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Superior Court of New Jersey
Appellate Division

A-3517-21

MILL ROAD SOLAR PROJECT LLC,
GHG TRADING PLATFORMS, INC.,

Appellants,

v.

FIBERVILLE ESTATES, LLC,

Respondent.

On Appeal From Orders of the Law Division, Bergen County, Hon. Robert C. Wilson, J.S.C., BER-L-863-22

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

Appellants/plaintiffs respectfully submit this brief on appeal from the Law Division's Order granting pre-answer dismissal of the respondent under Rule 4:6-2(e), essentially based upon the "entire controversy doctrine," as legally erroneous and contrary to prior orders entered in the antecedent case.

This appeal is related to, and should be considered together with, Appeal Number 3063-21, as the two appeals are related and indeed inexorably intertwined.[1] The two Law Division dockets numbers are BER-L-2029-19 and BER-L-863-22.

Appellants/plaintiffs are solar-energy developers. In 2015, Appellants purchased certain solar-energy developmental rights from Respondent/defendant Fiberville Estates and simultaneously entered into a confidential land-lease as separate transactions.

The cost and consideration to purchase the solar-energy developmental rights was $706,000 and was confirmed with an Assignment and a Bill of Sale. Separately,

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1 On September 23, 2022, appellants filed a motion to consolidate the two appeals as related. As this brief is being filed before that motion is resolved, appellants regurgitate their position in favor of consolidation with the anticipation that the motion would have resulted in consolidation before this brief is reviewed.

Appendix pagination for this appeal is set forth at the bottom, right corner, with "Pa1" ff; cross-reference pagination with Appeal Number 3063-21 appears at the top, right corner, with "Pa3473" ff.\

T1:___ Transcript of oral argument has been filed. Transcript does not reveal any more information than the filed papers.

the consideration for the land lease was an annual rent of $200,000 with a security deposit of $100,000 held by Respondent. At the closing of title, Appellants paid over $1 million to purchase the solar-energy rights and to pay rent and security. Pa3-4.

Approximately two years after Respondent "assigned" the solar-energy development rights to Appellants, Respondent, surreptitiously, re-assigned the same rights to a different purchaser, the lead defendants in the related appeal. This portion of the appeal involves the question whether Respondent may be held liable for its claimed re-sale of assets already sold in perpetuity to Appellants/plaintiffs, and if so whether the complaint filed below, under the new docket number, BER-863-22 should not have been dismissed with prejudice or whether the Law Division should have granted Appellants' motion for leave to file their second amended complaint in the earlier docket, BER-L-2029-19, which was still pending and active, when Appellants presented their proposed second amended complaint. See Pa20-282.

Because the complaint below was dismissed on a motion to dismiss, under Rule 4:6-2(e), see Pa18 (defendant's notice of motion), the allegations of the complaint, 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).

Because the appeal involves an involuntary dismissal, it is subject to de novo review, such that no deference to the lower court is applicable. Smith v. Millville

Rescue Squad, 225 N.J. 373, 397, 139 A.3d 1 (2016).

PROCEDURAL HISTORY

The procedural history set forth in related Appeal Number 3017-21 is incorporated, by reference. See footnote 1, supra.

The procedural history in this case below was simple. On February 14, 2022, Appellants filed a new complaint (which was essentially the proposed second amended complaint in the 29019 action). Pa1-17.

Defendant then filed a pre-answer motion to dismiss under Rule 4:6-2(e) invoking the entire controversy doctrine in their motion filed May 24, 2022, rather than seeking summary judgment under Rule 4:46-2. Pa18.

The Law Division erroneously granted dismissal with prejudice. Pa283.

The dismissal with prejudice is inherently in conflict with an order denying leave to file a second amended complaint "without prejudice" in the 2019 action and was legally erroneous. See Pa231, Pa236.

STATEMENT OF FACTS

Mill Road Solar Project, LLC, GHG Trading Platforms, Inc., and New Energy Ventures, Inc., are developers of solar energy rights. All three entities were plaintiffs in the first action and only two entities were named in the second action due to the lack of need for the third-plaintiff as against Fiberville Estates.

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. Ultimately, plaintiffs came to learn that Fiberville Estates was in the process of pursuing certain solar-energy development rights but was interested in selling those non-tangible rights to a real solar-energy developer. As it was in their mutual business interests, plaintiffs and defendant began negotiating the sale/purchase of defendant's non-tangible rights, and eventually then consummated a two-tier business transaction whereby plaintiffs purchased in perpetuity all of defendant's rights, title and interest in the solar-energy development assets consisting of:

(1) Solar Renewable Energy Credits (SRECs), a sellable, tradeable commodity in the solar industry;

(2) an "interconnection agreement," a sellable, tradeable asset in the solar industry;

(3) a WMPA, or Wholesale Market Participation Agreement, a sellable, tradeable asset in the solar industry.

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, ..." Negotiations began in April 2015 and concluded in September 2015, with plaintiffs paying $706,000 for the assignment of rights and, separately, $300,000 for the rent and security deposit. Pa3-4.

As of September 2015, plaintiffs became the owner of all of the solar-developmental rights that defendant Fiberville Estates had compiled including the three items listed above. The transaction was reflected in an Assignment document and a Bill of Sale. Pa65.

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. Pa167.

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.]

Pa167-68.

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 fully paid-for assets of plaintiffs. Pa168-69.

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 issued by defendant, the attendant SRECs now became permanent rights of plaintiffs. Pa169.

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. Pa169.

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. Pa169.

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. Pa169.

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. Pa169.

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. Pa169-70.

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. Pa170.

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".) Pa171-72.

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 individually and collectively comprise the "Solar Rights." Pa173.

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. Pa173.

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. Pa173.

After years of efforts by plaintiffs, 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. Pa173-74.

During September to December 2017, under a Non-Disclosure Agreement/Non-Circumvention Agreement, plaintiffs were engaged in multiple discussions with a competitor, the so-called CEP Defendants in the first action, to sell them plaintiffs' Solar Rights. Plaintiffs' Alex Lemus and CEP Defendants' Gary Cicero agreed to continue working towards such mutual goal of sale and purchase. Several offers to buy from Cicero to Lemus were rejected by plaintiffs as grossly inadequate.

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, Pa174.

While plaintiffs were so engaged, the CEP Defendants and Fiberville Estates were "negotiating" for Fiberville to "re-sell" its Solar Rights that it had already, previously sold to plaintiffs and confirmed in the Assignments and Bill of Sale. In the land lease, prepared by Fiberville Estates, the following confidentiality covenant was incorporated to govern the parties' trade secrets and information 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.]

Pa5-6.

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. Pa176-77.

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. Pa177.

By late 2017, rather than pursuing their stated intentions of negotiating a price to acquire plaintiffs' solar rights, the CEP Defendants schemed with Fiberville Estates to steal plaintiffs' Solar Rights and they purportedly sold and purchased plaintiffs' Solar Rights by their conspiracy whereby Fiberville Estates silently claimed that it

would render the non-tangible Assignments null and void and CEP Defendants would allegedly re-purchase those Solar Rights from Fiberville Estates. This was a daylight, brazen theft of plaintiffs' assets, but plaintiffs simply could not fathom until later in the 2019 action that Fiberville Estates was knowingly involved in this theft scheme. Pa177.

QUESTIONS PRESENTED

1. Whether the grant of defendant's motion to dismiss "for the facial failure to state a claim" was legally erroneous.

ARGUMENT

I

BECAUSE THE STATUTES OF LIMITATIONS HAD YET TO RUN, THE COMPLAINT SHOULD BE REINSTATED AND THE ORDER GRANTING DEFENDANT'S MOTION TO DISMISS UNDER RULE 4:6-2(e) SHOULD BE VACATED [Pa283]

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.

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.

P189.

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, Pa62.

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. Pa167-68.

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. Pa163.

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. Pa163.

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. Pa163.

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,[2] 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. Pa163.

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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.

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 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. Pa177-78.

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. Pa168.

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. Pa169-83.

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. Pa178-79.

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. Pa179.

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. Pa179.

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. Pa179.

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 extraneous materials. 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." Pa20-282..

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 extraneous 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).

