Prepared by the Court

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<td>RIVER POINTE HOMEOWNERS ASSOCIATION, INC., a non-profit New Jersey Corporation,

Plaintiff (s)

v.

PULTE HOMES OF NJ, LIMITED PARTNERSHIP, t/a River Pointe by Del Webb; PULTE HOME CORPORATION OF THE DELAWARE VALLEY; DEL WEBB CORPORATION; PULTE GROUP, INC.; PULTE HOME CORPORATION

CONTRACTORS: ACIES GROUP; CUNTIS, INC.; NASSAU CONSTRUCTION COMPANY

DEVELOPER APPOINTED TRUSTEES: CHARLES FOREMAN; BARBARA JAQUETT; PATRICIA SKROCKI; EVERETT R. HANKINS; JAMES MULLEN; RACHEL RICHARDSON; MARY CHURCHILL; SEAN DORNEY; CRAIG COLLIN; JOHN EVANS JOHN DOE DIRECTOR(S), OFFICER(S), AGENT(S) OR EMPLOYEE(S) OF PULTE HOMES OF NJ LIMITED PARTNERSHIP; DEL WEBB CORPORATION; PULTE GROUP, INC. and/or PULTE HOME CORPORATION, fictitious parties; JOHN DOE TRUSTEE(S) OF RIVER POINTE HOMEOWNERS ASSOCIATION, INC., fictitious parties; JOHN DOE CONTRACTORS (1-200), fictitious parties; JOHN DOE (1-100), fictitious parties

Defendant(s)

v.

PULTE HOMES OF NJ, LIMITED PARTNERSHIP, PULTEGROUP, INC., PULTE HOME COMPANY, LLC, PULTE HOME CORPORATION OF THE DELAWARE VALLEY, DEL WEBB</td>
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<td>SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO.: OCN-L-002491-17

Civil Action

OPINION</td>
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CORPORATION, EVERETT R. HANKINS, JAMES MULLEN, JOHN EVANS, SEAN DORNEY, MARY CHURCHILL, PATRICIA SKROCKI, and RACHEL RICHARDSON. Third-Party Plaintiffs, v. BENDER ENTERPRISES, INC., CARFARO, INC., SAMBOL CONSTRUCTION CORP., JOCAMA CONSTRUCTION CORP., METRO CORP. PLUMBING, INC., ACTION SPORT SURFACES, INC., FINAL TOUCH GLASS & MIRROR, LANDSCAPE MAINTENANCE SERVICES, INC., BRIGHTON EXTERIORS, INC., ALL MONMOUTH LANDSCAPING & DESIGN, INC., UTILITIES CONTRACTING SERVICES, INC., MDM SERVICES INCORPORATED., and ABC COMPANIES 1-10. Third-Party Defendants AND JOCAMA CONSTRUCTION CORP. Third-Party Pulte/Fourth Party River Pointe, v. ADVANCED CONCRETE PUMPING SERVICE INC., ALL SEASONS CONSTRUCTION CO., INC.; BR CONSTRUCTION; EURO CONCRETE LLC; J. MASONRY CORP.; J.M. PEREIRA & SONS, INC.; LOPES CONSTRUCTION INC.; RED EAGLE CONCRETE, INC.; RENAISSANCE MASONRY CORP. AND YUNGA AND SON CONSTRUCTION LLC. Fourth Party Defendants.		

This matter comes before the Court on application of the Defendants Pulte Homes of N.J., Limited Partnership; PulteGroup, Inc.; Pulte Home Company, LLC; Pulte Home

Corporation of the Delaware Valley; Del Webb Corporation; Everett R. Hankins, James Mullen, John Evans, Sean Dorney, Mary Churchill, Patricia Skrocki, and Rachel Richardson (collectively, the "Pulte Defendants"), Motion to Strike and to Dismiss River Pointe's Second Amended Complaint.

Facts

The underlying facts and procedural history are summarized here. River Pointe ("River Pointe" or "Association" or "Plaintiff") is an age-restricted residential development composed of 504 single-family homes in Manchester, New Jersey, which Pulte Homes of New Jersey ("Pulte" or "PHNJ" or "Defendant") developed and sold pursuant to the New Jersey Planned Real Estate Development Full Disclosure Act, *N.J.S.A*. 45:22A-21, et seq. ("PREDFDA"). Pulte began sitework construction on River Pointe by Del Webb, in 2004, registering its Public Offering Statement (the "POS") with the Department of Community Affairs (the "DCA") on December 2, 2005. The Pulte Group continued to develop, advertise, and market the Community through a nationwide common promotional plan. The Pulte Group marketed and financed the project through websites for Del Webb, Pulte Home Corporation, and Pulte Group. (SAC ¶16). Neither Pulte Homes nor any of the other Pulte Defendants physically constructed the River Pointe community. Subcontractors were hired to perform the construction tasks. SAC ¶ 49(a)–(g). PHNJ contracted with individuals who purchased homes in the community. SAC ¶ 49(h). PHNJ provided a copy of the POS, with the required disclosures of the purchaser's rights and privileges, to each prospective purchaser. See, e.g., SAC ¶ 407. The community contains common areas such as a clubhouse with an indoor pool, an outdoor pool, tennis courts, a putting green, bocce courts, horseshoe pits, some landscaped grounds, an irrigation system, sidewalks,

roadways, the guardhouse and entry gate, drainage basins, parking areas, signs, some common open space and other amenities. POS at 2, 10, 11.

River Pointe filed suit on September 1, 2017, alleging that there are construction defects in the clubhouse and other common areas of the community, along with financing deficiencies in the pre-turnover operation of River Pointe. The parties have and continue to engage in discovery from 2017 through today. In September 2019, the Association was ordered to file a First Amended Complaint ("FAC") as it wanted to assert claims for additional alleged construction defects and resulting damages. This amendment required the addition of more contractor parties; by the end of 2022 there were more than 27 Defendants appearing in the case.

In February 2022, River Pointe propounded 24 document demands and 149 interrogatories on each of the 12 Pulte Defendants, under the headings "piercing the corporate veil," "fraud," and "liability." The discovery demands sought all the Pulte Defendant's records dating back to 2005. The Court ordered River Pointe to limit its discovery requests. While this request was pending, River Pointe continued to seek discovery via third-party subpoenas and deposition notices. In May 2023, upon leave granted, the Pulte Defendants moved for a protective order. During this period, River Pointe filed multiple motions to strike the Pulte Defendant's answers and sought reconsideration of the Court's orders denying that relief.

In a September 2023 hearing, the Court proposed that River Pointe 's veil-piercing and fraud claims should be bifurcated from the remainder of the case, and that they would not be the subject of discovery at this time. The Court advised that it sought a practical solution as to how to move the construction claims against the subcontractors forward efficiently while leaving for later determination the other claims. River Pointe continued to assert it was entitled to the disputed discovery, claiming its demands all relate to the . . . veil-piercing claim.

At a March 14, 2024, hearing set to resolve the various discovery-related motions, the Court reviewed the piercing allegations in River Pointe 's complaint on the record and described them as conclusory and nonspecific. Per the Court's directions, the Association filed its Second Amended Complaint on April 12, 2024. (eCourts Transaction ID: LCV2024947475). In its Second Amended Complaint ("SAC"), the Association continues to allege that there are construction defects in the clubhouse and other common areas of the community that have resulted in property damage throughout the community, and financing deficiencies in the pre-turnover operation of the Association. In lieu of an answer, Pulte responded on June 20, 2024, with the present motion to strike and dismiss. (eCourts Transaction ID: LCV20241567254).

