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JOHN C. SULLIVAN, as Trustee of the Sylvester L. Sullivan Grantor Income Trust, and SYLVESTER L. SULLIVAN GRANTOR RETAINED INCOME TRUST Plaintiffs-Respondents/ Cross-Appellants, v. MAX SPANN REAL ESTATE & AUCTION CO., Defendants-Cross-Respondents And MENGXI LU, Defendant-Appellant-Cross Respondent	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-005327-18 ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, SOMERSET COUNTY DOCKET NO. L-1036-17 Sat Below: HON. FRED H. KUMPF, J.S.C. HON. MICHAEL J. ROGERS, J.S.C.

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Constitutions

Cases

Statutes/Codes

PRELIMINARY STATEMENT

This case seeks to undermine the long-standing Supreme Court mandate to include certain protections in all realtor-prepared residential real estate contracts to ensure individuals are aware of and have the opportunity to consult with legal counsel before entering into the transaction. Those protections include an attorney-review clause, allowing parties three days to consult with an attorney after executing a real estate contract before it is enforceable, and an *Opinion 26* notice, advising parties to a real estate transaction about the various roles played by the professionals involved in the transaction and notifying them of their right to seek their own counsel. See New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Boards, 93 N.J. 470, modified, 94 N.J. 449 (1983); In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 139 N.J. 323 (1995).

The trial court determined such protections were unnecessary in the context of a realtor-prepared residential real estate contract for a real estate auction where information was available to potential parties in advance. The New Jersey State Bar Association (NJSBA) disagrees. The need for protection is just as great in an auction setting as in any other residential real estate transaction. It urges the Appellate Division to affirm that all

realtor-prepared[1] residential real estate contracts, regardless of the circumstances, must meet the Supreme Court-mandated notice provisions to satisfy the Court's consumer protection concerns.

Further, the NJSBA contends that any changes to those Supreme Court-mandated notice provisions can only be made by the Supreme Court itself under its Constitutional authority to exclusively regulate the practice of law. Therefore, any attempt by the trial court to alter those mandates is invalid.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The NJSBA relies on the procedural history and statement of facts as presented by the parties.

[1] Throughout the brief, the term "realtor" is meant to encompass realtors, brokers, real estate agents, and licensees licensed by the New Jersey Real Estate Commission.

LEGAL ARGUMENT

I. Any Realtor-Prepared Residential Real Estate Contract that Fails to Adhere to the Critical Consumer Protection Requirements Imposed by the Supreme Court, Even if Prepared as a Result of a Real Estate Auction, is Unenforceable

Consumer protection is at the heart of two key provisions required by the New Jersey Supreme Court in all realtor-prepared residential real estate contracts: an attorney-review clause allowing consumers to seek the advice of counsel within three business days and an *Opinion 26* notice advising consumers of the risks of proceeding with a transaction when they are unrepresented by counsel. See New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Boards, 93 N.J. 470, modified, 94 N.J. 449 (1983); In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 139 N.J. 323 (1995). Consumer protection also underlies the Court's decision that a realtor's filling in the blanks of a boilerplate residential real estate contract constitutes the unauthorized practice of law. Calvert v. K. Hovnanian at Galloway IV, Inc., 247 N.J. Super. 518 (App. Div. 1991), aff'd, 128 N.J. 37 (1992).

That need for protection is just as great in residential real estate auctions as in any other residential real estate proceeding. For that reason, the NJSBA urges the Court to find the contract in this case unenforceable because it failed to contain an attorney-review clause and it included a deficient *Opinion 26* notice to the

parties. Furthermore, the NJSBA urges the Court to hold that all realtor-prepared residential real estate contracts, regardless of the circumstances, are held to the same standards.

A. The Attorney-Review Provision Allows Consumers Time to Consult with Counsel Before a Contract Becomes Binding

The attorney-review procedure was created by the New Jersey Supreme Court in 1983. It protects consumers by providing them with an opportunity to consult with an attorney before a real estate contract becomes enforceable, while ensuring the transaction moves forward in a way that realtors are not charged with the unauthorized practice of law. The New Jersey Supreme Court established the terms of the clause when it approved a final consent judgment implementing a settlement agreement between the New Jersey State Bar Association and the New Jersey Association of Realtor Boards. NJ State Bar Ass'n, 93 N.J. at 476-477, modified, 94 N.J. at 474 (1983).

The Court approved the settlement agreement because it resolved the question of realtors' unauthorized practice of law, and, "[m]ost importantly, . . . it serve[d] to protect the public interest by making the contract subject to prompt attorney review if either buyer or seller so desires." NJ State Bar Ass'n, 93 N.J. at 474, (quoting trial court opinion); see also Calvert v. K. Hovnanian at Galloway, VI, Inc., 128 N.J. 37, 45,

(1992) (holding that, "[m]ost importantly, what the Bar Ass'n sought to protect was not the private interest of lawyers but rather the public's right to be protected from inadequate information" by allowing parties to real estate transactions the opportunity to consult with counsel); Sears Mortgage Corp. v. Rose, 134 N.J. 326, 356 (1993) (explaining that NJ State Bar Ass'n settlement aimed to "protect the interests of buyers and sellers").

Essentially, the approved settlement required that every contract for residential real property, containing one to four dwelling units or single-family lots must contain conspicuously the following language at the top of the first page:

> **THIS IS A LEGALLY BINDING CONTRACT THAT WILL BECOME FINAL WITHIN THREE BUSINESS DAYS. DURING THIS PERIOD, YOU MAY CHOOSE TO CONSULT AN ATTORNEY WHO CAN REVIEW AND CANCEL THE CONTRACT. SEE SECTION ON ATTORNEY REVIEW FOR DETAILS.**

The attorney-review clause provides each party a three-day window during which the contract may be voided at the discretion of either party's attorney. Denesevich v. Moran, 211 N.J. Super. 554, 556 (App. Div. 1986). This time is deemed necessary to protect consumers' interests. Indoe v. Dwyer, 176 N.J. Super. 594, 602 (Law Div.1980). According to Trenta v. Gay, 191 N.J. Super. 617 (1983) the opportunity to consult counsel allows: "Attorneys (to) offer advice on a limitless range of matters. Clients rely on them

not only for legal advice but also for emotional support, financial guidance and common sense." Id. at 621.

Pursuant to the Court-approved settlement agreement, realtors are allowed to prepare contracts to sell or lease residential real property of one- to four-family homes without being charged with engaging in the unauthorized practice of law, so long as the contract they prepared includes a defined three-day period for attorney review. If, during the review period, a New Jersey attorney disapproves the contract by notifying the other party and the real estate agent(s) of the disapproval then the contract is legally terminated. If no notice of disapproval is sent within the three days as defined in the decision, the contract becomes enforceable. NJ State Bar Ass'n, 93 N.J. 470, modified, 94 N.J. 449 (1983).

The attorney-review clause has been at issue in numerous cases since the Supreme Court mandated its terms nearly 40 years ago. While various decisions have interpreted the details, the clause itself has remained a constant, signaling its importance as a component of any real estate transaction. See Trenta v. Gay 191 N.J. Super. 617 (Ch. 1983) (there was no occasion for the court to evaluate the reason for rejection of a contract, the lawyer was entitled to reject the contract on his clients' instruction for any reason); Century 21 - Candid Realty v. Cliett, 203 N.J. Super. 78 (Law Div. 1985) (a listing agreement is conditioned upon the

right of the parties to a transaction to rely upon the attorney-review clause); Levison v. Weintraub, 215 N.J. Super 273 (App. Div. 1987) (contract signed by attorney-agent for party is still subject to the three-day attorney review); Carmagnola v. Hann, 233 N.J. Super. 547 (N.J. Super. App. Div. 1989) (an Agreement to Honor unduly restricts parties to a real estate transaction and is contrary to the settlement approved by the Supreme Court); Kutzin v. Pernie, 124 N.J. 500 (1991) (rescission was not permitted because Plaintiff was not specifically informed of disapproval during the three-day attorney review period, despite negotiations over modifications to the agreement that continued beyond the three-day period); Freedman v. Clonmel Const. Corp., 246 N.J. Super. 397 (App. Div. 1991) (attorney review policy extended to all documents that affected the contract of sale); Calvert v. K. Hovnanian at Galloway IV, Inc., 247 N.J. Super. 518 (App. Div. 1991), aff'd, 128 N.J. 607 (1992) (reaffirming the need for an attorney-review clause where a boilerplate purchase agreement was completed by a realtor filling in blanks and signed by a purchaser without an attorney present); Gaglia v. Kirchner, 317 N.J. Super. 292 (App. Div. 1996) (the party who invoked the attorney-review provision to annul the contract could not avoid the consequences of doing so by relying on that party's own deviations from the prescribed procedure); Peterson v. Purcell, 339 N.J. Super 268 (App. Div. 2001) (holding the attorney-review clause needs to be

"crystal clear," and clarifying that the three-day review period begins on the date the signed contract is delivered to a party, not its agents); Romano v. Chapman, 358 N.J. Super. 48 (App. Div. 2003) (reaffirming the purpose of the attorney-review clause is to provide an opportunity for a party to consult with an attorney and holding that once an attorney approves the agreement, a client cannot back out, even if within the three day period); and Conley v. Guerrero, 228 N.J. 339 (2017) (allowing notice to be sent by email, fax and overnight delivery service).

Aside from this matter, no other lower court has attempted to carve out an exception for auction sales of residential real estate. Rather, the same public protections recognized as critical to residential real estate closings are equally as critical in auction sales. For this reason, the NJSBA urges the Court to find the contract at issue unenforceable for failure to include an attorney-review clause, and to affirm that all realtor-prepared residential real estate contracts, regardless of the circumstances, must include an attorney-review clause.

B. *Opinion 26* Notice Provisions Impart Important Information to Consumers About Their Right to Retain Counsel or Not

Twelve years after the advent of the NJ State Bar Ass'n settlement, the Supreme Court mandated additional protections in a real estate transaction to ensure parties are informed of the

risks of proceeding without an attorney. In Re Opinion 26, 139 N.J. 323 (1995). The Court reviewed an opinion of the Committee on the Unauthorized Practice of Law questioning whether the activities of title companies and realtors in real estate transactions involving parties not represented by an attorney constitute the unauthorized practice of law. In the opinion, the Court sanctioned certain common activities of title companies and realtors in the closing process provided the consumer is provided a specific notice so they can make an informed decision about whether to retain counsel. This clause was deemed necessary so that consumers understood the value of the independent legal advice of an attorney and did not simply rely on their realtor's or title company's advice.

The Supreme Court noted that its decision "turns on the identification of the public interest," which has been the polestar in all residential real estate contract disputes decided by New Jersey courts after the New Jersey State Bar Ass'n decision. Id. at 325. Although the Court noted that it "strongly believes that both parties should retain counsel for their own protection and that the savings in lawyers' fees are not worth the risks involved in proceeding without counsel," (Id. at 325) the decision allows both sellers and buyers in real estate transactions to proceed without legal representation, *provided that* the "parties are adequately informed of the conflicting interests of brokers and

title officers and of the risks involved in proceeding without counsel." Id. at 356.

This notice provision, in the exact form mandated by the Court, is necessary for the protection of the public. In this case, the realtor made critical substantive changes to the form provided to the buyer, resulting in the removal of an advisement about a party's right to seek counsel.

The text of the Court's mandatory notice requirement follows:

NOTICE TO BUYER AND SELLER
READ THIS NOTICE BEFORE SIGNING THE CONTRACT

The Law requires real estate brokers to give you the following information before you sign this Contract. It requires us to tell you that you must read all of it before you sign. The purpose is to help you in this purchase or sale.

1) As a real estate broker, I represent: [ ] the seller, not the buyer; [ ] the buyer, not the seller; [ ] both the seller and the buyer; [ ] neither the seller nor the buyer. The title company does not represent either the seller or the buyer.

2) You will not get any legal advice unless you have your own lawyer. Neither I nor anyone from the title company can give legal advice to either the buyer or the seller. If you do not hire a lawyer, no one will represent you in legal matters now or at the closing. Neither I nor the title company will represent you in those matters.

3) The contract is the most important part of the transaction. It determines your rights, risks and obligations. Signing the contract is a big step. A lawyer would review the contract, help you to understand it, and to negotiate its terms.

4) The contract becomes final and binding unless your lawyer cancels it within three business days. If you do not have a lawyer, you cannot change or cancel the contract unless the other party agrees. Neither can the real estate broker nor the title company can change the contract.

5) Another important service of a lawyer is to order a survey, title report, or other important reports. The lawyer will review them and help to resolve any questions that may arise about the ownership and condition of the property. These reports and survey can cost you a lot of money. A lawyer will also prepare the documents needed to close title and to represent you at the closing.

6) A buyer without a lawyer runs special risks. Only a lawyer can advise a buyer about what to do if problems arise concerning the purchase of this property. The problems may be about the seller's title, the size and shape of the property, or other matters that may affect the value of the property. If either the broker or the title company knows about the problems, they should tell you. But they may not recognize the problem, see it from your point of view, or know what to do. Ordinarily, the broker and the title company have an interest in seeing that the sale is completed, because only then do they usually receive their commissions. So, their interests may differ from yours.

7) Whether you retain a lawyer is up to you. It is your decision. The purpose of this notice is to make sure that you have the information needed to make your decision.

The language is clear, concise and provides the parties to the transaction sufficient notice of the risks involved in not retaining a lawyer. It makes it clear that should the buyer or seller elect to proceed without the protection of an attorney, they are permitted to do so. The required language is provided as the first page of the NJ Realtors Form Contract and must be signed by all parties and realtors because it conveys this critical information to the parties. See New Jersey Realtors Form 118-Statewide form contract (10/2019 version) (AA 1).

In the instant matter, the notice was deficient because the realtor-prepared residential real estate contract contained

language that had been altered from the Supreme Court-approved and mandated language. Instead of referring to the attorney-review provision in Paragraph 4, the notice provided in the contract at issue in this matter reads:

> The contract is final and binding. You cannot change or cancel the contract unless the seller agrees. Neither can the real estate broker nor the title insurance company change the contract.

It makes no difference that the transaction at issue is a residential real estate auction, as opposed to a typical residential real estate transaction. An auction is akin to a situation in which there is a bidding war through a realtor, in which prospective buyers are asked to present their highest and best offer. One offer ultimately gets chosen, based on the strength of its terms. The mere fact that there is an auction does not strip consumers of their rights which are a required part of ***every*** realtor-prepared residential real estate contract in New Jersey.

As the Court noted in In re Opinion 26, the purpose of the required disclosure notice is "to assure that the parties who decide not to retain lawyers know the conflicting interests of others and know that there are risks of proceeding without one." In re Opinion 26, 139 N.J. at 357. Whether the parties are purchasing residential real estate as a result of an offer on a single residential home or the result of a realtor auction, the need for such disclosure remains the same. In either case New

Jersey consumers need to be advised that they cannot replace the independent legal advice of an attorney with that of a realtor who has a vested interest in the outcome of the transaction.

Because the disclosure in this matter was deficient, the NJSBA urges the Court to find the contract unenforceable and to affirm that all realtor-prepared residential real estate contracts, regardless of the circumstances, must include the exact notice provisions mandated by the Supreme Court.

