJR, and pushed forward with their motion even after NJR retained counsel and filed opposition. Appellants now appeal the Order denying their motion.

Prior to filing its opposition, NJR's counsel delivered to Appellants' counsel a letter under R. 1:4-8, outlining the many reasons why Appellants' Motion for Default Judgment was inappropriate - NJR was never served with a complaint, NJR was no longer a party to the action, and Appellants did not comply with the procedures for obtaining a default judgment – and demanding that the motion be withdrawn. Notwithstanding several follow-up communications and ample time to do so, Appellants did not withdraw their

motion. Accordingly, NJR filed a Cross-Motion for Sanctions with its opposition to Appellants' Motion for Default Judgment. The cross-motion was based on the same reasons identified in the R. 1:4-8 letter to Appellants' counsel demanding withdrawal of the Motion for Default Judgment. Appellants had no basis for seeking default judgment against a non-party that was never served with anything in this case, and Appellants knew it. The trial court abused its discretion in denying the Cross-Motion, and that Order should be reversed.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

Appellants initially filed their Verified Complaint on March 18, 2019, but did not name NJR as a defendant therein. [Pa1] NJR was first named as a defendant in Appellants' First Amended Complaint (the "Amended Complaint"), filed on July 19, 2021. [Pa1608] On their Amended Summons [Pa1604], Appellants appropriately identified NJR's primary business address (1415 Wyckoff Road, Wall, NJ 07719) as an address where NJR could be served with the Amended Complaint. However, NJR was never personally served with the Amended Complaint at this address, nor was it or any other authorized agent for service of process ever served at any other location or in any other manner.

[1] For ease of the Court's review, NJR has combined its concise procedural history and counterstatement of facts.

On November 27, 2021, by notice posted on the trial court docket and delivered to counsel for Appellants, the trial court warned that "on January 25, 2022 (60 days from date of this notice), the court will dismiss [NJR] for lack of prosecution without prejudice, pursuant to Rule 1:13-7 or Rule 4:43-2 unless action required under the above Rules is taken." [Pa3297] On January 28, 2022, the Honorable Robert C. Wilson entered an Order dismissing the action as against NJR for lack of prosecution (the "Dismissal Order"), providing that "[a] formal notice of motion is now required to restore this party to active trial status." [Pa3326]

Appellants never filed any motion to reinstate the Amended Complaint, and accordingly the action was never reinstated against NJR. Appellants did not appeal the Dismissal Order.

Notwithstanding (i) the prior dismissal of NJR for lack of prosecution and (ii) the absence of a motion by Appellants to reinstate the action against NJR, Appellants filed a Motion for Default Judgment[2] on February 14, 2022 (the "Motion"). [Pa3334] Appellants had not, however, made any request for entry of default. Nor did Appellants serve (or even attempt to serve) NJR with the Motion. In support of the Motion, Appellants filed a Certification of their counsel, Michael S. Kimm, Esq. [Pa3337], together with a Proof of Service of

[2] The Motion for Default Judgment was filed against both NJR and Defendant Township of Holland ("Holland").

Process annexed thereto as an exhibit [Pa3342], wherein Mr. Kimm certified that he personally served NJR with the Amended Complaint on August 12, 2021 "by serving their general counsel Mark Bellin at their joint offices." In his Proof of Service, Mr. Kimm stated that he had delivered a copy of the Amended Complaint to Mr. Bellin's secretary, not Mr. Bellin, in Red Bank, New Jersey. [Pa3342] Mr. Bellin is a named defendant in the Amended Complaint, and has never represented or been employed by NJR. Mr. Kimm supplied no factual basis for his assertion that Mr. Bellin was the "general counsel" of NJR, a publicly traded company whose general counsel is a matter of public record. In short, NJR was never served with the Amended Complaint, and Mr. Kimm had no reason to believe it was.

On March 4, 2022, noting that the Motion was unopposed, Judge Wilson entered an Order granting default judgment against NJR [Pa3387], but that Order was vacated almost immediately as having been entered in error, with a hearing scheduled for April 1, 2022 to consider Appellants' Motion. [Pa3389]

By letter dated March 9, 2022, counsel for NJR demanded that counsel for Appellants withdraw the Motion as a frivolous motion in violation of R. 1:4-8. [Pa3395] Counsel identified the following reasons for withdrawal:

(i) NJR was never served with the Amended Complaint;

(ii) NJR had been previously dismissed from the case on January 29, 2022 and was therefore no longer a party to the action;

> (iii) default had never been requested by Appellants or entered against NJR, as required by Rule 4:43 prior to the entry of default judgment; and
>
> (iv) the sworn statements contained in Mr. Kimm's Certification in support of the motion [Pa3337] and Proof of Service of Process [Pa3342] were inaccurate, Mark Bellin was not authorized to accept service on behalf of NJR, and neither was his secretary.

[Pa3395] In the letter, NJR's counsel notified Mr. Kimm that NJR intended to file an application for sanctions pursuant to R. 1:4-8(b) in the event the Motion was not timely withdrawn. [Pa3395] NJR's counsel followed up with a phone call and e-mail request that the Motion be withdrawn. [Pa3392, Pa3397] Mr. Kimm did not respond, and Appellants' Motion was not withdrawn.

As a result, on March 24, 2022, in addition to opposing the Motion, NJR filed a Cross-Motion for Sanctions against Appellants and Mr. Kimm (the "Cross-Motion"). [Pa3390] Pursuant to the Cross-Motion, NJR sought sanctions in the form of attorneys' fees and costs incurred by NJR in defending against the Motion. [Pa3390]

On April 5, 2022, Judge Wilson entered an Order Denying Appellants' Motion. [Pa3419] In his opinion, Judge Wilson ruled as follows:

> The motion to enter default against NJR is also denied. Rule 4:4-1 requires service on a corporation by delivery of the complaint and summons "on any officer, director, trustee or managing or general agent, or any person authorized by appointment or by law to receive service of process on behalf of the corporation, or on a person at the registered office of

> the corporation." Plaintiffs served a copy of the complaint to Mark Bellin. Mr. Bellin is a named defendant in the matter and not affiliated with or employed by NJR. NJR is a public company with an agent for service of process. Service on Mr. Bellin is insufficient.
>
> Further, this Court dismissed NJR from this action by Order on January 28, 2022. [Appellants'] counsel filed a certification to reinstate the action against NJR on February 24, 2022, supporting the reinstatement. However, there was no motion filed by [Appellants]. NJR was never reinstated as a party and is presently listed as "dismissed without prejudice." For the aforementioned reasons, [Appellants'] motion to enter default against NJR is DENIED.

[Pa3427]

Also on April 5, 2022, Judge Wilson entered an Order Denying NJR's Cross-Motion. [Pa3430] Judge Wilson's sole reason for denial was that Appellants' actions did not "rise to the level of frivolousness that would lead this Court to grant NJR's motion to hold in contempt." [Pa3441]

On May 23, 2022, at the request of Appellants [Pa3456], Judge Wilson entered a Final Judgment terminating the action as to all parties. [Pa3460]

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR DEFAULT JUDGMENT AGAINST NJR, A NON-PARTY THAT WAS NEVER SERVED WITH ANY COMPLAINT AND AGAINST WHOM DEFAULT WAS NEVER REQUESTED NOR ENTERED (Pa3419)

Appellants' instant appeal concerns NJR only to the extent that Appellants seek to reverse Judge Wilson's April 5, 2022 Order denying the Motion. NJR was never served with any complaint, was dismissed as a party, and Appellants simply ignored all procedural requirements for a default judgment. Appellants do not address any of the reasons for Judge Wilson's denial of their Motion or otherwise provide any legitimate reason to reverse the Order.

Appellants' Motion was frivolous, inappropriate, factually unsupported and insupportable, and should have been withdrawn in response to NJR's letter demanding same. The trial court's Order denying the Motion was correct. Appellants' instant appeal under the circumstances compounds its utterly frivolous actions below. The appeal should be categorically rejected, and the trial court's denial of Appellants' Motion should be affirmed.

A. NJR Was Never Served with the Amended Complaint (or Any Complaint)

Pursuant to R. 4:6-1(a), a defendant shall file an answer to a complaint "within 35 days after service of the summons and complaint on that defendant." "Service" of a summons and complaint on a corporation such as NJR is accomplished by personally serving a copy of the summons and complaint "on any officer, director, trustee or managing or general agent, or any person authorized by appointment or by law to receive service of process on behalf of the corporation, or on a person at the registered office of the corporation." R. 4:4-4(6).

Appellants claim to have served NJR with the Amended Complaint by delivering copies of same to the secretary of Mark Bellin, Esq., another named defendant in this action who is in no way affiliated with NJR. [Pa3337, Pa3342]. As a matter of law, service was improper and Appellants do not (and cannot) contend otherwise. In denying Appellants' Motion, Judge Wilson appropriately observed that Appellants "served a copy of the complaint to Mark Bellin. Mr. Bellin is a named defendant in the matter and not affiliated with or employed by NJR. NJR is a public company with an agent for service of process. Service on Mr. Bellin is insufficient." [Pa3427]

On appeal, Appellants have not presented anything to suggest that NJR was properly served. While Appellants represent in their brief that the

Amended Complaint "was served and filed July 19, 2021" [Pb25], they cite to no evidence of service ***on NJR*** and offer nothing to refute Judge Wilson's factual findings to the contrary. They again gloss over the issue of service later in their brief, claiming that "[a]fter they were served, [NJR and Holland] failed to respond" [Pb61], but they cite only to a copy of the filed Amended Complaint in support of this statement, again offering no evidence of service on NJR.

NJR was never served with the Amended Complaint, and as a result, no default judgment could be properly entered against it. Accordingly, on this ground alone, the trial court's ruling should stand.

B. NJR Was Dismissed and Never Reinstated

Even if NJR had been properly served with the Amended Complaint, it was dismissed from the action by way of the Dismissal Order dated January 28, 2022. [Pa3326] The Dismissal Order itself expressly noted that "[a] formal notice of motion is now required to restore this party to active trial status." [Pa3326] It is undisputed that no such motion was ever filed by Appellants. As a result, NJR was not a party, and no judgment could be properly entered against it.

In denying Appellants' Motion, Judge Wilson reasoned, in part, as follows:

> Further, this Court dismissed NJR from this action by Order on January 28, 2022. [Appellants'] counsel filed a certification to reinstate the action against NJR on February 24, 2022, supporting the reinstatement. However, there was no motion filed by [Appellants]. NJR was never reinstated as a party and is presently listed as "dismissed without prejudice".