No such notice was provided; the motion judge did not convert the Rule 4:6-2(e) motion into one under Rule 4:46-2. Had such a motion been even been made, such 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 complaint should have been permitted as the statutes of limitations governing Fiberville claims were not affected. Both breach of agreement, fraud, and issues pertaining to the security deposit are covered by the six year limitations, which apply as of the time of breach. See N.J.S.A. § 2A:14-1. The six year period would have begun to run when the defendant apparently re-sold plaintiffs' rights to plaintiffs' competitors in 2017-18. Thus, for this reason, defendant did not even bother to invoke the statute of limitations as a basis for relief.

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.

Thus, it appears that the motion judge effectively held that Appellants' claims against Fiberville were dependent upon the viability of the land-lease, even though Appellants' claims involved the fraudulent sale of Appellants' solar-energy rights that had been acquired in perpetuity from defendant Fiberville. Thus, the Order denying Appellants' motion to file a second amended complaint was "dismissed without prejudice." Pa229. Thus, the motion judge's opinion states:

> On July 30, 2021, after discovery had concluded and eleven days after the First Amended Complaint was filed, the CEP Defendants filed a motion for summary judgment seeking dismissal of the First Amended Complaint. On August 5, 2021, the CEP Defendants, along with Cicero and Bellin, filed a motion to dismiss the First Amended Complaint. By Orders entered on September 23, 2021, this Court granted the CEP Defendants' motion for summary judgment and the motion to dismiss the First Amended Complaint as against the CEP Defendants, Cicero and Bellin. This Court found that the Plaintiffs' 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. [Emphasis added.]

Pa229.

Because the land-lease and the fully-purchased solar-energy rights were independent transactions, the latter being fully owned by Appellants in perpetuity, the underlying orders were all predicated upon the various defendants' "house of cards."

In addition, 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.

When the Law Division denied second amendment, it did not find that there was any "prejudice" to Fiberville. This was for two reasons. First, Fiberville was already a defendant as of the First Amendment, so it was fully able to defend had it chosen to defend and it could have sought to extend the discovery schedule by motion. Second, more importantly, Appellants' claims against Fiberville were clarified by the proposed second amendment, but that was denied without prejudice, so there was no "finding of prejudice" required for dismissal under the entire controversy doctrine. See Pa223 (first clause of Order); Pa235 (dismissing First Amended Complaint DISMISSED without prejudice[]" specifically holding that the dismissal was without prejudice, merely based upon the fact that another party had

entered into a new lease with Fiberville.

A "dismissal with prejudice is the ultimate sanction, [and thus] it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party." Abtrax Pharma., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 514, 655 A.2d 1368 (1995). As it relates to the entire controversy doctrine, "in the limited circumstances where a lesser sanction is not sufficient to remedy the problem caused by an inexcusable delay in providing the required notice, thereby resulting in substantial prejudice to the non-disclosed party's ability to mount an adequate defense[,]" dismissal with prejudice is a viable option. Mitchell v. Charles P. Procini, D.D.S., P.A., 331 N.J. Super. 445, 453-54, 752 A.2d 349 (App. Div. 2000). Because the entire controversy doctrine was not applied between the first amended complaint and the second amended complaint in the 2019 action, and because the entire controversy doctrine requires a finding of "prejudice" that was not found in the 2019 docket, it is simply inapplicable here and was not a proper basis for dismissal under Rule 4:6-2(e).

Accordingly, the dismissal Order should be reversed on two grounds: First, it was erroneous to hold that a new lease somehow vitiates an absolute sale/purchase transaction. Because Appellants allege that their purchased-assets were purportedly re-sold, Appellants have valid claims. Second, because Fiberville engaged in illegal self-help with the lease after breaching the confidentiality covenant, Appellants'

claims are valid.

CONCLUSION

For the reasons stated above, the Panel should reverse the dismissal Order appealed by Appellants/Plaintiffs and remand this matter to the Law Division along with the related appeal.

Dated: October 17, 2022

Respectfully submitted,

/s/ Michael Kimm

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MILL ROAD SOLAR PROJECT LLC and GHG TRADING PLATFORMS, INC., Plaintiffs/Appellants, v. FIBERVILLE ESTATES, LLC, Defendant/Respondent.	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO.: BER-L-863-22 SAT BELOW: HON. ROBERT C. WILSON, J.S.C. APPELLATE DIVISION DOCKET NO.: A-003517-21

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Dated: December 19, 2022

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PRELIMINARY STATEMENT

This appeal seeks to reverse the trial court's well-reasoned dismissal of the Complaint based on the Entire Controversy Doctrine and for failure to state a claim upon which relief can be granted under Rule 4:6-2(e). The appeal should be denied as it improperly implores this Court to substitute its discretion relating to dismissal of the Complaint under the Entire Controversy Doctrine for that of the trial court, which presided over a prior litigation involving the identical subject matter of this action for 2½ years. This appeal also improperly seeks to have this Court review the allegations of the Complaint without regard to the significant legal conclusions based on undisputed facts made by the trial court in that prior action, which the trial court utilized in dismissing the claims in this action for failure to state a claim.

This is the second action filed by Mill Road Solar Project LLC and GHG Trading Platforms, Inc. (the "Appellants") arising out of their dispute with CEP Solar, Ltd. and Milford Solar Farm LLC (the "CEP Parties"), regarding a lease for real property owned by Respondent, Fiberville Estates LLC ("Fiberville"), and the associated rights relating to a solar farm development project. The Complaint in this action, filed on February 14, 2022, asserts claims against Fiberville for (i) fraud, (ii) breach of contract and the covenant of good faith and fair dealing and (iii) breach of lease and unlawful self-help.

Notably, Appellants' claims in this action arise out of the very same transactions and occurrences litigated for 2½ years before the trial court in the prior action that Appellants commenced in March 2019. Fiberville was a defendant in that prior action, but ultimately dismissed for Appellants' failure to state a claim against it. Additionally, the claims asserted herein, as Appellants acknowledge, are identical to those they previously unsuccessfully sought leave to assert against Fiberville in that prior action.

In the instant matter, after a detailed analysis of the procedural history of the prior action, the trial court correctly concluded that the claims asserted in this lawsuit could have, and should have, been asserted in the prior action. Indeed, the trial court found that Appellants were aware of the facts that formed the predicates for their claims as early as March 2019 yet offered no basis in the prior action, or in opposing the motion to dismiss this action, as to why they did not bring the claims sooner. As such, the trial court properly exercised its discretion in dismissing the Appellants' Complaint with prejudice under the Entire Controversy Doctrine.

Likewise, the trial court made significant, correct conclusions of law based on undisputed facts in dismissing similar claims against the CEP Parties in the prior action. Importantly, the trial court found in the prior action that the direct and proximate cause of the Appellants' alleged losses – the same losses

for which they seek redress in this action - was their failure to pay rent to Fiberville. As the trial court aptly noted in its opinion dismissing the prior action against the CEP Parties, "if [Appellants] had not defaulted under the Lease, they would have the Solar Rights and Solar Project, and the subject action would be moot." The same rationale upon which the First Amended Complaint in the prior action was dismissed against the CEP Parties applies equally to Fiberville. The Appellants' alleged losses, in the prior action and this action, were caused by their failure to pay rent to Fiberville, not because of any alleged representations made at the time the subject lease was entered, the alleged breach of confidentiality, or the termination of the subject lease, as they now belatedly contend. Relying on its prior conclusions of law based on the undisputed fact that Appellants failed to pay rent and Appellants' lease for the subject property was terminated, the trial court properly determined that Appellants' claims in this action are not sustainable as a matter of law.

Accordingly, this appeal should be dismissed and the trial court's Order dismissing Appellants' Complaint with prejudice should be affirmed in its entirety.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

A. The Commencement Of The Prior Action In 2019

Appellants, Mill Road Solar Project LLC ("Mill Road") and GHG Trading Platforms, Inc. ("GHG"), along with New Energy Ventures Inc. ("NEV"), commenced a 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 "Prior Action").[1] [Pa87; Pa27].