II. Any Realtor-Prepared Residential Real Estate Contract that Fails to Contain the Attorney Review Language Mandated by N.J.A.C. 11:5-6.2 (g), Even if Prepared as a Result of a Real Estate Auction, is Unenforceable

Consistent with the protections afforded to consumers in the Court's NJ State Bar Ass'n and In re Opinion 26 decisions, the New Jersey Real Estate Commission and the Division of Banking and Insurance have mandated that certain language be printed and inserted in all residential real estate sales and leases prepared by realtors in the state of New Jersey. N.J.A.C. 11:5-6.2(g). Critical among that language is the following clause that must be printed at the top of the first page of any real estate contract in print larger than the rest of the agreement:

> **THIS IS A LEGALLY BINDING CONTRACT THAT WILL BECOME FINAL WITHIN THREE BUSINESS DAYS. DURING THIS PERIOD YOU MAY CHOOSE TO CONSULT AN ATTORNEY WHO CAN REVIEW AND CANCEL THE CONTRACT. SEE SECTION ON ATTORNEY REVIEW FOR DETAILS.**

The remainder of the required language describes the three-day attorney review and its mechanics.

This language adopted by the New Jersey Real Estate Commission and the Division of Banking and Insurance, as directed by the Supreme Court, is explicit and precise. There are no exceptions exempting realtors (licensees) from its requirements when engaging in auction contracts for the sale of single-family homes. N.J.A.C. 11:5-6.2(g) mandates that all licensees shall comply with this section of the Code, and further states that, "all contracts prepared by licensees for the sale of residential real estate containing one to four dwelling units and for the sale of vacant one-family lots in transactions in which the licensee has a commission or fee interest shall contain [the information] at the top of the first page [of the contract]." There are no exceptions.

Section (g)(7) further states that "the failure of any licensee to include such language in any such contract of sale or lease agreement prepared by the licensee shall be construed by the Commission as engaging in the unauthorized practice of law and shall be considered by the Commission as conduct which demonstrates the licensee's unworthiness and incompetency, thereby subjecting the licensee to sanctions pursuant to N.J.S.A. 45:15-17(e)."

Because the contract in this case was prepared by a realtor, who is a licensee under the Administrative Code, and it failed to

include the mandated language, the NJSBA urges the Court to find the contract unenforceable. The NJSBA further urges the Court to affirm that all realtor-prepared residential real estate contracts, regardless of the circumstances, must include the proscribed language to be valid.

III. Only the Supreme Court can Mandate Changes to the Attorney-Review Clause Requirement

The New Jersey Constitution grants the Supreme Court the exclusive jurisdiction over the practice of law. N.J. Const. art. 6, § 2, ¶ 3. The Supreme Court is given the power to permit the practice of law and to prohibit its unauthorized practice. The Court has exercised the latter power in numerous cases. In re Application of N.J. Soc'y of Certified Public Accountants, 102 N.J. 231 (1986); New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Boards, 93 N.J. 470 (1983); Cape May County Bar Ass'n v. Ludlam, 45 N.J. 121 (1965); New Jersey State Bar Ass'n v. Northern N.J. Mortgage Assocs., 22 N.J. 184 (1956); In re Baker, 8 N.J. 321 (1951); and Stack v. P.G. Garage, 7 N.J. 118, (1951).

The attorney-review clause was established as a result of a settlement in New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Boards, 93 N.J. 470 (1983), modified, 94 N.J. 449 (1983). There the NJSBA filed to suit to prohibit realtors from engaging in the unauthorized practice of law by preparing contracts in

residential real estate transactions. The Supreme Court reviewed and approved the settlement in the matter, as required under our Constitution. In its decision, the Court presented the attorney-review clause as a means of allowing real estate brokers to prepare residential real estate contracts without being subject to unauthorized practice of law allegations. It specifically noted, ". . . the public's interest is safeguarded through the settlement's attorney review provisions and the Court's continuing supervisory control." Id. at 474.

No lower court has altered the terms of the attorney-review clause, despite technological advances that have made some of the mechanics of the clause outdated and burdensome. It was not until 2017, when the Supreme Court decided Conley v. Guerrero, 228 N.J. 339 (2017) that any change to the clause's requirements was put in place. In Conley, the Court allowed a modern way to deliver notice of cancelation by using email, fax, overnight mail service. Those means of service were not technologically available at the time of the original decision.

The lower courts that considered Conley had been asked to update the means of delivery required under the attorney-review clause, generally. In holding that email delivery of a notice was satisfactory in Conley because actual notice was received by the parties, the Appellate Division stated "…. the drafters of the settlement in N.J. State Bar Ass'n, supra, apparently deemed the

three required methods as generally reliable means of accomplishing delivery. **Whether email or facsimile can satisfy the apparent purpose, and under what conditions, we leave to others to address."** Conley, 443 N.J. Super. 62, 66 (App. Div. 2015), aff'd as modified, 228 N.J. 339 (2017). (Emphasis Added). This was a tacit recognition that any universal changes to the attorney-review clause requirement could only be mandated in the same fashion as the creation of the original clause -- by the Supreme Court.

In allowing changes to the attorney-review clause provision in Conley, the Court maintained the primacy of protecting the public interest. In approving an updated method of notification under the clause, the Court confirmed that all realtor-prepared residential real estate contracts and leases require the mandated language set forth in the settlement agreement, making all residential real estate contracts subject to the mandatory three-day attorney review provision.

Similarly, in this case, any deviation from the well-settled principle that all realtor-prepared residential real estate contracts and leases require the mandated attorney-review clause language set forth in the NJ State Bar Ass'n case, can come only one way: a Supreme Court action. Accordingly, the decision of the lower court to allow an exception to the attorney-review requirement in the context of a real estate auction is invalid and

must be reversed. For that reason, the NJSBA urges this Court to find the contract unenforceable and to affirm that all realtor-prepared residential real estate contracts must include an attorney-review clause.

IV. The Lower Court's Analysis in Finding the Realtor-Prepared Residential Real Estate Contract in this Matter Valid is Misguided; It Had no Jurisdiction to Find the Three-Day Attorney-Review Clause is Not Required in an Auction Sale When the Contract is Prepared by a Realtor

In its opinion, the lower court analyzed the sale of goods under the New Jersey Uniform Commercial Code (NJUCC), indicating in auction sales, the bid constitutes an acceptance of the offer of sale of property, citing N.J.S.A. 12A:2-328. The NJSBA contends that this analysis is misplaced. N.J.S.A. 12A:2-105 defines goods as "all things (including specifically manufactured goods) which are movable at the time of identification to the contract for the sale other than money in which the price is to be paid, investment securities (Chapter 8) and things in action." The term also includes "unborn young animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from the realty (12A:2-107)." Id. Fixed real property does not meet the definition of "goods" under NJUCC. Thus, its terms cannot be applied to real estate sales.

The law is also clear in New Jersey, and throughout the United States, that neither the sale nor lease of real property apply under the Uniform Commercial Code. A review of N.J.S.A. 12A:2-328 makes no reference to the sale of residential real estate but instead deals only with the sale of "goods." Similarly, the language in the NJUCC indicates it is only applicable to leases of "goods," not leases involving real property. See N.J.S.A. 12A:2A-103 (h) and (j); N.J.S.A. 12A:2A-501(5).

The Appellate Division recently affirmed this interpretation of the scope of the NJUCC in Bergenline Prop. Grp., LLC v. Coto, No. A-0259-14T2, 2015 WL 7428755 (App. Div. Nov. 10, 2015) (attached at AA 16). There, the Court rejected an argument that a leasehold issue applies to the NJUCC. The Court explicitly determined that, "the NJUCC, does not govern a lease of a residence. Rather, the 'NJUCC' governs a lease only if it is a lease of goods." Id. at 6.

Similarly, in Four Seasons at North Caldwell Condominium Ass'n, Inc. v K. Hovnanian at North Caldwell III, LLC, No. ESX-L-7086-18, 2019 WL 2996574 (Law Div. May 28, 2019) (attached at AA 26), the Court held that the NJUCC does not apply to the sale and transactions involving the purchase of condominium units as they are not "movable at the time of identification" nor are they identified as "goods to be severed from realty." Id. at 18.

The Court in this matter also relied on the decision in

Bassford v. Trico Mortgage Company, 273 N.J. Super. 228 (App. Div. 1994) in determining the contract at issue was valid. In Bassford, the Court permitted an auction sale contract to be enforceable without a three-day attorney-review clause or *Opinion 26* language; however, the facts are distinguishable from this case because in Bassford, there were no licensed realtors or salesman acting as auctioneers. Because of that, the contract was determined to be exempt from the mandated law. That is not the case here where a realtor filled in the blanks in the contract at issue before presenting it to the buyer. See Calvert, 128 N.J. 37 (1992). Moreover, it appears that the contract in this matter was actually prepared by the realtor since they are mentioned by name throughout and many of the provisions, especially paragraph 29, seek to exclusively protect the realtor.

Accordingly, neither the UCC, nor the Bassford decision provided any authority to the lower court to carve out an auction exception and change the law by failing to follow the mandated requirements in NJ State Bar Ass'n and In Re Opinion 26. As noted earlier, under the state Constitution, the New Jersey Supreme Court has exclusive authority over the practice of law and the jurisdiction to do that. And, presumably, the Supreme Court would only carve out an exception if it was consistent with the notions of consumer protection that motivated the establishment of those requirements in the first place.

For these reasons, the NJSBA posits that the analysis the lower court relied upon to uphold the contract at issue is misguided. Rather, all realtor-prepared residential real estate contracts, no matter the circumstances of their formation, must be held to the standards enumerated elsewhere in this brief. Because the contract in this case failed to meet those standards, it should be declared unenforceable.

Conclusion

For the foregoing reasons, the New Jersey State Bar Association respectfully requests that this Court find the contract in this matter unenforceable since: (1) there was no attorney-review clause inserted into the auction contract of sale required under NJ State Bar Ass'n, 93 N.J. 470, modified, 94 N.J. 449 (1983); (2) the contract did not contain the mandated language required in In re Opinion 26, 139 N.J. 323 (1995); (3) the provisions required in N.J.A.C. 11:5-6.2(g) were not followed; and (4) there is no legal authority for the court below to carve out an exception to the attorney-review clause.

Furthermore, the NJSBA respectfully requests that this Court affirm that all realtor-prepared residential real estate contracts, including those prepared as a result of a residential real estate auction, are subject to the requirements mandated by NJ State Bar Ass'n, In re Opinion 26 and N.J.A.C. 11:5-6.2(g).

Respectfully,

New Jersey State Bar Association

By /s/
Evelyn Padin, Esq.
President
Attorney ID Number: 001991992

Dated: March 5, 2020

APPENDIX

NOTICE

TO BUYER AND SELLER

READ THIS NOTICE BEFORE SIGNING THE CONTRACT

The Law requires real estate brokers to give you the following information before you sign this contract. It requires us to tell you that you must read all of it before you sign. The purpose is to help you in this purchase or sale.

1) As a real estate broker, I represent: ☐ the seller, not the buyer; ☐ the buyer, not the seller; ☐ both the seller and the buyer; ☐ neither the seller nor the buyer.
The title company does not represent either the seller or the buyer.

2) You will not get any legal advice unless you have your own lawyer. Neither I nor anyone from the title company can give legal advice to either the buyer or the seller. If you do not hire a lawyer, no one will represent you in legal matters now or at the closing. Neither I nor the title company will represent you in those matters.

3) The contract is the most important part of the transaction. It determines your rights, risks, and obligations. Signing the contract is a big step. A lawyer would review the contract, help you to understand it, and to negotiate its terms.

4) The contract becomes final and binding unless your lawyer cancels it within the following three business days. If you do not have a lawyer, you cannot change or cancel the contract unless the other party agrees. Neither can the real estate broker nor the title insurance company change the contract.

5) Another important service of a lawyer is to order a survey, title report, or other important reports. The lawyer will review them and help to resolve any questions that may arise about the ownership and condition of the property. These reports and survey can cost you a lot of money. A lawyer will also prepare the documents needed to close title and represent you at the closing.

6) A buyer without a lawyer runs special risks. Only a lawyer can advise a buyer about what to do if problems arise concerning the purchase of this property. The problems may be about the seller's title, the size and shape of the property, or other matters that may affect the value of the property. If either the broker or the title company knows about the problems, they should tell you. But they may not recognize the problem, see it from your point of view, or know what to do. Ordinarily, the broker and the title company have an interest in seeing that the sale is completed, because only then do they usually receive their commissions. So, their interests may differ from yours.

7) Whether you retain a lawyer is up to you. It is your decision. The purpose of this notice is to make sure that you have the information needed to make your decision.

SELLER	DATE	BUYER	DATE
SELLER	DATE	BUYER	DATE
SELLER	DATE	BUYER	DATE
SELLER	DATE	BUYER	DATE
Listing Broker		Selling Broker	

Prepared by: _____
Name of Real Estate Licensee

Elizabeth Fritz Phone: (973)635-8200 Fax: (973)635-8233 Exclusive Listing

NEW JERSEY REALTORS®

STATEWIDE NEW JERSEY REALTORS® STANDARD FORM OF REAL ESTATE SALES CONTRACT

THIS FORM MAY BE USED ONLY IN THE SALE OF A ONE TO FOUR-FAMILY RESIDENTIAL PROPERTY OR VACANT ONE-FAMILY LOTS. THIS FORM IS SUITABLE FOR USE ONLY WHERE THE SELLER HAS PREVIOUSLY EXECUTED A WRITTEN LISTING AGREEMENT.

THIS IS A LEGALLY BINDING CONTRACT THAT WILL BECOME FINAL WITHIN THREE BUSINESS DAYS. DURING THIS PERIOD YOU MAY CHOOSE TO CONSULT AN ATTORNEY WHO CAN REVIEW AND CANCEL THE CONTRACT. SEE SECTION ON ATTORNEY REVIEW FOR DETAILS.

TABLE OF CONTENTS

1. PARTIES AND PROPERTY DESCRIPTION:

_____ **("Buyer")**, _____, **("Buyer")**,

_____ **("Buyer")**, _____, **("Buyer")**,

whose address is/are _____

_____

AGREES TO PURCHASE FROM

_____ **("Seller")**, _____, **("Seller")**,

_____ **("Seller")**, _____, **("Seller")**,

whose address is/are _____

_____

THROUGH THE BROKER(S) NAMED IN THIS CONTRACT AT THE PRICE AND TERMS STATED BELOW, THE FOLLOWING PROPERTY:

Property Address: _____

shown on the municipal tax map of _____ County _____

as Block _____ Lot _____ **(the "Property").**

THE WORDS "BUYER" AND "SELLER" INCLUDE ALL BUYERS AND SELLERS LISTED ABOVE.

2. PURCHASE PRICE:

TOTAL PURCHASE PRICE ..... $ _____

INITIAL DEPOSIT ..... $ _____

ADDITIONAL DEPOSIT ..... $ _____

MORTGAGE ..... $ _____

BALANCE OF PURCHASE PRICE ..... $ _____

Buyer's Initials: _____ **Seller's Initials:** _____

Exclusive Listing

3. MANNER OF PAYMENT:

(A) INITIAL DEPOSIT to be paid by Buyer to ☐ Listing Broker ☐ Participating Broker ☐ Buyer's Attorney ☐ Title Company ☐ Other _____, on or before _____(date) (if left blank, then within five (5) business days after the fully signed Contract has been delivered to both Buyer and the Seller).

(B) ADDITIONAL DEPOSIT to be paid by Buyer to the party who will be responsible for holding the escrow who is identified below on or before _____(date) (if left blank, then within ten (10) calendar days after the fully signed Contract has been delivered to both the Buyer and the Seller).

(C) ESCROW: All initial and additional deposit monies paid by Buyer shall be held in escrow in the NON-INTEREST BEARING TRUST ACCOUNT of _____, ("Escrowee"), until the Closing, at which time all monies shall be paid over to Seller. The deposit monies shall not be paid over to Seller prior to the Closing, unless otherwise agreed in writing by both Buyer and Seller. If Buyer and Seller cannot agree on the disbursement of these escrow monies, the Escrowee may place the deposit monies in Court requesting the Court to resolve the dispute.