[Pa3427] Accordingly, when Appellants filed their Motion on February 14, 2022 [Pa3334], they were seeking the entry of default judgment against a non-party to the action. Quite obviously, the trial court's refusal to grant such relief was necessary and appropriate.

C. Default Was Never Entered Against NJR

Even if NJR had been properly served with the Amended Complaint (which it was not) and had not been dismissed as a party (which it was), the trial court could not have entered a default judgment against NJR, because no default was ever entered against NJR. The procedure for obtaining a default judgment is prescribed by R. 4:43-2, which expressly provides that default judgment can be sought only "[a]fter a default has been entered in accordance with R. 4:43-1 . . . , but not simultaneously therewith," and requires service of the default on the alleged defaulting party. R. 4:43-2. Here, Appellants never requested the entry of default, no default was ever entered, and nothing was ever served on NJR. As a result, the trial court could not enter a default

judgment against NJR pursuant to R. 4:43-2, and it appropriately declined to do so.

D. Appellants' Arguments for Reversal are Irrelevant and Inapposite

This appeal seeks only the reversal of the trial court's Order denying Appellants' Motion for Default Judgment; it does not seek reversal of the Dismissal Order. Default judgment cannot be entered against a non-party.

Appellants' argument on appeal is that NJR "will have to return to the case" if the dismissals of other defendants are reversed and remanded, because NJR ultimately purchased the solar assets that are the subject of the Amended Complaint. [Pb62] This statement is not relevant to the instant appeal and provides no basis upon which this Court can reverse the trial court's denial of the Motion. The appeal should be rejected and the trial court's denial of Appellants' Motion for Default Judgment affirmed.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING NJR'S CROSS-MOTION FOR SANCTIONS (Pa3430)

NJR's cross-appeal seeks reversal of the trial court's denial of its Cross-Motion for sanctions for Appellants' refusal to withdraw their Motion. "A trial judge's decision to award fees pursuant to R. 1:4-8 is addressed to the judge's sound discretion, and will be reversed on appeal only if it 'was not premised upon consideration of all relevant factors, was based upon

consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment.'" McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011) (internal citations omitted).

NJR filed its Cross-Motion under R. 1:4-8(a), which provides in pertinent part:

> (a) ... The signature of an attorney ... constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney . . . certifies that to the best of his or her knowledge, information and belief, formed after an inquiry reasonable under the circumstances:
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support[.]

An assertion is deemed "frivolous" for purposes of R. 1:4-8(a) when "no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable." First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432 (App. Div. 2007). Continued prosecution of a claim for relief despite knowledge of facts that it is unsupported is

sanctionable as frivolous. Iannone v. McHale, 245 N.J. Super. 17, 31 (App. Div. 1990). Here, Appellants' counsel signed and filed the Motion for Default Judgment, which violated R. 1:4-8(a) because (i) NJR was never served with the Amended Complaint, or any complaint; (ii) NJR had already been dismissed, and was therefore no longer a party, when the Motion was filed; and (iii) Appellants did not request the entry of default against NJR prior to seeking the entry of default judgment by way of the Motion. Appellants then prosecuted the Motion even after being specifically notified of the above facts. No rational argument can be or ever was advanced by Appellants for the entry of default judgment against NJR under these circumstances.

Where a motion violates R. 1:4-8(a), the procedural requirements for seeking an award of sanctions are set forth in R. 1:4-8(b):

> An application for sanctions under this rule shall be by motion made separately from other applications and shall describe the specific conduct alleged to have violated this rule. No such motion shall be filed unless it includes a certification that the applicant served written notice and demand pursuant to R. 1:5-2[3] to the attorney or pro se party who signed or filed the paper objected to. The certification shall have annexed a copy of that notice and demand, which shall (i) state that the paper is believed to violate the provisions of this rule, (ii) set forth the basis for that belief with specificity, (iii) include a demand that the paper be withdrawn, and (iv) give notice, except as

[3] Pursuant to R. 1:5-2, "[s]ervice upon an attorney . . . shall be made by mailing a copy to the attorney at his or her office by ordinary mail . . . ."

> otherwise provided herein, that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within 28 days of service of the written demand. If, however, the subject of the application for sanctions is a motion whose return date precedes the expiration of the 28-day period, the demand shall give the movant the option of either consenting to an adjournment of the return date or waiving the balance of the 28-day period then remaining. A movant who does not request an adjournment of the return date as provided herein shall be deemed to have elected the waiver. The certification shall also certify that the paper objected to has not been withdrawn or corrected within the appropriate time period provided herein following service of the written notice and demand.

Counsel for NJR satisfied each of the foregoing procedural requirements. On March 9, 2022, NJR's counsel served a written notice and demand to Appellants' counsel by ordinary mail and e-mail, (i) stating NJR's belief that Appellants' Motion was filed in violation of R. 1:4-8(a), (ii) setting forth the specific bases for that belief, (iii) demanding that the motion be withdrawn, and (iv) giving notice that an application for sanctions would be made within a reasonable time thereafter if the motion was not withdrawn within 28 days of the notice and demand. [Pa3394] NJR's counsel again contacted Appellants' counsel by e-mail and telephone on March 21, 2022, but received no response. [Pa3394, Pa3397] Accordingly, pursuant to R. 1:4-8(b), the 28-day withdrawal period was deemed to have been waived.

NJR's Cross-Motion described the specific conduct alleged to have violated R. 1:4-8(a), supported by a certification attaching the March 9, 2022 notice and demand. [Pa3392, Pa3394] It is thus undisputed that Appellants and their counsel were aware of the facts giving rise to NJR's Cross-Motion. Nevertheless, they refused to withdraw their Motion, which sought the entry of default judgment against a non-party to the action who had never been served with the Amended Complaint.

When a party and/or attorney is found to have violated R. 1:4-8, the Rule provides for the imposition of sanctions, consisting of "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation . . . ." R. 1:4-8(d). NJR therefore sought to hold Appellants and their counsel jointly and severally liable for the attorneys' fees and costs incurred by NJR in responding to Appellants' frivolous Motion.

In denying NJR's Cross-Motion, the trial court appears to have mistaken NJR's motion for monetary sanctions as a motion to hold Appellants in contempt. Judge Wilson stated that "[Appellants'] actions do not rise to the level of frivolousness that would lead this Court to grant NJR's motion to hold in contempt." [Pa3441] No other explanation or rationale was provided as to why sanctions should not issue when Appellants and their counsel knowingly

sought default judgment against a non-party. NJR did not seek to hold Appellants in contempt, but instead sought relief that was clearly available under R. 1:4-8. Thus, the trial court's denial of NJR's Cross-Motion was "based upon consideration of irrelevant or inappropriate factors." See Man Wai Lee, supra, at 482. In all events, there was no rational basis for denying the request for sanctions, thus warranting reversal.

NJR continues to incur attorneys' fees and costs as a result of the frivolous filings by Appellants and their counsel. The instant appeal, which lacks any rational argument for the reversal of the trial court's refusal to enter default judgment against NJR, further magnifies the frivolousness of the underlying Motion and Appellants' conduct generally.

Accordingly, this Court should reverse the trial court's denial of NJR's Cross-Motion and direct that sanctions be imposed against Appellants and their counsel in the form of the total attorneys' fees and costs incurred by NJR.

CONCLUSION

For the reasons set forth above, NJR submits that the Court should reject Plaintiffs' challenge to the trial court's denial of their Motion for Default Judgment as against NJR.

NJR further submits that the trial court abused its discretion in declining to award sanctions to NJR pursuant to R. 1:4-8. The Order denying sanctions should be reversed, and an order entered directing Appellants and their counsel to pay NJR's reasonable attorneys' fees in defending the Motion and this appeal.

Respectfully submitted,

McCARTER & ENGLISH, LLP
Attorneys for Defendant-Respondent
New Jersey Resources Corporation

By: */s/ Lisa S. Bonsall*
LISA S. BONSALL
A Member of the Firm

Dated: October 24, 2022

Du-bergenMILL ROAD SOLAR PROJECT LLC, NEW ENERGY VENTURES INC. and GHG TRADING PLATFORMS, INC., *Plaintiffs/Appellants*, v. CEP SOLAR, LTD., MILFORD SOLAR FARM LLC, FWH ASSOCIATES, P.A., PURE POWER ENGINEERING, INC., GARY R. CICERO, MARK BELLIN, ESQ., NEW JERSEY RESOURCES, TOWNSHIP OF HOLLAND & ITS PLANNING BOARD, and FIBERVILLE ESTATES, LLC, *Defendants/Respondents*.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003063-21 ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-2029-19 Sat Below: Hon. Robert C. Wilson, J.S.C.

BRIEF OF RESPONDENT/CROSS-APPELLANT, FIBERVILLE ESTATES, LLC

SHAPIRO, CROLAND, REISER, APFEL & DI IORIO, LLP
411 Hackensack Avenue
Hackensack, NJ 07601
Tel: (201) 488-3900
Email: jdiiorio@shapiro-croland.com
Email: abenisatto@shapiro-croland.com *Attorneys for Defendant/ Respondent, Fiberville Estates, LLC*

On the Brief:
John P. Di Iorio, Esq. (Atty ID 021691985)
Alexander G. Benisatto, Esq. (Atty ID 037772000)

Dated: December 18, 2023

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[1] This Order is being appealed only to the extent that it dismissed the First Amended Complaint "Without Prejudice," as opposed to "With Prejudice."

PRELIMINARY STATEMENT

This appeal seeks to reverse the trial court's well-reasoned exercise of its discretion in denying Appellants' belated, prejudicial and futile motion for leave to file a Second Amended Complaint. It also seeks to reverse the trial court's dismissal of the First Amended Complaint. As discussed herein, Appellants' appeal should be denied as it improperly implores this Court to substitute its discretion for that of the trial court in denying the amendment and inexplicably seeks to resuscitate the First Amended Complaint that asserted no claims against Fiberville. Given that the First Amended Complaint, although naming Fiberville as a defendant, asserted no claims against Fiberville, the dismissal should have been with prejudice and Fiberville's cross-appeal should be granted.

This action, commenced in 2019, arises out of Appellants' dispute with CEP Solar, Ltd. and Milford Solar Farm LLC (the "CEP Parties"), regarding a lease for real property owned by Fiberville and the associated rights relating to a solar farm development project. As discussed below, Appellants belatedly sought leave to file a Second Amended Complaint to assert three (3) claims against Fiberville - fraud in the inducement as to their 2015 lease, breach of the lease for allegedly violating the confidentiality provision therein and wrongful eviction. Prior thereto, in July 2021, Appellants filed a First Amended Complaint naming Fiberville as a defendant although that complaint asserted no clams against Fiberville. Thus,

the proposed Second Amended Complaint was Appellants first attempt in the then-2½ year-old case to assert claims against Fiberville. However, by that time, discovery had concluded over six (6) months earlier, most defendants had already been dismissed, and Appellants admittedly had knowledge of the facts underlying their proposed claims at the outset of the litigation in 2019.

