PUBLIC VERSION

SUPREME COURT OF THE STATE OF DELAWARE

CITY OF PROVIDENCE, RHODE ISLAND, derivatively on behalf of JPMORGAN CHASE & CO., Plaintiff Below-Appellant, v. JAMES DIMON, *et al.*, Defendants Below-Appellees, -and- JPMORGAN CHASE & CO., Nominal Defendant Below-Appellee	No. 465, 2015 Court Below: Court of Chancery of the State of Delaware, Civil Action No. 9692-VCP

APPELLANT THE CITY OF PROVIDENCE, RHODE ISLAND'S REPLY BRIEF

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Plaintiff Below-Appellant The City of Providence, Rhode Island ("Plaintiff") respectfully submits this Reply to the Answering Brief of Nominal Defendant-Appellee JPMorgan Chase & Co. ("JPMorgan" or the "Company") and the Director and Officer Defendants-Appellees (collectively, "Defendants").

Defendants' Answering Brief mischaracterizes the allegations in Plaintiff's Complaint (A-22-263), overlooks key facts, and further ignores the relevant factors that must be considered under New York law for *res judicata* to apply. The trial court found, and Defendants assert in their Answering Brief, that the "transactions" at issue are various settlements and consent orders entered into by JPMorgan. OB, Ex. A at 19-20; AB at 2.[1] But this is wrong. The proper analysis under New York law is to consider the transactions that gave rise to those settlements and consent orders. As set forth below, when properly considered, there is little doubt that the allegations in Plaintiff's Complaint involve different "transactions" than those at issue in the complaint in *Central Laborers' Pension Fund v. Dimon*, ("*Central Laborers*") (A-331-445), and, therefore, the doctrine of *res judicata* is not applicable. Accordingly, the trial court's dismissal of the present Action should be reversed and the matter remanded for further proceedings.

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[1] Citations to "OB at __" refer to pages in Plaintiff's Opening Brief, filed with this Court on October 19, 2015. Citations to "A-_" refer to pages in the Appendix. Citations to "AB at __" refer to pages in Defendants' Answering Brief, filed with the Court on November 25, 2015.

Argument

Defendants assert "four separate bases that would lead a New York court" to conclude that the transactions alleged in Plaintiff's Complaint are part of the same series of transactions as alleged in the *Central Laborers'* complaint. AB at 18. Defendants' arguments are meritless.

New York's *res judicata* doctrine requires a pragmatic, transactional analysis. *Smith v. Russell Sage Coll.*, 429 N.E.2d 746, 750 (N.Y. 1981); *see also O'Brien v. City of Syracuse*, 429 N.E.2d 1158, 1159 (N.Y. 1981). In order for *res judicata* to apply, the foundational facts must be related in "'time, space, origin, or motivation [as well as] form a convenient trial unit'" and it must be established that the "'treatment [of the foundational facts] as a unit conforms to the parties' expectations . . . .'" *Smith*, 429 N.E.2d at 749; *Braunstein v. Braunstein*, 497 N.Y.S.2d 58, 63 (N.Y. App. Div. 1985). Contrary to Defendants' argument (AB at 3), New York's test is conjunctive, and, therefore, all of these elements must be satisfied before *res judicata* applies. The burden of showing that all elements have been established rests on Defendants. *33 Seminary LLC v. City of Binghamton*, 869 F. Supp. 2d 282, 303 (N.D.N.Y. 2012).

Defendants assert without authority that New York courts interpret the *res judicata* doctrine broadly. But this is not true. In fact, numerous courts, including decisions relied upon by Defendants, caution that the *res judicata* doctrine should

not be applied in a manner that results in unfairness: "unfairness may result if the doctrine is applied too harshly; thus in properly seeking to deny a litigant two days in court, courts must be careful not to deprive [the litigant] of one . . . ." *Chen v. Fischer*, 843 N.E.2d 723, 725 (N.Y. 2005) (internal quotations omitted). The following analysis of the relevant New York *res judicata* factors shows that the Court of Chancery's decision was wrong and resulted in unfairness to Plaintiff and the Company's shareholders.

A. An Analysis of the New York *Res Judicata* Factors Weighs Heavily Against Application of the Doctrine to Preclude Plaintiff's Claims

An analysis of the three factors relevant to New York's "same transaction" analysis shows that Plaintiff's Complaint alleges different transactions than are alleged in the *Central Laborers'* complaint. Neither the Court of Chancery nor the Defendants analyzed the New York factors in any detail.