(D) IF PERFORMANCE BY BUYER IS CONTINGENT UPON OBTAINING A MORTGAGE:

If payment of the purchase price requires a mortgage loan other than by Seller or other than assumption of Seller's mortgage, Buyer shall apply for the loan through any lending institution of Buyer's choice in writing on lender's standard form within ten (10) calendar days after the attorney-review period is completed or, if this Contract is timely disapproved by an attorney as provided in the Attorney-Review Clause Section of this Contract, then within ten (10) calendar days after the parties agree to the terms of this Contract, and use best efforts to obtain it. Buyer shall supply all necessary information and fees required by the proposed lender and shall authorize the lender to communicate with the real estate brokers(s) and involved attorney(s). Buyer shall obtain a written commitment from the lending institution to make a loan on the property under the following terms:

Principal Amount $ _____ Type of Mortgage: ☐ VA ☐ FHA ☐ Conventional ☐ Other _____
Term of Mortgage: _____ years, with monthly payments based on a _____ year payment schedule.

The written mortgage commitment must be delivered to Seller's agent, who is the Listing Broker identified in Section 30, and Seller's attorney, if applicable, no later than _____(date)(if left blank, then within thirty (30) calendar days after the attorney-review period is completed, or if this Contract is timely disapproved by an attorney as provided in the Attorney-Review Clause Section of this Contract, then within thirty (30) calendar days after the parties agree to the terms of this Contract). Thereafter, if Buyer has not obtained the commitment, then either Buyer or Seller may void this Contract by written notice to the other party and Broker(s) within ten (10) calendar days of the commitment date or any extension of the commitment date, whichever is later. If this Contract is voided, the deposit monies paid by Buyer shall be returned to Buyer notwithstanding any other provision in this Contract, provided, however, if Seller alleges in writing to Escrowee within said ten (10) calendar days of the commitment date or any extension of the commitment date, whichever is later, that the failure to obtain the mortgage commitment is the result of Buyer's bad faith, negligence, intentional conduct or failure to diligently pursue the mortgage application, then Escrowee shall not return the deposit monies to Buyer without the written authorization of Seller.

(E) BALANCE OF PURCHASE PRICE: The balance of the purchase price shall be paid by Buyer in cash, or by certified, cashier's check or trust account check.

Payment of the balance of the purchase price by Buyer shall be made at the closing, which will take place on _____ _____(date) at the office of Buyer's closing agent or such other place as Seller and Buyer may agree ("the Closing").

4. SUFFICIENT ASSETS:

Buyer represents that Buyer has or will have as of the Closing, all necessary cash assets, together with the mortgage loan proceeds, to complete the Closing. Should Buyer not have sufficient cash assets at the Closing, Buyer will be in breach of this Contract and Seller shall be entitled to any remedies as provided by law.

5. ACCURATE DISCLOSURE OF SELLING PRICE:

Buyer and Seller certify that this Contract accurately reflects the gross sale price as indicated in Section 2 of this Contract. Buyer and Seller understand and agree that this information shall be disclosed to the Internal Revenue Service and other governmental agencies as required by law.

6. ITEMS INCLUDED IN SALE:

The Property includes all fixtures permanently attached to the building(s), and all shrubbery, plantings and fencing, gas and electric fixtures, cooking ranges and ovens, hot water heaters, flooring, screens, storm sashes, shades, blinds, awnings, radiator covers, heating apparatus and sump pumps, if any, except where owned by tenants, are included in this sale. All of the appliances shall be in working

order as of the Closing. Seller does not guarantee the condition of the appliances after the Deed and affidavit of title have been delivered to Buyer at the Closing. The following items are also specifically included (If reference is made to the MLS Sheet and/or any other document, then the document(s) referenced should be attached.):

7. ITEMS EXCLUDED FROM SALE: (If reference is made to the MLS Sheet and/or any other document, then the document(s) referenced should be attached.):

8. DATES AND TIMES FOR PERFORMANCE:
Seller and Buyer agree that all dates and times included in this Contract are of the essence. This means that Seller and Buyer must satisfy the terms of this Contract within the time limits that are set in this Contract or will be in default, except as otherwise provided in this Contract or required by applicable law, including but not limited to if the Closing has to be delayed either because a lender does not timely provide documents through no fault of Buyer or Seller or for three (3) business days because of the change of terms as required by the Consumer Financial Protection Bureau.

If Seller requests that any addendum or other document be signed in connection with this Contract, "final execution date," "acknowledgement date," or similar language contained in such document that sets the time period for completion of any condition or contingencies, including but not limited to inspections and financing, shall mean that the time will begin to run after the attorney-review period is completed or, if this Contract is timely disapproved by an attorney as provided in the Attorney-Review Clause Section of this Contract, then from the date the parties agree to the terms of this Contract.

9. CERTIFICATE OF OCCUPANCY AND ZONING COMPLIANCE:
Seller makes no representations concerning existing zoning ordinances, except that Seller's use of the Property is not presently in violation of any zoning ordinances.

Some municipalities may require a Certificate of Occupancy or Housing Code Letter to be issued. If any is required for this Property, Seller shall obtain it at Seller's expense and provide to Buyer prior to Closing and shall be responsible to make and pay for any repairs required in order to obtain the Certificate or Letter. However, if this expense exceeds $ _____ (if left blank, then 1.5% of the purchase price) to Seller, then Seller may terminate this Contract and refund to Buyer all deposit monies plus Buyer's reasonable expenses, if any, in connection with this transaction unless Buyer elects to make repairs in excess of said amount at Buyer's expense, in which event Seller shall not have the right to terminate this Contract. In addition, Seller shall comply with all New Jersey laws, and local ordinances, including but not limited to smoke detectors, carbon monoxide detectors, fire extinguishers and indoor sprinklers, the cost of which shall be paid by Seller and not be considered as a repair cost.

10. MUNICIPAL ASSESSMENTS: (Seller represents that Seller ☐ has ☐ has not been notified of any such municipal assessments as explained in this Section.)

Title shall be free and clear of all assessments for municipal improvements, including but not limited to municipal liens, as well as assessments and liabilities for future assessments for improvements constructed and completed. All confirmed assessments and all unconfirmed assessments that have been or may be imposed by the municipality for improvements that have been completed as of the Closing are to be paid in full by Seller or credited to Buyer at the Closing. A confirmed assessment is a lien against the Property. An unconfirmed assessment is a potential lien that, when approved by the appropriate governmental entity, will become a legal claim against the Property.

11. QUALITY AND INSURABILITY OF TITLE:
At the Closing, Seller shall deliver a duly executed Bargain and Sale Deed with Covenant as to Grantor's Acts or other Deed satisfactory to Buyer. Title to the Property will be free from all claims or rights of others, except as described in this Section and Section 12, of this Contract. The Deed shall contain the full legal description of the Property.

This sale will be subject to utility and other easements and restrictions of record, if any, and such state of facts as an accurate survey might disclose, provided such easement or restriction does not unreasonably limit the use of the Property. Generally, an easement is a right of a person other than the owner of property to use a portion of the property for a special purpose. A restriction is a recorded limitation on the manner in which a property owner may use the property. Buyer does not have to complete the purchase, however, if any easement, restriction or facts disclosed by an accurate survey would substantially interfere with the use of the Property for residential purposes. A violation of any restriction shall not be a reason for Buyer refusing to complete the Closing as long as the title company insures Buyer against loss at regular rates. The sale also will be made subject to applicable zoning ordinances, provided that the ordinances do not render title unmarketable.

Title to the Property shall be good, marketable and insurable, at regular rates, by any title insurance company licensed to do business in New Jersey, subject only to the claims and rights described in this section and Section 12. Buyer agrees to order a title insurance commitment (title search) and survey, if required by Buyer's lender, title company or the municipality where the Property is located, and to furnish copies to Seller. If Seller's title contains any exceptions other than as set forth in this section, Buyer shall notify Seller and Seller shall have thirty (30) calendar days within which to eliminate those exceptions. Seller represents, to the best of Seller's knowledge, that there are no restrictions in any conveyance or plans of record that will prohibit use and/or occupancy of the Property as a _____ family residential dwelling. Seller represents that all buildings and other improvements on the Property are within its boundary lines and that no improvements on adjoining properties extend across boundary lines of the Property.

If Seller is unable to transfer the quality of title required and Buyer and Seller are unable to agree upon a reduction of the purchase price, Buyer shall have the option to either void this Contract, in which case the monies paid by Buyer toward the purchase price shall be returned to Buyer, together with the actual costs of the title search and the survey and the mortgage application fees in preparing for the Closing without further liability to Seller, or to proceed with the Closing without any reduction of the purchase price.

12. POSSESSION, OCCUPANCY AND TENANCIES:

(A) Possession and Occupancy.

Possession and occupancy will be given to Buyer at the Closing. Buyer shall be entitled to possession of the Property, and any rents or profits from the Property, immediately upon the delivery of the Deed and the Closing. Seller shall pay off any person with a claim or right affecting the Property from the proceeds of this sale at or before the Closing.

(B) Tenancies. ☐ **Applicable** ☐ **Not Applicable**

Occupancy will be subject to the tenancies listed below as of Closing. Seller represents that the tenancies are not in violation of any existing Municipal, County, State or Federal rules, regulations or laws. Seller agrees to transfer all security deposits to Buyer at the Closing and to provide to Brokers and Buyer a copy of all leases concerning the tenancies, if any, along with this Contract when it is signed by Seller. Seller represents that such leases can be assigned and that Seller will assign said leases, and Buyer agrees to accept title subject to these leases.

TENANT'S NAME	LOCATION	RENT	SECURITY DEPOSIT	TERM

13. LEAD-BASED PAINT AND/OR LEAD-BASED PAINT HAZARD: (This section is applicable only to all dwellings built prior to 1978.) ☐ **Applicable** ☐ **Not Applicable**

(A) Document Acknowledgement.

Buyer acknowledges receipt of the EPA pamphlet entitled "Protect Your Family From Lead In Your Home." Moreover, a copy of a document entitled "Disclosure of Information and Acknowledgement Lead-Based Paint and Lead-Based Paint Hazards" has been fully completed and signed by Buyer, Seller and Broker(s) and is appended to" and made a part of this Contract.

(B) Lead Warning Statement.

Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

(C) Inspection.

The law requires that, unless Buyer and Seller agree to a longer or shorter period, Seller must allow Buyer a ten (10) day period within which to complete an inspection and/or risk assessment of the Property as set forth in the next paragraph. Buyer, however, has the right to waive this requirement in its entirety.

This Contract is contingent upon an inspection and/or risk assessment (the "Inspection") of the Property by a certified inspector/risk assessor for the presence of lead-based paint and/or lead-based paint hazards. The Inspection shall be ordered and obtained by Buyer at Buyer's expense within ten (10) calendar days after the attorney-review period is completed or, if this Contract is timely disapproved by an attorney as provided in the Attorney-Review Clause Section of this Contract, then within ten (10) days after the parties agree to the terms in this Contract ("Completion Date"). If the Inspection indicates that no lead-based paint or lead-based paint hazard is present at the Property, this contingency clause shall be deemed null and void. If the Inspection indicates that lead-based paint or lead-based paint hazard is present at the Property, this contingency clause will terminate at the time set forth above unless, within five (5) business days from the Completion Date, Buyer delivers a copy of the inspection and/or risk assessment report to Seller and Brokers and (1) advises Seller and Brokers, in writing that Buyer is voiding this Contract; or (2) delivers to Seller and Brokers a written amendment (the "Amendment")

to this Contract listing the specific existing deficiencies and corrections required by Buyer. The Amendment shall provide that Seller agrees to (a) correct the deficiencies; and (b) furnish Buyer with a certification from a certified inspector/risk assessor that the deficiencies have been corrected, before the Closing. Seller shall have _____ (if left blank, then 3) business days after receipt of the Amendment to sign and return it to Buyer or send a written counter-proposal to Buyer. If Seller does not sign and return the Amendment or fails to offer a counter-proposal, this Contract shall be null and void. If Seller offers a counter-proposal, Buyer shall have _____ (if left blank, then 3) business days after receipt of the counter-proposal to accept it. If Buyer fails to accept the counter-proposal within the time limit provided, this Contract shall be null and void.

14. POINT-OF-ENTRY TREATMENT ("POET") SYSTEMS: ☐ Applicable ☐ Not Applicable

A point-of-entry treatment ("POET") system is a type of water treatment system used to remove contaminants from the water entering a structure from a potable well, usually through a filtration process. Seller represents that a POET system has been installed to an existing well on the Property and the POET system was installed and/or maintained using funds received from the New Jersey Spill Compensation Fund Claims Program, N.J.S.A. 58:10-23.11, et seq. The Buyer understands that Buyer will not be eligible to receive any such funds for the continued maintenance of the POET system. Pursuant to N.J.A.C. 7:1J-2.5(c), Seller agrees to notify the Department of Environmental Protection within thirty (30) calendar days of executing this Contract that the Property is to be sold.

15. CESSPOOL REQUIREMENTS: ☐ Applicable ☐ Not Applicable

(This section is applicable if the Property has a cesspool, except in certain limited circumstances set forth in N.J.A.C. 7:9A-3.16.) Pursuant to New Jersey's Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A (the "Standards"), if this Contract is for the sale of real property at which any cesspool, privy, outhouse, latrine or pit toilet (collectively "Cesspool") is located, the Cesspool must be abandoned and replaced with an individual subsurface sewage disposal system at or before the time of the real property transfer, except in limited circumstances.

(A) Seller represents to Buyer that ☐ no Cesspool is located at or on the Property, or ☐ one or more Cesspools are located at or on the Property. **[If there are one or more Cesspools, then also check EITHER Box 1 or 2 below.]**

1. ☐ Seller agrees that, prior to the Closing and at its sole cost and expense, Seller shall abandon and replace any and all Cesspools located at or on the Property and replace such Cesspools with an individual subsurface sewage disposal system ("System") meeting all the requirements of the Standards. At or prior to the Closing, Seller shall deliver to Buyer a certificate of compliance ("Certificate of Compliance") issued by the administrative authority ("Administrative Authority") (as those terms are defined in N.J.A.C. 7:9A-2.1) with respect to the System. Notwithstanding the foregoing, if the Administrative Authority determines that a fully compliant system cannot be installed at the Property, then Seller shall notify Buyer in writing within three (3) business days of its receipt of the Administrative Authority's determination of its intent to install either a nonconforming System or a permanent holding tank, as determined by the Administrative Authority ("Alternate System"), and Buyer shall then have the right to void this Contract by notifying Seller in writing within seven (7) business days of receipt of the notice from Seller. If Buyer fails to timely void this Contract, Buyer shall have waived its right to cancel this Contract under this paragraph, and Seller shall install the Alternate System and, at or prior to the Closing, deliver to Buyer such Certificate of Compliance or other evidence of approval of the Alternate System as may be issued by the Administrative Authority. The delivery of said Certificate of Compliance or other evidence of approval shall be a condition precedent to the Closing; or

2. ☐ Buyer agrees that, at its sole cost and expense, Buyer shall take all actions necessary to abandon and replace any and all Cesspools located at or on the Property and replace such Cesspools with a System meeting all the requirements of the Standards or an Alternate System. Buyer shall indemnify and hold Seller harmless for any and all costs, damages, claims, fines, penalties and assessments (including but not limited to reasonable attorneys' and experts' fees) arising from Buyer's violation of this paragraph. This paragraph shall survive the Closing.