River Pointe claims that Pulte's earlier statutory disclosures (made in the public offering statement) did not disclose the then-unknown alleged defects, and that PHNJ did not amend to disclose River Pointe 's 2017 accusations of defect. Pulte argues that these allegations do not plausibly allege fraud. Pulte asserts that the fraud claims are not pleaded with particularity; River Pointe has not demonstrated that Pulte or anyone else knowingly made any false statement; and River Pointe has not connected any alleged false statements to the alleged common-area construction defects or alleged reserve-funding deficiencies. The Defendant further claims that River Pointe 's injuries arise from alleged breaches of warranties set forth in the public offering statement and statutory duties, none of which can sustain a fraud claim.

In its SAC, River Pointe continues to assert that there are construction defects in the clubhouse and other common areas of the community that have resulted in property damage throughout the community, and financing deficiencies in the pre-turnover operation of River Pointe. River Pointe brings 15 claims, sounding in tort, contract, and statute:

I. Negligence;
II. Breach of Express Warranty;

III. Breach of Implied Warranty;
IV. Breach of Contract;
V. Failure to Pay for Benefits Derived;
VI. Failure to Meet Reserve Funding Requirements;
VII. Trustees' Breach of Fiduciary Duty;
VIII. Gross Negligence;
IX. Consumer Fraud;
X. Intentional Fraud;
XI. Negligent Misrepresentation/Fraud;
XII. Fraudulent Concealment by a Fiduciary;
XIII. Violation of the Non-Profit Corporations Act;
XIV. Breach of the Implied Covenant of Good Faith and Fair Dealing; and
XV. Tort—Vicarious Liability.

The allegations in the SAC expand upon the prior allegations to provide additional information regarding those defects. (SAC ¶¶235-247).

Pulte argues that the Court should: strike the SAC and order the Association to file a Third Amended Complaint that is straightforward, specific, and concise, to permit the remaining Defendants to answer any remaining claims; dismiss with prejudice Del Webb Corporation and Pulte Home Corporation; and strike and order a remedy which prohibits the Plaintiff from asserting in any subsequent pleading the allegations contained in the sections labeled "Piercing the Corporate Veil," "Spoliation of Evidence," "Deceptive Advertising," and "Unconscionable Commercial Practices"; and further dismiss with prejudice the fraud claims (Counts 9, 10, 11 and 12) and the breach of contract claims (Counts 4 and 14).

The goal of the POS is "simplicity and accuracy of information, in order to facilitate purchaser understanding of the totality of rights, privileges, obligations and restrictions." *N.J.S.A*. 45:22A-28(d). *See also* Calvert v. K. Hovnanian at Galloway, VI, Inc., 128 N.J. 37, 40 (1992) (PREDFDA provides "full and fair disclosure"). To that end, developers are required to report material changes in the POS to the New Jersey Division of Housing and Development (referred to in PREDFDA as the "agency," *see N.J.S.A*. 45:22A-24), which may then "require the

developer to alter or amend the proposed public offering statement in order to assure full and fair disclosure to prospective purchasers." *N.J.S.A*. 45:22A-28(c); *see also N.J.A.C*. 5:26-4.5(a). If the developer misrepresents material facts that cause injury to a purchaser, including in the POS, PREDFDA itself provides a cause of action. *N.J.S.A.* 45:22A-37(a). The developer must also organize a homeowner's association for the planned community and appoint its initial board. *N.J.S.A*. 45:22A-43(a). The developer may remain a member of the association so long as the development contains unsold units. *N.J.S.A.* 45:22A-43(c). And the developer may thereafter appoint some members of the executive board of the association; those members are "liable as fiduciaries to the owners for their acts or omissions." *N.J.S.A*. 45:22A-45(c). Control of the association must be surrendered to the owners when a certain percentage of units is owned by owners. *N.J.S.A*. 45:22A-47.

The law imposes requirements on individual transactions, as well. The developer must "deliver to the purchaser a current public offering statement, on or before the contract date of" any sale. *N.J.S.A*. 45:22A-26(a)(2). It must include information about the developer and the development, copies of all contracts affecting the development, descriptions of all easements or other encumbrances on the development, information about the local community, the estimated cost of maintenance for existing and proposed amenities in the development, a proposed budget, and any other "information required by the [New Jersey Division of Housing and Development] to assure full and fair disclosure to prospective purchasers." *N.J.S.A.* 45:22A-28(a). And, the POS must provide notice that all sales are subject to a seven-day cooling-off period, during which time the purchaser may cancel the sale without cause or penalty. *N.J.S.A*. 45:22A-26(b), (c).

PREDFA Claims

The Planned Real Estate Development Full Disclosure Act ("PREDFDA") establishes detailed regulations regarding the sale of planned real estate developments. It defines the "Developer" of a property as "any person who disposes or offers to dispose of any lot, parcel, unit, or interest in a planned real estate development." *N.J.S.A.* 45:22A-23(b). The developer must "deliver to the purchaser a current POS, on or before the contract date of" any sale. *N.J.S.A*. 45:22A-26(a)(2). It must include information about the developer and the development, information about the local community the estimated cost of maintenance for existing and proposed amenities in the development, a proposed budget, and any other "information required by the [New Jersey Division of Housing and Development] to assure full and fair disclosure to prospective purchasers." *N.J.S.A.* 45:22A-28(a).

PREDFDA requires a developer to file an application for registration. *N.J.S.A.* 45:22A-26a (1). One of the required application items is a copy of any Purchase Agreement that purchasers will be required to sign. *N.J.S.A*. 45:22A-27a (7). Another is the POS which must be supplied to prospective purchasers and must describe the characteristics of the development, the nature of the interest being offered, as well as any relevant rights or restrictions applicable to purchasers. *N.J.S.A*. 45:22A-26d; N.J.S.A. 45:22A-28a; *N.J.A.C*. 5:26-4.1(a).

The developer must "organize or cause to be organized an association whose obligation it shall be to manage the common elements and facilities." *N.J.S.A.* 45:22A-43. "The association shall be formed on or before the filing of the master deed or declaration of covenants and restrictions and may be formed as a for-profit or nonprofit corporation, unincorporated association, or any other form permitted by law." *Ibid*.

The Plaintiff alleges that the promotional materials which were distributed to advertise the property contained language representing that Pulte Home Corporation, Del Webb

Corporation, and Pulte Group, Inc., were each developers backing construction and sales at the site. (SAC ¶¶16 & 666). These marketing ventures, are suggested by the Plaintiff to place the Pulte Defendants, including Del Webb, within the statutory definition of a developer under PREDFDA. River Point asserts that any entity that offers "any inducement, solicitation, advertisement, or attempt to encourage a person to acquire a unit, parcel, lot, or interest in a planned real estate development," including participation in a "common promotional plan" via "any offer for the disposition of lots . . . of real property by a person or group of persons acting in concert" may be viewed as a developer. *N.J.S.A*. 45:22A-23.

This Court finds that under PREDFDA, a developer is "any person who disposes or offers to dispose of any lot, parcel, unit or interest in a planned real estate development." The statute further requires POS to disclose the name and principal address of the developer. No representation has been made that any person or entity other than Pulte Homes NJ has contracted with purchasers for the sale of residential units within the River Point development. Only Pulte Homes NJ can be held accountable for representations in the POS. While PREDFDA defines terms such as Common Promotional Plan, the liability under the statute for untruth, omission, or misleading statements is limited to actions taken by the developer. N.J.S.A. 45:22A-37. Liability for making untrue statements or material facts is limited to those determined to be a developer disposing of real property. Pulte Homes NJ has been identified in the Public Offering Statement as the developer of River Point. Any additional entities sought to be designated as a developer under PREDFDA shall be subject to proofs presented by the Plaintiff if challenged as a matter of law.