On June 21, 2019, a Case Management Order was entered in the Prior Action, which set forth a discovery end date of June 24, 2020. [Pa287-88]. Thereafter, four (4) discovery extensions were granted for a total extension of discovery for nearly ten (10) months to April 20, 2021. [Pa288]. The Discovery End Date was not further extended. [Pa21].

On June 23, 2021, after the close of discovery in the Prior Action,

[1] The Prior Action, entitled Mill Road Solar Project LLC, et al. v. CEP Solar, Ltd., et al., Docket No. BER-L-2029-19, is the subject of a separate appeal pending before this Court bearing appellate docket number A-0030063-21. Though a party to the Prior Action, Fiberville is not a party to that appeal, is not identified as a respondent in that appeal, and was not served with Appellants' Notice of Appeal or Amended Notice of Appeal. Therefore, that appeal has not been properly perfected as to Fiberville. R. 4:5-1(a); PRESSLER & VERNIERO, Current N.J. COURT RULES, Comment 1 to R. 4:5-1 (Gann) (stating "Perfection of the taking of the appeal requires both timely service as well as timely filing. See e.g., Alberti v. Civil Serv. Comm., 41 N.J. 147, 154 (1963)…")

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. [Pa288]. A Certification of Appellants' counsel was submitted in support of that motion. [Pa52]. Counsel certified that the amendment was precipitated by "issues that were discovered during discovery [which concluded April 20, 2021], and more particularly during depositions, and from certain OPRA records obtained from the Township after February 2021." [Pa288; Pa52-53]. Appellants' counsel also certified as to the claims being added, and/or relief being sought, against each of the proposed new defendants. [Pa288; Pa52]. 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. [Pa288].

On July 19, 2021, Appellants filed their First Amended Complaint in the Prior Action. 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. [Pa288; Pa53].

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 in the Prior Action pursuant to a subpoena served by the CEP Parties' counsel. [Pa288]. On November 20, 2020, eight (8) months prior to the filing of the First Amended Complaint in the Prior Action, Appellants' counsel conducted the deposition of Stanley Sackowitz, who was a consultant to Fiberville in connection with allegations made in the action. [Pa288]. 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. [Pa289].

B. <u>CEP Parties Are Granted Summary Judgment In The Prior Action</u>

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. The CEP Parties, along with Cicero and Bellin, also filed a motion to dismiss the First Amended Complaint. [Pa289]. 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. [Pa289]. 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." [Pa144];

- 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." [Pa144];

- 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." [Pa144];

- 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." [Pa144-45];

- 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." [Pa146];

- 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." [Pa147];

- 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." [Pa148-49];

- 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." [Pa149];

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- 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." [Pa150];

- 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." [Pa151];

- 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." [Pa153]; 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." [Pa154].

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 Prior Action was commenced and nearly six (6) months after discovery concluded. [Pa289].

The proposed Second Amended Complaint sought to assert claims for damages against Fiberville when no such claims were asserted in the First

Amended Complaint filed in the Prior Action in July 2021. 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 for wrongful eviction. [Pa289]. 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 against, or seek any relief from, Fiberville . [Pa289; Pa23].

On December 7, 2021, the trial court entered an Order denying Appellants' motion for leave to file a Second Amended Complaint and entered a separate Order dismissing Appellants' First Amended Complaint without prejudice as to Fiberville pursuant to R. 4:6-2(e). [Pa289; Pa221; Pa236]. 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. [Pa233].
>
> * * * * *
>
> 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. [Pa234].

Following dismissal of Fiberville, motion practice ensued among Appellants and the remaining defendants, New Jersey Natural Resources, Inc. and Township of Holland. [Pa24]. 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. [Pa24]. 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.

[Pa259]. 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. [Pa24].

D. The Appellants' Second Action Against Fiberville And The Dismissal

Appellants commenced this action by way of Complaint filed on February 14, 2022 (the "Complaint"). [Pa1; Pa290]. As set forth in the Complaint, Appellants assert the same three (3) causes of action against Fiberville, *i.e.*, (i) fraud, (ii) breach of contract and breach of the covenant of good faith and fair dealing, and (iii) breach of lease and unlawful self-help, which the trial court denied Appellants leave to amend to assert in the Prior Action. [Pa290].

Just like the Prior Action, Appellants' claims in this action arise out of the Lease between Fiberville, as landlord, and Mill Road, as tenant, for the subject property and the associated solar rights. [Pa290]. Indeed, the factual allegations and claims made in the Complaint filed in this action are virtually identical to the factual allegations and causes of action that were included in the proposed Second Amended Complaint that Appellants sought leave to file in the Prior Action, which as discussed above was denied by the trial court. [Pa290]. Appellants acknowledge as much in their brief, indicating that the Complaint in this action "was essentially the proposed second amended complaint in the [Prior A]ction." [Pb3].

On April 13, 2022, Fiberville filed a motion to dismiss the Complaint with prejudice pursuant to R. 4:6-2(e) for failure to state a claim upon which relief may be granted and pursuant to the Entire Controversy Doctrine. [Pa18].

Appellants opposed Fiberville's motion. [Pa284].

By way of Order and accompanying Opinion dated June 22, 2022, the trial court granted Fiberville's motion to dismiss the Complaint with prejudice (the "Dismissal Order"). [Pa283]. 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 Prior Action. Thus, these claims should have been asserted in the Prior Action." [Pa291]. 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 all the defendants in the Prior Action, *i.e.*, any of Appellants' losses were caused by their failure to pay rent and the resulting termination of the subject lease. [Pa292-95].

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

Appellants appeal the trial court's June 22, 2022 Dismissal Order. However, Appellants did not perfect any appeals with regard to either of the trial court's December 7, 2021 Orders entered in the Prior Action, one of which denied Appellants' motion for leave to file a Second Amended Complaint, [Pa221], and the other which dismissed the First Amended Complaint as against

Fiberville without prejudice. [Pa236]. The time to appeal those Orders has expired.[2]

COUNTERSTATEMENT OF 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,

[2] As discussed in footnote 1, supra, prior to the filing of the within appeal, Appellants appealed various orders entered in the Prior Action. Fiberville is not a party to that appeal, is not identified as a respondent in that appeal, and was not served with Appellants' Notice of Appeal or Amended Notice of Appeal. Nonetheless, Appellants' Amended Notice of Appeal references, without specification, a December 7, 2021 trial court order as being appealed. As discussed above, two (2) Orders were entered in the Prior Action on December 7, 2021 – one Order denied Appellants' motion for leave to file a Second Amended Complaint against Fiberville and the other Order dismissed the First Amended Complaint as against Fiberville without prejudice. The Order dismissing the First Amended Complaint without prejudice is not identified as being appealed, yet one of Appellants' proposed issues on appeal in that separate appeal is whether the dismissal of Fiberville was erroneous as a matter of law and/or an abuse of discretion. The Case Information Statement in that other appeal states that Appellants are appealing the Order denying leave to file a second amended complaint. As discussed above, the appeal of those December 7, 2021 Orders, to the extent they are being appealed at all, has not been properly perfected as against Fiberville. Moreover, the standard of review applicable to denial of Appellants' motion for leave to file a Second Amended Complaint is an abuse of discretion. MicroBilt Corp v. L2C, Inc.. 2011 N.J. Super. Unpub. LEXIS 2280, *10 (App. Div. Aug, 23, 2011) (finding the trial "judge did not abuse his discretion by denying the motion to amend, as the proposed amendments are "not sustainable as a matter of law.") [Da1]. As discussed in various parts of this brief, the trial court's denial of leave to amend in the Prior Action was well-reasoned and premised on the unjustified delay in asserting the claims and the resulting prejudice to Fiberville. The trial court's denial of Appellants' motion for leave to amend was not an abuse of discretion.

consisting of approximately seventy (70) non-contiguous acres (the "Property"). [Pa285].

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. [Pa285]. 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"). [Pa139]. These Solar Rights are contractual in nature and are specific to the Property. [Pa140]. By way of a Sale/Purchase Agreement, GHG purchased all of Fiberville's Solar Rights for $600,000 plus reimbursements, which was paid by GHG in September 2015. [Pa285-86].