(B) If prior to the Closing, either Buyer or Seller becomes aware of any Cesspool at or on the Property that was not disclosed by Seller at or prior to execution of this Contract, the party with knowledge of the newly identified Cesspool shall promptly, but in no event later than three (3) business days after receipt of such knowledge, advise the other party of the newly identified Cesspool in writing. In such event, the parties in good faith shall agree, no later than seven (7) business days after sending or receiving the written notice of the newly identified Cesspool, or the day preceding the scheduled Closing, whichever is sooner, to proceed pursuant to subsection (A) 1 or 2 above or such other agreement as satisfies the Standards, or either party may terminate this Contract.

16. INSPECTION CONTINGENCY CLAUSE:

(A) Responsibilities of Home Ownership.

Buyer and Seller acknowledge and agree that, because the purchase of a home is one of the most significant investments a person can make in a lifetime, all aspects of this transaction require considerable analysis and investigation by Buyer before closing title to the Property. While Brokers and salespersons who are involved in this transaction are trained as licensees under the New Jersey Licensing Act they readily acknowledge that they have had no special training or experience with respect to the complexities pertaining to the multitude of structural, topographical and environmental components of this Property. For example, and not by way of limitation, Brokers and salespersons have no special training, knowledge or experience with regard to discovering and/or evaluating physical defects, including

structural defects, roof, basement, mechanical equipment, such as heating, air conditioning, and electrical systems, sewage, plumbing, exterior drainage, termite, and other types of insect infestation or damage caused by such infestation. Moreover, Brokers and salespersons similarly have no special training, knowledge or experience with regard to evaluation of possible environmental conditions which might affect the Property pertaining to the dwelling, such as the existence of radon gas, formaldehyde gas, airborne asbestos fibers, toxic chemicals, underground storage tanks, lead, mold or other pollutants in the soil, air or water.

(B) Radon Testing, Reports and Mitigation.
(Radon is a radioactive gas which results from the natural breakdown of uranium in soil, rock and water. It has been found in homes all over the United States and is a carcinogen. For more information on radon, go to www.epa.gov/radon/pubs/citguide.html and www.nj.gov/dep/rpp/radon or call the NJ Radon Hot Line at 800-648-0394 or 609-984- 5425.)

If the Property has been tested for radon prior to the date of this Contract, Seller agrees to provide to Buyer, at the time of the execution of this Contract, a copy of the result of the radon test(s) and evidence of any subsequent radon mitigation or treatment of the Property. In any event, Buyer shall have the right to conduct a radon inspection/test as provided and subject to the conditions set forth in paragraph (D) below. If any test results furnished or obtained by Buyer indicate a concentration level of 4 picocuries per liter (4.0 pCi/L) or more in the subject dwelling, Buyer shall then have the right to void this Contract by notifying Seller in writing within seven (7) business days of the receipt of any such report. For the purposes of this Section 16, Seller and Buyer agree that, in the event a radon gas concentration level in the subject dwelling is determined to be less than 4 picocuries per liter (4.0 pCi/L) without any remediation, such level of radon gas concentration shall be deemed to be an acceptable level ("Acceptable Level") for the purposes of this Contract. Under those circumstances, Seller shall be under no obligation to remediate, and this contingency clause as it relates to radon shall be deemed fully satisfied.

If Buyer's qualified inspector reports that the radon gas concentration level in the subject dwelling is four picocuries per liter (4.0 pCi/L) or more, Seller shall have a seven (7) business day period after receipt of such report to notify Buyer in writing that Seller agrees to remediate the gas concentration to an Acceptable Level (unless Buyer has voided this Contract as provided in the preceding paragraph). Upon such remediation, the contingency in this Contract which relates to radon shall be deemed fully satisfied. If Seller fails to notify Buyer of Seller's agreement to so remediate, such failure to so notify shall be deemed to be a refusal by Seller to remediate the radon level to an Acceptable Level, and Buyer shall then have the right to void this Contract by notifying Seller in writing within seven (7) calendar days thereafter. If Buyer fails to void this Contract within the seven (7) day period, Buyer shall have waived Buyer's right to cancel this Contract and this Contract shall remain in full force and effect, and Seller shall be under no obligation to remediate the radon gas concentration. If Seller agrees to remediate the radon to an Acceptable Level, such remediation and associated testing shall be completed by Seller prior to the Closing.

(C) Infestation and/or Damage By Wood Boring Insects.
Buyer, shall have the right to have the Property inspected by a licensed exterminating company of Buyer's choice, for the purpose of determining if the Property is free from infestation and damage from termites or other wood destroying insects. If Buyer chooses to make this inspection, Buyer shall pay for the inspection unless Buyer's lender prohibits Buyer from paying, in which case Seller shall pay. The inspection must be completed and written reports must be furnished to Seller and Broker(s) within _____ (if left blank, then 14) calendar days after the attorney-review period is completed or, if this Contract is timely disapproved by an attorney as provided in the Attorney-Review Clause Section of this Contract, then within _____ (if left blank, then 14) calendar days after the parties agree to the terms of this Contract. This report shall state the nature and extent of any infestation and/or damage and the full cost of treatment for any infestation. Seller agrees to treat any infestation and cure any damage at Seller's expense prior to Closing, provided however, if the cost to cure exceeds 1% of the purchase price of the Property, then either party may void this Contract provided they do so within _____ (if left blank, then 7) business days after the report has been delivered to Seller and Brokers. If Buyer and Seller are unable to agree upon who will pay for the cost to cure and neither party timely voids this Contract, then Buyer will be deemed to have waived its right to terminate this Contract and will bear the cost to cure that is over 1% of the purchase price, with Seller bearing the cost that is under 1% of the purchase price.

(D) Buyer's Right to Inspections.
Buyer acknowledges that the Property is being sold in an "as is" condition and that this Contract is entered into based upon the knowledge of Buyer as to the value of the land and whatever buildings are upon the Property, and not on any representation made by Seller, Brokers or their agents as to character or quality of the Property. Therefore, Buyer, at Buyer's sole cost and expense, is granted the right to have the dwelling and all other aspects of the Property, inspected and evaluated by "qualified inspectors" (as the term is defined in subsection G below) for the purpose of determining the existence of any physical defects or environmental conditions such as outlined above. If Buyer chooses to make inspections referred to in this paragraph, such inspections must be completed, and written reports including a list of repairs Buyer is requesting must be furnished to Seller and Brokers within _____ (if left blank, then 14) calendar days after the attorney-review period is completed or, if this Contract is timely disapproved by an attorney as provided in the Attorney-Review Clause Section of this Contract, then within _____ (if left blank, then 14) calendar days after the parties agree to the terms of this Contract. If Buyer fails to furnish such written reports to Seller and Brokers within the _____ (if left blank, then 14) calendar days specified in this paragraph, this contingency clause shall be deemed waived by Buyer, and the Property shall be deemed acceptable by Buyer. The time period for furnishing the inspection reports is referred to as the "Inspection Time Period." Seller shall have all utilities in service for inspections.

(E) Responsibility to Cure.
If any physical defects or environmental conditions (other than radon or woodboring insects) are reported by the qualified inspectors to Seller within the Inspection Time Period, Seller shall then have seven (7) business days after the receipt of such reports to notify Buyer in writing that Seller shall correct or cure any of the defects set forth in such reports. If Seller fails to notify Buyer of Seller's agreement to so cure and correct, such failure to so notify shall be deemed to be a refusal by Seller to cure or correct such defects. If Seller fails to agree to cure or correct such defects within the seven (7) business day period, or if the environmental condition at the Property (other than radon) is incurable and is of such significance as to unreasonably endanger the health of Buyer, Buyer shall then have the right to void this Contract by notifying Seller in writing within seven (7) business days thereafter. If Buyer fails to void this Contract within the seven (7) business day period, Buyer shall have waived Buyer's right to cancel this Contract and this Contract shall remain in full force, and Seller shall be under no obligation to correct or cure any of the defects set forth in the inspections. If Seller agrees to correct or cure such defects, all such repair work shall be completed by Seller prior to the closing of title. Radon at the Property shall be governed by the provisions of Paragraph (B), above.

(F) Flood Hazard Area (if applicable).
The federal and state governments have designated certain areas as flood areas. If the Property is located in a flood area, the use of the Property may be limited. If Buyer's inquiry reveals that the Property is in a flood area, Buyer may cancel this Contract within ten (10) calendar days after the attorney-review period is completed or, if this Contract is timely disapproved by an attorney as provided in the Attorney-Review Clause Section of this Contract, then within ten (10) calendar days after the parties agree to the terms of this Contract. If the mortgage lender requires flood insurance, then Buyer shall be responsible for obtaining such insurance on the Property. For a flood policy to be in effect immediately, there must be a loan closing. There is a (30) calendar day wait for flood policies to be in effect for cash transactions. Therefore, cash buyers are advised to make application and make advance payment for a flood policy at least thirty (30) calendar days in advance of closing if they want coverage to be in effect upon transfer of title.

Buyer's mortgage lender may require Buyer to purchase flood insurance in connection with Buyer's purchase of this Property. The National Flood Insurance Program ("NFIP") provides for the availability of flood insurance but also establishes flood insurance policy premiums based on the risk of flooding in the area where properties are located. Due to amendments to federal law governing the NFIP, those premiums are increasing and, in some cases, will rise by a substantial amount over the premiums previously charged for flood insurance for the Property. As a result, Buyer should not rely on the premiums paid for flood insurance on this Property previously as an indication of the premiums that will apply after Buyer completes the purchase. In considering Buyer's purchase of this Property, Buyer is therefore urged to consult with one or more carriers of flood insurance for a better understanding of flood insurance coverage, the premiums that are likely to be required to purchase such insurance and any available information about how those premiums may increase in the future.

(G) Qualifications of Inspectors.
Where the term "qualified inspectors" is used in this Contract, it is intended to refer to persons or businesses that are licensed or certified by the State of New Jersey for such purpose.

17. MEGAN'S LAW STATEMENT:
Under New Jersey law, the county prosecutor determines whether and how to provide notice of the presence of convicted sex offenders in an area. In their professional capacity, real estate licensees are not entitled to notification by the county prosecutor under Megan's Law and are unable to obtain such information for you. Upon closing, the county prosecutor may be contacted for such further information as may be disclosable to you.

18. MEGAN'S LAW REGISTRY:
Buyer is notified that New Jersey law establishes an Internet Registry of Sex Offenders that may be accessed at www.njsp.org. Neither Seller or any real estate broker or salesperson make any representation as to the accuracy of the registry.

19. NOTIFICATION REGARDING OFF-SITE CONDITIONS: (Applicable to all resale transactions.)
Pursuant to the New Residential Construction Off-Site Conditions Disclosure Act, N.J.S.A. 46:3C-1, et. seq, the clerks of municipalities in New Jersey maintains lists of off-site conditions which may affect the value of residential properties in the vicinity of the off-site condition. Buyers may examine the lists and are encouraged to independently investigate the area surrounding this property in order to become familiar with any off-site conditions which may affect the value of the property. In cases where a property is located near the border of a municipality, buyers may wish to also examine the list maintained by the neighboring municipality.

20. AIR SAFETY AND ZONING NOTICE:
Any person who sells or transfers a property that is in an airport safety zone as set forth in the New Jersey Air Safety and Zoning Act of 1983, N.J.S.A. 6:1-80, et seq., and appearing on a municipal map used for tax purposes as well as Seller's agent, shall provide notice to a prospective buyer that the property is located in an airport safety zone prior to the signing of the contract of sale. The Air Safety and Zoning Act also requires that each municipality in an airport safety zone enact an ordinance or ordinances incorporating the standards promulgated under the Act and providing for their enforcement within the delineated areas in the municipality. Buyer acknowledges

receipt of the following list of airports and the municipalities that may be affected by them and that Buyer has the responsibility to contact the municipal clerk of any affected municipality concerning any ordinance that may affect the Property.

Municipality	Airport(s)	Municipality	Airport(s)
Alexandria Tp.	Alexandria & Sky Manor	Manalapan Tp. (Monmouth Cty.)	Old Bridge
Andover Tp.	Aeroflex-Andover & Newton	Mansfield Tp.	Hackettstown
Bedminister Tp.	Somerset	Manville Bor.	Central Jersey Regional
Berkeley Tp.	Ocean County	Medford Tp.	Flying W
Berlin Bor.	Camden County	Middle Tp.	Cape May County
Blairstown Tp.	Blairstown	Millville	Millville Municipal
Branchburg Tp.	Somerset	Monroe Tp. (Gloucester Cty.)	Cross Keys & Southern Cross
Buena Bor. (Atlantic Cty.)	Vineland-Downtown	Monroe Tp. (Middlesex Cty.)	Old Bridge
Dennis Tp.	Woodbine Municipal	Montgomery Tp.	Princeton
Eagleswood Tp.	Eagles Nest	Ocean City	Ocean City
Ewing Tp.	Trenton-Mercer County	Old Bridge Tp.	Old Bridge
E. Hanover Tp.	Morristown Municipal	Oldsman Tp.	Oldmans
Florham Park Bor.	Morristown Municipal	Pemberton Tp.	Pemberton
Franklin Tp. (Gloucester Cty.)	Southern Cross & Vineland Downtown	Pequannock Tp.	Lincoln Park
Franklin Tp. (Hunterdon Cty.)	Sky Manor	Readington Tp.	Solberg-Hunterdon
Franklin Tp. (Somerset Cty.)	Central Jersey Regional	Rocky Hill Boro.	Princeton
Green Tp.	Trinca	Southampton Tp.	Red Lion
Hammonton Bor.	Hammonton Municipal	Springfield Tp.	Red Wing
Hanover Tp.	Morristown Municipal	Upper Deerfield Tp.	Bucks
Hillsborough Tp.	Central Jersey Regional	Vineland City	Kroelinger & Vineland Downtown
Hopewell Tp. (Mercer Cty.)	Trenton-Mercer County	Wall Tp.	Monmouth Executive
Howell Tp.	Monmouth Executive	Wantage Tp.	Sussex
Lacey Tp.	Ocean County	Robbinsville	Trenton-Robbinsville
Lakewood Tp.	Lakewood	West Milford Tp.	Greenwood Lake
Lincoln Park Bor.	Lincoln Park	Winslow Tp.	Camden County
Lower Tp.	Cape May County	Woodbine Bor.	Woodbine Municipal
Lumberton Tp.	Flying W & South Jersey Regional		

The following airports are not subject to the Airport Safety and Zoning Act because they are subject to federal regulation or within the jurisdiction of the Port of Authority of New York and New Jersey and therefore are not regulated by New Jersey: Essex County Airport, Linden Airport, Newark Liberty Airport, Teterboro Airport, Little Ferry Seaplane Base, Atlantic City International Airport, and Maguire Airforce Base and NAEC Lakehurst.

21. BULK SALES:

The New Jersey Bulk Sales Law, N.J.S.A. 54:50-38, (the "Law") applies to the sale of certain residential property. Under the Law, Buyer may be liable for taxes owed by Seller if the Law applies and Buyer does not deliver to the Director of the New Jersey Division of Taxation (the "Division") a copy of this Contract and a notice on a form required by the Division (the "Tax Form") at least ten (10) business days prior to the Closing. If Buyer decides to deliver the Tax Form to the Division, Seller shall cooperate with Buyer by promptly providing Buyer with any information that Buyer needs to complete and deliver the Tax Form in a timely manner. Buyer promptly shall deliver to Seller a copy of any notice that Buyer receives from the Division in response to the Tax Form.

The Law does not apply to the sale of a simple dwelling house, or the sale or lease of a seasonal rental property, if Seller is an individual, estate or trust, or any combination thereof, owning the simple dwelling house or seasonal rental property as joint tenants, tenants in common or tenancy by the entirety. A simple dwelling house is a one or two family residential building, or a cooperative or condominium unit used as a residential dwelling, none of which has any commercial property. A seasonal rental property is a time share, or a dwelling unit that is rented for residential purposes for a term of not more than 125 consecutive days, by an owner that has a permanent residence elsewhere.