The Plaintiff has identified fifteen separate causes of action in tis six hundred forty-eight-page second amended complaint. The Plaintiff has not sought any relief for the

alleged violations of PREDFDA in its most recent amended complaint. To the extent that the Pulte Defendants seek dismissal of PREDFDA claims the requested relief does not address any of the fifteen enumerated causes of action identified by the Plaintiff. The court's obligation to review the Defendants' request for dismissal of the pleadings is limited to the appropriateness of the Plaintiff's pleading as a whole, or alternatively to consider dismissal of the individual counts set for the in second amended complaint.

Spoliation of Evidence

Plaintiff is seeking relief for the loss or destruction of documents within the control of the Defendant. Spoliation of evidence in a prospective civil action occurs when evidence pertinent to the action is destroyed, thereby interfering with the action's proper administration and disposition. Cockerline v. Menendez, 411 N.J. Super. 596, 620, 988 A.2d 575 (App. Div. 2010) *(quoting* Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 364, 707 A.2d 180 (App. Div. 1998)). "[T]o a great extent our traditional approach to spoliation begins with identifying the spoliator, because that, in and of itself, will impact on the available and appropriate remedies." Robertet Flavors, Inc. v. Tri-Form Constr., Inc., 203 N.J. 252, 272, 1 A.3d 658 (2010) (*citing* Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 119-20, 961 A.2d 1167 (2008)). When the spoliator is the Defendant in the suit, the court is empowered to fashion an appropriate remedy. *See* Cockerline, 411 N.J. Super. at 620, 988 A.2d 575 ("Depending on the circumstances, spoliation can result in dismissal, a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of evidence") (*citing* Jerista v. Murray, 185 N.J. 175, 201, 883 A.2d 350 (2005)). *27-35* Jackson Avenue, LLC v. Samsung Fire & Marine Ins. Company, Ltd., 469 N.J. Super. 200, 209-210.

Our courts have not recognized a separate tort for negligent spoliation of evidence but rather have applied traditional negligence principles. Gilleski, 336 N.J. Super. at 648-50, 765 A.2d 1103. "[N]egligent destruction of evidence against a third party may be resolved by applying traditional negligence principles of a duty of care, breach of that duty by Defendant, and an injury to Plaintiff proximately caused by Defendant's breach." Swick v. New York Times Co., 357 N.J. Super. 371, 378, 815 A.2d 508 (App. Div. 2003) (*citing* Gilleski, 336 N.J. Super. at 652, 765 A.2d 1103). In Gilleski, the Court indicated, "we never addressed the issue of proximate cause in a negligence suit based on spoliation of evidence because our focus was on whether the Defendant owed the Plaintiff a duty to preserve the evidence." 336 N.J. Super. at 654-55, 765 A.2d 1103.

New Jersey has recognized the tort of fraudulent concealment of evidence. *See* Viviano v. CBS, Inc., 251 N.J. Super. 113, 126, 597 A.2d 543 (App.Div.1991), *certif. denied,* 127 N.J. 565, 606 A.2d 375 (1992). The Plaintiff in Viviano, while a CBS employee, was injured when a machine she was operating malfunctioned. *Id.* at 117, 597 A.2d 543. Plaintiff instituted an action against CBS claiming that its personnel had fraudulently concealed an internal memo that was key to Plaintiff's action against the manufacturer of the machine. *Id.* at 119-20, 597 A.2d 543.

In an action for fraudulent concealment, the Plaintiff must show that the Defendants were legally obligated to disclose the evidence, that it was material to the Plaintiff's claim, that the Plaintiff could not readily have learned of the information without the Defendant disclosing its content, that the Defendants intentionally failed to disclose the evidence, and that the Plaintiff was harmed by relying on the nondisclosure. *Cf.* State of N.J., Dep't of Environ. Protect. v. Ventron Corp., 94 N.J. 473, 503, 468 A.2d 150 (1983).

The determination of whether a duty exists is a matter of law properly decided by the court. Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572, 675 A.2d 209 (1996). Indeed, the Court has expressly held that the existence of a duty to preserve evidence is a question of law to be determined by the trial court. Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 365, 707 A.2d 180 (App.Div.1998); *and see* Hirsch v. General Motors Corp., 266 N.J. Super. 222, 249, 628 A.2d 1108 (Law Div.1993). As to the question of duty to preserve evidence the general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute (*see* Rodgers v. St. Mary's Hospital (1992), 149 Ill. 2d 302, 173 Ill. Dec. 642, 597 N.E.2d 616) or another special circumstance.

"The question of whether a duty to exercise reasonable care to avoid the risk of harm to another exists is one of fairness and policy that implicates many factors." Carvalho, *supra*, 143 N.J. at 572, 675 A.2d 209. The foreseeability of harm is one important factor. *Ibid.* However, "[o]nce the foreseeability of an injured party is established . . . considerations of fairness and policy warrant the imposition of a duty." Carter Lincoln-Mercury, Inc. v. Emar Group, Inc., 135 N.J. 182, 194-95, 638 A.2d 1288 (1994). The assessment of fairness and policy "involves identifying, weighing, and balancing several factors--the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439, 625 A.2d 1110 (1993).

Most negligent spoliation causes of action are dismissed because the Defendant owed no duty to Plaintiff to preserve the evidence. *See* Koplin v. Rosel Well Perforators, Inc., 241 Kan. 206, 734 P.2d 1177, 1179 (1987).

Limiting the usual duty in third party negligent spoliation to an agreement to preserve, or a voluntary undertaking with reasonable and detrimental reliance, or a specific request, ensures that such a spoliator has acted wrongfully in a specifically identified way." *Id.* at 637, 79 Cal. Rptr. 2d 234. *Accord* Smith, *supra*, 771 So. 2d at 432.

In the SAC, Plaintiffs claim that the Developer has not preserved all relevant documents, materials, and information in its possession relating to the Association's claims and as a direct result of the Developer's failure to preserve all relevant documents, materials, and information in its possession relating to the Association's claims, relevant evidence has now become inaccessible or unavailable. More specifically, all the invoices Pulte Group, Inc. received from the contractors who worked on the Community, and the copies of all the payments Pulte Group, Inc. issued to those vendors are no longer available to the Developer because the Developer allegedly failed to preserve them.

The Pulte Group Defendants claim that the allegations covered in the "Spoliation of Evidence" and "Unconscionable Commercial Practices" sections arise out of this litigation and are thus irrelevant and protected by litigation privilege. Defendants claim the alleged conduct is protected by litigation privilege, which "has long been embedded in New Jersey's jurisprudence." Loigman v. Twp. Comm. of Twp. of Middletown, 185 N.J. 566, 580 (2006). This privilege is "the backbone to an effective and smoothly operating judicial system." *Id*. at 584. It protects "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Id*. at 585.

The Association counters by claiming that the litigation privileged is not an all-encompassing evidentiary privilege. The privilege does not bar all claims arising from non-

litigation conduct committed during a litigation, and it does not prohibit the use of a parties' certifications and sworn testimony in subsequent proceedings. *See* Rainier's Dairies v. Raritan Val. Farms, 19 N.J. 552, 564-566 (1955). Instead, the privilege simply insulates the participants in a litigation (the judges, attorneys, parties, witnesses, and jurors) from subsequent tort actions for litigation statements they made during the course of prior litigation. 19 N.J. 552, 557-564 (1955); Fenning v. S. G. Holding Corp., 47 N.J. Super. 110, 117 (App. Div. 1957); and Loigman v. Township Committee of Tp. of Middletown, 185 N.J. 566, 583-584 (2006). The Association states they are not asserting claims arising out of the Defendant's litigation conduct – rather the Association alleges the Defendant's certifications, testimony, and filings evidence the falsity of the Defendant's non-litigation marketing and sales conduct.