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"). [Pa139]. 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. [Pa140-41].[3]

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"). [Pa286; Pa139]. Pursuant to the Lease, Mill Road was required to make an annual rental payment to Fiberville on September 1 of each year. [Pa286; Pa139].

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. To evaluate the Solar Project, CEP requested access to all the information relating to the Solar Project and the Property. Mill Road, two (2) years earlier, had entered into a

[3] As found by the trial court in its Opinion granting summary judgment to the CEP Parties in the Prior 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." [Pa145].

"Non-Disclosure/Non-Circumvention Agreement" dated September 28, 2015 (the "NDA"). This NDA was between CEP and GHG, which along with NEV, owned Mill Road. [Pa140].

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." [Pa70].

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. [Pa287; Pa140]. 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. [Pa140; Pa286]. 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." [Pa71]. 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. [Pb10].

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. [Pa141; Pa287]. 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. [Pa141; Pa287]. Mill Road never made the required payment under the Lease and Fiberville terminated the Lease on October 17, 2017. [Pa141; Pa287]. 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. [Pa141; Pa287].

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. [Pa142; Pa287]. 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. [Pa287].

PJM was subsequently informed that the Appellants were going to lose site control at the Property, whereupon PJM cancelled the WMPA. [Pa141]. 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. [Pa141]. The letter advised Secretary Bose that the WMPA was being cancelled due to lose of site control resulting in Mill Road's default under the WMPA. [Pa141]. As pointed out by the trial court in granting summary judgment to the CEP Parties in the Prior Action:

> … 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. [Pa145-46].

ARGUMENT

I. The Applicable Standard Of Review

In entering the Dismissal Order, the trial court determined that Appellants' claims were barred by the Entire Controversy Doctrine, concluding that the claims "arise from the identical transactions and occurrences that formed the basis for the Prior Action" and, thus, "should have been asserted in the Prior Action." [Pa291]. The trial court also found that dismissal was appropriate as the Appellants failed to state a claim upon which relief could be granted as to the three (3) claims set forth in the Complaint. [Pa292-95].

On appeal, a trial court's grant or denial of a motion to dismiss is reviewed under the same standards as the trial court. 1707 Realty, LLC v. Revolution Architecture, LLC, 2022 N.J. Super. Unpub. LEXIS 1303, *17 (App. Div. July 19, 2022)[4] (citing, Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005)).

Where the decision being appealed is based on equitable principles, the trial court's findings are reviewed under an abuse of discretion standard. 1707 Realty, LLC, supra, 2022 N.J. Super. Unpub. LEXIS 1303, *17-18 (citing, BOC Group, Inc. v. Chevron Chem. Co., 359 N.J. Super. 135, 145 (App. Div. 2003)).

[4] Da5. Pursuant to R. 2:6-1(a)(1)(H) and R. 1:36-3, all unpublished opinions cited herein are included in Fiberville's Appendix. Fiberville is not aware of any unpublished opinions contrary to those cited herein.

In that regard, "it is well settled that '[t]he entire controversy doctrine is an equitable principle and its application is left to judicial discretion.'" 1707 Realty, LLC, supra, 2022 N.J. Super. Unpub. LEXIS 1303, *18 (citing, 700 Highway 33 LLC v. Pollio, 421 N.J. Super. 231, 238 (App. Div. 2011)). "The doctrine's 'application is left to judicial discretion based on the factual circumstances of individual cases.'" 1707 Realty, LLC, supra, 2022 N.J. Super. Unpub. LEXIS 1303, *18 (citing, Dimitrakopoulos v. Borrus, 237 N.J. 91, 114 (2019)). Thus, the trial court's determination to dismiss the Appellants' Complaint pursuant to the Entire Controversy Doctrine is reviewed for an abuse of discretion.

On appeal, 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 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 (citing, Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)). Thus,

when reviewing the trial court's exercise of such discretion, the appellate court "will reverse the trial court's decision only if it was clearly erroneous." 1707 Realty, LLC, supra, 2022 N.J. Super. Unpub. LEXIS 1303, *18 (citing, State v. Simon, 161 N.J. 416, 444 (App. Div. 1999)).

As to the alternative ground of dismissal of Appellants' claims, namely failing to state a claim upon which relief could be granted, the trial court's decision is reviewed de novo. Lerner v. City of Jersey City, 2019 N.J. Super. Unpub. LEXIS 755, *6 (App. Div. April 2, 2019).[5] In evaluating a motion to dismiss, the court is to accept the allegations asserted in the complaint and accord the claimant all favorable inferences. Id. at *7. However, in addition to the allegations themselves, the court may consider "exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." Id. (quoting, Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005)).

As discussed further herein, the trial court did not abuse its discretion in determining that the claims asserted in this action were barred by the Entire Controversy Doctrine. Additionally, under the standards governing motions to dismiss, the trial court correctly concluded that Appellants' Complaint failed to state a claim upon which relief could be granted against Fiberville.

[5] Da28.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN APPLYING THE ENTIRE CONTROVERSY DOCTRINE TO DISMISS APPELLANTS' COMPLAINT WITH PREJUDICE

The trial court did not abuse its discretion in determining that Appellants' Complaint was barred by the Entire Controversy Doctrine. Rather, the trial court correctly concluded that the transactions and occurrences forming the basis for this action were identical to those which formed the basis of the Prior Action, which action had previously been litigated in the trial court for nearly 2½ years. The trial court properly found that Appellants' claims could, and should, have been asserted earlier in the Prior Action, and that the failure to do so barred Appellants from subsequently asserting them in this action.

In that regard, New Jersey's Entire Controversy Doctrine evolved through common law to encompass a mandatory rule "for the joinder of virtually all causes, claims, and defenses relating to a controversy between the parties engaged in litigation." Cogdell v. Hospital Ctr., 116 N.J. 7, 16 (1989). New Jersey's courts have recognized that the purposes of the doctrine include "the needs of economy and the avoidance of waste, efficiency and the reduction of delay, fairness to parties, and the need for complete and final disposition through the avoidance of 'piecemeal decisions.'" 1707 Realty, LLC v. Revolution Architecture, LLC, 2020 N.J. Super. Unpub. LEXIS 2381, *13 (Law Div. Nov.

20, 2020)[6] (quoting, Kent Motor Cars Inc. v. Reynolds, 207 N.J. 428, 443 (2011)).

"The Entire Controversy Doctrine has been a cornerstone of New Jersey's jurisprudence for many years, as evidenced by the Supreme Court's longstanding 'preference that related matters arising among related parties be adjudicated together rather than in separate, successive, fragmented, or piecemeal litigation.'" 1707 Realty, supra, 2020 N.J. Super. Unpub. LEXIS 2381, at *12 (quoting, Kent Motor, supra, 207 N.J. at 443). The Entire Controversy Doctrine has since been implemented through R. 4:30A, which provides:

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

Indeed, "[t]he Entire Controversy Doctrine, which finds its support in our Constitution, requires a litigant to present 'all aspects of a controversy in one legal proceeding.'" Id., (citing, Kent, supra, 207 N.J. at 443). "The failure to adhere to the requirements of mandatory joinder precludes a party in a subsequent lawsuit from asserting a new and independent action for damages.

[6] Da15.

Thus, the general rule in New Jersey is 'a defendant must assert all matters which will defeat a claim against him and a plaintiff must seek complete relief for vindication of the wrong he charges.'" Vision Mtge. Corp., Inc. v. Patricia J. Chiapperini, Inc., 307 N.J. Super. 48, 52-53 (App. Div. 1997) (citing, Applestein v. United Bd. & Carton Corp., 35 N.J. 343, 356 (1961)).

"Under this doctrine the 'entire controversy,' rather than its constituent causes of action, is the unit of litigation and joinder of all such causes of action is compulsory under penalty of forfeiture." Mori v. Hartz Mountain Dev. Corp., 193 N.J. Super. 47, 56 (App. Div. 1983) (quoting, Malaker Corp. v. First Jersey National Bank, 163 N.J. Super. 463, 496 (App. Div. 1978), certif. denied, 79 N.J. 488 (1979)). In that regard, "'[t]he essential consideration is whether distinct claims are aspects of a single larger controversy because they arise from interrelated facts.'" 1707 Realty, supra, 2020 N.J. Super. Unpub. LEXIS 2381, at *12 (quoting, Hobart Bros. Co. v. Nat'l Union Fire Ins. Co., 354 N.J. Super. 229, 244 (App. Div. 2002)). "'[T]he entire controversy doctrine applies not only to matters actually litigated, but to all aspects of a controversy that might have been thus litigated and determined.'" Vision Mtge., supra, 307 N.J. Super. at 52, (quoting, Mori, supra, 193 N.J. Super. at 56).