If, prior to the Closing, the Division notifies Buyer to withhold an amount (the "Tax Amount") from the purchase price proceeds for possible unpaid tax liabilities of Seller, Buyer's attorney or Buyer's title insurance company (the "Escrow Agent") shall withhold the Tax Amount from the closing proceeds and place that amount in escrow (the "Tax Escrow"). If the Tax Amount exceeds the amount of available closing proceeds, Seller shall bring the deficiency to the Closing and the deficiency shall be added to the Tax Escrow. If the Division directs the Escrow Agent or Buyer to remit funds from the Tax Escrow to the Division or some other entity, the Escrow Agent or Buyer shall do so. The Escrow Agent or Buyer shall only release the Tax Escrow, or the remaining balance thereof, to Seller (or as otherwise directed by the Division) upon receipt of written notice from the Division that it can be released, and that no liability will be asserted under the Law against Buyer.

22. NOTICE TO BUYER CONCERNING INSURANCE:
Buyer should obtain appropriate casualty and liability insurance for the Property. Buyer's mortgage lender will require that such insurance be in place at Closing. Occasionally, there are issues and delays in obtaining insurance. Be advised that a "binder" is only a temporary commitment to provide insurance coverage and is not an insurance policy. Buyer is therefore urged to contact a licensed insurance agent or broker to assist Buyer in satisfying Buyer's insurance requirements.

23. MAINTENANCE AND CONDITION OF PROPERTY:
Seller agrees to maintain the grounds, buildings and improvements, in good condition, subject to ordinary wear and tear. The premises shall be in "broom clean" condition and free of debris as of the Closing. Seller represents that all electrical, plumbing, heating and air conditioning systems (if applicable), together with all fixtures included within the terms of the Contract now work and shall be in proper working order at the Closing. Seller further states, that to the best of Seller's knowledge, there are currently no leaks or seepage in the roof, walls or basement. Seller does not guarantee the continuing condition of the premises as set forth in this Section after the Closing.

24. RISK OF LOSS:
The risk of loss or damage to the Property by fire or otherwise, except ordinary wear and tear, is the responsibility of Seller until the Closing.

25. INITIAL AND FINAL WALK-THROUGHS:
In addition to the inspections set forth elsewhere in this Contract, Seller agrees to permit Buyer or Buyer's duly authorized representative to conduct an initial and a final walk-through inspection of the interior and exterior of the Property at any reasonable time before the Closing. Seller shall have all utilities in service for the inspections.

26. ADJUSTMENTS AT CLOSING:
Seller shall pay for the preparation of the Deed, realty transfer fee, lien discharge fees, if any, and one-half of the title company charges for disbursements and attendance allowed by the Commissioner of Insurance; but all searches, title insurance premium and other conveyancing expenses are to be paid for by Buyer.

Seller and Buyer shall make prorated adjustments at Closing for items which have been paid by Seller or are due from Seller, such as real estate taxes, water and sewer charges that could be claims against the Property, rental and security deposits, association and condominium dues, and fuel in Seller's tank. Adjustments of fuel shall be based upon physical inventory and pricing by Seller's supplier. Such determination shall be conclusive.

If Buyer is assuming Seller's mortgage loan, Buyer shall credit Seller for all monies, such as real estate taxes and insurance premiums paid in advance or on deposit with Seller's mortgage lender. Buyer shall receive a credit for monies, which Seller owes to Seller's Mortgage lender, such as current interest or a deficit in the mortgage escrow account.

If the Property is used or enjoyed by not more than four families and the purchase price exceeds $1,000,000, then pursuant to N.J.S.A. 46:15-7.2, Buyer will be solely responsible for payment of the fee due for the transfer of the Property, which is the so-called "Mansion "Tax, in the amount of one (1%) percent of the purchase price.

Unless an exemption applies, non-resident individuals, estates, or trusts that sell or transfer real property in New Jersey are required to make an estimated gross income tax payment to the State of New Jersey on the gain from a transfer/sale of real property (the so-called "Exit Tax,") as a condition of the recording of the deed.

If Seller is a foreign person (an individual, corporation or entity that is a non-US resident) under the Foreign Investment in Real Property Tax Act of 1980, as amended ("FIRPTA"), then with a few exceptions, a portion of the proceeds of sale may need to be withheld from Seller and paid to the Internal Revenue Service as an advance payment against Seller's tax liability.

Seller agrees that, if applicable, Seller will (a) be solely responsible for payment of any state or federal income tax withholding amount(s) required by law to be paid by Seller (which Buyer may deduct from the purchase price and pay at the Closing); and (b) execute and deliver to Buyer at the Closing any and all forms, affidavits or certifications required under state and federal law to be filed in connection with the amount(s) withheld.

There shall be no adjustment on any Homestead Rebate due or to become due.

27. FAILURE OF BUYER OR SELLER TO CLOSE:
If Seller fails to close title to the Property in accordance with this Contract, Buyer then may commence any legal or equitable action to which Buyer may be entitled. If Buyer fails to close title in accordance with this Contract, Seller then may commence an action for damages it has suffered, and, in such case, the deposit monies paid on account of the purchase price shall be applied against such damages. If Buyer or Seller breach this Contract, the breaching party will nevertheless be liable to Brokers for the commissions in the

amount set forth in this Contract, as well as reasonable attorneys' fees, costs and such other damages as are determined by the Court.

28. CONSUMER INFORMATION STATEMENT ACKNOWLEDGMENT:
By signing below, Seller and Buyer acknowledge they received the Consumer Information Statement on New Jersey Real Estate Relationships from the Brokers prior to the first showing of the Property.

29. DECLARATION OF BROKER(S)'S BUSINESS RELATIONSHIP(S):
(A) _____, (name of firm) and its authorized representative (s) _____

_____
(name(s) of licensee(s))

ARE OPERATING IN THIS TRANSACTION AS A (indicate one of the following)
☐ **SELLER'S AGENT** ☐ **BUYER'S AGENT** ☐ **DISCLOSED DUAL AGENT** ☐ **TRANSACTION BROKER.**

(B) (If more than one firm is participating, provide the following.) INFORMATION SUPPLIED BY _____ (name of other firm) HAS INDICATED THAT IT IS OPERATING IN THIS TRANSACTION AS A (indicate one of the following)
☐ **SELLER'S AGENT** ☐ **BUYER'S AGENT** ☐ **TRANSACTION BROKER.**

30. BROKERS' INFORMATION AND COMMISSION:
The commission, in accord with the previously executed listing agreement, shall be due and payable at the Closing and payment by Buyer of the purchase consideration for the Property. Seller hereby authorizes and instructs whomever is the disbursing agent to pay the full commission as set forth below to the below-mentioned Brokerage Firm(s) out of the proceeds of sale prior to the payment of any such funds to Seller. Buyer consents to the disbursing agent making said disbursements. The commission shall be paid upon the purchase price set forth in Section 2 and shall include any amounts allocated to, among other things, furniture and fixtures.

Listing Firm REC License ID

Listing Agent REC License ID

Address

Office Telephone Fax Agent Cell Phone

(Per Listing Agreement)

E-mail **Commission due Listing Firm**

Participating Firm REC License ID

Participating Agent REC License ID

Address

Office Telephone Fax Agent Cell Phone

E-mail **Commission due Participating Firm**

31. EQUITABLE LIEN:
Under New Jersey law, brokers who bring the parties together in a real estate transaction are entitled to an equitable lien in the amount of their commission. This lien attaches to the property being sold from when the contract of sale is signed until the closing and then to the funds due to seller at closing, and is not contingent upon the notice provided in this Section. As a result of this lien, the party who disburses the funds at the Closing in this transaction should not release any portion of the commission to any party other than Broker(s) and, if there is a dispute with regard to the commission to be paid, should hold the disputed amount in escrow until the dispute with Broker(s) is resolved and written authorization to release the funds is provided by Broker(s).

32. DISCLOSURE THAT BUYER OR SELLER IS A REAL ESTATE LICENSEE: ☐ Applicable ☐ Not Applicable
A real estate licensee in New Jersey who has an interest as a buyer or seller of real property is required to disclose in the sales contract that the person is a licensee. _____ therefore discloses that he/she is licensed in New Jersey as a real estate ☐ broker ☐ broker-salesperson ☐ salesperson ☐ referral agent.

33. BROKERS TO RECEIVE CLOSING DISCLOSURE AND OTHER DOCUMENTS:
Buyer and Seller agree that Broker(s) involved in this transaction will be provided with the Closing Disclosure documents and any amendments to those documents in the same time and manner as the Consumer Financial Protection Bureau requires that those documents be provided to Buyer and Seller. In addition, Buyer and Seller agree that, if one or both of them hire an attorney who disapproves this Contract as provided in the Attorney-Review Clause Section, then the attorney(s) will notify the Broker(s) in writing when either this Contract is finalized or the parties decide not to proceed with the transaction.

34. PROFESSIONAL REFERRALS:
Seller and Buyer may request the names of attorneys, inspectors, engineers, tradespeople or other professionals from their Brokers involved in the transaction. Any names provided by Broker(s) shall not be deemed to be a recommendation or testimony of competency of the person or persons referred. Seller and Buyer shall assume full responsibility for their selection(s) and hold Brokers and/or salespersons harmless for any claim or actions resulting from the work or duties performed by these professionals.

35. ATTORNEY-REVIEW CLAUSE:
(1) Study by Attorney
Buyer or Seller may choose to have an attorney study this Contract. If an attorney is consulted, the attorney must complete his or her review of the Contract within a three-day period. This Contract will be legally binding at the end of this three-day period unless an attorney for Buyer or Seller reviews and disapproves of the Contract.

(2) Counting the Time
You count the three days from the date of delivery of the signed Contract to Buyer and Seller. You do not count Saturdays, Sundays or legal holidays. Buyer and Seller may agree in writing to extend the three-day period for attorney review.

(3) Notice of Disapproval
If an attorney for the Buyer or Seller reviews and disapproves of this Contract, the attorney must notify the Broker(s) and the other party named in this Contract within the three-day period. Otherwise this Contract will be legally binding as written. The attorney must send the notice of disapproval to the Broker(s) by fax, email, personal delivery, or overnight mail with proof of delivery. Notice by overnight mail will be effective upon mailing. The personal delivery will be effective upon delivery to the Broker's office. The attorney may also, but need not, inform the Broker(s) of any suggested revision(s) in the Contract that would make it satisfactory.

36. NOTICES:
All notices shall be by certified mail, fax, email, recognized overnight courier or electronic document (except for notices under the Attorney-Review Clause Section) or by delivering it personally. The certified letter, e-mail, reputable overnight carrier, fax or electronic document will be effective upon sending. Notices to Seller and Buyer shall be addressed to the addresses in Section 1, unless otherwise specified in writing by the respective party.

37. NO ASSIGNMENT:
This Contract shall not be assigned without the written consent of Seller. This means that Buyer may not transfer to anyone else Buyer's rights under this Contract to purchase the Property.

38. ELECTRONIC SIGNATURES AND DOCUMENTS:
Buyer and Seller agree that the New Jersey Uniform Electronic Transaction Act, N.J.S.A. 12A:12-1 to 26, applies to this transaction, including but not limited to the parties and their representatives having the right to use electronic signatures and electronic documents that are created, generated, sent, communicated, received or stored in connection with this transaction. Since Section 11 of the Act provides that acknowledging an electronic signature is not necessary for the signature of such a person where all other information required to be included is attached to or logically associated with the signature or record, such electronic signatures, including but not limited to an electronic signature of one of the parties to this Contract, do not have to be witnessed.

39. CORPORATE RESOLUTIONS:
If Buyer or Seller is a corporate or other entity, the person signing below on behalf of the entity represents that all required corporate resolutions have been duly approved and the person has the authority to sign on behalf of the entity.

40. ENTIRE AGREEMENT; PARTIES LIABLE:
This Contract contains the entire agreement of the parties. No representations have been made by any of the parties, the Broker(s) or its

salespersons, except as set forth in this Contract. This Contract is binding upon all parties who sign it and all who succeed to their rights and responsibilities and only may be amended by an agreement in writing signed by Buyer and Seller.

41. APPLICABLE LAWS:

This Contract shall be governed by and construed in accordance with the laws of the State of New Jersey and any lawsuit relating to this Contract or the underlying transaction shall be venued in the State of New Jersey.

42. ADDENDA:

The following additional terms are included in the attached addenda or riders and incorporated into this Contract (check if applicable):

- ☐ Buyer's Property Sale Contingency
- ☐ Condominium/Homeowner's Associations
- ☐ FHA/VA Loans
- ☐ Lead Based Paint Disclosure (Pre-1978)
- ☐ New Construction
- ☐ Private Sewage Disposal (Other than Cesspool)
- ☐ Private Well Testing
- ☐ Properties With Three (3) or More Units
- ☐ Seller Concession
- ☐ Short Sale
- ☐ Solar Panel
- ☐ Swimming Pools
- ☐ Underground Fuel Tank(s)

43. ADDITIONAL CONTRACTUAL PROVISIONS:

WITNESS:

	BUYER	Date
	BUYER	Date
	BUYER	Date
	BUYER	Date
	SELLER	Date
	SELLER	Date
	SELLER	Date
	SELLER	Date

NEW JERSEY REALTORS®

WIRE FRAUD NOTICE

PROTECT YOURSELF FROM BECOMING A VICTIM OF WIRE FRAUD. Wire fraud has become very common. It typically involves a criminal hacker sending fraudulent wire transfer instructions in an email to an unsuspecting buyer/tenant or seller/landlord in a real estate transaction that appears as though it is from a trusted source, such as the victim's broker, attorney, appraiser, home inspector or title agent. The email may look exactly like other emails that the victim received in the past from such individuals, including having the same or a similar email address, accurate loan and other financial information, and the logo of one of those individuals. If the hacker is successful, the victim will follow the bogus instructions to wire money, such as deposit money or payment of an invoice, to the hacker's account. Once this money has been wired, it may not be possible to recover it.

We strongly recommend that, **before** you wire funds to any party, including your own attorney, real estate broker or title agent, you **personally call** them to confirm the account number and other wire instructions. You only should call them at a number that you have obtained on your own (e.g., from the sales contract, their website, etc.) and should **not** use any phone number that is in any email - **even if the email appears to be from someone you know**.

If you have any reason to believe that your money was sent to a hacker, you must immediately contact your bank and your local office of the Federal Bureau of Investigation, who can work with other agencies to try to recover your money, to advise them where and when the money was sent. You also should promptly file a complaint with the Internet Crime Center at bec.ic3.gov.

Finally, since much of the information included in such fraudulent emails is obtained from email accounts that are not secure, we strongly recommend that you not provide any sensitive personal or financial information in an email or an attachment to an email. Whenever possible, such information, including Social Security numbers, bank account and credit card numbers and wiring instructions, should be sent by more secure means, such as by hand delivery, over the phone, or through secure mail or overnight services.

By signing below, you indicate that you have read and understand the contents of this Notice:

Seller/Landlord: _____ **Date:** _____

Seller/Landlord: _____ **Date:** _____

Buyer/Tenant: _____ **Date:** _____

Buyer/Tenant: _____ **Date:** _____

2015 WL 7428755
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

BERGENLINE PROPERTY GROUP, LLC, Plaintiff–Respondent,
v.
Maria COTO, Defendant–Appellant.

A-0259-14T2
|
Submitted Oct. 6, 2015.
|
Decided Nov. 10, 2015.

On appeal from the Superior Court of New Jersey, Law Division, Special Civil Part, Hudson County, Docket No. LT–14067–13.