This Court finds that the claims of spoliation of evidence are not a direct cause of action, but a remedy that can provide a tool to the jury for their assistance in deciding. This request for relief is premature. Upon a showing that the Plaintiff has exhausted all avenues and remedies to obtain the requested information, the Plaintiff may petition the Court for a jury instruction addressing spoliation of evidence.

To the extent that the Plaintiff has plead Fraudulent Concealment by a Fiduciary under Count XII of the Second Amended Complaint, the Court denies without prejudice the Defendants' application to dismiss this Count of the Second Amended Complaint. The Defendants may file for summary judgment seeking dismissal upon presentation of sufficient proofs of the Defendant's lack of obligation to retain or preserve any documents or evidence sought by the Plaintiff.

Piercing the Corporate Veil

River Pointe's allegations regarding piercing the corporate veil are extensive and technical in nature. To pierce the corporate veil, River Pointe must plead and prove (1) that the subsidiary was dominated by the parent corporation and (2) that adherence to the fiction of separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law. Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc., 195 N.J. 457, 472 (2008) (the party seeking to pierce the corporate veil "bears the burden of proving that the court should disregard the corporate entity.") Verni ex rel Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199 (App. Div. 2006).

Piercing the corporate veil is qualified as an equitable remedy. This claim can be made once there is a judgment to allow the Plaintiff to levy upon assets beyond those owned by the corporate Defendant. The Court will not grant River Pointe H.O.A.'s motion to pierce the corporate veil at this time but will allow the claim to remain. This claim is currently premature and will not yield any further necessary discovery.

The Plaintiff claims a right to pierce the corporate veil of the Developer Defendants, to hold enterprises liable for any obligations of those entities imposed via this lawsuit.

The moving Defendants argue that this Count is unripe for judicial consideration. The Defendants aver that a veil-piercing claim is more appropriately brought after the Plaintiff secures a judgment against the entities whose corporate veils the Association seeks to pierce.

The Plaintiff asserts that there is no precedent for confining the remedy to the post-judgment phase. Moreover, it asserts that, substantively, its claim should survive this motion.

The Court first addresses the contention that the Plaintiff's claim is unripe for review. To the Court's knowledge, there are no New Jersey decisions addressing whether a claim to pierce the corporate veil may lie only after a judgment is entered. To be sure, the moving Defendants' argument seems meritorious on its face. As a matter of logic, a Court cannot disregard the corporate form to hold a parent liable for the actions of its subsidiary unless there has been a proven wrong perpetrated by the subsidiary. That necessarily is not determined unless and until there is a judgment indicating as much. In addition, in most cases it is difficult to conceive that a party seeking to pierce the corporate veil of a subsidiary would have sufficient knowledge of the subsidiary's internal operations and financial condition and its relationship to its parent to be able to plead and prove a veil-piercing claim until after it secures a judgment and has the ability to explore the pertinent facts through post-judgment discovery.

The Court now addresses the Defendants' motion to dismiss the veil-piercing request in its entirety. Under New Jersey law, the doctrine of piercing the corporate veil is a narrow exception to the fundamental principle of limited liability. "Except in cases of fraud, injustice, or the like, courts will not pierce a corporate veil." State Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 500 (1983). To secure the equitable remedy of veil piercing, a Plaintiff must establish (1) that "the subsidiary was dominated by the parent" and (2) that "adherence to the fiction of separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law." Verni v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 160 (App. Div. 2006) (*citation omitted*).

The first factor requires that a Plaintiff plead and prove that a parent "so dominated" its subsidiary that the subsidiary had "no separate existence" from the parent and was "merely" its "conduit." Ventron, 94 N.J. at 501. The factors the Court can consider in this inquiry include: (1)

the extent of the "day-to-day involvement" of the parent's directors, officers, and personnel in the subsidiary's operations, as well as whether the subsidiary (2) was "grossly undercapitalized," (3) "pays no dividends," (4) is insolvent, (5) is "merely a façade," and (6) failed to observe corporate formalities or lacked corporate records. Verni, 387 N.J. Super, at 200.

As to the first factor, the Complaint, liberally construed, may indicate that Pulte Home Corp. and or Pulte Group Inc., Homes, through its officers and legal arrangements, exert a degree of control over Pulte Homes of NJ's routine activities. For example, the Plaintiff alleges that Pulte Homes dominates Pulte Homes New Jersey through its two wholly owned operational subsidiaries. The Plaintiff also alleges that Pulte Homes shares many of the same officers as Pulte Homes of N.J. The Plaintiff highlights the same commonality as between the corporate entities.

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

Here, the Complaint is lacking in meaningful factual detail as to such other factors as whether PHNJ is undercapitalized. The Association asserts that PHNJ is undercapitalized as the Developer. However, this contention is entirely conclusory.

Without more, however, this is insufficient evidence of undercapitalization to survive a motion to dismiss. Namely, the Complaint contains no allegation as to the solvency of Pulte Homes New Jersey or its ability vel non to meet its financial obligations, including to this

Plaintiff - the critical factors with respect to undercapitalization. There is simply no assertion that Pulte Homes New Jersey is insolvent or unable to pay its debts when due.

The Court in Four Seasons at N. Caldwell Condo. Ass'n v. Hovnanian, states it is not wrongful for a subsidiary to rely on corporate affiliates for services and obtaining financing for its operations so long as the capital supplied or obtained is sufficient for the subsidiary to operate its business and satisfy its obligations. Thus, absent facts supporting the conclusory allegation of undercapitalization of Pulte Homes of N.J., this factor is insufficiently pled. Four Seasons at N. Caldwell Condo. Ass'n v. Hovnanian, 2019 N.J. Super. Unpub. LEXIS 3492, 61.

Examining the allegations pertaining to the other indicia of domination further demonstrates that facts establishing this element are lacking here. The Complaint entirely fails to address three of the remaining four factors - dividends, insolvency, and observance of corporate formalities and record-keeping. Specifically, the Association alleges no facts implicating the issuance of dividends by, or the solvency of, Pulte Homes of NJ or the other Defendants whose veils the Plaintiff seeks to pierce. *Id.* At 61-62.

However, even if facts establishing corporate dominance are set forth here, the Association fails to establish the second element of a veil-piercing claim - that the parent "has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law." Ventron, 94 N.J. at 501. The "hallmarks" of such abuse are "the engagement of the subsidiary in no independent business of its own but exclusively the performance of a service for the parent and, even more importantly, the undercapitalization of the subsidiary rendering it judgment-proof." OTR Assocs. v. IBC Servs., Inc., 353 N.J. Super. 48, 52 (App. Div. 2002) (citing *Ventron,* 94 N.J. at 501).

Here, there is no indication that Pulte Homes New Jersey does not engage in business of its own.

There are insufficient facts supplied permitting the conclusion that Pulte Homes of NJ is undercapitalized. While the "hallmark" of abuse of the corporate form may be undercapitalization, fraudulent activity must be inextricably tied to the insufficient assets of the subservient corporation. *Ibid.* In addition to the averment that Pulte Homes of NJ is "undercapitalized," the Plaintiff suggests that the collective Pulte business have been devised to shield and protect the parent corporation from liabilities incurred by affiliated corporations. Under capitalization is suggested by the Plaintiff as a tool designed to leave Pulte Homes of NJ assetless and unable to answer for its liabilities. Other than speculation and inuendo, there is no evidence that any parent corporation carried out such a plan to defraud its creditors. In the end, the operation and financial condition of Pulte Homes of NJ is the entirely conclusory averment that it was undercapitalized.