1. Whether the Underlying Facts Are Related in Time, Space, Origin, or Motivation

Other than two mentions of Bernard L. Madoff ("Madoff") in Plaintiff's Complaint, almost none of the violations of law and transactions at issue in Plaintiff's Complaint are alleged in the *Central Laborers'* complaint. As explained below, there are material differences in time, space, origin and motivation between the transactions at issue in the *Central Laborers'* complaint and the transactions alleged Plaintiff's Complaint.

a. There Are Material Differences in Time

Plaintiff's Complaint alleges a relevant period of roughly 2005 through 2014. A-34 (¶32). Further, Plaintiff's Complaint involves numerous meetings of JPMorgan's audit committee and board of directors over the course of 2009 through 2014 – all after Madoff was arrested and his Ponzi scheme ended. A-22-138 (¶¶ 145-46, 158-59, 163, 168, 175, 177, 179-80, 190, 194, 196, 200, 202, 206-07, 210, 215). In contrast, the *Central Laborers'* complaint alleges a course of

conduct that began as early as 1986 and ended with the arrest of Madoff and the collapse of his Ponzi scheme in December 2008. A-361 (¶114). Indeed, the *Central Laborers'* complaint focuses on transactions that occurred in the 1990s, all of which occurred before the beginning of the Relevant Period alleged in Plaintiff's Complaint. A-371-73; 386-87. Accordingly, while the time periods overlap to some extent (1986 through 2008 in *Central Laborers'*, compared to 2005 through 2014 in Plaintiff's Complaint), Plaintiff's Complaint alleges Defendants' violations of U.S. Economic Sanctions, and Anti-Money Laundering laws and the Bank Secrecy Act ("AML/BSA laws") over a period of approximately 5 years that occurred *after* Madoff's Ponzi scheme ended. The alleged wrongful transactions between 2009 and 2014 alleged in Plaintiff's Complaint cannot reasonably be considered related in time to the transactions at issue in the *Central Laborers'* complaint.

b. There Are Material Differences in Space

The *Central Laborers'* complaint involved JPMorgan's Investment Banking and Asset Management divisions (A-353), whereas Plaintiff's Complaint involves [redacted] Moreover, Plaintiff's Complaint alleges violations of

U.S. law involving J.P Morgan and entities and individuals throughout the world. *See, e.g.* A-22-138 (¶¶ 102-04, 120 (Cuba); ¶ 107 (Al-Aqsa terrorist group); ¶¶ 108, 140, 147, 150 (Islamic Republic of Iran); ¶¶ 110, 131, 153 (Sudan); ¶ 180 [redacted] In contrast, the violations at issue in the *Central Laborers'* complaint are confined to conduct in New York and London. A-350.

Further, the relevant JPMorgan committees that considered the transactions are different. Plaintiff's Complaint focuses on meetings of the Audit Committee and the full board of directors. A-22-138 (¶¶ 116-17, 121, 129, 136, 139, 158, 159). In contrast, the *Central Laborers'* complaint focuses on the Hedge Fund Underwriting Committee and the Investment Bank Risk Committee. A-356-57.

In addition, the core issues are different. The *Central Laborers'* complaint focuses on the "billions of dollars" that passed through Bernard L. Madoff Investment Securities LLC's ("BMIS") "703 Account" established by Madoff. A-333, 361, 337, 359-62; 370. Indeed, the *Central Laborers'* complaint alleges numerous transactions that occurred in the 1990s at a predecessor institution (Chemical Bank). A-370-73. Another key issue in the *Central Laborers'* complaint is the Company's review of SEC-mandated Financial and Operational Combined Uniform Single Reports – reports that *Central Laborers'* alleged show the Company knew or should have known about Madoff's criminal conduct. A-333, 338; 390-94. Further, JPMorgan loans to BMIS in 2005 and 2006 that

allegedly perpetuated Madoff's fraud (A-394-97), and the reasons for the Company's decision to redeem its assets from BMIS feeder funds (A-418), are central issues in the *Central Laborers'* complaint. Moreover, the Company's due diligence efforts regarding Madoff and BMIS, and the Company's structuring of investment products by Chase Alternative Asset Management linked to Madoff and BMIS (through "feeder funds" structured and issued by the Company's Equity Exotics & Hybrids Desk), are key issues in the *Central Laborers'* action. A-338-40; 397-418. *None of these issues would be relevant in a trial concerning the transactions in Plaintiff's Complaint.*