Attorneys and Law Firms

Gregory T. Farmer, attorney for appellant.

Roberta L. Tarkan, attorney for respondent.

Before Judges HOFFMAN and LEONE.

Opinion

PER CURIAM.

***1** Plaintiff Bergenline Property Group, LLC obtained an order of eviction after defendant Maria Coto inserted the phrase "signing under protest" beneath her signature on a lease. We affirm the trial court's ruling that defendant's qualified signature failed to effectuate a valid lease. We remand for further fact finding on whether subsequent events affect the trial court's ruling that defendant may execute a judgment of possession.

I.

The following are the facts and procedural history through the trial court's orders. Those orders were based, without objection, on the facts set forth in letters from counsel, which are undisputed unless otherwise noted.

Defendant is a long-term tenant on premises owned and operated by plaintiff. There was an oral lease between the parties for most of the tenancy. On May 14, 2013, plaintiff served a notice to quit on defendant requiring her to execute a written lease or vacate the premises before August 31, 2013. The notice also requested a $1,115 .08 security deposit. Plaintiff said defendant had to sign the lease by June 30, 2013, and pay the security deposit by July 1, 2013. Defendant objected to several provisions of the proposed lease and failed to sign it or pay the security deposit by those dates.

On July 16, 2013, plaintiff sent defendant an additional notice to quit informing her that she was in violation of [ ] *N.J.S.A.* 2A:18–61.1(i), due to her refusal to accept reasonable changes to the terms of her lease after written notice was provided. The notice to quit also informed defendant that her tenancy would terminate on August 31, 2013. Defendant did not sign the lease, pay the security deposit, or vacate the premises by that date.

On September 5, 2013, plaintiff filed an eviction complaint in the Special Civil Part. Following a hearing, plaintiff and defendant, as the court understood, "agreed that the Court will make a final determination regarding the reasonableness of several provisions of the proposed lease. The parties ... agreed that they will be bound by the Court's determination." On February 14, 2014, Judge Marybeth Rogers issued a written opinion in which she modified various terms of the proposed lease. The lease as modified by the court provided, among other things, that: defendant had to pay $1,115.08 as a security deposit; that defendant had to remove a washing machine from her residence that could potentially damage the building; and guests may not stay overnight more than fourteen days in a twelve-month period without advance notice to plaintiff. Despite her prior agreement to be bound by the court-modified lease, defendant refused to sign it. Plaintiff made a motion for a judgment of possession.

On June 12, 2014, Judge Rogers held a hearing on plaintiff's motion for a judgment of possession. Judge Rogers orally ordered defendant to: sign and deliver the lease by 4:00 p.m. on June 16, 2014; pay the $1,115.08 security deposit; adhere to the occupancy restrictions; and remove the washing machine. Defendant failed to meet this deadline or adhere to the modified lease terms.

2 Plaintiff's counsel certified as follows. At about 7:00 p.m. on June 16, 2014, defendant's boyfriend delivered an unwitnessed lease, allegedly signed by defendant, and a postdated check signed by her boyfriend. Plaintiff objected to both the lease and the post-dated check. Plaintiff's counsel agreed to extend, until June 18, 2014, the period of time for defendant to deliver an appropriately-signed lease and a security deposit.

Plaintiff's counsel further certified as follows. On June 18, 2014, defendant's boyfriend delivered two money orders for the security deposit, and a lease signed by defendant and witnessed by defendant's counsel. However, directly below defendant's signature on the lease appeared the words "signing under protest." Plaintiff's counsel said that the "signing under protest" language was unacceptable, and asked defendant to sign the lease in the presence of plaintiff's counsel. Upon arriving at the office of plaintiff's counsel, defendant refused to exit the car, strike the "signing under protest" language, or execute a new lease.

Plaintiff's counsel asked the trial court for a judgment of possession. In letters to the court, defendant's counsel defended defendant's "signing under protest" language as free speech, said it did not change the document, and stated "[p]arenthetically" that "if [plaintiff's counsel] was offended by that statement she could strike that language." However, defendant made no effort to strike that language thereafter. Moreover, defendant's counsel represented that defendant had removed the washing machine, but plaintiff's counsel certified that the washing machine was still visible in plaintiff's apartment.

On July 29, 2014, the court entered a judgment of possession against defendant, and permitted the filing and execution of a warrant of removal. Judge Rogers stressed that defendant placed the notation "signing under protest" under her signature. The court found:

> A meeting of the minds is an essential element to the valid consummation of a contract. *E.g.*, *Cent. 48 Ltd. P'ship v. Macy Dept. Stores Co.*, 355 *N.J.Super.* 390, 406, 810 A.2d 610 (App.Div.2002).

> [Defendant's] notation is an explicit representation of dissatisfaction with the contract. The Court shall not accept [defendant's] signature. Accordingly, [defendant] failed to execute the lease and thus violated the Court's order.

On August 8, 2010, defendant filed a motion for reconsideration. After hearing oral argument, Judge Rogers denied the motion on August 22, 2014. Defendant filed a notice of appeal of the July 29 and August 22 orders.

II.

This case is brought under the New Jersey Anti–Eviction Act, N.J.S.A. 2A:18–61.1 to –61.12. The Act was "designed to limit the eviction of tenants to 'reasonable grounds' and to provide for 'suitable notice' of tenants in the event of an eviction proceeding." *447 Assocs. v. Miranda*, 115 N.J. 522, 527, 559 A.2d 1362 (1989). "[T]enants may not be removed from their residential premises except on one of various enumerated grounds constituting 'good cause.' " *Id.* at 528, 559 A.2d 1362 (citing N.J.S.A. 2A:18–61.1). "One of the statutory grounds occurs if a landlord proposes 'at the termination of a lease, reasonable changes of substance in the terms and conditions of the lease, including specifically any change in the term thereof, which the tenant, after written notice, refuses to accept....' " *Riverview Realty, Inc. v. Williamson*, 284 N.J.Super. 566, 568, 665 A.2d 1150 (App.Div.1995) (quoting N.J.S.A. 2A:18–61.1(i)).

***3** "New Jersey and other jurisdictions have shown an increasing tendency to analogize landlord-tenant law to conventional doctrines of contract law." *McGuire v. Jersey City*, 125 N.J. 310, 321, 593 A.2d 309 (1991). "The interpretation of a contract is subject to de novo review by an appellate court." *Kieffer v. Best Buy*, 205 N.J. 213, 222 (2009). The formation of a contract is likewise reviewed de novo. *See* *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.*, 421 N.J.Super. 404, 430 (App.Div.), certif. granted, 209 N.J. 96 (2011), appeal dismissed, 213 N.J. 47 (2013). We must hew to this standard of review.

III.

As noted by the trial court, "[a] legally enforceable agreement requires 'a meeting of the minds.' " *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 442 (2014) (citation omitted), *cert. denied*, —— U.S. ——, 135 S.Ct. 2084, 192 L. Ed.2d 847 (2015); *Cent. 48 Ltd. P'ship, supra*, 355 N.J.Super. at 406, 810 A.2d 610. "In order for a contract to form, ... there must be a 'meeting of the minds,' as evidenced by each side's express agreement to every term of the contract." *State v. Ernst & Young, L.L.P.*, 386 N.J.Super. 600, 612, 902 A.2d 338 (App.Div.2006) (citation omitted).

" 'In the very nature of the contract, acceptance must be absolute.' " *Ibid.* (citation omitted). "[I]f parties agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract." *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 435, 608 A.2d 280 (1992). "Where the parties do not agree to one or more essential terms, however, courts generally hold that the agreement is unenforceable." *Ibid.* " '[I]t is requisite that there be an unqualified acceptance to conclude the manifestation of assent.' " *Id.* at 435–36, 608 A.2d 280 (citation omitted).

Therefore, the "parties' objective intent governs. A contracting party is bound by the apparent intention he or she outwardly

manifests to the other party. It is immaterial that he or she has a different, secret intention from that outwardly manifested ." *Hagrish v. Olson*, 254 *N.J.Super.* 133, 138, 603 A.2d 108 (App.Div.1992); *accord* *Schor v. FMS Financial Corp.*, 357 *N.J.Super.* 185, 191, 814 A.2d 1108 (App.Div.2002).

The trial court found that, by placing the words "signing under protest" beneath her signature on the lease, defendant manifested an intention that she did not assent to the terms of the modified lease, and thus did not comply with the court's order. Under the particular circumstances here, we agree.

Defendant's "signing under protest" came after a series of refusals by defendant to agree to the terms of the lease. Defendant agreed to be bound by the court's determination of the reasonableness of the challenged terms in the proposed lease, but when the court issued its opinion modifying several terms and ultimately approving the modified lease as reasonable, defendant breached that agreement and refused to sign the modified lease. The court ordered defendant to sign the modified lease and pay the security deposit by a deadline, but defendant failed to do so.[1]

1 Thus, there is no merit to defendant's claim that the trial court failed to give her an opportunity to sign the modified lease. Defendant cites *Housing Auth. & Urban Redevelopment Agency v. Spratley*, 327 *N.J.Super.* 246, 256, 743 A.2d 309 (App.Div.1999) (hereinafter "*Spratley* "), but there we reversed the Special Civil Part's judgment that the defendants did not have to sign the new leases.

*4 After the deadline, defendant tried to present a lease allegedly containing her unwitnessed signature and a post-dated check signed by her boyfriend who was not a tenant. Defendant's offering of an unwitnessed lease that might be contestable by her, and a post-dated third-party payment that would not indicate her agreement, further evidenced her refusal to be bound by the terms of the lease, as well as her defiance of the court's order to sign the lease and pay the security deposit immediately.

When plaintiff gave defendant yet another opportunity to sign the lease, she marked her signature "signing under protest," explicitly manifesting her dissatisfaction with the modified lease.[2] When plaintiff's counsel objected to that language qualifying defendant's signature and asked her to remove it, she refused.

2 *Cf.* *Quigley v. KPMG Peat Marwick, LLP*, 330 *N.J.Super.* 252, 266–267, 749 A.2d 405 (App.Div.) (finding the signer's insertion of "U.D." within his signature, without a "contemporaneous explanation" of the insertion's intended meaning, was not an outward manifestation that he was under duress), *certif. denied*, 165 *N.J.* 527 (2000).

After plaintiff sought a judgment of possession, defendant's counsel stated that plaintiff's counsel could strike the language.[3] However, defendant's counsel did not represent that he had defendant's agreement to remove the language she had added, or that defendant would strike her language. Indeed, defendant made no effort to strike that language or re-sign the lease in the five weeks before the court entered the judgment of possession, or even in the subsequent four weeks before the denial of her motion for reconsideration.

3 Defendant now argues she still retained the power of acceptance of plaintiff's offer of the modified contract. However, her "signing under protest," and her refusal to remove that language, constituted a rejection of the modified lease and "terminate[d] the power of acceptance." *Berberian v. Lynn*, 355 *N.J.Super.* 210, 217, 809 A.2d 865 (App.Div.2002), *aff'd as modified*, 179 *N.J.* 290, 845 A.2d 122 (2004). In any event, plaintiff's request for a judgment of possession withdrew plaintiff's offer, further terminating defendant's power of acceptance.

Finally, defendant's apparent refusal to be bound by the modified lease was further demonstrated by the ongoing dispute regarding whether the washing machine had been removed as required by the modified lease approved by the trial court.

In light of this history, the trial court could properly find that defendant's "signing under protest" did not represent her

agreement to the terms of the modified lease, but rather another in a long series of refusals to agree to its terms. The court could also properly regard defendant's "signing under protest" as another breach of defendant's agreement to be bound by the terms the court found reasonable, and further defiance of the court's order that she sign the agreement.

This unusual history of refusal, particularly defendant's defiance of the trial court's order, supports the court's ruling. No party can "openly defy the court's authority to suit [her] own purposes, and expect to triumph." *Gonzalez v. Safe & Sound Sec. Corp.*, 185 *N.J.* 100, 117, 881 A.2d 719 (2005); *see* *State v. Whaley*, 168 *N.J.* 94, 100, 773 A.2d 61 (2001). The Special Civil Part must deal with a "huge volume" of cases involving often unrepresented litigants. *See* *Chase Bank USA, N.A. v. Staffenberg*, 419 *N.J.Super.* 386, 398 (App.Div.2011); *Tuckey v. Harleysville Ins. Co.*, 236 *N.J.Super.* 221, 224, 565 A.2d 419 (App.Div.1989). Allowing defendant to disregard her agreement to abide by the court's determination, defy its order to sign the modified lease, and employ a series of stratagems to postpone eviction while withholding then qualifying her acceptance, undermines the authority of the court and its ability to function. Moreover, it provides ample evidence to support the trial court's conclusion that defendant's "signing under protest" was not an absolute or unqualified acceptance of the modified lease, as required for the contract to be enforceable under our case law. *See* *Weichert Co. Realtors, supra*, 128 *N.J.* at 435–36, 608 A.2d 280; *Ernst & Young, L.L.P., supra*, 386 *N.J.Super.* at 612, 902 A.2d 338.

*5 A judge's "findings warrant particular deference when they are substantially influenced by [the judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." *State v. Rockford*, 213 *N.J.* 424, 440 (2013) (citations and quotation marks omitted). Here, the trial court had seen defendant testify. It had also observed defendant's actions over many months of litigation. "An appellate court must pay deference to the trial court's feel of the case, given that, on appeal, review is confined to the cold record." *Johnson v. Scaccetti*, 192 *N.J.* 256, 282, 927 A.2d 1269 (2007) (internal quotation marks omitted). Accordingly, we defer to the trial court's finding that defendant's "signing under protest" was not an unqualified acceptance of the modified lease.

IV.

Defendant advances three theories why the trial court erred in finding that her signature "under protest" did not constitute an unqualified acceptance. First, she argues signing the lease "under protest" constituted a legitimate reservation of rights. Second, she asserts the "under protest" language was a grumbling acceptance. Third, she contends the "under protest" language was immaterial.

A.

In support of her contention that the insertion of "signing under protest" constituted a valid reservation of rights, defendant cites *Riverview* and *Spratley*. In *Riverview*, a tenant objected to a termination-at-death clause of a lease, and refused to sign it. *Riverview, supra*, 284 *N.J.Super.* at 568, 665 A.2d 1150. After the trial court entered a judgment of possession against the tenant, the tenant signed the lease, but orally stated that she did so "under protest" and that "she was not waiving her right to appeal the judgment." *Ibid.* Because we believed the validity of such a clause "can best be determined in the light of the circumstances that exist at the time of the defendant's death," we held that the tenant's signing of the lease under protest "is without prejudice to a determination at the time of her death of the legal effect, if any," of the termination-at-death clause. *Id.* at 570. *Riverview* is distinguishable from the instant case. As the trial court noted, the tenant in Riverview did not actually write "signing under protest" on the lease, and was reserving an issue that would arise, and could best be judged, only after

her death.

In the second case defendant cites, [redacted] *Spratley, supra,* 327 *N.J.Super.* at 249, 743 A.2d 309, tenants refused to accept a lease addendum permitting the Housing Authority to bring eviction proceedings for any drug-related criminal activity. Again, we refused to "decide the issue in the abstract," because the proper construction of the addendum could be decided "if a summary disposition action were brought against them for failure to abide by the lease provision." [redacted] *Id.* at 252, 743 A.2d 309. We added that the addendum added little if anything to the prior lease, so "[d]efendants would thus have lost nothing had they signed the leases under protest." [redacted] *Id.* at 253, 743 A.2d 309. We did not state that the tenants could qualify their signatures with the words "signing under protest."