Accordingly, the Court denies the Plaintiffs application to pierce the corporate veil, without prejudice to the right to re-plead or re-assert a veil-piercing claim against the Pulte entities, in the event that the Plaintiff secures judgment against Pulte Homes of N.J. that remains unsatisfied. Four Seasons at N. Caldwell Condo. Ass'n v. Hovnanian, 2019 N.J. Super. Unpub. LEXIS 3492.

In the SAC, River Pointe asks the Court to “pierce the corporate veils of Pulte Homes of New Jersey, Pulte Home Corporation of the Delaware Valley, Del Webb Corporation, and Pulte Home Corporation, and hold Pulte Group, Inc. liable for any judgment that is entered in this litigation.” SAC ¶ 786. Since there is no existing judgment, the allegations of veil piercing are premature, and the expansive discovery River Pointe hopes to pursue has been previously denied

by this Court. Therefore, this Court denies River Pointe's application to pierce the corporate veil, the application for this relief will be dismissed without prejudice, no further discovery on this matter will be conducted.

Deceptive Advertising

Pursuant to PREDFDA: "Advertising" means and includes the publication or causing to be published of any information offering for disposition or for the purpose of causing or inducing any other person to purchase an interest in a planned real estate development, including the land sales contract to be used and any photographs or drawings or artist's representations of physical conditions or facilities on the property existing or to exist by means of any:

(1) Newspaper or periodical;

(2) Radio or television broadcast;

(3) Written or printed or photographic matter;

(4) Billboards or signs;

(5) Display of model houses or units;

(6) Material used in connection with the disposition or offer of the development by radio, television, telephone, or any other electronic means; or

(7) Material used by developers or their agents to induce prospective purchasers to visit the development, particularly vacation certificates which require the holders of such certificates to attend or submit to a sales presentation by a developer or his agents.

[*N.J.S.A*. §45:22A-23(j); see also, *N.J.A.C.* §5:26-1.3.]

River Pointe's deceptive advertising claims, require prima facie showing that the Defendants have attempted to induce individuals to purchase their products. The Plaintiff alleges that Pulte included statements in the POS, in brochures, newspapers, television, websites, banners, signs, merchandise, and warranty brochures all either offered homes for sale in River Pointe or were intended to cause or induce people to purchase homes in the Community. (SAC

¶662) Pursuant to *N.J.S.A.* §45:22A-23(j) and *N.J.A.C.* §5:26-1.3, those materials are all advertisements governed by PREDFDA. The allegations brought forth by the Plaintiff in the Deceptive Advertising Facts (SAC ¶¶660-703) describe in detail how the Pulte employed a strategy for advertising, marketing, offering, and selling the homes at River Pointe via a myriad of different platforms and formats.

The Defendants Pulte may make an application for Summary Judgment that the Plaintiffs allegations are without merit. At this juncture, River Pointe has set forth prima facie claim of deceptive advertising. Therefore, the Court will not dismiss the deceptive advertising claims.

Punitive Damages

In *N.J.S.A.* 2A:58C-1 to -7, the Legislature substantially codified the judicial standards for the award of punitive damages. Assembly Insurance Committee, Statement to S. 2805 (June 22, 1987); *see also* William A. Dreier et al., Product Liability and Toxic Tort Law in New Jersey: A Practitioner's Guide 129 (6th ed. Supp.1993) (stating that "the standards of the Act substantially codify Fischer v. Johns-Manville Corp., 103 *N.J.* 643, 512 *A.*2d 466 (1986)"). The act mandates that in determining the amount of punitive damages in product-liability actions, the trier of fact "shall consider all relevant evidence, including, but not limited to . . . [t]he financial condition of the tortfeasor." *N.J.S.A.* 2A:58C-5d(4); *see* A. 2068, 205th Leg., 1st Sess., § 1b(4) (1992) (mandating consideration of financial condition of Defendant in all actions based on injuries or wrongs done to either persons or property); *see also* A. 2206, 205th Leg., 2d Sess. (1993) (establishing procedure for determining punitives in all civil actions).

The act provides further that "[i]f the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those

damages." *N.J.S.A.* 2A:58C-5d. Although section 5(d) could be read to require a further bifurcation of the punitive-damages hearing, neither the words nor the legislative history of the statute compels that result. Unlike its treatment of the trial of compensatory and punitive damages, the Legislature did not require the bifurcation of the liability and damage phases of a punitive damages claim. See Model Jury Charges 5.34J and 6.20 (proposing single charge on liability and damages in punitive damages claim); Dreier et al., *supra*, at 130-31 (stating that section 5(d) requires only separate determinations, not separate proceedings, for determining entitlement and damages).

Punitive damages are not available for the breach of a contract except with rare exceptions. *Buckley v. Trenton Savings Fund Society*, 111 N.J. 355, 369-370, 544 A.2d 857 (1988); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72-73, 417 A.2d 505 (1980). Pursuant to N.J.S.A. 2A:15-5.12, punitive damages may be awarded only where a party proves, by clear and convincing evidence, that the acts or omissions of a Defendant are actuated by actual malice or accompanied by a wanton and willful disregard of persons who might foreseeably be harmed. *Smith v. Whitaker*, 160 N.J. 221, 241, 734 A.2d 243 (1999).

A breach of contract, even if intentionally committed, does not warrant an award of punitive damages unless the Defendant also breached a duty independent of the contract. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1194 (3d. Cir. 1993). For example, punitive damages are not awarded unless the breach also constitutes a tort for which punitive damages are recoverable, *Buckley v. Trenton Sav. Fund Soc'y*, 216 N.J. Super. 705, 715, 524 A.2d 886 (App. Div. 1987), *modified*, 111 N.J. 355, 544 A.2d 857 (1988), or there is a fiduciary relationship between the parties. *Villa Enterprises Management Ltd. v. Federal Ins. Co.*, 360 N.J. Super. 166, 190, 821 A.2d 1174 (Law. Div. 2002).

In *Sandler v. Lawn-A-Mat Chemical and Equipment Corp.*, the court declined to allow punitive damages in a contentious case involving one party's breach of a distributor agreement. 141 N.J. Super. 437, 451, 358 A.2d 805 (App. Div.), *certif. denied*, 71 N.J. 503, 366 A.2d 658 (1976). The court further rejected the non-breaching party's argument that the cause of action equated with the tort of malicious interference with a contractual relationship, finding that the claim was made by one party to the contract against the other, and not against a third party interloper. *Id.* at 450. The court noted, "[t]he addition of such stylized labels as 'malice' and 'maliciously' . . . do not transform the essence of the action into a tortious wrong," and, because there was no special relationship or duty arising out of the parties' contract, punitive damages were inappropriate. *Id.* at 451.

In this case, the cause of action primarily involves River Point's breach of contract claims against Pulte Homes NJ. The appellate courts have warned that claims sounding in contract rather than tort are rarely afforded punitive damages. In *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 579-80, 489 A.2d 660 (1985), our Supreme Court explained that the Economic [*12] Loss Doctrine is based on the principle that economic expectations between parties to a contract are not entitled to supplemental protection by negligence principles. The Court noted the difference in the policies underlying tort and contract remedies:

> The purpose of a tort duty of care is to protect society's interest in freedom from harm, i.e., the duty arises from policy considerations formed without reference to any agreement between the parties. A contractual duty, by comparison, arises from society's interest in the performance of promises. Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.
>
> [*Ibid.*]

The Court stated that when addressing economic losses in commercial transactions, contract theories were better suited than were tort-based principles. *Id.* at 580-82.