Accordingly, the differences in the kind of facts to be proved, and the differences that exist between the issues raised in the *Central Laborers'* complaint and those raised in Plaintiff's Complaint, weigh against finding that *res judicata* applies. *See Coliseum Towers Assocs. v. Cnty. of Nassau*, 637 N.Y.S.2d 972, 974 (N.Y. App. Div. 1996).

c. There Are Material Differences in Origin and Motivation

Neither the Court of Chancery nor Defendants considered that there are material differences in origin and motivation. The *Central Laborers'* complaint's core claim involves Madoff's Ponzi scheme and how the Company allegedly turned a blind eye to Madoff in order to make lucrative fees. A-360-61, ¶ 113 ("JPMorgan's willful blindness protected its valued relationships with some of the

largest BMIS customers, particularly Levy, and allowed JPMorgan to collect revenue from these relationships. JPMorgan made money, Madoff made money, and the Ponzi scheme's largest enablers made money – while BMIS's customers, whose money was entrusted to JPMorgan, lost billions of dollars."). In sharp contrast, Plaintiff's Complaint focuses on the Company's illegal conduct in facilitating the financing for individuals and entities involved in international terrorism and drug trafficking. *See, e.g.* A-22-138 (¶¶ 102-04, 120 (Cuba); ¶ 107 (Al-Aqsa terrorist group); ¶¶ 108, 140, 147, 150 (Islamic Republic of Iran); ¶¶ 110, 131, 153 (Sudan); ¶ 180 [redacted] Accordingly, the stark differences in time, space, origin, and motivation weigh heavily in favor of finding that this factor of New York's *res judicata* test has not been satisfied.

2. Whether They Form a Convenient Trial Unit

This factor fails to support a finding of *res judicata*. The Court of Chancery determined, and Defendants – with almost no analysis – assert, that the claims alleged in the *Central Laborers'* complaint and the claims asserted in Plaintiff's Complaint "form a convenient trial unit." OP, Ex. A at 22; AB at 22. The following review of the allegations in both actions shows this is not true.

a. A Trial Involving Plaintiff's Claims Would Involve Unique Evidence and Witnesses

First, a trial of the claims alleged in Plaintiff's Complaint's would require

different witnesses and evidence than those that would be needed in the *Central Laborers'* action. Plaintiff's Complaint alleges transactions in violation of U.S. Economic Sanctions that have nothing to do with Madoff's Ponzi scheme. OB at 9-10. Also, the following witnesses would be central in a trial on Plaintiff's claims:

- [redacted].
- The members of the Company's Audit Committee, including Defendants James A. Bell, Crandall C. Bowles and Laban P. Jackson, and members of the Company's Risk Policy Committee, including Defendants James C. Crown and Timothy P. Flynn, would be witnesses [redacted] A-120 (¶ 247).
- Defendant Martha Gallo would be a key witness [redacted].
- William Langford would be a witness [redacted].

These witnesses' testimony has nothing to do with the core claims alleged in *Central Laborers'*. Indeed, the numerous violations of U.S. Economic Sanctions alleged in Plaintiff's Complaint (A-55-89; ¶¶ 98-187; OB at 9-10), and the extent

to which the JPMorgan Board of Directors knew and failed to stop such illegal conduct, would be front and center in a trial in Plaintiff's action. None of these issues or transactions was at issue in the *Central Laborers'* complaint.

b. A Trial Involving the Claims Alleged in the *Central Laborers'* Complaint Would Involve Witnesses and Evidence That Have Nothing to Do with Plaintiff's Claims

In contrast to Plaintiff's claims, the gravamen of the *Central Laborers'* complaint is the "extent to which JPMorgan's actual knowledge of or willful blindness to Madoff's fraud reached the highest echelon of the Bank." A-322 (¶2). The key witnesses in a trial of the claims alleged *Central Laborers'* would include:

- Madoff, Walter Shipley (CEO of JPMorgan predecessors Chemical Bank and Chase Manhattan Bank), Norman Levy (a JPMorgan customer with ties to Madoff and BMIS), John Hogan ("Hogan") (Chief Risk Officer in JPMorgan's Investment Bank), and Defendant Robert I. Lipp (a former Company director). A-332-35 (¶¶ 3-12, 104); 258; 378-90.
- Jonathan "Bobby" Magee, Andrea De Zordo, Neil McCormack, and Dimitri Nikolakopoulos, who worked for the Company's Equity Exotics & Hybrids Desk. A-354.
- Jane Buyers-Russo and Richard Cassa, employees of the Company's Broker/Dealer Group who were responsible for managing's Madoff's 703 Account. A-354.
- Luke Dixon and Scott Palmer, employees in JPMorgan's London office who allegedly conducted due diligence on the BMIS feeder funds in 2008. A-355.
- Hogan, Brian Sankey, Marco Bischof, James Coffman, Andrew Cox, Richard Wise, and Chen Yang, employees in the Company's Credit Risk and Market Risk teams who were responsible for reviewing and approving JPMorgan's structured products relating to BMIS feeder funds. A-355.

- Matt Zames (who allegedly told Hogan in 2007 that Madoff was rumored to be operating a Ponzi scheme), Carlos Hernandez (who conducted due diligence on Madoff), Alain Kruger (who was involved in the Company's decision to redeem from BMIS feeder funds), and Michael Cembalest (who conducted due diligence on BMIS). A-356.

These individuals, who feature prominently in JPMorgan's relationship with Madoff and BMIS, and, therefore, are part and parcel of the *Central Laborers'* complaint, have nothing to do with the claims alleged by Plaintiff.

This analysis shows that the transactions involving Madoff and JPMorgan would not have any role in a trial involving the transactions alleged in Plaintiff's Complaint. Accordingly, there was no basis in the record for the Court of Chancery to conclude that the claims alleged in Plaintiff's Complaint and the claims alleged in the *Central Laborers'* complaint would make a "convenient trial unit." Indeed, based on the analysis above, no judicial economy would have been achieved by the litigation of these two separate actions under the aegis of a single complaint. *See Coliseum Towers Assocs.*, 637 N.Y.S.2d at 974.

3. Whether Their Treatment as a Unit Conforms to the Parties' Expectations or Business Understanding or Usage

a. The Company Treated *Central Laborers'* as Limited to Transactions Involving Madoff

Defendants treated the *Central Laborers'* complaint as dealing with a narrow issue – JPMorgan's transactions with Madoff and BMIS. Perhaps the best evidence to show that JPMorgan did so is its own characterization of that

proceeding: "The Complaint focuses on the bank's recent settlements relating to Bernard Madoff's Ponzi scheme." AR-6. Further, JPMorgan explained that the key issue in *Central Laborers'* was whether JPMorgan's directors "had knowledge of: (a) the existence of Madoff's accounts at the Bank, or any activity in such accounts; (b) the Madoff-related structured products issued by a JPMorgan affiliate in London; or (c) any concerns or questions raised by JPMorgan employees relating to Madoff." AR-9. None of these issues is relevant to Plaintiff's claims. Thus, the Company tacitly admits that the *Central Laborers'* complaint involved different issues than those relevant to a trial involving Plaintiff's claims.

b. The Relevant Transactions Cannot Be Treated as One Unit

Citing the flawed reasoning applied by the Court of Chancery, Defendants assert that Plaintiff's Complaint treats each settlement and consent order as a "single series of transactions." AB at 18 ("The 'series of transactions' that the Complaint identifies as giving rise to those *Caremark* claims are . . . the OFAC Settlement, the 2013 OCC Consent, the Fed Consent, the DPA and the 2014 OCC Consent."). Specifically, the Court of Chancery concluded that because the Madoff-related Deferred Prosecution Agreement between the Company and the U.S. Department of Justice ("DPA") mentions generally violations of AML/BSA laws and OFAC regulations, it therefore encompasses all the transactions at issue in Plaintiff's Complaint. OB, Ex. A at 18-24.

But, settlements and consent decrees are not the relevant "transactions." In fact, the relevant transactions in Plaintiff's Complaint are specific violations of U.S. Economic Sanctions and AML/BSA laws that the Company's Board allegedly knew of or recklessly ignored. These transactions are alleged in detail in Plaintiff's Complaint. OB at 9-10. In contrast, the *Central Laborers'* complaint alleged transactions involving JP Morgan, Madoff and BMIS.