***6** By contrast to *Riverview* and *Spratley,* defendant here actually inserted the "signing under protest" language on the lease to qualify her signature. Moreover, her qualification indicated she did not accept the lease's clauses that were immediately applicable to her present situation, such as the clause barring washing machines. Further, the reasonableness of those clauses was not an issue best reserved for a possible future proceeding, but rather an issue on which the trial court had already ruled. Most importantly, given defendant's history of refusal to agree to the modified lease and her defiance of the court's rulings, the court could find plaintiff's qualified signature did not constitute an acceptance with a valid reservation of rights.

Similarly, we reject defendant's argument that we adopt the approach of *N.J.S.A.* 12A:1–308(a) in the New Jersey Uniform Commercial Code (NJUCC), which states: "A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest,' or the like are sufficient." *Ibid.* However, the NJUCC, does not govern a lease of a residence. Rather, the NJUCC governs a lease only if it is a lease of "goods." *N.J.S.A.* 12A:2A–103 (h), (j); *see also N.J.S.A.* 12A:2A–501(5). Moreover, nothing in the NJUCC states that the trial court was required to find that defendant's insertion of the "signing under protest" language constituted assent, given defendant's prior refusal to sign the modified lease or follow the trial court's orders.

B.

Defendant also argues that adding the words "signing under protest" constitutes a grumbling acceptance. Defendant quotes a treatise which states:

> If the response to an offer indicates dissatisfaction or displeasure with the offer but still manifests an unequivocal and unconditional acceptance, it operates as an acceptance notwithstanding the "grumbling" statements of the offeree. An offeree need not be pleased with an offer; he need not like the offer and may even harbor ill feelings toward the offeror. Nonetheless, he has a power of acceptance and may exercise it though adding an expression of discontent in an otherwise clear manifestation of acceptance. Thus, where an employee responded to a renewal of his contract for another term by suggesting, in effect, "I *Idon't like your offer, I don't think it's right or fair, but I accept it,*" the court rejected the employer's claim that this response was a qualified or conditional acceptance amounting to a counter offer. Rather, these expressions of dissatisfaction constituted a "grumbling acceptance" but an acceptance, nonetheless.
>
> [J. Murray, *Murray on Contracts,* § 49[E] (5th ed.2011).]

However, no New Jersey court, let alone the Supreme Court, has yet adopted the theory of "grumbling acceptance." Nor is this the appropriate case to recognize such a theory. Defendant never explicitly stated "I accept your offer." *Cf. ibid.;* A. Corbin, 1 *Corbin on Contracts,* § 3.30 (1993) (giving the example: "I accept your offer as made, but I still insist that you are driving a very hard bargain."). Defendant cites her signature as acceptance, but she qualified her signature with "signing under protest." Viewed in light of her history of refusing to accept the modified lease, and her defiance of the trial court's orders, the court could find that defendant's "signing under protest" was not an unqualified assent. *See, e.g.,* [redacted] *Hullman v.*

Bd. of Trs., 725 *F.Supp.* 1536, 1543, 1551 (D.Kan.1989) (finding the plaintiff's signing a contract by attaching a memorandum stating he was signing "under protest," and not waiving his rights, was not a grumbling acceptance), *aff'd* 950 *F.2d* 665 (1991). This is not a situation where a contracting party, having accepted the signer's services despite similar protests in the past, then seized on the signer's latest protest to claim lack of assent. *See* *Price v. Okla. Coll. of Osteopathic Med. & Surgery*, 733 P.2d 1357, 1357–59, 1362 (Okla.App.1986). Here, plaintiff consistently refused to accept defendant's "signing under protest" as assent.[4]

[4] Nor is this a situation where the signer, after stating it "accepted with prejudice" or protest, and after receiving the benefits of the agreement, thereafter attempts to claim it never assented to the agreement. *See* *Mass. Hous. Fin. Agency v. Whitney House Assocs.*, 37 Mass.App.Ct. 238, 638 *N.E.2d* 1378, 1380–81 (Mass.App.Ct.1994).

*7 In addition, *Murray on Contracts, supra,* at § 49(C), states that the "offeror is entitled to a clear manifestation of acceptance by the offeree before the offeror will be said to be bound to a contract." "The offeror is not required to guess or draw inferences of assent from the offeree's response to the offer" and the offeror need not "infer assent from an equivocal response, but may reasonably assume [its] offer has not been accepted." *Ibid.* In taking both Sections (C) and (E) of *Murray on Contracts* together, in order for a "grumbling acceptance" to be valid, there must still be a "clear manifestation of acceptance" by the offeree. Here, there was not a clear manifestation of acceptance by defendant considering her history of refusal to agree to the modified lease and her repeated defiance of the trial court's order.

C.

Finally, defendant argues that the "signing under protest" language was immaterial. However, it is undisputed that defendant was "signing under protest" because of the terms in the proposed lease which she had challenged. These terms were essential and material, as demonstrated by the parties' dispute over these terms, their tendering those disputes to the trial court for resolution and agreeing to be bound by it, and the court's determination that those terms were reasonable, just, and fair, and had to be accepted by defendant.

Furthermore, the court expressly found some of the challenged terms to be material. For example, in finding the prohibition on washing machines to be reasonable, the court noted that "[t]he potential damage to the building that can flow from the washing machine is great." With regard to the provision limiting overnight guests, the court recognized that "rent controlled apartments are ripe for abuse," and acknowledged plaintiff's concern that defendant "was renting out rooms."

As set forth above, defendant's "signing under protest" language did not constitute an unqualified acceptance of those essential terms of the modified lease. "Where the parties do not agree to one or more essential terms, however, courts generally hold that the agreement is unenforceable." *Weichert Co. Realtors, supra,* 128 *N.J.* at 435, 608 A.2d 280. Thus, inclusion of that language was material.

V.

Defendant argues that upholding the trial court's rulings would be contrary to the purpose of the Anti–Eviction Act. She cites the findings in the 1986 amendment to the Act:

It is in the public interest of the State to maintain for citizens the broadest protections available under State eviction laws to

> avoid such displacement and resultant loss of affordable housing, which, due to housing's uniqueness as the most costly and difficult to change necessity of life, causes overcrowding, unsafe and unsanitary conditions, blight, burdens on community services, wasted resources, homelessness, emigration from the State and personal hardship, which is particularly severe for vulnerable seniors, the disabled, the frail, minorities, large families, and single parents.
>
> *8 [*N.J.S.A.* 2A:18–61.1a(d).]

However, the Anti–Eviction Act specifically provides that one of the grounds for "good cause" to remove a tenant arises when the landlord proposes "reasonable changes of substance in the terms and conditions of the lease, including specifically any change in the term thereof, which the tenant, after written notice, refuses to accept." *N.J.S.A.* 2A:18–61.1(i). Here, the trial court found that plaintiff had carried its "burden of proving that any change in the terms and conditions of the lease, rental or regulations both is reasonable and does not substantially reduce the rights and privileges to which the tenant was entitled." *Ibid.* The court also found that "the tenant, after written notice, refuse[d] to accept" the modified lease containing the changed terms. *Ibid.* "The clear language of the statute thus indicates that a landlord may remove a tenant" under these circumstances. *See Cashin v. Bello,* — *N.J.* ——, —— (2015)*See Cashin v. Bello,* — *N.J.* ——, —— (2015) (slip op. at 11). As "defendant had been provided some formal means to express her refusal to accept" the challenged terms, and she defied the trial court's contrary rulings, the court was not required to view "indulgently" defendant's non-acceptance of the terms. *447 Assocs., supra,* 115 *N.J.* at 533, 559 A.2d 1362.

In light of the unusual circumstances posed by defendant's history of refusal and defiance, we affirm the trial court's July 29, 2014 order entering a judgment of possession, because defendant's "signing under protest" showed she failed to accept the modified lease. We also affirm the court's August 22, 2014 order denying reconsideration.

VI.

Defendant next argues that subsequent events show her acceptance of the modified lease. She also argues that plaintiff waived any complaint about her "signing under protest" by accepting her payments under that lease.

Following the trial court's denial of defendant's motion for reconsideration, it denied defendant's motion for a stay pending appeal. Defendant then filed in this court an emergent motion for a stay. On September 3, 2014, we granted the stay and ruled that "[d]efendant must comply with all court orders and all terms of the lease as modified by the Court on February 14, 2014, including the timely payment of rent. Within one week, defendant must re-sign the lease and remove the words 'under protest.' "

In accordance with our order, defendant signed a lease on September 8, 2014, omitting the words "signing under protest." Thereafter, in this court, plaintiff filed a motion to vacate the stay pending appeal, alleging that defendant had not removed the washing machine, and defendant filed a cross-motion for summary disposition. On November 13, 2014, we denied both motions. In denying plaintiff's motion, we found:

> The continued presence of a washing machine in the apartment is a violation of trial court's February 14, 2014 order approving the lease as modified, of the modified lease which defendant has signed, and of this court's September 3, 2014 order requiring defendant to comply with all court orders and all terms of the lease as modified. Defendant must remove the washing machine from the premises before November 20, 2014, on which date plaintiff may inspect the apartment to ensure removal. This court's September 3, 2014 order stayed removal and lock-out based on the trial court's July 29, 2014 and August 22, orders only, and shall not be read to prevent plaintiff from seeking removal, lock-out, or other relief from the trial court based on alleged violations of the lease subsequent to September 3,

2014, including failure to remove the washing machine *if* it is still on the premises on November 20, 2014.

*9 Defendant now contends that she has removed the washing machine and thus complied with all of the essential terms of the lease. Defendant also contends that plaintiff, without any reservation of rights, accepted defendant's security deposit and monthly rent payments starting in July 2014.

Plaintiff's appellate brief does not address these allegations because they are related to events that occurred after the orders on appeal. Plaintiff adds only that "acceptance of rent was without prejudice with consent of [defendant's] counsel at the beginning of the eviction trial." Plaintiff also represented that it had not deposited defendant's checks.

We agree with plaintiff that defendant's appeal of the trial court's July 29 and August 22 orders does not encompass these events occurring from September 2014 onward. Further, we lack information about defendant's alleged removal of the washing machine; her alleged compliance with the other terms of the modified lease, such as the occupancy restrictions; plaintiff's alleged acceptance of rent after the judgment of possession; or defendant's counsel's alleged consent thereto.

Accordingly, we remand to the trial court to hold a hearing to consider whether these allegations are true, and whether the events occurring after its August 22 order affect its ruling that plaintiff may execute a judgment of possession.[5]

[5] We note that receipt of "payments after the initiation of statutory dispossess proceedings provides only evidence of a waiver which should be considered together with all other existing circumstances in determining whether the defense of waiver has been sustained." *Jasontown Apartments v. Lynch*, 155 *N.J.Super.* 254, 263, 382 A.2d 688 (App.Div.1978); *accord A.P. Dev. Corp. v. Band*, 113 *N.J.* 485, 497–98, 550 A.2d 1220 (1988).

The trial court may also consider defendant's September 8, 2014 signing of the modified lease pursuant to this court's stay order. Defendant alleges her signature represented not just compliance with a condition of our stay, but her unqualified acceptance of the modified lease. The trial court may assess the truth of that allegation.

Our stay shall continue until the trial court's hearing. We do not retain jurisdiction.

Affirmed and remanded.

All Citations

Not Reported in A.3d, 2015 WL 7428755

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2019 WL 2996574 (N.J.Super.L.) (Trial Order)
Superior Court of New Jersey, Law Division.
Civil Part
Essex County

FOUR SEASONS AT NORTH CALDWELL CONDOMINIUM ASSOCIATION, INC., Plaintiff,
v.
K. HOVNANIAN AT NORTH CALDWELL III, LLC, et al., Defendants.
K. HOVNANIAN AT NORTH CALDWELL III, LLC, et al., Defendants/Third-Party Plaintiffs,
v.
BLUE LINE DRYWALL et al., Third-Party Defendants.

No. ESX-L-7086-18.
May 28, 2019.

Memorandum Opinion

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

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

Keith E. Lynott, Judge.

*1 *Decided*: May 28, 2019

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

This is a construction-defect case alleging breach of contract, fraud, breach-of-trust, and other claims related to the construction of a condominium complex—Four Seasons at North Caldwell (the "Complex"). Four named Defendants—K. Hovnanian at North Caldwell, III, LLC ("KHNC"), Hovnanian Enterprises, Inc. ("Enterprises"), K. Hovnanian Companies, LLC ("KHC"), and K. Hovnanian Enterprises, Inc. ("KHE")[1]—move to dismiss the Complaint of the Plaintiff, Four Seasons at North Caldwell Condominium Association, Inc. (the "Association"). Specifically, Enterprises, KHC, and KHE seek dismissal of all Counts of the Complaint as to those Defendants.[2] The four Defendants also move to dismiss eight of the sixteen Counts in their entirety (including as against KHNC).[3]

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

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

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

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

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

I

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

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

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

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

3. The Developer warrants that the Common Elements will be free from substantial defects due to faulty materials or workmanship for a period of two years from completion of each improvement or facility.

4. The Developer warrants that the Common elements are fit for their intended use, and that within the two-year period set forth above, the Developer will correct any substantial defect within a reasonable time after notification of the defect. ...

5. THE DEVELOPER WARRANTS THAT THE UNITS AND THE COMMON ELEMENTS WILL SUBSTANTIALLY CONFORM TO THE SALES MODELS, DESCRIPTIONS OR PLANS USED TO INDUCE PURCHASERS TO ENTER

INTO CONTRACTS WITH THE DEVELOPER. ...

****

7. The Developer warrants that on-site drainage of surface water runoff is proper and adequate.

8. The Developer warrants that all off-site improvements, if any, installed by it in constructing the Condominium will be free from defects due to faulty materials or workmanship for a period of one year from the date of the construction of the improvement(s).

9. The Developer warrants that the common facilities located outside of the Condominium, if any, installed or constructed by it are fit for their intended use, and that within the two (2) year period described above, the Developer will correct any substantial defect in a common facility installed by it within a reasonable time after notification of the defect.

*3 [(Defs.' Motion, Exh. A, at 48–49.)]

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

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

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

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

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

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

KHE is a wholly owned financing subsidiary of Enterprises. (Compl. ¶ 40.) In this capacity, it provides financing for Enterprises' various affiliates—including KHNC, the developer of the Complex—through revolving credit agreements. (Compl. ¶ 165.) Similar to KHC, KHE has the same officers as Enterprises, as well as no customers, recurring expenses, or employees. (Compl. ¶¶ 44–46.)

The Complaint lodges a range of allegations against varying combinations of Defendants.[5] Count One alleges that all Defendants, including the moving Defendants, "negligently developed, constructed, renovated and oversaw the construction

of the [Complex] in a manner that deviates from acceptable standards of care and in violation of statutes and building codes ...." (Compl. ¶ 78.) It seeks to impose joint-and-several liability for damages, attorneys' fees, interest, and costs.

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

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

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

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

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

Count Nine alleges that the Developer Defendants violated the New Jersey Consumer Fraud Act, N.J.S.A 58:8-1, *et seq.* ("CFA") through the untrue/misleading statements and omissions of material facts alleged in Counts Five and Six. The Plaintiff further avers it suffered ascertainable losses from the alleged violations, and that the Defendants should be jointly and severally liable for such losses, attorneys' fees, interest, and costs.

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

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

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

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

Count Fourteen seeks a remedy of piercing the corporate veil of the Developer Defendants, KHC, and KHE to hold Enterprises liable for the alleged misconduct of the Developer Defendants. This claim is supported by allegations that Enterprises, through a "corporate maze" utilized for all the Hovnanian developments in New Jersey, exercised "pervasive domination and control" over the Developer Defendants, KHC, and KHE such that each of them individually and collectively were "alter egos" of Enterprises.