In the instant matter, as both the Complaint herein and the record in the Prior Action establish, the facts and controversy that form the basis of this action

and the Prior Action are not only "interrelated," but are identical. The nucleus of each action relates to the Appellants' breach and termination of the Lease and the associated Solar Rights due to Appellants' failure to pay rent, as well as Fiberville's subsequent lease of the Property to the CEP Parties and the CEP Parties' acquisition of the Solar Rights. The background facts, the "larger controversy" and the alleged losses in both actions are identical and, thus, the claims asserted in this new action against Fiberville should have been asserted in the Prior Action.

As evidence that the matters in controversy are the same, Appellants unsuccessfully sought to amend their First Amended Complaint in the Prior Action to add these very same claims, but were denied. The denial was not premised on a determination that the claims were unrelated to the Prior Action. Rather, the denial was based upon, among other things, the Appellants' unjustified delay in seeking to assert the claims until 2½ years after the Prior Action was commenced, after discovery closed, and after most of the defendants had already been dismissed on the merits. Indeed, as the trial court in the Prior Action determined when denying Appellants leave to amend to add these claims:

> [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].

Despite having knowledge years earlier of the facts that form the predicates of the claims they sought to add in the Prior Action (which are the same facts underlying the claims in this case), the Appellants offered no justification to the trial court in the Prior Action as to why these claims were not asserted in the Prior Action earlier. Thus, the trial court correctly denied Appellants' motion for leave to amend the First Amended Complaint.

To permit the Appellants to assert these claims in a new action, as they are attempting to, would allow them to impermissibly circumvent the ruling of the trial court and its denial of the motion to amend in the Prior Action. This would violate the purpose of the Entire Controversy Doctrine, namely avoiding fragmented and piecemeal litigation, while proliferating the prejudice borne upon Fiberville if these belated claims are permitted.

Likewise, the belated and unsuccessful attempt to assert these claims in the Prior Action does not serve as a basis to circumvent the requirements of the Entire Controversy Doctrine and Appellants' obligation to have asserted the claims in the Prior Action. While Appellants may have attempted to add the claims, they did not, although they were required to do so under the Entire Controversy Doctrine. Based on prejudice and delay, the belated attempt to add these claims in the Prior Action was denied and cannot be avoided by filing a

new lawsuit. The same prejudice resulting from inexcusably not asserting these claims earlier in the Prior Action, bars the assertion of these claims in a new subsequent action.

Indeed, as the trial court noted in denying leave to amend in the Prior Action, the facts supporting the claims in the Prior Action were known to Appellants at the time they filed their initial Complaint and First Amended Complaint in the Prior Action in March 2019 and July 2021, respectively. [Pa233]. Specifically, while Fiberville denies the allegations that are asserted herein (and which Appellants belatedly and unsuccessfully sought to add to the Prior Action), 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. [Pa233].

These are the facts that form the basis for Appellants' claims in this action against Fiberville. Yet, none of these facts are new or recently discovered. While these facts were known to Appellants prior to the commencement of the Prior 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 in the Prior

Action. In the Prior Action, the trial court recognized the prejudice and the Appellants' inability to justify their failure to assert the claims earlier and denied Appellants leave to amend the First Amended Complaint. The same prejudice and unfairness that militated against allowing the belated and unjustified attempt to add these claims in the Prior Action – when Appellants were duty-bound to have included them - justifies application of the Entire Controversy Doctrine and dismissal of the Complaint. The trial court echoed these sentiments in granting Appellants' motion to dismiss the Complaint in this action, finding:

> The facts asserted in the Complaint are neither new nor recently discovered. While the facts were known to [Appellants] prior to the commencement of the Prior Action in 2019, [Appellants] did not assert any claims against Fiberville. Rather, they allowed discovery to conclude after over two year[s] and four discovery extensions, before seeking to add these claims in the Prior Action. There is no disagreement as to the facts, and there is no further discovery to be had. This Court recognized [Appellants'] failure to justify their failure to assert the claims earlier and denied [Appellants] leave to amend the First Amended Complaint. The same reasoning applies here in the application of the Entire Controversy Doctrine. [Pa292].

The Appellants cannot overcome these rational determinations to establish that the trial court abused its discretion in applying the Entire Controversy Doctrine as a basis to dismiss Appellants' Complaint. Yet, in appealing its application, Appellants inexplicably contend that "… because the entire controversy doctrine requires a finding of 'prejudice' that was not found in the 2019 docket, it is simply inapplicable here and was not a proper basis for dismissal under Rule 4:6-2(e)."

[Pb29]. Not only is the argument not legally supported, but it is belied by the factual record. Indeed, in denying the motion for leave to file the Second Amended Complaint in the Prior Action to add these very claims, the trial court expressly found that Fiberville would be prejudiced by the untimely assertion of these claims. Specifically, the trial court stated Appellants "delay in seeking to assert these claims is prejudicial to Fiberville and is not permitted." [Pa9]. The trial court's denial of the Appellants' motion for leave to file the Second Amended Complaint is not on appeal, and the finding of prejudice stands undisturbed.[7]

It is clear that the filing of this action represents a desperate attempt by Appellants to take a second bite of the apple after having had their claims dismissed in the Prior Action and having been denied leave to add these claims in the Prior Action, where they should have been asserted earlier. Clearly, the Entire Controversy Doctrine applies here, and dismissal of the Complaint with prejudice pursuant to R. 4:6-2(e) was appropriate; not an abuse of discretion.

[7] Even assuming arguendo the order denying leave to file the Second Amended Complaint is on appeal, as discussed in footnote 2 supra, the trial court did not abuse its discretion in denying the motion.

III. THE TRIAL COURT PROPERLY DETERMINED THAT THE COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AGAINST FIBERVILLE

Given the conclusions of law based on undisputed facts made by the trial court in granting summary judgment to the CEP Parties and dismissing the Appellants' claims in the Prior Action, it is clear that Appellants' belated claims against Fiberville in this action are not sustainable as a matter of law. The trial court's dismissal of Appellants' Complaint in this action was appropriate based on, among other things, its unequivocal determination in the Prior Action that Appellants' alleged losses in that action – the same losses alleged in this action - were "the direct and proximate result of [Appellants'] failure to cure the default under the Lease with Fiberville." [Pa144]. Indeed, as the trial court noted in the Prior Action, "If [Appellants] had not defaulted under the Lease, they would have the Solar Rights and Solar Project, and the subject action would be moot." [Pa144]. Further, the undisputed facts make abundantly clear that these claims facially lack merit, thereby justifying their dismissal as a matter of law for failure to state a claim upon which relief can be granted against Fiberville.

A. Fraud Claim

Count 1 of the Complaint asserts a fraud claim against Fiberville based on an alleged fraudulent inducement that is nearly identical to the fraudulent inducement claim that Appellants unsuccessfully sought to add as Count 16 of

their proposed Second Amended Complaint in the Prior Action. 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.[8] However, Appellants cannot establish damages by clear and convincing evidence as the trial court expressly determined in the Prior Action 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.

[8] Paragraph 31 of the Complaint in this action alleges that Fiberville's "actions were intentionally deceitful, and its statement that ***induced*** plaintiff to purchase the Solar Rights in perpetuity were false…" Paragraph 32 alleges that Fiberville used false representations to ***induce*** plaintiff's reliance and payment …" to purchase the Solar Rights in perpetuity (emphasis added). [Pa10].

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 the 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. Apr. 29, 2016).[9]

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 found in the Prior Action that the direct and proximate cause of the Appellants' alleged losses, the same losses alleged herein, was their failure to pay rent to Fiberville. As the trial court noted in its Opinion granting summary judgment to the CEP Parties in the Prior Action, "If [Appellants] had not defaulted under the Lease, they would have the Solar Rights and Solar Project, and the subject action would be moot." [Pa144].