Here, Plaintiff has asserted causes of action based on negligent construction, negligent design, and negligent misrepresentation. Even so, the claims are essentially breach-of-contract claims. *See* *Wasserstein v. Kovatch*, 261 N.J. Super. 277, 286, 618 A.2d 886 (App. Div.) ("Notwithstanding the language of the . . . complaint sounding in tort, the complaint essentially arises in contract rather than tort and is governed by the contract."), *certif. denied*, 133 N.J. 440, 627 A.2d 1145 (1993). *See also* *New Mea Constr. Corp. v. Harper*, 203 N.J. Super. 486, 494, 497 A.2d 534 (App. Div. 1985) (claim against principal of construction company for negligent supervision of construction sounds basically in contract, not in tort, despite the characterization of the claim as one for negligent supervision).

Plaintiff's cause of action is a breach of contract action, not a negligence action. When "there is no express contractual provision concerning workmanship, the law implies a covenant that the contract will be performed in a reasonably good and workmanlike manner." *Aronsohn v. Mandara*, 98 N.J. 92, 98, 484 A.2d 675 (1984). Indeed, a home buyer relies on a housing developer's "implied representation that the house will be erected in a reasonably workmanlike manner." *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 91, 207 A.2d 314 (1965)

The Court can determine no path forward for the Plaintiff to pursue a punitive damage claim on its breach of contract counts within the second amended complaint. However, the Court will preserve the punitive damage claims against the fraud counts and allow the matter to be resolved at the time of summary judgment. Accordingly, the court dismisses the punitive damages claims on Counts, II,III,IV.V,VI, and Count XIII.

Unfair Commercial Practices

The Complaint alleges the injury and damages caused by unfair commercial practices and alleged misrepresentations Pulte included in the POS. The Complaint also alleges the Plaintiff suffered injury and damages caused by the Pulte's deceptive advertisements, marketing materials, common promotional plan, and unconscionable commercial practices. River Pointe alleges that in addition to deceptive advertising materials, Pulte Homes utilized other unconscionable commercial practices to sell the homes in River Pointe to the public. (SAC ¶¶734-780) The Plaintiff claims that misrepresentations, deceptive advertising, and unconscionable commercial practices have caused River Pointe to endure an alleged $8,500,000 in damages. (SAC ¶¶494, 657, 701, 778, 1071, 1377, 1452, 1505, and 1556).

River Pointe argues that the disclaimer contained in the POS is "illegal" under PREDFDA. The POS declares that purchasers cannot rely on representations made elsewhere, including in advertisements. The Defendants suggest that POS warning about representations made beyond the four corners of the Public Offering Statement render any damages borne from advertisements without a remedy. Pulte Brf. at 17; POS at 59. River Pointe argues that PREDFDA declares void any provision (such as this disclaimer) that purports to bind any purchaser to a waiver of compliance with PREDFDA and its regulations. Opp. Brf. at 57–58. The POS disclaimer states: Any information, data or representation not contained in this POS, the Application for Registration as filed with the Division of Codes and Standards, Bureau of Homeowner Protection of the New Jersey Department of Community Affairs or in the documents referred to in this POS may not be relied upon. This language does not purport to waive any PREDFDA compliance requirements; nor does it waive any PREDFDA regulations. It

lets purchasers know that they can rely on the information contained in the POS itself, PREDFA does not regulate the use of any outside advertising.

This Court leaves the Plaintiff to its proofs to establish the Defendants use unconscionable commercial practices. The Defendants may seek relief in the form of Summary Judgment upon submission of the alleged offending commercial practices for judicial review.

Fraud

River Pointe brings four fraud-based counts against all Defendants: Consumer Fraud Act (Count 9); common-law intentional fraud (Count 10); negligent misrepresentation/fraud (Count 11); and fraudulent concealment by a fiduciary (Count 12). Those counts each espouse the same two broad theories: the Pulte Entity Defendants used misleading advertising to sell homes in the Community, see, e.g., SAC ¶ 463(a); and Pulte made material misrepresentations in the POS, see, e.g., SAC ¶ 639.

Beginning with the elements of common law fraud, a Plaintiff must prove that the Defendant materially misrepresented a presently existing or past fact; the Defendant knew or believed it was false, intending that the Plaintiff would rely on the misrepresentation; and the Plaintiff reasonably relied on the misrepresentation and suffered damage as a result. *Gennari v.* Weichert Co. Realtors, 148 N.J. 582, 610, 691 A.2d 350 (1997). In the real estate context, misrepresentation may consist of intentional nondisclosure of a material defect not observable by the buyer. State Dep't of Envir. Prot. v. Ventron Corp., 94 N.J. 473, 503-04, 468 A.2d 150 (1983); Weintraub v. Krobatsch, 64 N.J. 445, 455, 317 A.2d 68 (1974). Likewise, the "unlawful practice" element of a CFA violation encompasses a knowing concealment or omission of material fact with the intent that others rely on it. *N.J.S.A.* 56:8-2.

The Plaintiff's common-law fraud claim, subject to the heightened "particularity" standard, similarly satisfies this requirement. The elements the Plaintiff must establish to state prima facie claim of fraud are as follows: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the Defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. /Banco Popular N. Am. v. Gandi, 184 N.J. 161, 172-73 (2005) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)).]

The statute of limitations begins to run when the fraud was or reasonably should have been discovered. In *Belmont, supra*, a condominium association brought a CFA claim premised on misrepresentations by the general contractor, after the building was severely damaged from water leaks. 432 N.J. Super. at 60, 62-63, 74 A.3d 10. The Court held that the claim did not accrue until the Plaintiff "had reason to believe that it had suffered an ascertainable loss," which we found was the point at which "the true nature and extent of the water infiltration problem first became evident . . .." *Id.* 432 N.J. Super. at 83, 74 A.3d 10. In other words, the claim did not accrue until the Plaintiff was aware of facts establishing an essential element of its claim. Catena v. Raytheon Co., 447 N.J. Super. 43, 55. Because the wrongdoer's mental state is an essential element of the claim, discovery does not occur until the Plaintiff is aware of facts indicating the wrongdoer *knew* his statement was false and *intended* the other party to rely on its falsity. *See* Merck, *supra*, 559 U.S. at 649, 130 S. Ct. in 1796, 176 L. Ed. 2d at 597 (stating that it would "frustrate the very purpose of the discovery rule" if the limitations period commenced "regardless of whether a Plaintiff had discovered any facts suggesting scienter."). Catena v. Raytheon Co., 447 N.J. Super. 43, 55-56.

The Plaintiff alleges the following misrepresentations were contained within the POS:

1) The Developer misrepresented that the Association would exist as a separate and distinct legal entity and not merely as an arm of the Developer. (SAC ¶406);

2)The Developer misrepresented that the Association would be operated by a board and officers made up of fiduciaries with duties of loyalty and good faith to the Association and its membership and not to the Developer. (SAC ¶411);

3) The Developer misrepresented that it would comply with PREDFDA and all other applicable laws and standards with respect to the creation, development, sale of units within, and operation of, the Association even though it did, and intended to, fail to pay to the Association its proportionate share of the Association's common expenses. (SAC ¶416);

4) The Developer misrepresented that the Association's budget would reflect the cost for the operation, repair, replacement, and maintenance of the Common Elements and the Association's Improvements, and operation of the Association. (SAC ¶421);

5) The Developer misrepresented that the Association would discharge its powers in a manner that protected and furthered the health, safety, and general welfare of the Community. (SAC ¶426);

6) The Developer misrepresented that "The Community is in compliance with all applicable ordinances and governmental regulations." (SAC ¶431);

7) The Developer misrepresented that "Irrigation will be by private wells and irrigation system." (SAC ¶¶495-496);

