PRELIMINARY STATEMENT

This matter arises from the procedural machinations of the Town of West New York to retain control of the Town's school board by denying its citizens the right to elect, in a school board election this past April, four new members of the West New York Board of Education in accord with their expectations. Last November, the voters of West New York changed their school board from an appointed school board, which (according to a report issued by the State of New Jersey, Department of Education, Office of Fiscal Accountability and Compliance (Comp., Ex. A)) was seemingly controlled by the governing body, to an elected board. Rather than risk loss of control of the Board of Education at the next scheduled election, the Town of West New York, decided to change the annual school board election from April to the General Election in November, without notifying the Board of Education prior to taking action, and without permitting public comment before or after the Town Commission adopted the relevant resolution as part of a consent agenda. Furthermore, it appears that the Town was relying on the Board of Education to adopt such resolution itself, and when that did not happen, it acted in haste, but not within the time required by statute.

Now, the Town of West New York wants this matter to simply go away so they can continue to do business as usual. That is, retain control of the Board of Election (with 7 members still appointed) until November, and then try to employ their political clout in the General Election to influence who gets elected to the four open seats. The Town asserts that all the claims raised in the Verified Complaint have already been decided by Judge Bariso pursuant to his order denying Mr. Ferreiro's "Order to Show Cause seeking a preliminary injunction" (Miller Cert.,[1] Ex. B, T71-8-12), and thus it too should be dismissed against Mr. Ferreiro on the grounds

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[1] Throughout their Brief, Defendants refer to the "Dias Certification." However, Plaintiffs were

of *res judicata* and the entire controversy doctrine, and against the West New York Concerned Residents ("WNYCR") because of the doctrine of collateral estoppel. Neither assertion is valid.

Because Judge Bariso's decision did not constitute a final judgment on the merits, (Id., Ex. I, Order at 2), and Mr. Ferreira acted on his own, with no pretense of representing anyone but himself, the policies behind the common-law doctrine barring relitigation of claims or issues that have already been adjudicated by the same parties, i.e., *res judicata*, do not apply herein. There is little doubt that "the initial engagement on the merits of this matter were inadequate," Velasquez v. Franz, 123 N.J. 498, 517 (1991)(J. Stein, dissenting), and that there is no privity between Mr. Ferreira and the members of WNYCR. It therefore follows that at this early stage of litigation there is no basis to dismiss this complaint against either Plaintiff.

STATEMENT OF FACTS

On November 5, 2013, Town of West New York voters approved a public question "Shall the West New York's ordinance be amended to establish a Type II School District (N.J.S.A. 18A:9-3) which provides for the election of all board of education members by the residents of West New York?" by a margin of 3,193 to 759 or 80.79% to 19.21% (the "Elect Our School Board Referendum") . (Comp., ¶9) On January 28, 2014, there was a West New York Special School Board Election for two new members of the Board. Matthew Cheng was the winner of one seat for a 1 year term, and Joan Palermo was the winner of the second seat for a 2 year term. (Id., ¶10). At the next scheduled school board meeting on February 12, 2014, Matthew Cheng and Joan Palermo were sworn in as Trustees of the West New York Board of Education. At that meeting the Trustees present defeated a resolution entitled "Resolution 5.4 Establishing the Election of Members of the West New York Board of Education As the First

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only served with a Certification of Laura Miller, Esq. Accordingly, we are referring to Defendants' Certification as the "Miller Cert.".