Additionally, like their claims against the CEP Parties in the Prior Action, 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 had previously correctly determined in the Prior Action 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

[9] Da35.

under the Lease. [Pa140-41]. Appellants do not dispute this. In fact, they alleged it in their proposed Second Amended Complaint in the Prior Action, 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." [Pa176].

Consistent with its prior findings and conclusions in the Prior Action, the trial court correctly determined that the Appellants' fraud claim 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 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. [Pa293].

Here, based on the determinations made in the Prior Action, which are equally applicable here, the trial court recognized that Appellants would not be able present any evidence, let alone clear and convincing evidence, that the purported representations caused any damages to Appellants.

In addition, the 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. [Pa276].

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." [Pa113].

By seeking to introduce these alleged statements, Appellants are improperly seeking 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 filed claims are without merit and were justifiably dismissed.

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 claim for fraud was properly dismissed as a matter of law.

B. Breach of Contract/Covenant of Good Faith and Fair Dealing Claim

Count 2 of the Complaint asserts a claim for breach of contract and breach of 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. This claim is virtually identical to the claim that Appellants unsuccessfully sought to add as Count 17 of their proposed Second Amended Complaint in the Prior Action. However, the allegations of breach in this regard are belied by the Appellants' own allegations of fact and the findings previously made by the trial court in the Prior Action 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 2 is comprised of two (2) paragraphs. The factual crux of the claim is captured in Paragraph 36, 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] in negotiations with one or more third-parties to re-sell [Appellants'] Solar Rights and to re-lease the land in violation of the 20 year term with [Appellants]." [Pa11].

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 for a potential sale between the Appellants and the CEP Parties. In that regard, at paragraphs 53 through 57 of their First Amended Complaint in the Prior Action,[10] 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" [Pa69];

- 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 [Pa69]; and

[10] These identical allegations were also set forth in the proposed Second Amended Complaint that Appellants unsuccessfully sought leave to file in the Prior Action. [Pa174].

- 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). [Pa70].

By their own admission in the pleadings filed in the Prior Action, 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 Prior 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) [Pa35], 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" [Pa36] and "fell due on September 1 of every year." [Pa36].

Given these allegations that were made, maintained and vigorously pursued by Appellants for 2½ years in the Prior Action, 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 in the Prior Action, that the direct and proximate cause of Appellants' damages was their failure to pay rent to Fiberville, bars this claim. In dismissing the breach of confidentiality claim asserted against the CEP Parties in the First Amended Complaint in the Prior Action, 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. [Pa145]. Like Count 2 of the Complaint against Fiberville herein, Count 1 of the First Amended Complaint in the Prior Action 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, 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) [Pa145].

Likewise, in the context of dismissing Appellants' tortious interference with prospective economic advantage claim in Count 2 of the First Amended Complaint in the Prior Action, 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) [Pa147].

The same rationale holds true for claims against Fiberville for breach of the confidentiality provision in the Lease. 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 trial court correctly concluded that the claims

set forth in Count 2 of the Complaint could not be sustained. The trial court was correct to conclude that the information regarding the Lease was disclosed to the CEP Parties by Appellants themselves as early as 2015 – well in advance of the alleged (and disputed) disclosure by Fiberville, [Pa293-94]. In addition, the trial court was correct to conclude that Appellants could not prove damages, in light of its prior determination that their losses were directly and proximately caused by their default under the Lease, not on account of any purported breach of confidentiality. [Pa294]. Thus, the trial court's determination to dismiss Count 2 of the Complaint under Rule 4:6-2(e) was appropriate.

C. Breach of Lease and Unlawful Self-Help Claim

More than three (3) 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 sought to assert a claim that they were wrongfully removed from the Property. This claim is virtually identical to that which Appellants unsuccessfully sought to add as Count 18 in their proposed Second Amended Complaint in the Prior Action. The trial court correctly determined that the lack of merit and delay in seeking to assert this claim warranted dismissal.

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." [Pa274].

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 now) that Fiberville was not properly in possession of the Property.

Additionally, the record in the Prior Action and the trial court's conclusions of law therein 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 in the Prior Action, 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. [Pa149]. 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." [Pa149].[11]

Here, as with the other belated claims and the previously dismissed claims against the CEP Parties in the Prior Action, 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 in the Prior Action with regard to the CEP Parties' motion for summary judgment are applicable and binding and, as a result, the trial court was correct in determining that this claim lacked merit and should be dismissed as a matter of law.

[11] This finding by the trial court completely contravenes and undermines the Appellants' bald allegations that Fiberville wrongfully re-sold the Solar Rights. [Pb13]. As the trial court correctly determined in the summary judgment proceedings in the Prior Action, 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. [Pa149].

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 its Complaint, Appellants incorrectly contend that the trial court should have treated Fiberville's motion to dismiss as a motion for summary judgment. Without saying as much, Appellants suggest that the trial court should have limited its inquiry to the Complaint alone, while ignoring the record facts and legal conclusions relating to the identical transactions and occurrences, as developed through discovery and motion practice in the Prior Action. This is not the law and the trial court was correct to evaluate Fiberville's motion under Rule 4:6-2(e).

Indeed, over 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 [Pb21-25]. The Appellants contend that the presentation of materials outside the 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, supra, 2019 N.J. Super. Unpub. LEXIS, at * 7 (quoting, Lum, supra, 361 F.3d at 221 n.3). Accordingly, "in reviewing a motion 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' Complaint as each document presented with Fiberville's motion was a public record or document referred to, or explicitly relied upon, in

the Complaint. Specifically, in support of its motion to dismiss, Fiberville submitted the Certification of its counsel. Twelve (12) exhibits, labeled A through L, were attached to the Certification for the Court's consideration. [Pa20-282].

In that regard, Exhibits A, B, D and E are all pleadings filed by Appellants themselves in this action or the Prior Action. Exhibit A is the Appellants' Complaint filed in this action, Exhibit B is the Appellants' Verified Complaint filed in the Prior Action, Exhibit D is the Certification of Appellants' counsel submitted in support of Appellants' motion for leave to file the First Amended Complaint in the Prior Action and Exhibit E is the Appellants' First Amended Complaint filed in the Prior Action. Exhibits F through K are Orders and accompanying Opinions issued by the trial court in the Prior Action, all of which emanated from motions involving Appellants. Exhibit C is a single page letter relating to discovery that was identified as having been conducted in the trial court's Opinion denying Appellants' motion in the Prior Action for leave to file a Second Amended Complaint. Finally, Exhibit L is the Lease between Fiberville and Appellants which forms the basis of the claims asserted in their Complaint in this action.

In short, each of the documents presented to the trial court in support of Fiberville's motion to dismiss was a public document, such as pleadings or

orders in the Prior Action, or documents that were referred to in the Complaint. The record presented on the motion to dismiss did not warrant treatment of Fiberville's motion as one for summary judgment and Appellants' arguments to the contrary lack merit.

CONCLUSION

For the foregoing reasons, the trial court's Order dismissing Appellants' Complaint with prejudice should be affirmed in its entirety and this appeal should be dismissed.

Respectfully Submitted,

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Dated: December 19, 2022

Superior Court of New Jersey
Appellate Division

A-3517-21

MILL ROAD SOLAR PROJECT LLC,
GHG TRADING PLATFORMS, INC.,

Appellants,

v.

FIBERVILLE ESTATES, LLC,

Respondent.

On Appeal From Orders of the Law Division, Bergen County, Hon. Robert C. Wilson, J.S.C., BER-L-863-22

APPELLANTS' REPLY

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PRELIMINARY STATEMENT

Appellants/plaintiffs respectfully submit this reply brief in further support of their appeal from the Law Division's Order granting pre-answer dismissal of the respondent under Rule 4:6-2(e).

Respondent essentially concedes that, while the Law Division motion judge couched the dismissal under the "entire controversy doctrine," under Rule 4:30A, the essential reason for dismissal was for the court's perception that Appellants "failed to state a claim," under Rule 4:6-2(e).