Furthermore, prior to the filing of the First Amended Complaint in July 2021, four (4) discovery extensions had been granted and discovery had concluded several months prior. During the lengthy discovery period, Appellants received nearly 1,000 pages of discovery from Fiberville by way of subpoena in March 2020 and deposed two (2) Fiberville representatives. Yet, while Appellants named Fiberville as a defendant in July 2021, their First Amended Complaint did not assert any claims against, nor seek any relief from, Fiberville. Instead, the matter proceeded to dispositive motion practice in which the CEP Parties and their principals obtained dismissals of the First Amended Complaint, wherein the trial court properly found, among other things, that the direct and proximate cause of Appellants' alleged losses was their own failure to pay rent to Fiberville, which led to the loss of their lease rights and the associated rights for the subject solar project.

The trial court properly exercised its discretion in denying the belated request for leave to amend, noting that discovery was long closed, most other defendants had been dismissed and Appellants knew of the predicate facts underlying their

claims years earlier, yet inexplicably chose not to assert them earlier and thus the amendment was prejudicial to Fiberville. There was no abuse of discretion by the trial court and its exercise of discretion should not be disturbed on appeal.

Beyond the obvious prejudice relied upon below, the denial was warranted as the amendment was futile. The trial court had already made significant, correct conclusions of law based on undisputed facts in dismissing similar claims against the CEP Parties, namely, that the direct and proximate cause of Appellants' losses was their failure to pay rent to Fiberville. The same rationale applied equally to Fiberville - Appellants' alleged losses were caused by their failure to pay rent to Fiberville, not because of any alleged representations made when the subject lease was entered, the purported breach of confidentiality, or termination of the lease.

As to the dismissal, it is clear that the First Amended Complaint – the pleading Appellants were left with after leave to amend again was properly denied – did not set forth any claims against, or seek any relief from, Fiberville. Thus, dismissal was appropriate under R. 4:6-2(e). However, because Appellants were denied leave to amend and the First Amended Complaint did not assert any claims against Fiberville, the dismissal should have been with prejudice.

Accordingly, Appellants' appeal should be denied and Fiberville's cross-appeal, seeking a with prejudice dismissal of the First Amended Complaint, should be granted.

COUNTERSTATEMENT OF PERTINENT PROCEDURAL HISTORY

A. The Commencement Of The Underlying Action In 2019

Appellants, Mill Road Solar Project LLC ("Mill Road"), New Energy Ventures Inc. ("NEV") and GHG Trading Platforms, Inc. ("GHG"), commenced this lawsuit on March 18, 2019 by way of Order to Show Cause and Verified Complaint against CEP Solar, Ltd. ("CEP"), Milford Solar Farm LLC, FWH Associates, P.A., and Pure Power Engineering, Inc. (the "Underlying Action"). [FEDa9; Pa1; Pa42].

On June 21, 2019, a Case Management Order was entered by the trial court, which set forth a discovery end date of June 24, 2020. [FEDa9; Pa495]. Thereafter, four (4) discovery extensions were granted for a total extension of discovery for nearly ten (10) months to April 20, 2021. [FEDa9-10]. The Discovery End Date was not further extended. [FEDa11; Pa3305].

On June 23, 2021, after the close of discovery, Appellants filed a Motion to Amend Complaint. The proposed amendment sought to add as defendants the CEP Parties' representatives, Gary R. Cicero ("Cicero") and Mark Bellin, Esq. ("Bellin"), as well as New Jersey Resources, Inc., Township of Holland, and Fiberville. [FEDa10; Pa3304]. A Certification of Appellants' counsel was submitted in support of that motion. [FEDa10; FEDa37; Pa3304]. Counsel certified that the amendment was precipitated by "issues that were discovered

during discovery [which concluded two (2) months earlier in April 20, 2021], and more particularly during depositions, and from certain OPRA records obtained from the Township after February 2021." [FEDa10; FEDa38-39; Pa3304]. Appellants' counsel also certified as to the claims being added, and/or relief being sought, against each of the proposed new defendants. [FEDa10; FEDa38-39; Pa3304]. Yet, despite the bases cited to the trial court for the amendment as to the newly added defendants, the Certification did not indicate that any claims were being asserted against Fiberville and did not indicate that any relief was being sought against Fiberville. [FEDa10; Pa3304].

The trial court granted Appellants leave to amend and the First Amended Complaint was filed on July 19, 2021 [FEDa10; Pa3304]. Consistent with the Certification of Appellants' counsel submitted in support of the motion to amend, while the First Amended Complaint added claims against the various defendants, no claims were asserted, nor was any relief sought, against Fiberville, though Fiberville was named as a defendant. [FEDa10; Pa3304].

Prior thereto, on March 23, 2020 – nearly 16 months prior to the filing of the First Amended Complaint - Fiberville produced over 1,000 pages of documents pursuant to a subpoena served by the CEP Parties' counsel. [FEDa11; FEDa107; Pa3304]. On November 20, 2020, eight (8) months prior to the filing of the First Amended Complaint, Appellants' counsel conducted the deposition

of Stanley Sackowitz, who was a consultant to Fiberville in connection with allegations made in the action. [FEDa11; Pa3304]. On January 15, 2021, six (6) months prior to the filing of the First Amended Complaint, Appellants' counsel conducted the deposition of Fiberville's representative, Harold Bogatz, Esq. [FEDa11; Pa3304-05].

B. The CEP Parties Are Granted Summary Judgment

On July 30, 2021, after discovery had concluded and the First Amended Complaint was filed, the CEP Parties filed a motion for summary judgment seeking dismissal of the First Amended Complaint. [Pa1781; Pa3305]. The CEP Parties, along with Cicero and Bellin, also filed a motion to dismiss the First Amended Complaint. [Pa1987; Pa3305]. By Orders entered on September 23, 2021, the trial court granted the CEP Parties' motion for summary judgment and the motion to dismiss the First Amended Complaint as against the CEP Parties, Cicero and Bellin. [FEDa11, FEDa109; FEDa130]. In addition to various findings of fact, the trial court made the following pertinent conclusions of law in granting the CEP Parties' motion for summary judgment:

- In dismissing Count 1 of the First Amended Complaint (breach of contract), "All damages set forth by [Appellants] relate directly to their loss of the Solar Project. The facts demonstrate that [Appellants] defaulted under their Lease for the subject Property, lost possessory interest in the Property upon which the Solar Project was to be built, and subsequently lost the Solar Rights for which they claim damages. [Appellants'] assertions fail to connect any facts between CEP Defendants and [Appellants'] default under the Lease. If [Appellants] had not defaulted

under the Lease, they would have the Solar Rights and Solar Project, and the subject action would be moot." [FEDa118];

- In dismissing Count 1 of the First Amended Complaint (breach of contract), "At all times relevant to [Appellants'] allegations, Fiberville owned the Property. Fiberville entered the Lease with Mill Road, requiring Mill Road to make an annual payment to Fiberville on September 1 of each year. On September 1, 2017, Mill Road failed to make that annual payment due under the Lease in the amount of $206,045.00. On September 5, 2017, counsel for Fiberville sent notice of default to Mill Road stating that Mill Road was in default under the Lease, that it was required to make the payment within ten (10) days from the date of notice, and that if payment was not received Fiberville had the right to terminate the Lease. Upon termination, Mill Road was required to surrender and return the Property. Mill Road never made the payment under the Lease. As a result, Fiberville terminated the Lease with Mill Road on October 17, 2017." [FEDa118];

- In dismissing Count 1 of the First Amended Complaint (breach of contract), "Therefore, the loss of the Property was the direct and proximate result of [Appellants'] failure to cure the default under the Lease with Fiberville." [FEDa118];

- In dismissing Count 1 of the First Amended Complaint (breach of contract), once Appellants lost land control of the Property, their Solar Rights were voided by the entity that granted such rights. "[Appellants] cannot seek damages against a blameless third party simply because CEP Defendants signed an NDA. [Appellants] do not establish the requisite causal link between a breach of the NDA and [Appellants'] default under the Lease and subsequent loss of their Solar Rights." [FEDa118-19];

- In dismissing Count 1 of the First Amended Complaint (breach of contract), "[Appellants] lost the Property and subsequently lost their Solar Rights as a result of their default under the Lease and their failure to cure this default… Had [Appellants] made their Lease payments, they would still control the Property and would have retained their approvals. [Appellants] bear the responsibility for their own actions." [FEDa120];

- In dismissing Count 2 of the First Amended Complaint (tortious interference with prospective economic advantage), "[Appellants] assert that CEP Defendants used confidential information under the NDA to negotiate a competing deal with the owners of the Property, and that CEP Defendants 'undercut [Appellants'] deal' and, had they not done so, '[Appellants] would have received the economic benefit of having the Solar Project at the Project Site.' The claims ignore [Appellants'] payment default under the Lease and consequent loss of site control over the Property… even if [Appellants] proved a violation of the NDA, it was [Appellants'] Lease default that led inevitably to their loss of the solar rights tied to the Property. As a result of [Appellants'] own failures, [Appellants] lost the ability to continue with the solar project at the Property." [FEDa121];

- In dismissing Count 3 (fraud), Count 4 (conversion), and Count 6 (breach of implied covenant of good faith and fair dealing) of the First Amended Complaint, "[Appellants] defaulted under the Lease when they failed to make the annual rental payment due to a dispute with their members. [Appellants] could have made the payment and continued developing their Solar Project but chose not to." [FEDa122-23];

- In dismissing Count 3 (fraud), Count 4 (conversion), and Count 6 (breach of implied covenant of good faith and fair dealing) of the First Amended Complaint, "[Appellants] did not own the Solar Rights. After [Appellants] lost site control of the Property, PJM voided the Solar Rights, and [Appellants] lost all rights to develop the Solar Project. CEP Defendants, and anyone else for that matter, were free to pursue development of the Solar Rights thereafter." [FEDa123];

.