8) The Developer misrepresented that the Common Elements and the Association's Improvements would be constructed in accordance with the approved plans and specifications for the Community. (SAC ¶¶502-506);

9) The Developer misrepresented that "Any outbuildings, driveways, walkways, patios, decks, retaining walls and fences shall be free from substantial defects due to material and workmanship...." (SAC ¶524);

10) The Developer misrepresented that "All drainage [throughout the Community] is proper and adequate...." (SAC ¶547);

11) The Developer misrepresented that "All the common facilities are fit for their intended use." (SAC ¶570);

12) The Developer misrepresented that "The Developer shall repair or correct any material defect in construction, material or workmanship in the common facilities within a reasonable time after notification of the defect." (SAC ¶589);

13) The Developer misrepresented that "There are no lawsuits or other proceedings now pending ... against the Developer or any person ... which might materially affect this offering except as herein expressly set forth." (SAC ¶598);

14) The Developer misrepresented that the Developer has not "made any untrue statement of material fact" in the POS. (SAC ¶613); and

> 15) The Developer misrepresented that purchasers could rely upon any information, data, or representation contained within the POS, the Application for Registration as filed with the Division of Codes and Standards, Bureau of Homeowner Protection of the New Jersey Department of Community Affairs or in the documents referred to in the POS. (SAC ¶634-635).

The Pulte Group Defendants claim that three (3) of the fifteen (15) misrepresentations that appear in the POS cannot be misrepresentations because they are "warranties." (Movants' Brief, p. 28). Pulte, in response argues warranties cannot form the basis of fraud claims, whether brought under the CFA or common law. The Pulte Defendants also explained that the other alleged misrepresentations in the POS are not actionable misrepresentations of fact, and some were not in the POS at all. See Mot at 25-29 and Ex. B.

For the claims of fraud, the Plaintiff must establish the language used and the format it was presented in to establish the existence of fraud and an intent to deceive. Pulte may file Summary Judgment motions seeking relief after establishing the evidence relied upon by the Plaintiff fails rise to the necessary requirements of fraud. River Pointe has submitted the prima facie for the elements of fraud; therefore, this Court denies the application to dismiss the fraud counts.

Consumer Fraud Act

The Court now addresses the Plaintiff's specific Counts for consumer fraud. Specifically, the Defendants seek to dismiss the claims for violations of the Consumer Fraud Act ("CFA"), along with the common-law fraud claims contained in the Complaint.

The Defendants assert a failure to plead with the requisite particularity. R. 4:5-8(a) provides:

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

The Defendants urge the Court to dismiss all fraud-related claims pursuant to this Rule, as the Plaintiff does not allege the elements of the various causes of action with the requisite particularity.

Conversely, the Defendants assert that the Complaint has pleaded "particularized" facts establishing the unlawful conduct of the Defendants by compiling an exhaustive and unmanageable array of alleged violations.

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

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

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

> merchandise ... whether or not any person has in fact been misled, deceived or damaged thereby[.]
>
> [*N.J.S.A*. 56:8-2.]

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

The Plaintiff's Amended Complaint now satisfies this test. This court expressed its concern that the Plaintiff's initial pleadings did not identify with particularity the factual underpinnings of the alleged fraud violations. With the most recent amendment to the Plaintiff's complaint the Defendant has been placed on notice of each incident the Plaintiff claims are a fraud violation. The Complaint now avers that the Defendants began selling homes in 2007, and continued construction and sales for over a decade, with a known variety of construction defects. The Plaintiff claims that the masonry stone veneer, stucco, and brick veneer on the clubhouse, guardhouse, gatehouse, and entrance walls lacks requisite flashing, mortar, weep screed, ground clearance, etc., which the Plaintiff claims was the proximate cause of water to infiltration and other structural elements, resulting in estimated damages of at least $900,000.00 (SAC ¶¶87- 182 & 220-228), the clubhouse roof lacks requisite flashing and properly installed fasteners, permitting water infiltration into the roof deck, and the clubhouse attic lacks adequate ventilation

over the indoor pool, causing excess humidity and moisture damage to the attic's structural elements, resulting in estimated damages of at least $350,000.00, (SAC ¶¶183- 209 & 229-234); Pulte failed to obtain the requisite permits for the Association's irrigation system, causing the State to prohibit use of the irrigation system, and resulting in at least $896,000.00 in estimated costs to modify the site to the State's requirements and obtain the requisite permits, along with an ongoing previously unbudgeted expense of $4,000.00 per year to maintain the additional permits, (SAC ¶500).

The Plaintiff has now plead the "particulars" of the misrepresentations that form the basis for the alleged consumer fraud suffered by the Association, as is required under the CFA. As plead, the Complaint now identifies sufficient particularized evidence, alleging that the Defendant committed an unconscionable commercial practice via misrepresentation of conditions at the development.

The condition of the development was alleged to have been disclosed to Pulte before all sales were completed in the Community. (SAC ¶302). Throughout construction, Pulte's engineer, Gentech Engineering Associates, P.C., provided Pulte with written reports regarding construction of the Community's retaining walls, (SAC ¶¶266-268); On July 27, 2017, legal counsel for the Association notified the Association's Board of Trustees, including the two Pulte appointees controlling the Association's Board, of the defects, (SAC ¶302.h-302.l); On September 1, 2017, the Association filed suit against Pulte, and subsequently served Pulte with its Complaint detailing the construction defects and misleading marketing, (SAC ¶302.m-302.p); and on October 27, 2017, the Association served Pulte with a copy of the Association's initial Transition Report, detailing its engineer's observations, findings, and conclusions regarding the construction defects, (SAC ¶302.q-302.u).

The Amended Complaint satisfies the requirement of pleading an "ascertainable loss." To satisfy this element, a Plaintiff must present evidence that shows it suffered "a quantifiable or otherwise measurable loss as a result of the alleged CFA unlawful practice[.]" Thiedemann, 183 N.J. at 238. Because the Complaint sets forth numerous specific defects within the development that the Plaintiff asserts are the basis for its claim, it has met its burden to allege with requisite particularity "quantifiable or otherwise measurable" loss suffered by the Association.

The amended complaint further alleges facts establishing a causal connection between the alleged unlawful practice and losses suffered. The Plaintiff's allegations set forth factual allegations that satisfy the heightened "particularity" pleading requirement.

Accordingly, the Court denies the Defendants request to dismiss the Plaintiff's amended complaint for failure to identify with particularity the factual underpinnings of the fraud allegations.

Similar to the alleged CFA violations the Plaintiff's amended complaint is replete factual allegations that establish the elements of common-law fraud. Here, the court's obligation is to construe the pleadings liberally, Printing-Mart Morristown, 116 N.J. at 746, the allegations contained in the Complaint demonstrate a cognizable claim of common-law fraud.

The Plaintiff has been careful to set forth an adequate factual basis to support an allegation of misrepresentation or omission of material facts. The Complaint contains ample allegations as to the nature, extent, and location of the defects to place the Defendants on notice of the claims.

The Plaintiff also sufficiently pled the element of reliance with numerous examples of particularity. The Amended Complaint sets forth particular instances where "[t]he Association

and its members justifiably relied upon the accuracy and truthfulness of the Developer Defendants' representations ...." (Compl. ¶ 141.) The Plaintiff has satisfied its burden as to common-law fraud by setting forth repeated instances where homeowners justifiably relied on the representations of the Defendants.

The Court finds that the Plaintiff's claim for fraud under the common law and CFA are sufficiently pled under R. 4:5-8(a). It denies the Defendants' motion to dismiss the Amended Complaint.