Further, the structuring of Plaintiff's pleading so that it reads chronologically does not mean that all of the transactions are related. In fact, as set forth above, the transactions involving Madoff alleged in the *Central Laborers'* complaint are different and distinct from the violations of U.S. Economic Sanctions and AML/BSA laws alleged by Plaintiff, and are tangentially mentioned in Plaintiff's Complaint.

Finally, the Court of Chancery's analysis that linked the DPA to the other settlements and consent orders at issue was flawed because it was based on the premise that the settlements and consent decrees are the relevant transactions. OB, Ex. A at 24. As set forth above, this is not true.

B. Defendants' Additional Arguments Do Not Support Application of *Res Judicata* to Bar Plaintiff's Claims

Defendants' additional arguments are meritless. Defendants argue that "JPMC and the Board treated AML/BSA and economic sanctions oversight as related and therefore also treated the settlements as related." A.B. at 20. This argument is a red herring. Under New York law, a *res judicata* analysis examines whether the transactions were the same. Simply because each action involves certain violations of the same laws, that does not make them the same transactions for purposes of *res judicata*. *See Lukowsky v. Shalit*, 487 N.Y.S.2d 781, 784 (N.Y. App. Div. 1985) ("[O]ur Court of Appeals has nevertheless held that even when two successive actions arise from an identical course of dealing, the second may not be barred if the requisite elements of proof and evidence necessary to sustain recovery vary materially."). As shown above, the proof and evidence are materially different.

Similarly, the fact that the Company had developed a company-wide compliance policy does not mean that the transactions at issue in Plaintiff's Complaint are the same as the transactions at issue in the *Central Laborers'* complaint. As the analysis above shows, Plaintiff's Complaint and the *Central Laborers'* complaint involve materially different conduct and transactions.

Defendants further argue that non-party federal regulators treat AML/BSA and economic sanctions "as related." AB at 22. This argument, too, is misleading. Under New York law, the relevant consideration is the parties' view of the transactions, and accordingly, the view of non-party regulators is irrelevant to New York's *res judicata* analysis.

Finally, Defendants assert that all of the conduct alleged in Plaintiff's Complaint could have been alleged in the *Central Laborers'* complaint. This is not true. Because the *Central Laborers'* complaint has nothing to do with violations of U.S. Economic Sanctions, it makes no sense to conclude that the claims alleged by Plaintiff could or should have been alleged in the *Central Laborers'* complaint. In fact, Plaintiff's allegations that the Company's Board of Directors knew or recklessly disregarded the Company's repeated violations of U.S. Economic Sanctions has nothing to do with any claims asserted in the *Central Laborers'* complaint. As noted above, no judicial economy would be served by combining allegations of disparate transactions in one complaint. *See Coliseum Towers Assocs.*, 637 N.Y.S.2d at 974.

C. The Relief Sought in the *Central Laborers'* Complaint and Plaintiff's Complaint Is Materially Different

Under New York law, only if a successive action seeks "what is essentially the *same relief* for harm arising out of the *same or related facts* such as would be considered a single factual grouping," then the second action would be barred by *res judicata*. *See O'Brien*, 429 N.E.2d at 1160 (emphasis added). The *Central Laborers'* complaint sought damages regarding the costs and expenses arising out the Company's relationship with Madoff. A-344, 427 (seeking damages concerning "JPMorgan's conduct related to Madoff"). In contrast, Plaintiff's Complaint seeks different, broader relief stemming from the damage caused by the Company's involvement in transactions that violated U.S. Economic Sanctions and AML/BSA laws, specifically the enabling of U.S. dollar transactions for rogue nations, terrorist groups and international drug cartels. The *Central Laborers'* action is more limited, as it seeks damages relating to the Company's transactions with Madoff and BMIS.

Under New York law, for *res judicata* to apply to a second action, the relief must "mirror" the relief sought in the first action. *Hancock v. Arts4All, Ltd.*, 858 N.Y.S.2d 92 (N.Y. App. Div. 2008) (finding court improperly dismissed the petition on the grounds of *res judicata*, where some of the relief sought did not mirror that sought in petitioner's counterclaims in a previous proceeding); *Medcalf*

v. Thompson Hine LLP, 84 F. Supp. 3d 313, 326 (S.D.N.Y. 2015) ("The fact that several operative facts may be common to successive actions between the same parties does not mean that a judgment in the first will always preclude litigation of the second."). As set forth above, that is not the case here. This is yet another reason to find that *res judicata* does not preclude the claims alleged in Plaintiff's Complaint.