- In dismissing Count 3 (fraud), Count 4 (conversion), and Count 6 (breach of implied covenant of good faith and fair dealing) of the First Amended Complaint, "CEP Defendants' actions did nothing to destroy [Appellants'] rights to receive the 'fruits' of the contract. The 'fruits' at issue would be the profits [Appellants] would earn from their development and/or sale of their Solar Project. However, [Appellants'] own default of payment under the Lease for the Property on which the Solar Project was to be built destroyed the possibility for [Appellants] to have 'fruits' arise from the project." [FEDa124];

- In dismissing Count 5 of the First Amended Complaint (unjust enrichment), "[Appellants] failed to make the required payments under the Lease and, as a result, the Lease was terminated, and [Appellants] lost site control of the Property and Solar Rights." [FEDa125];

- In dismissing Count 8 of the First Amended Complaint (injunctive relief), "[Appellants'] claims fail due to their damages being the direct and proximate result of [Appellants'] own failure to make the payments due under the Lease." [FEDa127]; and

- In its conclusion, "[Appellants] defaulted under their Lease with Fiberville for the Property on which [Appellants] were going to pursue the Solar Project. After several notices, Fiberville then terminated the Lease with [Appellants]. CEP Defendants then entered into a lease with Fiberville and became the successor to the Solar Project… The termination of the Lease was due simply because of [Appellants'] own default. That event enabled CEP Defendants to become successors to this solar farm development." [FEDa128].

C. Leave To File A Second Amended Complaint Is Denied

Following dismissal of its claims against the CEP Parties, Cicero and Bellin, Appellants moved for leave to file a Second Amended Complaint on October 6, 2021 – more than 2½ years after the action was commenced and nearly six (6) months after discovery concluded. [Pa3085].

The proposed Second Amended Complaint sought to assert claims for damages against Fiberville when no such claims were asserted in the First Amended Complaint that was filed in July 2021 [FEDa11; Pa3091-3150]. Specifically, the proposed Second Amended Complaint sought to add a claim for fraud in the inducement as to the subject lease, breach of the subject lease for allegedly violating the confidentiality provision therein and wrongful

eviction. [Pa3091-3150]. Fiberville opposed the Appellants' motion for leave to file a Second Amended Complaint and cross-moved to dismiss Appellants' First Amended Complaint pursuant to R. 4:6-2(e) for failure to state a claim since the First Amended Complaint did not assert any claims or seek any relief against Fiberville. [Pa3217].

On December 7, 2021, the trial court entered an Order denying Appellants' motion for leave to file a Second Amended Complaint (the "Order Denying Leave to Amend") and entered a separate Order dismissing Appellants' First Amended Complaint without prejudice as to Fiberville pursuant to R. 4:6-2(e) (the "Dismissal Order"). [Pa3298; Pa3312]. In denying leave to file a Second Amended Complaint and dismissing the First Amended Complaint, the trial court held that:

> [Appellants] cannot, after discovery is long closed, and most other defendants have been dismissed, seek to first add claims against Fiberville, especially where [Appellants] knew of the predicate facts years prior, but chose not to assert them previously. To permit the amendment would bog down judicial administration and economy and be prejudicial to Fiberville. [Pa3309].
>
> * * * * *
>
> Here, the First Amended Complaint asserts no claims against Fiberville and seeks no relief against it. The First Amended Complaint fails to state a claim upon which relief may be granted against Fiberville. Thus, pursuant to R. 4:6-2 the First Amended Complaint is dismissed without prejudice as against Fiberville. [Pa3310].

Following dismissal of Fiberville, motion practice ensued among

Appellants and the remaining defendants, New Jersey Natural Resources, Inc. and Township of Holland. [Pa3326-3442]. In pertinent part, by Order dated April 5, 2022, the trial court granted the Township of Holland's motion to dismiss the First Amended Complaint for failure to state a claim. [Pa3442]. At page 6 of the accompanying Opinion, the trial court wrote:

> On October 28, 2021, Fiberville filed a motion to dismiss the First Amended Complaint and to deny [Appellants'] leave to amend the complaint. On December 7, 2021, this Court granted Fiberville's dismissal and denied [Appellants'] request to file a second amended complaint. The same reasoning was used for both decisions. This Court found that the [Appellants'] default under its lease with Fiberville was the cause of the termination. That event then enabled the CEP Defendants to enter a new lease with Fiberville and become successors to the solar farm development.

[Pa3449]. This same statement was repeated in the Opinion accompanying the trial court's April 5, 2022 Order denying Appellants' request for default judgment against Holland Township and New Jersey Natural Resources, Inc. and the Court's April 5, 2022 Order denying New Jersey Natural Resources, Inc.'s cross-motion for sanctions. [Pa3425].

D. Appellants' Second Action Against Fiberville And The Dismissal[1]

Thereafter, Appellants commenced a second action against Fiberville by way of Complaint filed on February 14, 2022, in the Superior Court of New

[1] Appellants' brief discusses the Second Action against Fiberville, which is the subject of a separate pending appeal, App. Docket No. A-3517-21. [Pb42].

Jersey, Law Division, Bergen County, bearing Docket No. BER-L-863-22, which was assigned to the trial judge that sat below in the Underlying Action (the "Second Action"). [FEDa155]. In that Second Action, Appellants' asserted the same three (3) causes of action that the trial court denied Appellants leave to assert against Fiberville in the Underlying Action. [FEDa155]. The factual allegations and claims in the Second Action were "virtually identical to the factual allegations and causes of action from the [Underlying] Action." [FEDa155]. Fiberville moved to dismiss the Complaint in the Second Action. [Pb42].

By way of Order and accompanying Opinion dated June 22, 2022, the trial court granted Fiberville's motion to dismiss the Complaint in the Second Action with prejudice. [FEDa149]. First, the trial court found that "[t]he claims asserted against Fiberville in this action are barred by the Entire Controversy Doctrine as these claims arise from the identical transactions and occurrences that formed the basis for the [Underlying] Action. Thus, these claims should have been asserted in the Prior Action." [FEDa149-160]. In addition, the trial court evaluated the three (3) claims asserted in the Complaint under the standards governing dismissal pursuant to R. 4:6-2(e) and determined that each claim failed to state a claim upon relief may be granted against Fiberville for the same reasons it dismissed the claims against the CEP Parties and their

principals, *i.e.*, any of Appellants' losses were caused by their failure to pay rent and the resulting termination of the subject lease. [FEDa157-161].

E. Appellants' Appeals In This Action And the Second Action

Appellants filed the within appeal on June 8, 2022, however did not perfect the same as to Fiberville. Although the time to appeal elapsed, the Court issued a Deficiency Notice to Appellants on October 13, 2023 and allowed them to perfect service as to Fiberville. Service was effected upon Fiberville and Fiberville filed a Notice of Cross-Appeal on October 30, 2023. [FEDa1]. Subsequent to this appeal, Appellants appealed the trial court's June 22, 2022 Order dismissing the Second Action with prejudice, which appeal is pending under App. Docket No. A-3517-21. [Pb42].

COUNTERSTATEMENT OF PERTINENT FACTS

A. The Property, The Lease And The Solar Rights

At all times relevant to the claims in this lawsuit, Fiberville owned real property located in Holland Township, Hunterdon County, New Jersey, consisting of approximately seventy (70) non-contiguous acres (the "Property"). [FEDa94; FEDa1008; Pa3300].

As a result of its ownership of the Property, Fiberville owned certain rights for the development of a solar energy farm at the Property, which it offered to sell to Appellant, GHG, in 2015. [FEDa46; FEDa 94-105]. The development of a solar

project such as the one in question involves numerous interrelated development activities such as obtaining a suitable site, designing the plant, maximizing energy yield, securing power purchasers and obtaining all necessary authorizations and permissions from the utilities and local, state and federal agencies (the "Solar Rights"). [FEDa45; FEDa113; Pa3301]. These Solar Rights are contractual in nature and are specific to the Property. [FEDa113; Pa3301]. By way of a Purchase and Sale Agreement, GHG purchased all of Fiberville's Solar Rights for $600,000 plus reimbursements, which was paid by GHG in September 2015. [FEDa47; FEDa94-105].

Appellant, Mill Road, was formed in or around 2015 as a special purpose entity to develop a utility-scale solar energy farm to be located at the Property (the "Solar Project"). [FEDa113]. Mill Road obtained a Wholesale Market Participation Agreement (the "WMPA") in conjunction with PJM Interconnection, LLC ("PJM") and Jersey Central Power & Light Company ("JCP&L"). The WMPA permits the sale of electricity generated at the Property to a local utility. The Interconnection Agreement with JCP&L allows the owner of the Solar Project to connect a utility and obtain the right to earn Solar Energy

Renewable Credits ("SREC") from the New Jersey Board of Public Utilities pursuant to the New Jersey Solar Act. [FEDa113-14].[2]

Together with the sale of the Solar Rights to GHG, Fiberville entered a land lease agreement with Appellant, Mill Road, on or about September 1, 2015 (the "Lease"). [FEDa113; Pa1009; Pa3238-39]. Pursuant to the Lease, Mill Road was required to make an annual rental payment to Fiberville on September 1 of each year of approximately $206,000. [FEDa113; Pa1009].

B. CEP Parties' Negotiations With Appellants

In or about April 2017, CEP approached Appellant, Mill Road, expressing an interest in acquiring the Solar Rights to the Solar Project. [FEDa114]. To evaluate the Solar Project, CEP requested access to all information relating to the Solar Project and the Property. [Pa1095]. Mill Road, two (2) years earlier, had entered into a "Non-Disclosure/Non-Circumvention Agreement" dated

[2] As found by the trial court in its Opinion granting summary judgment to the CEP Parties in the Underlying Action: "For any solar project in New Jersey that seeks to connect to the existing power grid, the approvals consist of a Wholesale Market Participation Agreement ("WMPA") with PJM, an agreement with the utility power company, such as Jersey Central Power and Light ("JCPL"), and registrations with the New Jersey Board of Public Utilities ("BPU"). However, to finalize and rely upon these approvals, the developer must have a recognized possessory interest in the land to be developed, as well as local land use approval. If a developer does not have this land interest, its approvals to connect to the grid are voidable if the PJM, JCPL, or the BPU learn that the entity does not exercise control over that land. Moreover, if a solar developer fails to obtain or loses one of the approvals comprising the bundle (as in this case), it cannot move forward with the solar project." [FEDa119].

September 28, 2015 (the "NDA"). This NDA was between CEP and GHG, which along with NEV, owned Mill Road. [FEDa114; Pa1095].

As acknowledged by Appellants, after the NDA was executed, between September 2015 and late 2017, Appellants themselves "disclosed all aspects of its proprietary and confidential information pertaining to [Appellants'] ongoing establishment of a solar farm under the auspices of Mill Road Solar. [Appellants'] confidential disclosures included plans, applications, contracts, negotiation histories, contact lists, and other proprietary records pertaining to the acquisition of the Fiberville Estates SREC rights and the separate 20-year lease for the land, municipal and state filings and permit applications, and other proprietary materials." [FEDa55].