A review of the case law shows that the two concepts of "entire controversy doctrine" and "failure to state a claim" are not only grounded in different Rules and policy rationale but that the two principles are not to be commingled as was done below.

REPLY ARGUMENT

I

BECAUSE THE STATUTES OF LIMITATIONS HAD YET TO RUN, RESPONDENTS HAD NO BASIS TO SEEK DISMISSAL "FAILURE TO STATE A CLAIM"

As discussed in Fogel 152-158 Realty LLC v. Sport-A-Rama, 2013 N.J. Super. Unpub. LEXIS 2550 (Essex County 2013), "most residential evictions are based on the grounds provided in N.J.S.A. 2A:18-61.1 whereas all commercial evictions are based on the grounds found at N.J.S.A. 2A:18-53 . . . ." Seeking eviction for non-

payment of money is speedy, efficient, and usually results in judgment of possession within weeks of filing.

At common law, self-help evictions were not unlawful and were frequently practiced. Vasquez v. Glassboro Serv. Ass'n, 83 N.J. 86, 105, 415 A.2d 1156 (1980) (citing Mershon v. Williams, 62 N.J.L. 779, 784, 42 A. 778 (E. & A. 1899)). Some landlords resorted to ejectment actions which were "slow and expensive." Id. The Legislature resolved these societal issues by a comprehensive adoption of statutes eviction and anti-eviction statutes. The statutes provide fair, orderly and efficient remedies to protect tenants from wrongful eviction and the seizure of personal property by landlords. Vasquez, supra, 83 N.J. at 105. Those statutes also protect land owners from non-paying tenancies by swiftly regaining possession by summary proceedings for non-payment and for holdover after a lease has been terminated. N.J.S.A. 2A:18-61.2; Hodges v. Sasil Corp., 189 N.J. 210, 221, 915 A.2d 1 (2007).

The Forcible Entry and Detainer Act (Act), N.J.S.A. 2A:39-1 to -8, provides, in relevant part:

> No person shall enter upon or into any real property . . . and detain and hold the same, except where entry is given by law, and then only in a peaceable manner. With regard to any real property occupied solely as a residence by the party in possession, such entry shall not be made in any manner without the consent of the party in possession unless the entry and detention is made pursuant to legal process . . . .

N.J.S.A. 2A:39-1.

Where a property owner has engaged in unlawful, self-help eviction, the

statutes provide for damages even after the property has been sold to another owner. See N.J.S.A. 2A:39-8, Truesdell v. Carr, 351 N.J. Super. 317, 320, 798 A.2d 153 (Law Div. 2002) (treble damages may be awarded in lieu of possession); McNeill v. Estate of Lachmann, 285 N.J. Super. 212, 219, 666 A.2d 996 (App. Div. 1995).

There is no question that plaintiffs established the elements required to assert their "illegal self-help eviction" claim, see Opening Brief at 18-19; n.2; 29. Thus, Respondent had no factual or legal basis to seek dismissal for alleged "failure to state a claim" and the motion judge had no legal or factual basis to conclude that Rule 4:6-2(e) supported dismissal since the claim was plainly stated.

Once any eviction case had been presented to the courts, the Respondent landlord would have been required to account for the security deposit, and upon failure to show any loss that would have justified even a set off of the security deposit, Respondent would have had to disgorge the deposit. That was never done.

New Jersey courts have long held that a landlord must mitigate damages, and cannot engage in dual recovery. "[A] commercial landlord must make 'reasonable' efforts to mitigate its damages after a tenant breaches the lease." Harrison Riverside Ltd. P'ship v. Eagle Affiliates, Inc., 309 N.J. Super. 470, 473, 707 A.2d 490 (App. Div. 1998) (citing McGuire v. City of Jersey City, 125 N.J. 310, 320-21, 593 A.2d 309 (1991)). "Whether [a] landlord's efforts to mitigate its damages were reasonable is a question of fact." Harrison Riverside Ltd. P'ship, 309 N.J. Super. at 475.

Respondent Fiberville has never been held to account for its dual recovery and failure to mitigate damages.

To their credit, Respondents do not attempt to argue that the "statute of limitations" had run. Indeed, as discussed in our Opening Brief, at 25, the applicable statute of limitations on these contract claims is the six-year contract statute, N.J.S.A. 2A:14-1.

Even more fundamental than Respondent's commission of an illegal self-help lockout, the unlawful retention of the security deposit, and the abject failure to mitigate damages is the "elephant in the room," Respondent's dual "sale" of its assets initially sold in 2015-16 outright to Appellants and then sold the same assets in 2016 co-defendants in the related appeal, CEP Solar and its related entities and CEO Gary R. Cicero.

Appellants' purchase of the solar rights from Respondent for $606,000 and their security deposit of $100,000 and their annual rent of $200,000 paid through September 2016 stand in stark contradiction to Respondents' "sale" of the same solar rights to Gary Cicero and his companies before Appellants' lease expired, and Respondent's breach of the lease and confidentiality covenant in the lease by re-leasing the grounds with Gary Cicero and his entities before September 2016 and before any court declaration of removal of Appellants. These are simply overwhelming facts that well supported Appellants' claims against Fiberville Estates

and they were properly asserted well within the statute of limitations. There is no basis to conclude that Appellants' claims were "futile" and our futility analysis in our Opening Brief emphasize this point adequately.

II

BECAUSE THE "FIRST ACTION" WAS PENDING, THE "SECOND ACTION" WAS NOT "SUCCESSIVE" AND SHOULD NOT HAVE BEEN DISMISSED UNDER THE ENTIRE CONTROVERSY DOCTRINE

Respondent and the motion judge fundamentally mistake the scope of the entire controversy doctrine's reach. As it has clearly be stated and restated by case law, the entire controversy doctrine applies only to successive lawsuits involving related claims. The doctrine does not apply to claims that are pending in different courts at the same time, even if they were filed at different intervals. See Kaselaan & D'Angelo Assocs., Inc. v. Soffian, 290 N.J. Super. 293, 299, 675 A.2d 705 (App. Div. 1996).

As the Appellate Division squarely held in Kaselaan:

> . . . the entire controversy doctrine only precludes successive suits involving related claims. It does not require dismissal when multiple actions involving the same or related claims are pending simultaneously. As we noted in American Home Prods. Corp. v. Adriatic Ins. Co., 286 N.J. Super. 24, 33, 668 A.2d 67 (App. Div. 1995), "[t]he fact that an action pending in another State involves the same parties and the same or substantially similar claims does not bar prosecution of a subsequent action here in New Jersey." Although multiple pending actions arising out of the same or related operative facts pose some of the same dangers of fragmented and duplicative litigation that the entire controversy doctrine seeks to address, those dangers do not require the dismissal of the second filed action prior to the conclusion of the first action. Instead,

> the court rules provide other appropriate means to prevent unfairness to affected parties or an undue burden on the court system. Thus, Rule 4:5-1(b)(2) requires the first pleading of a party to include a certification as to whether the matter is the subject of any other pending action and whether there is any other party who should be joined. Rule 4:5-1(b)(2) further provides that "[t]he court may compel the joinder of parties in appropriate circumstances, either upon its own motion or that of a party." In addition, a party in a related pending action may seek intervention in the newly filed action pursuant to Rule 4:33, consolidation of the cases pursuant to Rule 4:38-1, [*11] "or . . . whatever other steps may be appropriate to protect [its] interests." Pretrial and case management conferences provide the court with additional opportunities to assure that related cases are processed in a manner which is fair to the parties involved and conserves judicial resources.

Id. at 299-300 (citations omitted) (alterations in original).

Where a "first pleading" has disclosed the existence of another action, the in which the first-pleading has been filed can elect to consolidate the related cases if they are within New Jersey or facilitate the parties to seek consolidation or transfer of cases pending in different states. Id.

However, in our cases below, the first pleading filed by Appellants in 2019 did not list Fiberville Estates because Respondent was not involved in the Non-Disclosure Covenant made between Gary Cicero and his entities with plaintiff, to pursue a buy/sell of Appellants' assets that Appellants had acquired from Fiberville Estates. Fiberville was not disclosed in the Rule 4:5-1 statement until Fiberville was sought to be joined and the joinder was for reasons totally unrelated to the "dispute" between Appellants and Gary Cicero and his entities; the dispute between Appellants

and Fiberville was for breaching the lease and for fraudulent sale of the assets.