Tuesday after the First Monday in November" by a margin of 4 Yes, 4 No. (Id., ¶11)

Assuming that the defeat of this resolution meant that the next school board election would occur in April 2014, the Trustees then approved resolutions entitled "Resolution 5.5 Approve Polling Locations", "Resolution 5.6 Establish Date & Time of Annual Board Election", "Resolution 5.7 Drawing for Position on School Ballot", "Resolution 5.8 Establish Date & Time of Annual Board Election" and "Resolution 5.9 Transfer of Funds to Pay for Annual Election" by a margin of 6 Yes, 0 No, 2 Abstentions. (Id., ¶12). Members of the public, including Mr. Ferreiro (founder of Residents for a Better West New York, an unincorporated association that was a major proponent of the referendum to change the West New York school board from an appointed board to one where all members are elected), and persons associated with another group, the WNYCR, who were also present at this school board meeting, expected after witnessing the host of resolutions approved by the Trustees that the annual school board election would be held in April, as contemplated by statute. (Id., ¶ ¶5, 13)

At some time soon thereafter, one or more of the Commissioners of West New York decided to consider a resolution at the next scheduled regular meeting of the Governing Body to change the annual school board election from April to November. As a result of such approval, the terms of four appointed members of the school board (i.e., Trustee Nasrin Alam, Trustee Angela Duval, Trustee Sara Gastanadui, and Trustee Adam Parkinson) would not expire on May 16, 2014, as would be the case if the annual election were held in April, as the public expected when it approved the establishment of a Type II School District (N.J.S.A. 18A:9-3). (Id., ¶14). On information and belief, Defendant Carmela Riccie did not communicate to the affected school board, either by phone, e-mail, text or written Notice, the intention of the Commissioners

to consider a resolution at their next scheduled regular meeting to change the school board election from April to November as required by N.J.S.A. 19:60-1.1(a). (Id., ¶15-19, Exhs. B-E).

Nonetheless, on Saturday, February 15, 2014, Defendant Riccie published a Public Notice Advertisement in the *Jersey Journal* indicating the Governing Board's intention to consider a resolution entitled "Establishing the Election of Members of the West New York Board of Education As the First Tuesday after the First Monday in November". This was a holiday weekend because Monday, February 17, 2014 was President's Day, a federal holiday. (Id., ¶22). Recognizing the special public import of such resolution, the Governing Board did not cause to be published in the *Jersey Journal*, or any other newspaper, any other resolution that it intended to be considered at its February 19, 2014, regular meeting as part of its consent agenda. (Id., ¶23). On February 18, 2014, the Governing Body caused the agenda of the monthly Commissioner's Meeting to be posted on the Town's website www.westnewyorknj.org. Resolution R-20 "Establishing the Election of Members of the West New York Board of Education As the First Tuesday after the First Monday in November" is on that agenda, noted as a change to consent agenda. (Id., ¶24). At the February 19, 2014 regular meeting of the Governing Body, four Commissioners, including the Mayor, were present. Commissioner Wiley asked that Resolution R-20 be removed from the consent agenda and be discussed and voted upon separately. The Mayor decided not accommodate Commissioner Wiley's request. (Id., ¶25). Members of the public who attended this meeting, including Plaintiff Ferreiro and members of the West New York Concerned Residents, made several requests to be heard prior to the Governing Body taking any formal action. Mr. Cheng and Joan Palermo of the School Board were present; and, each of them was notified that R-20 was on the consent agenda by personal friends who had seen the notice in the *Jersey Journal*. (Id., ¶26).

Despite public protest and other expressions of anger and frustration, the Commissioners voted on and approved the consent agenda, including R-20 "Establishing the Election of Members of the West New York Board of Education As the First Tuesday after the First Monday in November" with 3 yes votes and 1 no. Mayor Felix Roque and Commissioners Caridad Rodriguez and Ruben Vargas then abruptly walked out of the meeting. (Id., ¶27). There was no public portion of the meeting as required under the Open Public Meetings ("OPM") law, N.J. S.A. 10:4-12(a); and the February 19, 2014 regular meeting of the Governing Body ended abruptly, and was never formally closed. (Id., ¶ ¶28-29).

Members of the public interpreted the Governing Body's failure to follow the requirements of the OPM and to follow other procedural requirements as a slap in the face and a statement that the Commissioners do not believe that they have to listen to the sentiment of the people, even on a matter as significant and controversial as R-20, and one that may, as a matter of statute, be initiated by the voters themselves. (Id. ¶30).