C. Mill Road's Default Under The Lease

On September 1, 2017, Mill Road failed to make the annual rental payment due to Fiberville under the Lease in the amount of $206,045. [FEDa114; Pa1009; Pa3302]. At that time, Appellants were negotiating to buy the land from Fiberville. However, internal strife among Appellants' investors interfered with Appellants' ability to raise enough money to purchase the land, or apparently to pay the rent due under the Lease. [FEDa114-15; Pa3302]. Indeed, as Appellants acknowledged, GHG's "inability to pay annual rent in 2017 was due, in part, to an internal shareholder dispute within the company,

principally between Lemus and another shareholder named Robert Kampf concerning the company's direction and business strategy." [FEDa56 (at ¶61); Pa3245 (at ¶61)]. Appellants admit that in September 2017, it was they who disclosed to the CEP Parties that there was a default in payment of rent under the Lease. [Pb21; FEDa56 (at ¶60); Pa3245 (at ¶60)].

On September 5, 2017, Fiberville's counsel sent a written notice to Mill Road advising that it was in default of its payment obligations under the Lease. The notice further informed Mill Road that it was required to make payment in the amount of $206,045 within ten (10) days from the date of the notice, in accordance with the Lease. [FEDa115; Pa1009-10; Pa1019; Pa3302]. The notice further informed Mill Road that Fiberville had the right to terminate the Lease if payment was not received within the indicated time frame. In the event of termination, Mill Road would be required to surrender and return the Property to Fiberville. [FEDa115; Pa1019; Pa1110; Pa3302]. Mill Road never made the required payment under the Lease and Fiberville terminated the Lease on October 17, 2017. [FEDa115; Pa1022; Pa1110; Pa3302-3303]. Alex Lemus, a principal of Mill Road and GHG, admitted that Fiberville was within its rights to terminate Appellants' Lease when the annual rental payment was not made. [FEDa115; Pa1828 (pp. 107:4-9); Pa3303].

Cicero then formed Milford Solar Farm, LLC in 2017 after Mill Road's Lease default. Cicero's entity was then able to enter into a lease agreement for the Property with Fiberville. [FEDa116; Pa3303]. Cicero's entity then requested an extension of the approval for the Solar Project from Holland Township and initiated its own new application process with PJM. [FEDa116; Pa3303].

PJM was subsequently informed that the Appellants were going to lose site control at the Property, whereupon PJM cancelled the WMPA. [FEDa115; Pa3303]. In a letter dated January 31, 2018 to the Honorable Kimberly D. Bose, Secretary of the Federal Regulatory Commission, PJM's counsel notified Secretary Bose that PJM was cancelling the WMPA entered into among PJM, Mill Road and JCP&L. [FEDa115; Pa3303]. The letter advised Secretary Bose that the WMPA was being cancelled due to loss of site control resulting in Mill Road's default under the WMPA. [FEDa115; Pa3303]. As pointed out by the trial court in granting summary judgment to the CEP Parties:

> … the Mill Road Solar WMPA was being canceled because, "material terms and conditions of the Mill Road Solar WMPA, including the loss of site control, were breached, and were not cured, resulting in the default of the Mill Road Solar WMPA. The Mill Road WMPA is thus terminated pursuant to section 1.1 therein." After months of notice of the pending termination from PJM and FERC, as required by law and regulation, the requisite approvals were terminated. [FEDa119-20].

ARGUMENT

I. THE APPLICABLE STANDARD OF REVIEW

"Amendment of pleadings, while liberally allowed, nevertheless remains a matter within the sound discretion of the court. It is well-settled that an exercise of that discretion will be sustained where the trial court refuses to permit new claims and new parties to be added late in the litigation and at a point at which the rights of other parties to a modicum of expedition will be prejudicially affected." Du-Wel Prods., Inc. v. U.S. Fire Ins. Co., 236 N.J. Super. 349, 364 (App. Div. 1989), certif. denied, 121 N.J. 617 (1990). On appeal, a trial court's determination of a motion for leave to amend will not be disturbed unless it constitutes a "clear abuse of discretion." Allen v. Seymore, 2010 N.J. Super. Unpub. LEXIS 1376, *8 (App. Div. June 24, 2010).[3]

In such matters involving a trial court's discretion, appellate courts "do not second-guess the exercise of sound discretion by the court because [they] recognize '[j]udicial discretion connotes conscientious judgment, not arbitrary action; it takes into account the law and the particular circumstances of the case before the court.'" U.S. Bank Nat'l Ass'n v. Williams, 415 N.J. Super. 358, 365 (App. Div. 2010), quoting, Higgins v. Polk, 14 N.J. 490, 493 (1954). "Such determinations should not be overturned on appeal unless it can be shown that

[3] FEDa 161.

the "court palpably abused its discretion, that is, that its finding was so wide off the mark that a manifest denial of justice resulted." U.S. Bank Nat'l Ass'n v. Williams, supra, 415 N.J. Super. at 365.

As to the Dismissal Order, the appellate court reviews a dismissal for failure to state a claim pursuant to R. 4:6-2(e) *de novo*, following the same standard as the trial court. State v. Grillo, 469 N.J. Super. 267, 273 (App. Div. 2021). Although such dismissals are often without prejudice, "a dismissal with prejudice is 'mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted, [..], or if 'discovery will not give rise to such a claim.'" Mac Property Group LLC & The Cake Boutique LLC v. Selective Fire and Cas. Ins. Co., 473 N.J. Super. 1, 17 (App. Div. 2022), quoting, Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987) and Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, P.C., 237 N.J. 91, 107 (2019).

As discussed further herein, the trial court did not abuse its discretion in denying Appellants' motion for leave to file a Second Amended Complaint where discovery had concluded, Appellants had knowledge of the claims from the outset of the litigation and most other defendants had been dismissed by summary judgment. As to the Dismissal Order, the trial court properly granted Fiberville's motion to dismiss the First Amended Complaint. However, given that trial court denied Appellants' motion for leave to amend and the First

Amended Complaint did not set forth any claims against, or seek any relief from, Fiberville, the trial court erred in not dismissing the First Amended Complaint with prejudice.

II. THERE IS NO BASIS TO DISTURB THE TRIAL COURT'S SOUND EXERCISE OF DISCRETION IN DENYING APPELLANTS' PREJUDICIAL AND FUTILE MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

Appellants' motion for leave to amend was properly denied in the trial court's exercise of its sound discretion. First, the proposed Second Amended Complaint sought to assert claims against Fiberville when no such claims were previously asserted against it in the action. The belated effort was prejudicial to Fiberville as Appellants had knowledge of the underlying facts at the time they filed their original and First Amended Complaints. It also came nearly 2½ years after the action was commenced, more than six (6) months after the close of discovery, and only after all of the primary defendants were dismissed from the action.

Additionally, as argued below[4] though not the basis for the denial of the motion, denial of leave to amend was appropriate as the proposed claims were not sustainable as a matter of law. Among other things, the trial court had already concluded based on undisputed facts that the Appellants' losses were "the direct and proximate result of [Appellants'] failure to cure the default under the Lease with

[4] Futility of the proposed amendment was also argued below in opposing Appellants' motion for leave to file a Second Amended Complaint. T2 10:9-13:25.

Fiberville." As the Court noted, "If [Appellants] had not defaulted under the Lease, they would have the Solar Rights and Solar Project, and the subject action would be moot." As described below, that same logic applies to the claims Appellants belatedly sought to assert against Fiberville and rendered those claims futile.

Indeed, "[l]ateness of a motion coupled with apparent lack of merit virtually dictates denial" of a motion for leave to amend. PRESSLER & VERNIERO, CURRENT N.J. COURT RULES, cmt. 2.2.1 on R. 4:9-1 (2023).

A. The Standard Governing Motions For Leave To Amend

New Jersey Court Rule 4:9-1 governs the propriety of amendments to pleadings. While leave to amend is "freely given in the interest of justice," it is well-settled that granting leave, while liberal, is not completely unfettered. Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 257 (App. Div. 1997); Fox v. Mercedes-Benz Credit Corp., 281 N.J. Super. 476, 483 (App. Div. 1995).

Indeed, such applications "are best left to the sound discretion of the trial court in light of the factual situation existing at the time each motion is made." Id. "That exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte v. Merch. Mut. Ins., 185 N.J. 490, 501 (2006). Factors to be considered include "the reason for the late filing" and "whether the newly-asserted claim would unduly prejudice the opposing party, survive a motion to dismiss on the merits, cause

undue delay of the trial, or constitute an effort to avoid another applicable rule of law." Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 484-85 (App. Div. 2012). The rationale for this freedom to deny amendments is the preservation of judicial economy and efficiency. Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994).

As to the first step, prejudice to the non-moving party, "[i]t is well settled that an exercise of that discretion will be sustained where the trial court refuses to permit new claims … to be added late in the litigation and at the point at which the rights of other parties to a modicum of expedition will be prejudicially affected." Brown v. Town of Old Bridge, 319 N.J. Super. 476, 513 (App. Div. 1999) (affirming trial court's denial of motion to amend); see also, Globe Motor Car Co. v. First Fid., 291 N.J. Super. 428, 429 (App. Div. 1996) (affirming denial of motion to amend made almost three years after complaint was filed); MBCC v. Lotito, 328 N.J. Super. 491, 511 (App. Div. 2000) (finding trial court's denial of motion to amend, on the basis it was made only on the eve of trial, discovery had not been conducted with regard to the proposed claims, and amendment would have necessitated further discovery and further delayed trial, was not abuse of discretion).

As to the second step, futility of the amendment, leave to amend should be denied when it would lead to an immediate and successful motion to dismiss. Interchange State Bank, supra, 303 N.J. Super. at 256-57; Mustilli v. Mustilli, 287

N.J. Super. 605, 607 (1995). In other words, courts are free to refuse leave to amend where the claims sought to be added are not sustainable as a matter of law. Interchange State Bank, supra, 303 N.J. Super. at 257; Malone v. Aramark Services, Inc., 334 N.J. Super. 669 (Law Div. 2000). The determination is made by the same criteria as a motion to dismiss pursuant to Rule 4:6-2(e). Interchange State Bank, supra, 303 N.J. Super. at 257. Likewise, where a proposed claim is "marginal at best," the Court's discretion is not abused in the denial of a motion to amend. Fox, supra, 281 N.J. Super. at 483.