Once Appellants disclosed to the motion judge that Fiberville would be made a defendant, in the first amended complaint, even before the second amended complaint was filed, Fiberville had an opportunity to seek discovery or to seek extension of discovery end date and knew full well that Appellants were antagonistic to its interests. When the second amended complaint was filed, Fiberville could have sought extension of discovery or a case management conference to air its concerns but filed a motion to dismiss. The motion to dismiss was "denied without prejudice" by the motion judge.

Thereupon, the new action being filed against Respondent, with a new filing fee and new docket number, was entirely based upon the "dismissal, without prejudice" ruling induced by Respondent and issued by the motion judge. That resulted in there now being a "second action" but this "section action" was not a "second, successive action" because the first action had not concluded. For this reason, the entire controversy doctrine was simply inapplicable and should not have been invoked by Respondent and should not have been granted by the motion judge after the "second action" was commenced, well before the first action had been concluded.

The grant of the first amended complaint, naming Fiberville Estates, coupled with Fiberville's dismissal from the 2019 docket number, "without prejudice," clearly

showed that the motion judge did not perceive any prejudice being suffered by Fiberville Estates, and this obviously showed everyone that Appellants' claims against Fiberville Estates were appropriate for filing in a new action. The new action was filed when the first action was clearly pending, and incomplete; indeed, the motion for leave to file the second amended complaint in the first action was itself filed when discovery could have been extended and all claims resolved fully and properly, to say nothing of the Covid-19 Omnibus Orders of the Supreme Court directing the bench and bar to grant extensions liberally.

In Rycoline Prods., Inc. v. C & W Unlimited, 109 F.3d 883, 889 (3d Cir. 1997), the Third Circuit followed Kaselaan, and held "that [New Jersey's] Entire Controversy Doctrine does not preclude the initiation of a second litigation before the first action has been concluded." That case involved a plaintiff who brought an action in federal court after the state court had refused to entertain certain claims, unlike our case where the motion judge had denied Appellants' claims in the first docket "without prejudice," meaning "without prejudice to be filed anew."

As discussed in Alpha Beauty Distribs., Inc. v. Winn-Dixie Stores, Inc., 425 N.J. Super. 94, 101-04, 39 A.3d 937 (App. Div. 2012), "successive action" means an action brought after an already-concluded terminated, antecedent action:

> The action the trial judge dismissed here was not "a successive action." By "successive action," the Rule clearly meant to encompass only actions following the suit in which the Rule 4:5-1(b)(2) violation occurred. The most obvious example of this would be an action where

A sues B for personal injury damages, and then, later, after A v. B is concluded, A brings a claim against C for having caused the same injuries. A v. C would be a "successive action" within the intendment of the Rule and, in certain circumstances, the Rule authorizes dismissal of the successive suit against C. See, e.g., Mitchell v. Procini, 331 N.J. Super. 445, 453-54, 752 A.2d 349 (App.Div.2000). The Rule, however, does not expressly authorize dismissal of a suit because of a pleader's failure to identify a pending action, such as the federal action here.

Moreover, even if we were to assume Alpha violated the Rule, we would conclude that the leap to dismissal rather than some [*102] lesser sanction was inappropriate. HN4 Our Court Rules, from their inception, have been understood as "a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits." Ragusa v. Lau, 119 N.J. 276, 284, 575 A.2d 8 (1990) (quoting Tumarkin v. Friedman, 17 N.J. Super. 20, 27, 85 A.2d 304 (App.Div.1951), certif denied, 9 N.J. 287, 88 A.2d 39 (1952)); see also Ponden v. Ponden, 374 N.J. Super. 1, 9-10, 863 A.2d 366 (App.Div.2004), certif. denied, 183 N.J. 212, 871 A.2d 90 (2005); Tucci v. Tropicana Casino and Resort, Inc., 364 N.J. Super. 48, 53, 834 A.2d 448 (App.Div.2003). As a result, the Supreme Court has recognized a "strong preference for adjudication on the merits rather than final disposition for procedural reasons." Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 356, 771 A.2d 1141 (2001) (quoting Mayfield v. Cmty. Med. Assocs., P.A., 335 N.J. Super. 198, 207, 762 A.2d 237 (App.Div.2000)). Indeed, the propriety of the ultimate sanction of dismissal for a violation is, as the Rule makes perfectly clear, dependent upon whether "the undisclosed party . . . has been substantially prejudiced" by the lack of notice. R. 4:5-1(b)(2) (emphasis added). Because C & S and United do not qualify as "undisclosed parties"—their identity was disclosed in the complaint to which the certification was appended—dismissal was unauthorized in this instance.

We also conclude, for the sake of completeness, that even if we were to find that Alpha violated the Rule by failing to mention the pending federal action, no lesser sanction would be appropriate here. C & S and United have not demonstrated they suffered any prejudice by the lack of notice. The impact of the lack of notice in Alpha's Rule 4:5-1(b)(2) certification was of very brief duration; C & S and United soon learned of the federal action and quickly moved for relief.1Link to

> the text of the note At best, United could have argued that the cost of moving for an amendment of their answers, to include the entire controversy doctrine defense, was caused by Alpha's alleged violation. Indeed, such a discretionary sanction would be appropriate if the Rule were, in fact, violated. Ibid. (authorizing "the imposition on the non-complying party of litigation expenses that could have been avoided by compliance with this rule"). But the brief delay in learning of the federal action caused no appreciable injury here. United was essentially in no different position when it moved to amend its answer than it was in the short, intervening time-span following Alpha's failure to mention the federal action in its Rule 4:5-1(b)(2) certification. As United and C & S moved for dismissal at that same time, the additional expense incurred by United in also seeking leave to amend its answer was negligible.

Both the Respondent and the motion judge are mistaken in that the entire controversy doctrine is not to be applied willy nilly but only as a last resort. Where, as in our case, the motion judge had elected to dismissed the claims without prejudice, the court should have followed Kaselaan & D'Angelo Assocs., Inc. v. Soffian, supra, by permitting the new filing "to proceed simultaneously." See 290 N.J. Super. at 300-01.

The doctrine will be not applied "where to do so would be unfair in the totality of the circumstances and would not promote any of its objectives, namely, the promotion of conclusive determinations, party fairness, and judicial economy and efficiency." Pressler, Current N.J. Court Rules, comment 3.2 on R. 4:30A (2009). Allowing plaintiffs' claims to proceed in state court is consistent with these principles.

A "dismissal with prejudice is the ultimate sanction, [and thus] it will normally

be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party." Abtrax Pharma., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 514, 655 A.2d 1368 (1995). As it relates to the entire controversy doctrine, "in the limited circumstances where a lesser sanction is not sufficient to remedy the problem caused by an inexcusable delay in providing the required notice, thereby resulting in substantial prejudice to the non-disclosed party's ability to mount an adequate defense[,]" dismissal with prejudice is a viable option. Mitchell v. Charles P. Procini, D.D.S., P.A., 331 N.J. Super. 445, 453-54, 752 A.2d 349 (App. Div. 2000). Because the entire controversy doctrine was not applied between the first amended complaint and the second amended complaint in the 2019 action, and because the entire controversy doctrine requires a finding of "prejudice" that was not found in the 2019 docket, it is simply inapplicable here and was not a proper basis for dismissal under Rule 4:6-2(e).

Accordingly, the dismissal Order should be reversed on two grounds: First, it was erroneous to hold that a new lease somehow vitiates an absolute sale/purchase transaction. Because Appellants allege that their purchased-assets were purportedly re-sold, Appellants have valid claims. Second, because Fiberville engaged in illegal self-help with the lease after breaching the confidentiality covenant, Appellants' claims are valid.

CONCLUSION

For the reasons stated above and in our Opening Brief, the Panel should reverse the dismissal Order appealed by Appellants/Plaintiffs and remand this matter to the Law Division, and likewise remand the issues in the related appeal.

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Respectfully submitted,

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