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

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

Count Sixteen alleges that Enterprises, KHC, and KHE aided and abetted the Developer Defendants in violating the CFA. The Count alleges that these Defendants facilitated such CFA violations by "participating in the marketing and sale" of the Units with "full knowledge" of the defects and the misrepresentations and omissions of material facts related to those defects in the Complex set forth in the POS. (Compl. ¶ 177.) The Count further alleges that these Defendants suppressed such material facts "deliberately and with intent to deceive." (*Ibid.*) As such, the Count seeks to impose joint-and-several liability for damages, attorneys' fees, interest, and costs.

II

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

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

The Court must accept the facts alleged in the pleading as true. *Velantzas*, 109 N.J. at 192 (a court "must assume the facts as asserted by plaintiff are true and give her the benefit of all inferences that may be drawn in her favor") (internal quotation marks omitted); *Malik v. Ruttenberg*, 389 N.J. Super. 489, 494 (App. Div. 2008) (the court must "accept as true the facts alleged in the complaint, and credit all reasonable inferences therefrom"). The pleading party is entitled to "every reasonable inference of fact." *Printing Mart-Morristown*, 116 N.J. at 746. The Court is "not concerned at this stage with whether the

plaintiff can prove the facts averred in the Complaint," but merely with the legal sufficiency of the pleading. *Ibid.*

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

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

III

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

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

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

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

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

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

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

- "Developer Defendants and *the Hovnanian Defendants* knew about many of [the alleged defects] before they began [and while they were] marketing the [Complex] to the public[;] ... had a duty to disclose the [d]efects before and during the marketing of the [Complex] to the public" but failed to do so; and "failed to correct and repair the [d]efects despite demand by the Association." (Compl. ¶¶ 67-75 (emphasis added).)

- "The Developer Defendants and *Hovnanian Defendants* had express knowledge that the Developer Board Defendants were breaching their fiduciary duties to the Association, and they actively aided, abetted and encouraged the Developer Board Defendants in doing so." (Compl. ¶ 99 (emphasis added).)

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

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

- Count One (negligence) alleges that "[all] Defendants had a duty to exercise reasonable care in developing, designing, constructing, and supervising the construction of the [Complex]" but did so negligently. (Compl. ¶ 77-78.)

- Count Seven (breach of express warranties) avers that "[all] Defendants have breached [express] warranties by constructing the Development with construction defects and building code violations, and further by failing to remedy, replace, rectify or otherwise cure said construction defects." (Compl. ¶ 119.)

- Count Eight (breach of implied warranties) alleges that "[all] Defendants breached implied warranties by defectively constructing the Development, in violation of applicable building codes." (Compl. ¶ 127.)

Although the Court must not grant a motion to dismiss if "the fundament of a cause of action may be gleaned even from an obscure statement of claim," *Printing Mart-Morristown*, 116 N.J. at 746, *R.* 4:5-2 requires that a pleading must, at minimum, contain "a statement of the facts on which the claim is based, showing that the pleader is entitled to relief." There are simply *no* such facts alleged here that specify the connection of each of these Defendants to any of the Counts alleging affirmative acts of wrongdoing.

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

The Court therefore dismisses all Counts except Count Fourteen (veil-piercing) as to Enterprises, KHC, and KHE.[2] This dismissal is without prejudice, however, to the right to re-plead should additional relevant facts exist or arise.

2 The dismissal of these parties warrants dismissal of Count Fifteen (civil conspiracy) in its entirety. For the same

reasons set forth in the text, Count Fifteen fails to sufficiently allege the role each of the Hovnanian Defendants had in the alleged conspiracy. Without meaningful differentiation among these entities, the Court cannot discern a basis for a claim of civil conspiracy against each of them.
The only remaining Defendant against which the claim lodged in Count Fifteen is advanced is KHNC. Yet, a civil conspiracy claim requires "a *combination of two or more persons* acting in concert to commit an unlawful act ... ," *Morgan v. Union County Board of Chosen Freeholders*, 268 N.J. Super. 337, 364 (App. Div. 1993), *certif. denied*, 135 N.J. 468 (1994) (quoting *Rotermund v. U.S. Steel Corp.*, 474 F.2d 1139, 1145 (8th Cir. 1973) (internal quotations omitted)). It is a legal impossibility, given the dismissal of the above parties, that the Plaintiff can allege a civil conspiracy against only one party. Accordingly, the Court dismisses this Count without prejudice to the right to re-plead.

IV

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

1. *Economic-Loss Doctrine*

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

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

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

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

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

Based on these principles, the Court finds that the ELD does not bar the fraud-based claims in Counts Nine and Ten (and therefore Sixteen). Although the Court is unaware of any cases addressing the application of the ELD to intentional torts within the construction-defect context, it sees no reason why the logic of *Alloway*, 149 N.J. at 639–40, should not apply here. Both Counts allege fraud—intentional conduct that surely is not "consequential damage that the parties have, or could have, addressed in their agreement." *Spring Motors Distributors, Inc.*, 98 N.J. at 579–80. Moreover, the CFA claim involves "an independent duty imposed by law," *Saltiel*, 170 N.J. at 316, as that claim for relief arises by statute.

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

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

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

[*Ibid.*]

The Complaint here, as currently drafted, does not specify the nature or extent of the alleged damages. Rather, it only avers that the common elements "suffer extensive design and construction-related defects" and that several of those defects are "hidden by components or finishes." (Compl. ¶¶ 65–66.) Further, in the negligence Count, the Association alleges only that "the Association has sustained and will … continue to sustain damages." (Compl. ¶ 80.)

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

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

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

2. Fraud-Based Claims

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

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

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

[(emphasis added).]

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

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

Claims "sounding in fraud" must satisfy the "heightened fraud pleading requirement" in *R.* 4:5-8(a). *N.J. [illegible] 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." *[illegible] Levinson v. D'Alfonso & Stein*, 320 N.J. Super. 312, 315 (App. Div. 1999).

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

> any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise ... whether or not any person has in fact been misled, deceived or damaged thereby[.]

[*[illegible]* 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." *[illegible] 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," *[illegible] 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 [illegible] Gennari*, 148 N.J. at 607–08; *see also [illegible] Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 246 (2005).

The Plaintiff's Complaint fails to satisfy the first element of this test. Count Nine does not itself contain any factual

allegations. Even looking elsewhere in the Complaint—namely, the allegations mentioned *infra* in the discussion of PREDFDA—the Complaint contains *no* facts as to the alleged defects in the Complex that the Defendant failed to disclose or as to which the Defendant is otherwise (allegedly) guilty of misrepresentation. The Complaint only avers that the common elements "suffer extensive design and construction-related defects" and that several of those defects are "hidden by components or finishes." (Compl. ¶¶ 65–66.) This falls short of pleading the "particulars" of the misrepresentations that form the basis for the alleged consumer fraud suffered by the Association, as is required under the CFA. As pleaded, the Complaint is simply devoid of any evidence, let alone particularized evidence, that the Defendant committed an unconscionable commercial practice via misrepresentation of conditions at the Complex.

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

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

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

The Plaintiff's common-law fraud claim in Count Ten, also subject to the heightened "particularity" standard, suffers from the same deficiencies as the CFA claim. The elements the Assocation must establish to state a prima facie claim of fraud are as follows:
(1) a material misrepresentation of a presently existing or past fact;

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

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

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

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

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

right to re-plead.

3. *PREDFDA Claims*

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

***13** The section of PREDFDA under which these Counts arise—N.J.S.A. 45:22A-37— provides that any developer that violates the act "shall be liable to *the purchaser* for double damages suffered ...." (emphasis added). The Act defines "purchaser" as "any *person or persons* who *acquires a legal or equitable interest* in a unit, lot, or parcel in a planned real estate development ...." N.J.S.A. 45:22A-23(d) (emphasis added). A "person" may be any of the descriptors listed in N.J.S.A. 1:1-2—"corporations, companies, *associations*, societies, firms, partnerships and joint stock companies as well as individuals ..." (emphasis added). The statute separately defines "association" as an association for the management of common elements and facilities, organized pursuant to section 1 of P.L.1993, c.30 (C.45:22A-43)." N.J.S.A. 45:22A-23(n).

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

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

KHNC's argument is certainly grounded in a plausible construction of the statute. The exclusion of "associations" from the PREDFDA provision creating a right of action but inclusion elsewhere in the statute suggests that a developer cannot be liable to an association for statutory damages under PREDFDA. The inclusion of separate definitions for "purchaser" and "association" and the Association's apparent lack of legal or equitable title in the common elements of the Complex provide further textual basis for the Defendants' position.

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

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

***14** This suggests that the Association may step into the shoes of its members to bring tort-based claims, including a claim

under PREDFDA, so long as the members themselves qualify as "purchasers." Stated differently, it is immaterial that the Association here may not have a legal or equitable interest in the common elements, as its members hold that interest.

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

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

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

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

> The Legislature *in recognition of the increased popularity of various forms of real estate development in which owners share common facilities, units, parcels, lots, areas, or interests*, and taking notice of the underlying complexities of these new and proliferating forms, deems it *necessary in the interest of the public health, safety, and welfare, and in the effort to provide decent, safe and affordable housing*, and *to foster public understanding and trust*, that dispositions in these developments be regulated by the State pursuant to the provisions of this act.

[N.J.S.A. 45:22A-22 (emphasis added).]

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

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

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

The court held that the NJCA—a statutory scheme predating PREDFDA that defines the status, rights, and responsibilities of condominiums and their governing associations, among other related procedures—authorized the plaintiff's CFA claims.

Id. at 74. In so holding, it determined that the NJCA designates a condominium association as "responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners." N.J.S.A. 46:8B-12. As a result, as under PREDFDA, an association "may assert tort claims concerning the common elements and facilities of the development *as if the claims were asserted directly by the unit owners individually*." N.J.S.A. 46:8B-16(a) (emphasis added).

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

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

The reasoning in *Geibel* is directly apposite to the claims asserted here under PREDFDA. Although PREDFDA was not at issue in *Geibel*, several parallels between the CFA and PREDFDA favor a determination that the Association may also bring PREDFDA claims relating to common elements. Like PREDFDA, the CFA is a tort-based statutory scheme that seeks to accomplish a remedial purpose by holding defendants to account for exemplary damages for certain proscribed acts. Although the CFA does not explicitly permit condominium associations to recover for such acts, it does permit "[a]ny *person* who suffers any ascertainable loss of moneys or property" to bring an action. N.J.S.A. 56:8-19 (emphasis added). The CFA then defines "person" as "corporations, companies, *associations*, societies, firms, partnerships and joint stock companies as well as individuals," N.J.S.A. 56:8-26 (emphasis added)—a definition that is identical to PREDFDA's definition of the same term.

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

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

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

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

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

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

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

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

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

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

4. *Negligent-Misrepresentation Claim*

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

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

The pleading also does not establish with required particularity the element of reliance. Instead, it simply concludes that "[t]he Association and its members reasonably relied to their detriment on the Developer Defendants' negligent and reckless misrepresentations." (Compl. ¶ 148.) The Amended Complaint contains no specific facts that support this assertion.

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

More generally, the Plaintiff neglects to draw a particularized connection between KHNC's alleged misrepresentations, purchasers' reliance on those alleged misstatements, and the alleged damages. The Court must therefore dismiss this Count

without prejudice to the right to re-plead.

5. *Breach of Implied Warranties*

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

***18** The relevant disclaimer provisions of the POS read as follows:

> This warranty will constitute the sole obligation of the Developer to the purchasers and owners of Units with respect to the Common Elements.
>
> ********
>
> THE DEVELOPER DISCLAIMS ANY IMPLIED WARRANTY OR WARRANTY ARISING BY LAW WITH RESPECT TO THE UNIT, OR WHICH WOULD ARISE BY MAKING AN AGREEMENT TO SELL A UNIT. THIS MEANS THAT THE ONLY WARRANRIES WHICH ARE GIVEN BY THE DEVELOPER TO A UNIT OWNER, ARE THOSE LISTED ABOVE.

[(Defs.' Mot., Exh. A at 45–46.)]

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

[8] The moving Defendants raise the applicability of New Jersey's codification of the UCC. The UCC in New Jersey permits the disclaimer of the implied warranty of fitness, provided that such disclaimer is "conspicuous." N.J.S.A. 12A:2-316. However, as the Defendants point out, the UCC likely does not apply to transactions involving the purchase of condominium units.
The "Sales" Chapter of the Code—containing the warranty provision cited above—states that it pertains only to "transactions in goods." N.J.S.A. 12A: 2-102. "Goods" is defined as:
all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Chapter 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (12A:2-107).
[N.J.S.A. 12A:2-105(1).]
Condominium units do not conform to this definition. They are not "movable at the time of identification." Nor does the "section on goods to be severed from realty"—N.J.S.A. 12A:2-107—mention condominium units, let alone any form of residential real estate.
The Court will therefore examine the warranty provisions at issue using common-law rules of contractual

interpretation. As discussed *infra*, the Court finds that such rules preclude dismissal of the breach-of-warranty claim at this stage.

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

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

***19** Moreover, the Plaintiff has sufficiently pled the allegations of this Count against KHNC. Viewed with a "generous and hospitable approach," the Count alleges defects in the common elements that a court could determine breach an implied warranty of habitability or workmanship, as well as KHNC's alleged role as the developer of the Complex.[2] Such allegations establish that "the fundament of a cause of action may be gleaned even from an obscure statement ...." *Printing Mart-Morristown*, 116 N.J. at 746.

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

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

6. *Piercing the Corporate Veil*

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

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

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

The Court first addresses the contention that the Plaintiff's claim is unripe for review. To the Court's knowledge, there are no New Jersey decisions addressing whether a claim to pierce the corporate veil may lie only after a judgment is entered. To be

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

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

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

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

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

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

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

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

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

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

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

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

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the material facts alleged are the same.
>
> [*First Union Nat'l Bank v. Penn Salem Marina, Inc.*, 190 N.J. 342, 353 (2007) (quoting *United States v. Athlone Indus. Inc.*, 746 F.2d 977, 984 (3d Cir. 1984)) (citations omitted).]

It is true that, as a general matter, the Plaintiff seeks to hold Enterprises accountable under the same legal theory, by virtue of what is alleged to be a similar profile of corporate relationships with the developer in this case, and with similar evidence as in *Grandview I* and *Grandview II*. However, those cases did not consider whether the Court should pierce *KHNC's* corporate veil with respect to *the Complex* at issue here.

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

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

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

It follows that the second and fourth *Dawson* factors are similarly absent here. Given the factual differences noted above—mainly, that this case involves a separate condominium project and a different corporate developer—it is not conceivable that *KHNC's* relationship with Enterprises regarding *the Complex* was "actually litigated" in *Grandview I* or *Grandview II*. Those cases only considered Enterprises' relationship with two other developer entities relating to two adjacent condominium buildings in West New York. Thus, Enterprises' role in forming and operating KHNC and in the development of the Complex, and whether its role requires piercing of the corporate veil of KHNC, KHC, and KHE, was neither actually litigated nor "essential to the judgment" in the two prior cases.

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

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

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

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

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

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

[(Compl. ¶ 38.)]

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

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

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

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

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

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

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

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

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

However, even if facts establishing corporate dominance are set forth here, the Association fails to establish the second element of a veil-piercing claim—that the parent "has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law." *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).

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

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

The Court thus finds that the Complaint fails to plead a cause of action to pierce the corporate veils of KHNC, KHE, and KHC to hold Enterprises liable for KHNC's liabilities and obligations stemming from this suit. Accordingly, the Court dismisses Count Fourteen, but without prejudice to the right to re-plead or re-assert a veil-piercing claim against the

Hovnanian entities, including at a later time.

V

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

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

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