B. The Appellants' Proposed Amendment To The First Amended Complaint Was Prejudicial Thus Denial of Leave to Amend Was Warranted And An Appropriate Exercise of Discretion

The trial court correctly denied Appellants' motion for leave to amend because Appellants knew all of the predicate facts underlying their proposed claims when they filed their Complaint in March 2019 and their First Amended Complaint in July 2021. Yet, they chose not to assert claims relating to these facts against Fiberville, instead focusing their claims on the CEP Parties. Only after the claims against the CEP Parties were dismissed did Appellants seek another bite at the apple and first seek relief against Fiberville by relying on factual allegations they knew 2½ years earlier to support these new claims. The inexplicable and unjustified delay in seeking relief against Fiberville was prejudicial and leave was correctly denied on that basis by the trial court.

"The factual situation in each case must guide the court's discretion, particularly where the motion is to add new claims or new parties late in the litigation." Bonczek v. Carter-Wallace, Inc., 304 N.J. Super. 593, 602 (App. Div. 1997). A trial court may deny a motion to amend where the moving party fails to consider available evidence and the non-moving party will suffer prejudice from a late amendment. Id. (finding no abuse of discretion in denying amendment where the defendant's existence and corporate function were known well before the amendment was sought). Indeed, in Branch v. Emery Transp. Co., the Appellate Division noted:

> That broad purpose of the rules must be read in the light of the salutary admonition that the progressive judicial policy in permitting amendments, generally, is not intended to afford a refuge to languid or dilatory litigants. See Welsh v. Bd. of Ed. of Tewksbury Tp., 7 N.J. Super. 141, 146 (App. Div. 1950). Nor should a party ordinarily be permitted the luxury of liberal amendment because his lawyer was dilatory, solely on a general plea of substantial justice. The court should not permit itself to be imposed upon. A party seeking leave to effect a tardy amendment must show circumstances which will bring him within the scope of certain recognized factors, thus establishing a basis for the proper exercise of judicial discretion.

53 N.J. Super. 367, 375 (App. Div. 1958). Likewise, a proposed amendment may be denied where it prejudices the non-moving party. To assess prejudice, courts must weigh the interests of the amending party against the prejudice that a defendant would suffer from the late amendment. Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 195-203 (App. Div. 2006).

Here, the trial court's denial of Appellants' motion to amend was based upon, among other things, the Appellants' unjustified delay in seeking to assert the claims until 2½ years after the Underlying Action was commenced, after discovery closed, and after most of the defendants had already been dismissed on the merits. Indeed, as the trial court reasoned in its Opinion:

> [Appellants] cannot, after discovery is long closed, and most other defendants have been dismissed, seek to first add claims against Fiberville, especially where [Appellants] knew of the predicate facts years prior, but chose not to assert them previously. To permit the amendment would bog down judicial administration and economy and be prejudicial to Fiberville. [Pa233].

Additionally, as the trial court noted in denying leave to amend, the facts supporting the claims in the proposed Second Amended Complaint were known to Appellants at the time they filed their initial Complaint and First Amended Complaint in March 2019 and July 2021, respectively. [Pa3308]. Specifically, the Appellants were well aware that the Lease contained a confidentiality provision, that the CEP Parties had information as to the Lease and its terms, that the Lease was terminated, that a new lease was entered into with the CEP Parties and that the CEP Parties acquired the Solar Rights when they gained control of the Property. [Pa3309].

These are the facts that formed the basis for Appellants' claims in the proposed Second Amended Complaint against Fiberville. Yet, none of these

facts were new or recently discovered. While these facts were known to Appellants prior to the commencement of the Underlying Action in 2019, the Appellants did not assert any claims against Fiberville. Instead, they allowed discovery to conclude after 2½ years and four (4) discovery extensions, before ever seeking to add these claims. The trial court, correctly recognizing the prejudice and the Appellants' inability to justify their failure to assert the claims earlier, denied Appellants leave to amend the First Amended Complaint.

As previously noted by this Court, "Courts should not countenance a plaintiff's dilatory action in belatedly seeking to add wholly new claims after the closing of discovery and after the filing of a dispositive motion for summary judgment. To hold otherwise would open the floodgates to never-ending litigation whenever a plaintiff perceives that his or her originally asserted claims may be dismissed after motion practice." Capps v. Rowan Univ., 2021 N.J. Super. Unpub. LEXIS 2753, *15 (App. Div. Nov. 12, 2021).[5] This within principle applies equally here, where Appellants delayed pursuing another party until after their claims against their primary target were dismissed on the merits.

Furthermore, while Appellants baldly asserted below that these claims were only learned in discovery, though they were clearly known earlier, discovery ended six (6) months before the attempt to amend. Had the facts only really been learned

[5] FEDa 165.

during discovery, then they should have been asserted at least when Appellants moved to file the First Amended Complaint in June 2021, which, again was after discovery had concluded. In other words, even if Appellants only learned of the claims in discovery, then they were able to raise, and should have raised, them in the First Amended Complaint which was filed after discovery concluded. However, the claims were not asserted and Appellants offered no justification as to why they were not asserted.

It is clear that this is a desperate effort to stave off dismissal of this utterly meritless lawsuit. Indeed, despite having knowledge years earlier of the facts that formed the predicates of the claims they sought to add by way of the Second Amended Complaint, the Appellants offered no justification to the trial court as to why these claims were not asserted earlier. Thus, the trial court correctly denied Appellants' motion for leave to amend the First Amended Complaint.

In short, the trial court properly exercised its discretion, based upon the circumstances before it, in denying Appellants' belated motion for leave to file the proposed Second Amended Complaint.

C. The Proposed Amendment Is Futile [T2 10:9-13:25]

Though not addressed by the trial court in denying the motion for leave to amend, the trial court's entry of the Order Denying Leave to Amend was alternatively appropriate based on, among other things, the trial court's prior

unequivocal determinations, based on undisputed facts, reached in dismissing the claims against the CEP Parties. Specifically, the trial court determined that Appellants' alleged losses which were attributed to the CEP Parties – the same losses they then sought to attribute to Fiberville - were "the direct and proximate result of [Appellants'] failure to cure the default under the Lease with Fiberville." [FEDa118]. Indeed, as the trial court noted, "If [Appellants] had not defaulted under the Lease, they would have the Solar Rights and Solar Project, and the subject action would be moot." [FEDa118]. Further, the undisputed facts referenced in the trial court's prior rulings, as well as the Appellants' own allegations in the pleadings, make abundantly clear that the proposed claims facially lack merit and allowing their assertion thereof would be futile.

i. Appellants' Proposed Fraud Claim

Count 16 of the proposed Second Amended Complaint sought to add a fraudulent inducement claim against Fiberville. This claim is generally predicated on Appellants' baseless allegation that Fiberville misrepresented that when Appellants purchased the Solar Rights from Fiberville in 2015, Fiberville would assure that no competitor would be able to "set up shop" at the Property and that even if Appellants defaulted under the Lease, Appellants would retain the Solar Rights. However, Appellants cannot establish damages by clear and convincing evidence as the trial court expressly determined that Appellants'

alleged losses were "the direct and proximate result of [Appellants'] failure to cure the default under the Lease with Fiberville." In addition, such a claim is barred by the integration provisions in the Lease and Purchase and Sale Agreement.

To establish a claim for fraudulent inducement, five elements must be proven ***by clear and convincing evidence***: (1) a material representation of a presently existing or past fact; (2) made with knowledge of its falsity; and (3) with the intention that the other party rely thereon; (4) resulting in reliance by that party; (5) to his detriment. Jewish Ctr. Of Sussex County v. Whale, 86 N.J. 619, 624 (1981); RNC Systems, Inc. v. Modern Technology Group, Inc., 861 F. Supp. 2d 436, 451 (D.N.J. 2012). Evidence that is clear and convincing is "evidence which is 'so clear, direct, and weighty and convincing as to enable [the fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960) (citation omitted). Under this standard, even uncontroverted evidence may nonetheless fail to meet the elevated clear and convincing evidence standard. In re Jobes, 108 N.J. 394, 408 (1987).

The clear and convincing standard must be applied to both liability and damages in the Appellants' attempt to prove fraud in the inducement. As if the difficulty in meeting this standard is not enough for Appellants, it clearly

becomes impossible under New Jersey case law, as extrinsic evidence to show fraud in the inducement is not admissible in disputes where the matters were expressly addressed in an integrated agreement. Filmlife, Inc. v. Mal "Z" Ena, Inc., 251 N.J. Super. 570 (App. Div. 1991). "There is a distinction between fraud regarding matters expressly addressed in the integrated writing and fraud regarding matters wholly extraneous to the writing." Id. at 573. In that regard, "where a contract contains an integration clause, the parol evidence rule bars the introduction of evidence of extrinsic negotiations or agreements to supplement or vary its terms." CDK Global, LLC v. Tulley Auto Group, Inc., 2016 U.S. Dist. LEXIS 57186, *3 (D.N.J. April 29, 2016).[6]

As a preliminary matter, Appellants cannot prove damages as a result of any representations or promises made by Fiberville in connection with the sale of the Solar Rights by clear and convincing evidence. The trial court had already concluded, based on the undisputed facts, that the direct and proximate cause of the Appellants' alleged losses, the same losses alleged in the Second Amended Complaint as against Fiberville, was their failure to pay rent to Fiberville. As the trial court noted in its Opinion granting summary judgment to the CEP Parties, "If [Appellants] had not defaulted under the Lease, they would have the

[6] FEDa 170.

Solar Rights and Solar Project, and the subject action would be moot." [FEDa118].

Additionally, like their claims against the CEP Parties, the Appellants cannot show any causal link between Fiberville's actions in making the alleged representations to Appellants when they entered into the Lease and Sale and Purchase Agreement in 2015, and their subsequent failure to pay the rent two (2) years later in 2017. Rather, the trial court previously correctly determined that the failure to pay the rent was due to internal strife among Appellants' investors, which interfered with their ability to raise enough money to purchase the land, or apparently to pay the rent due under the Lease. [FEDa114-15]. Appellants do not dispute this. In fact, they alleged it in their First Amended Complaint and proposed Second Amended Complaint, acknowledging that GHG's "inability to pay annual rent in 2017 was due, in part, to an internal shareholder dispute within the company, principally between Lemus and another shareholder named Robert Kampf concerning the company's direction and business strategy." [Pa3105 (at ¶61); Pa3245 (at ¶61);].[7]

[7] Notably, in the Second Action, the trial court correctly determined that the Appellants' fraud claim – which was virtually identical to that in the proposed Second Amended Complaint - was not sustainable as a matter of law, finding:

> [Appellants] cannot prove damages as a result of any representations or promises made by Fiberville in connection with the sale of the Solar Rights by clear and convincing evidence. The Court found in the Prior Action that

Finally, reliance on such statements that are outside the parties' written agreement is prohibited by the integration clause found in Section 10.10 of the Lease, which provides:

> **Section 10.10 Entire Agreement**. This Agreement, together with its attached exhibits and addenda, contains the entire agreement between the Parties with respect to the subject matter hereof, and any prior or contemporaneous agreements, discussions or understandings, written or oral (including any options or agreements for leases and/or easements previously entered into by the Parties with respect to all or any portion of the Property), are superseded by this Agreement and shall be of no force or effect. No addition or modification of any term or provision of this Agreement shall be effective unless set forth in writing and signed by each of the Parties. [FEDa145].