1. The Court Can Sever Any Overlapping Claims Relating to the DPA

Defendants assert that Plaintiff seeks to alter "the remedy it is seeking (by dropping its claim for recovery of the $1.7 billion DPA penalty)." AB at 20. But this is not true. Plaintiff's statement in its Opening Brief (OB at 8 n.2) simply recognizes: *after* its complaint was filed, the *Central Laborers'* complaint was dismissed (it is now on appeal). Accordingly, damages stemming from JPMorgan's transactions concerning Madoff and BMIS are precluded as *res judicata*. However, as outlined above, *res judicata* does not apply to the violations of U.S. Economic Sanctions and AML/BSA laws and any related fines and penalties that have nothing to do with Madoff.

Contrary to Defendants' arguments that New York law does not permit the Court to "sever" the precluded claims (AB at 3), New York courts apply a pragmatic approach to *res judicata*, precluding claims that may be barred, and

sustaining claims that are not. *See, e.g., Reyes v. Fairfield Props.*, 661 F. Supp. 2d 249, 277-78 (E.D.N.Y. 2009) (finding certain claims not precluded, even though other claims were barred by prior litigation). Accordingly, New York's pragmatic *res judicata* test does not require the Court to throw the baby out with the bathwater, as the trial court has done.

D. The Court Should Not Consider Defendants' Collateral Estoppel Argument

While Defendants asserted New York collateral estoppel law as a basis for dismissal before the trial court, the trial court expressly did not discuss or otherwise consider the issue, basing its decision solely on *res judicata* grounds. OB, Ex. A at 2 ("I do not reach the defendants' other grounds for dismissal"); AB at 9 ("the Court of Chancery issued an opinion dismissing Providence's complaint in its entirety based on *res judicata*."). Defendants now argue in their Answering Brief that "[i]f not affirmed on the basis of *res judicata*, the Court of Chancery's dismissal should nonetheless be affirmed for the alternative reason that Providence's complaint is barred as a matter of collateral estoppel." AB at 27.

Defendants' collateral estoppel argument should not be considered by the Court.[2] As conceded by Defendants, issue and claim preclusion are related, but

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[2] Citing *Central Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012), Defendants assert the Court may decide any issue "fairly presented" to the trial court, even if that issue was not addressed by that court. AB at 27 n.13; *see also* Supr. Ct. R. 8. However, the Court rarely affirms a trial court's decision on an unconsidered issue below when it would otherwise reverse and remand. *See, e.g.*, *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (declining to affirm on alternative grounds not considered by the trial court after the Court found reversible error); *cf. RBC Capital Mkts., LLC v. Jervis*, 2015 Del. LEXIS 629, at *75 (Del. Nov. 30, 2015) (affirming trial court's decision); *News Corp.*, 45 A.3d at 141 (alternate basis for affirmance); *In re Ethel F. Peierls Charitable Lead Unitrust*, 77 A.3d 232, 238 (Del. 2013) (trial court incorrectly relied on the law governing the court's equitable powers of reformation rather than the law governing trust administration); *Lemos v. Willis*, 858 A.2d 955, 959 (Del. 2004)

have different standards. *Id.* at 28; *see also M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999) ("Collateral estoppel and res judicata are related principles of law."). Here, collateral estoppel need only be considered if the Court reverses the trial court's conclusions on *res judicata*. However, a reversal on *res judicata* will throw into question the viability of Defendants' collateral estoppel arguments before both the Court and the trial court. Defendants' suggestion that the Court could *reverse* the trial court's holding on *res judicata* and then *affirm* on the "related" basis of collateral estoppel is improper, especially when the trial court explicitly declined to rule on the latter issue.

A reversal by the Court on *res judicata* requires consideration of collateral estoppel by the trial court after re-briefing by the parties, and full briefing of the issue on any subsequent appeal. Anything less would be unfair to Plaintiff.

Assuming, *arguendo*, the Court considers Defendants' collateral estoppel argument, it should be rejected for the reasons set forth in Plaintiff's briefing on this issue before the Court of Chancery. A-2288-96.

In sum, for the reasons set forth in Plaintiff's Opening Brief and above, the trial court's dismissal of the present Action should be reversed and the matter remanded for further proceedings.

(appeal dismissed where a decision by the Court subsequent to the trial court's opinion rendered invalid the city ordinance on which the trial court's opinion was based).

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