Conclusion

This Court denies the application of Pulte to dismiss the Second Amended Complaint and have River Pointe submit a Third Amended Complaint. River Pointe had completed and filed this Second Amended Complaint at behest of the court. The Court needed River Pointe to identify all allegations of fraud so the Court can see if they are sufficient to pleas. The allegation set forth in the amended complaint are identifiable as to the degree of specificity and necessity. Pulte Homes is required to file an answer to the Second Amended Complaint within thirty (30) days. The Court is not requiring a specific answer to each, and every allegation set forth in the complaint. The Court at a previous hearing sought a concise and definite statement from the Plaintiff as to its allegations of fraud. The Court expressed its frustration when called upon to rule on the sufficiency of the Plaintiff's fraud claims. The Plaintiff's original assertions were vague and relied on inuendo without sufficient specificity to allow for adequate judicial review. In response to the Court's direction to plead its fraud counts with specificity the Plaintiff has elected to compile over sixteen hundred separate paragraphs in its second amended complaint. Because the Plaintiff drafted four hundred seventy-four pages in its second amended complaint prior to setting forth its First Count seeking damages, the Court has determined it would be

inappropriate for the Defendants to Answer in a similar fashion. For the purposes of conciseness, the Defendants are entitled to identify each of the fifteen causes of actions (Counts 1 – 15) in the Plaintiff's second amended complaint and reply with affirmative acknowledgements or denials.

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RIVER POINTE HOMEOWNERS ASSOCIATION, INC., a non-profit New Jersey Corporation, Plaintiff, v. PULTE HOMES OF NJ, LIMITED PARTNERSHIP, t/a River Pointe by Del Webb; PULTE HOME CORPORATION OF THE DELAWARE VALLEY; DEL WEBB CORPORATION; PULTE GROUP, INC.; PULTE HOME CORPORATION **CONTRACTORS**: ACIES GROUP; CUNTIS, INC.; NASSAU CONSTRUCTION COMPANY **DEVELOPER APPOINTED TRUSTEES**: CHARLES FOREMAN; BARBARA JAQUETT; PATRICIA SKROCKI; EVERETT R. HANKINS; JAMES MULLEN; RACHEL RICHARDSON; MARY CHURCHILL; SEAN DORNEY; CRAIG COLLIN; JOHN EVANS JOHN DOE DIRECTOR(S), OFFICER(S), AGENT(S) OR EMPLOYEE(S) OF PULTE HOMES OF NJ LIMITED PARTNERSHIP; DEL WEBB CORPORATION; PULTE GROUP, INC. and/or PULTE HOME CORPORATION, fictitious parties; JOHN DOE TRUSTEE(S) OF RIVER POINTE HOMEOWNERS ASSOCIATION, INC., fictitious parties; JOHN DOE CONTRACTORS (1-200), fictitious parties; JOHN DOE (1-100), fictitious parties Defendants v.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION OCEAN COUNTY DOCKET NO. OCN-L-002491-17 Civil Action CBLP Action **ORDER**

PULTE HOMES OF NJ, LIMITED PARTNERSHIP, PULTEGROUP, INC., PULTE HOME COMPANY, LLC, PULTE HOME CORPORATION OF THE DELAWARE VALLEY, DEL WEBB CORPORATION, EVERETT R. HANKINS, JAMES MULLEN, JOHN EVANS, SEAN DORNEY, MARY CHURCHILL, PATRICIA SKROCKI, and RACHEL RICHARDSON.

Third-Party Plaintiffs,

v.

BENDER ENTERPRISES, INC., CARFARO, INC., SAMBOL CONSTRUCTION CORP., JOCAMA CONSTRUCTION CORP., METRO CORP. PLUMBING, INC., ACTION SPORT SURFACES, INC., FINAL TOUCH GLASS & MIRROR, LANDSCAPE MAINTENANCE SERVICES, INC., BRIGHTON EXTERIORS, INC., ALL MONMOUTH LANDSCAPING & DESIGN, INC., UTILITIES CONTRACTING SERVICES, INC., MDM SERVICES INCORPORATED., and ABC COMPANIES 1-10.

Third-Party Defendants.

AND

JOCAMA CONSTRUCTION CORP.

Third-Party Defendant/Fourth Party Plaintiff,

v.

ADVANCED CONCRETE PUMPING SERVICE INC., ALL SEASONS CONSTRUCTION CO., INC.; BR CONSTRUCTION; EURO CONCRETE LLC; J. MASONRY CORP.; J.M. PEREIRA & SONS, INC.; LOPES CONSTRUCTION INC.; RED EAGLE CONCRETE, INC.; RENAISSANCE MASONRY CORP. AND YUNGA AND SON CONSTRUCTION LLC.

Fourth Party Defendants.

THIS MATTER, having been brought to the attention of the Court by Giordano, Halleran & Ciesla, P.C., attorneys for defendants, Pulte Homes of N.J., Limited Partnership; PulteGroup, Inc.; Pulte Home Company, LLC; Pulte Home Corporation of the Delaware Valley; Del Webb Corporation, Everett R. Hankins, James Mullen, John Evans, Sean Dorney, Mary Churchill, Patricia Skrocki, and Rachel Richardson (collectively, the "Pulte Defendants"), by way of a motion, and on notice to counsel for the Association, and the Court having read the papers in support thereof and in opposition thereto, and having heard oral argument, and for good cause having been shown:

IT IS on this _21__ day of _November_, 2024,

IT IS HEARBY **ORDERED** for the reasons set forth more fully in the attached Opinion of this date, and ADJUDGED:

1. The Association's Second Amended Complaint ("SAC") does not contain such prolix, irrelevant and vexatious allegations as to be impermissible and therefore Defendant Pulte's request to strike the Second Amended Complaint is DENIED;
2. Pulte Homes motion to have The Association file a "simple, concise and direct" Third Amended Complaint that pleads its claims with specificity, and is otherwise consistent with paragraphs 3 through 6 of this order is DENIED
3. The Association may keep the following allegations or claims in its Second Amended Complaint without a need to file a Third Amended Complaint:
    a. the "Spoliation of Evidence" allegations (SAC ¶¶ 704–733) are not direct causes of action, but a remedy that can assist the factfinder in making a decision therefore motion to have this allegation stricken is DENIED;

b. the "Unconscionable Commercial Practices" allegations (SAC ¶¶ 734–781)

c. the "Deceptive Advertising" allegations (SAC ¶¶ 660–703) are permitted as a prima facie claim has been set forth and the motion to have this allegation stricken is DENIED;

d. the tennis court and concrete defect allegations (SAC ¶¶ 235–247) are permitted and the motion to have this allegation stricken is DENIED;

e. allegations related to the irrigation system (SAC ¶ 443) are permitted and the motion to have this allegation stricken is DENIED;

f. propositions of law or citations to caselaw are permitted and the motion to have this allegation stricken is DENIED;

g. the Association's Counts 5, 6, and 7, are not duplicative and are permitted and the motion to have this allegation stricken is DENIED;

h. definitions, including but not limited to defining "Developer" to refer to multiple Defendants are permitted and the motion to have this allegation stricken is DENIED.

4. The Association has failed to state a claim upon which relief can be granted against Del Webb Corporation and Pulte Home Corporation. The motion to have Defendants dismissed with prejudice is DENIED.

5. The Association's "Piercing the Corporate Veil" allegations are premature and dismissed without prejudice, GRANTED

6. The motion to dismiss Counts 4, 9, 10, 11, 12 and 14 for failure to state a claim upon which relief can be granted is DENIED.

Craig L. Wellerson

CRAIG L. WELLERSON, P.J. Cv.

Opposed _X_

Unopposed _____