Likewise, Section 10(a) of the Purchase and Sale Agreement bars such reliance, stating: "This Agreement constitutes the entire agreement of the parties hereto with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings, whether written or oral." [FEDa98].

> the direct and proximate cause of the [Appellants'] alleged losses, the same losses alleged herein, was their failure to pay rent which led to the default. This default caused [Appellants] to lose the Solar Rights and the Solar Project. [Appellants] cannot show any causal link between Fiberville's actions in making the alleged representation to [Appellants] when they entered into the Lease and Sale and Purchase Agreement in 2015, and their subsequent failure to pay rent. Therefore, Count 1 of [Appellants'] Complaint is DISMISSED. [FEDa158].

By seeking to introduce these alleged statements, Appellants improperly seek to introduce parol evidence that goes beyond the terms of the fully integrated agreements between the parties. Based on the parties' fully integrated agreements, these belatedly proposed claims are without merit and, thus, futile.

As a result of Appellants' inability to prove damages based on any alleged representations, since the direct and proximate cause of their damages was their own failure to pay rent, and their inability to augment the terms of the Lease and Purchase and Sale Agreement with these newly raised allegations, the proposed fraud in the inducement claim is futile.

ii. Appellants' Proposed Claim For Breach of Contract/ Covenant Of Good Faith and Fair Dealing

Count 17 of the proposed Second Amended Complaint sought to assert a claim for breach of contract and the covenant of good faith and fair dealing, alleging that Fiberville breached the confidentiality provision in the Lease by disclosing terms of the Lease and the Solar Rights to the CEP Parties. However, the allegation of breach in this regard is belied by the Appellants' own allegations of fact and the findings previously made by the trial court that Appellants themselves previously disclosed these very facts to the CEP Parties, thereby making this claim unsustainable as a matter of law.

In that regard, the breach of contract and covenant of good faith and fair dealing claim in Count 17 is comprised of two (2) paragraphs. The factual crux

of the claim is captured in Paragraph 241, which alleges that Fiberville breached the confidentiality provision in the Lease "by disclosing the facts relating to the land lease, the Solar Rights, and other facts relating to [Appellants], and thereby directly enabled CEP Defendants to essentially bid against [Appellants'] interest in the land lease, so as to garner a higher financial gain than it had already gained from [Appellants]. In pursuit of profit, defendant Fiberville Estates breached the Confidentiality Covenant." [Pa3147].

Essentially, Appellants allege that the loss of their Lease and the Solar Rights was a result of Fiberville's improper disclosure to the CEP Parties of facts relating to both, in contravention of the Lease's confidentiality provision. However, the allegation is belied by the Appellants' own allegations that they themselves disclosed such information as early as 2015 to the CEP Parties in the context of negotiations of a potential sale between the Appellants and the CEP Parties. In that regard, at Paragraphs 53 through 57 of their First Amended Complaint and the proposed Second Amended Complaint, Appellants alleged as follows:

- At Paragraph 53, while its "million-dollar purchase-plus-land lease transaction had consummated with Fiberville Estates, and [Appellants] had received the $3 million offer, [Appellants'] principal Lemus was approached by defendant Gary Cicero for a possible sale of the rights" [FEDa54; Pa3104];

- At Paragraphs 54 and 55, on September 28, 2015, Appellants entered into a Non-Disclosure Agreement with CEP Solar, Ltd., which

contained non-circumvention provisions, for the purpose of protecting confidential information to be provided by Appellants [FEDa54; Pa3104]; and

- At Paragraph 57, after the Non-Disclosure Agreement was executed, between September 2015 and late 2017, Appellants "***disclosed all aspects of its proprietary and confidential information pertaining to [Appellants'] ongoing establishment of a solar farm under the auspices of Mill Road Solar***. ***[Appellants'] confidential disclosures included*** plans, applications, contracts, negotiation histories, contact lists, and other ***proprietary records pertaining to the acquisition of the Fiberville Estates' SREC rights and the separate 20-year lease for the land***, municipal and state filings and permit applications, and other proprietary materials" (emphasis added). [FEDa55; Pa3105].

By their own admission in their pleadings, Appellants disclosed this very same information to the CEP Parties as early as September 2015. Thus, even assuming Fiberville did disclose information regarding the Lease and Solar Rights to the CEP Parties (which it disputes), such disclosure could not have caused any harm given that the CEP Parties were previously supplied with such information by the Appellants themselves.

Additionally, Appellants' claim since the outset of the action in March 2019 was that the CEP Parties breached the NDA with Appellants by improperly using the information they learned from Appellants in due diligence between 2015 and 2017 to acquire the Lease and the Solar Rights. In their initial Complaint in the Prior Action, Appellants alleged, among other things, that during the term of the NDA with the CEP Parties, they "provided [the] CEP Defendants with the name of the owners of the Land, ***and a copy of the Lease***

containing all of the material Lease terms" (emphasis added) [FEDa22], and that based upon the confidential information provided to the CEP Parties, the CEP Parties were aware that the lease "payment was $200,000 per year with a 1½ % annual escalator" and "fell due on September 1 of every year." [FEDa23].

Given these allegations that were made, maintained and vigorously pursued by Appellants for 2½ years, a claim of breach of confidentiality provision in the Lease is simply not sustainable against Fiberville as Appellants admittedly disclosed the pertinent information, including providing the Lease itself and the annual rent, to the CEP Parties as early as 2015.

Alternatively, as discussed above in the context of their fraud claim, the trial court's express rulings, that the direct and proximate cause of Appellants' damages was their failure to pay rent to Fiberville, renders this claim futile. In dismissing the breach of confidentiality claim asserted against the CEP Parties in the First Amended Complaint, the trial court found that the Appellants' losses were not related to any violation of the non-disclosure and non-circumvention provisions by the CEP Parties. [FEDa118]. Like Count 17 of the proposed Second Amended Complaint against Fiberville herein, Count 1 of the First Amended Complaint asserted a breach of contract claim against the CEP Parties for alleged violation of the NDA in utilizing information it acquired, including

information relating to the Lease, for its own gain. In dismissing this claim against the CEP Parties, the trial court found:

> Therefore, the loss of the Property was the direct and proximate result of [Appellants'] failure to cure the default under the Lease with Fiberville…. ***[Appellants] cannot seek damages against a blameless third party simply because CEP Defendants signed an NDA. [Appellants] do not establish the requisite causal link between a breach of the NDA and [Appellants'] default under the Lease and subsequent loss of their Solar Rights*** (emphasis added) [FEDa188-19].

Likewise, in the context of dismissing Appellants' tortious interference with prospective economic advantage claim in Count 2 of the First Amended Complaint, the trial court noted that:

> [Appellants] assert that CEP Defendants used confidential information under the NDA to negotiate a competing deal with the owners of the Property, and that CEP Defendants "undercut [Appellants'] deal" and, had they not done so, "[Appellants] would have received the economic benefit of having the Solar Project at the Project Site." The claims ignore [Appellants'] payment default under the Lease and consequent loss of site control over the Property… ***even if [Appellants] proved a violation of the NDA, it was [Appellants'] Lease default that led inevitably to their loss of the solar rights tied to the Property***. (emphasis added) [FEDa121].

The same rationale holds true for the alleged breach of the Lease's confidentiality provision by Fiberville. Assuming, *arguendo*, Fiberville disclosed any information to the CEP Parties, such information was already in the CEP Parties' possession through the Appellants as discussed above.

Based on the record, including the trial court's prior findings as well as Appellants' own allegations, the claims set forth in Count 17 of the proposed Second Amended Complaint could not be sustained and were futile.

iii. Appellants' Proposed Unlawful Self-Help Claim

More than 2½ years after Appellants defaulted under the Lease by failing to pay the annual rent due to Fiberville, and after Appellants voluntarily surrendered the Property to Fiberville in accordance with the Lease, Appellants first sought to assert a claim that they were wrongfully removed from the Property in Count 18 of the proposed Second Amended Complaint. The lack of merit and delay in seeking to assert this claim militated against allowing the Appellants to assert it.

As a preliminary matter, the inexcusable delay in bringing this claim is obviously prejudicial to all the parties which have proceeded with their business and the development of the Solar Project over the last several years, without a claim by the Appellants regarding the surrender of the Property in accordance with the terms of the Lease. It is undisputed that Appellants did not pay the annual rent due in September 2017. This event of default remained uncured and resulted in a termination, which required Appellants to surrender the Property, as they did, thereby allowing Fiberville to re-let it.

In that regard, pursuant to Section 10.5 of the Lease, Appellants agreed to surrender the Property upon termination. Specifically, Section 10.5 of the Lease, entitled "Surrender of Property," provides that "Upon the expiration or earlier termination of this Agreement (whether or not following an Event of Default), Lessee shall peaceably and quietly leave, surrender and return the Property to Lessor." [FEDa143].

The New Jersey Supreme Court has cautioned that "where the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written." Karl's Sales & Service, Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 493 (App. Div. 1991), certif. denied, 127 N.J. 548 (1991). When interpreting contracts they are to be afforded their "plain and ordinary meaning." E. Brunswick Sewerage Auth. v. E. Mill Assocs., Inc., 365 N.J. Super. 120, 125 (App. Div. 2004). The court has no right "to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently" nor may it "remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other." Karl's Sales, supra, 249 N.J. Super. at 493.

Here, Appellants contractually agreed to surrender the Property upon termination of the Lease. There is no dispute that the Appellants – through their

own doing – defaulted under the Lease by failing to pay rent due in 2017. There is also no dispute that proper notice to cure was given and that Appellants still failed to cure the default. As a result, the Lease was properly terminated by Fiberville. Thus, as they were contractually obligated to do, Appellants peaceably surrendered the Property to Fiberville, and never made a claim against Fiberville (until 2½ years later) that Fiberville was not properly in possession of the Property.

Additionally, the record and the trial court's well-reasoned conclusions of law below are clear that the loss of the Property was the direct and proximate result of the Appellants' failure to pay rent due to Fiberville under the Lease. From there, as the trial court noted in its summary judgment opinion, all associated Solar Rights were lost as such rights, which are contractual in nature, run with the land and were free for anybody to pursue. [FEDa123]. As the Court expressly stated, "[Appellants] did not own the Solar Rights. After [Appellants] lost site control of the Property, PJM voided the Solar Rights, and [Appellants] lost all rights to develop the Solar Project. CEP Defendants, and anyone else for that matter, were free to pursue development of the Solar Rights thereafter." [FEDa123].[8]

[8] This finding by the trial court completely contravenes and undermines the Appellants' bald allegations that Fiberville wrongfully re-sold the Solar Rights. [Pb3, Pb33]. As the trial court correctly determined in the summary judgment

Furthermore, as with the other belatedly proposed claims and the previously dismissed claims against the CEP Parties, the Appellants' alleged damages were directly and proximately caused by their failure, in September 2017, to pay the rent due to Fiberville under the Lease and the resulting termination of the Lease. None of the alleged actions of any of the other parties caused Appellants not to make that payment. The conclusions of law based on undisputed facts made by the trial court with regard to the CEP Parties' motion for summary judgment are applicable and binding and, as a result, this claim is futile, thus, warranting denial of leave to amend.

III. WHILE THE TRIAL COURT PROPERLY DETERMINED THE FIRST AMENDED COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED, THE RESULTING DISMISSAL SHOULD HAVE BEEN WITH PREJUDICE [Pa3217]

As part of its Opposition to Appellants' belated effort to assert claims against Fiberville, Fiberville also cross-moved to dismiss the First Amended Complaint with prejudice. Having appropriately denied Appellants leave to file the Second Amended Complaint, the Appellants and the trial court were left with the First Amended Complaint, which plainly failed to assert any claims against,

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proceedings below, the Solar Rights run with the land, and once the rights were voided by PJM, anybody was free to pursue them. The Appellants had no entitlement to the Solar Rights once they defaulted under the Lease, lost control of the Property as a result of the default, and the Solar Rights were voided by the PJM. [FEDa123].

or seek any relief from, Fiberville. The trial court correctly granted Fiberville's cross-motion and dismissed the First Amended Complaint based thereon. However, given that the First Amended Complaint was silent as to Fiberville and Appellants were prohibited from amending to add claims against Fiberville, the First Amended Complaint should have been dismissed with prejudice.

While the Dismissal Order is reviewed *de novo*, the more liberal standard does not aid the Appellants in this case, as their First Amended Complaint was woefully deficient and not compliant with R. 4:5-2 with regard to Fiberville. Specifically, while the Court Rules require that all pleadings be construed liberally in the interest of justice, R. 4:5-7, "a party's pleadings must nonetheless fairly apprise an adverse party of the claims and issues to be raised at trial." Miltz v. Borroughs-Shelving, Div. of Lear Siegler, Inc., 203 N.J. Super. 451, 457 (App. Div. 1985). "To be adequate the pleadings must contain a claim for relief, a statement of the facts on which the claim is based showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader deems him or herself entitled." Miltz, supra, 203 N.J. Super. at 457, citing, R. 4:5-2. As aptly noted by the New Jersey Supreme Court:

> … the fundament of a cause of action, however inartfully it may be stated, still must be discernable within the four corners of the complaint. A thoroughly deficient complaint -- a complaint that completely omits the underlying basis for relief-- cannot be sustained as a matter of fundamental fairness. An opposing party must know

> what it is defending against; how else would it conduct an investigation and discovery to meet the claim?

Bauer v. Nesbitt, 198 N.J. 601, 611 (2009).

Where a complaint is deficient, R. 4:6-2(e) allows a party to seek dismissal by motion based on a failure to plead a claim upon which relief can be granted. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165 (2005). Although such dismissals are often without prejudice, "a dismissal with prejudice is 'mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted, [..], or if 'discovery will not give rise to such a claim.'" Mac Property Group LLC, supra, 473 N.J. Super. at 17, quoting, Rieder, supra, 221 N.J. Super. at 552 and Dimitrakopoulos, supra, 237 N.J. at 107.

In the instant matter, the trial court correctly concluded that dismissal of the First Amended Complaint as to Fiberville was appropriate. There is no question that the First Amended Complaint was void of any claims against Fiberville and did not seek any relief against it. Further, once the trial court denied Appellants leave to amend, there was no reason why the First Amended Complaint should not have been dismissed with prejudice as there were no claims or requests for relief available to Appellants in the Underlying Action.

Given the only pleading extant at the time Fiberville sought dismissal and the trial court appropriately denied Appellants' motion for leave to amend was the First Amended Complaint (which did not assert any claims or seek any relief against

Fiberville), the First Amended Complaint should have been dismissed with prejudice pursuant to R. 4:6-2(e). Accordingly, Fiberville's cross-appeal for a "with prejudice" dismissal of the First Amended Complaint should be granted.[9]

IV. THE TRIAL COURT DID NOT ERR IN CONSIDERING FIBERVILLE'S MOTION TO DISMISS THE APPELLANTS' COMPLAINT UNDER R. 4:6-2(e) AS OPPOSED TO R. 4:46-2

In a last-ditch effort to overcome dismissal of the First Amended Complaint, Appellants incorrectly contend that the trial court should have treated Fiberville's motion to dismiss as a motion for summary judgment. In support, Appellants incorrectly argue that the trial court considered matters outside the pleadings because the Certification of Fiberville's counsel – which was also submitted in opposition to the motion for leave to amend – attached "extensive extraneous material." [Pb40].

Indeed, in multiple pages of their brief, Appellants address the basic standards governing motions to dismiss under Rule 4:6-2(e) and when such a motion is to be treated as a motion for summary judgment [Pb37-42]. The

[9] Tellingly, although the trial court only dismissed the First Amended Complaint without prejudice in the Underlying Action, the same judge that sat below dismissed the Complaint in the Second Action with prejudice. In the Second Action, the factual allegations and claims were "virtually identical to the factual allegations and causes of action from the [Underlying] Action." [FEDa155]. The subsequent with prejudice dismissal is indicative of the trial court's intent that the claims sought to be added by way of the proposed Second Amended Complaint were barred.

Appellants contend that the presentation of materials outside the First Amended Complaint required Fiberville's motion to be treated as one for summary judgment, relying on Rule 4:6-2, which provides that "[i]f, on a motion to dismiss based on defense (e) [failure to state a claim upon which relief can be granted], matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46..."

Although consideration of matters outside the pleadings may result in a motion to dismiss for failure to state a claim becoming a summary judgment motion, New Jersey's Supreme Court has nonetheless made clear that "[i]n evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" Banco Popular N. Am., supra, 184 N.J. at 183, quoting, Lum v. Bank of Am., 361 F.3d 217, 221 n.3 (3d Cir. 2004). "'The purpose of this rule is to avoid the situation where a plaintiff with a legally deficient claim that is based on a particular document can avoid dismissal of that claim by failing to attach the relied upon document.'" Lerner v. City of Jersey City, 2019 N.J. Super. Unpub. LEXIS 755, *7 (App. Div. April 2, 2019),[10] quoting, Lum, supra, 361 F.3d at 221 n.3. Accordingly, "in reviewing a motion

[10] FEDa180.

under Rule 4:6-2(e), a court may consider documents referred to in the complaint, matters of public record, or documents explicitly relied on in the complaint, without converting the motion to dismiss into one for summary judgment." Lerner, supra, 2019 N.J. Super. Unpub. LEXIS, at * 7, citing, N.J. Citizen Action, Inc. v. Cnty. of Bergen, 391 N.J. Super. 596, 605 (App. Div. 2007).

Here, the trial court properly applied the standards of Rule 4:6-2(e) in dismissing Appellants' First Amended Complaint. First, a review of the portion of the trial court's Opinion dismissing the First Amended Complaint makes clear that the trial court did not consider anything beyond the First Amended Complaint in entering the Dismissal Order. Rather, the trial court succinctly noted that "the First Amended Complaint asserts no claims against Fiberville and seeks no relief against it." [Pa3310]. Second, each document presented by Fiberville – primarily in opposition to the motion for leave to amend - was a public record or document referred to, or explicitly relied upon, in the First Amended Complaint.

Specifically, Fiberville submitted the Certification of its counsel in opposition to the motion for leave to amend and in support of the cross-motion to dismiss and seven (7) exhibits, labeled A through G, were attached thereto for the trial court's consideration. [FEDa8-147]. In that regard, Exhibits A, B,

and C are all pleadings filed by Appellants themselves in this action. Exhibit A is the Appellants' Verified Complaint, Exhibit B is the Certification of Appellants' counsel submitted in support of Appellants' motion for leave to file the First Amended Complaint and Exhibit C is the Appellants' First Amended Complaint. [FEDa13-105]. Exhibits E and F are Orders and accompanying Opinions issued by the trial court in the Underlying Action with regard to the CEP Parties' motion for summary judgment and motion to dismiss Appellants' First Amended Complaint. [FEDa108-132]. Exhibit D is a single page letter relating to discovery that was identified as having been conducted and was referenced to address the propriety of Appellants' motion for leave to amend. [FEDa106-107]. This letter was not referenced in the trial court's dismissal of the First Amended Complaint. Finally, Exhibit G is the Lease between Fiberville and Appellants which formed the basis of the claims asserted in their First Amended Complaint. [FEDa133-147]

Accordingly, the record presented on the cross-motion to dismiss did not warrant treatment of Fiberville's application as one for summary judgment and Appellants' arguments to the contrary lack merit.

CONCLUSION

For the foregoing reasons, the Appellants' appeal, which seeks to reverse the trial court's Orders denying their motion for leave to file a Second Amended Complaint and dismissing their First Amended Complaint, should be denied. Instead, Fiberville's cross-appeal should be granted and the dismissal of the First Amended Complaint should be "with prejudice" as it failed to state a claim against Fiberville as a matter of law in that it indisputably asserted no claims, and sought no relief, against Fiberville.

Respectfully Submitted,

SHAPIRO, CROLAND. REISER, APFEL & DI IORIO, LLP

By: John P. Di Iorio
John P. Di Iorio

Continental Plaza II
411 Hackensack Avenue
Hackensack, NJ 07601
Tel: (201) 488-3900
Fax: (201) 488-9481
Attorneys for Defendant/Respondent,
Fiberville Estates, LLC

Dated: December 18, 2023