The following day, Defendant Carmela Riccie notified the Hudson County Clerk and the West New York Board of Education of the Governing Body's Resolution to change the date of the school board election via email and same day delivery through Lawyers Service on February 20, 2014. (Id., ¶32). In turn, also on February 20, 2014, Board of Education Secretary Kevin Franchetta mailed a copy of the resolution to all Board of Education Trustees with the note "Enclosed please find a copy of the Town of West New York resolution that was hand delivered to me this afternoon. I have contacted our attorney, Lester Taylor, to investigate the legality of the resolution." (Id., ¶33). On February 21, 2014, Matthew Cheng met with the Board of Education Superintendent John Fauta and Board of Education Secretary Kevin Franchetta to discuss the status of the resolution. Matthew Cheng asked Superintendent Fauta to ask Board

President Vilma Reyes to call a special meeting to discuss the resolution and take action. She declined. Matthew Cheng was unable to get a majority of the Board members (5) to sign a petition calling for a special meeting to discuss the resolution and consider action. (Id., ¶34). Following the resolution, Board of Education Secretary Kevin Franchetta did not make nomination forms available to members of public for the annual April 2014 school board election, although on March 13, 2014, he showed a nomination kit to one member of the WNYCR. (Id., ¶35).

On March 4, 2014, Plaintiff Ferreiro, proceeding *pro se,* filed an Order to Show Cause with Temporary Restraints. ("OTSC") (Miller Cert., Ex. A). He apparently was acting on his own, and no member of WNYCR was aware of his actions, until it was discussed at a West New York Board of Education meeting on March 12, 2014. (Id.., Ex. B, T10-11).[2] Mr. Ferreiro's OTSC did not include a verified complaint, affidavit or other sworn testimony, and for that reason alone, Judge Bariso stated that the application should be denied. (Id., T17: 15-24; T69:4-8). Nonetheless, he held a hearing on March 14, 2014, and permitted Mr. Ferreiro to proceed with oral argument. At the hearing, Judge Bariso granted the West New York Board of Education to intervene to raise a factual issue, which was not raised by Mr. Ferreiro. (Id.., Ex. G). The Board, like Mr. Ferreiro, did not file a verified complaint or pleading of any sort, though submitted a certification (that raised a factual dispute that could not be resolved properly

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[2] At that meeting, Matthew Cheng, a member of the Board of Education and WNYCR, became aware that Mr. Ferreiro had filed an action in the Superior Court. He wrote and faxed a letter to Judge Bariso, (independent of Mr. Ferreiro), dated March 13, 2014, concerning the issue of whether the Town of West New York had given notice of its intent to consider R-20 to the Board of Education prior to the adoption of such resolution. (Miller Cert. Ex. H). Judge Bariso acknowledged that correspondence , (id., Ex. B. T46:1-6), but did not let Mr. Cheng participate in the hearing. Despite counsel's representation otherwise, Matthew Cheng's letter was not part of Mr. Ferreiro's reply submission to the court.

at a summary hearing, id., Ex. B, T50-52; 57: 21-23) and sought no relief. (Id., T11:5-6). At the end of the hearing, Judge Bariso denied Mr. Ferreiro's "order to show cause seeking a preliminary injunction," (Id., T71:9-12) again simply stating that, "the order to show cause was denied. There is no complaint." (Id., T73:16-19). The court then proceeded to instruct opposing counsel that the order also had to say that "the action was dismissed," also because there is no complaint. (Id., T73:22-23). The court made no mention that the action was dismissed with prejudice, and in fact, went on to explain to Mr. Ferreiro that he should seek legal advice if he wanted to file an "alternate complaint, or if you want to file a new action seeking relief." ((Id., T73:22-23).

On March 25, 2014, Judge Bariso signed and entered an Order prepared by counsel for the Town of West Newark, denying the OTSC, dismissing the action, but crossing of counsel's language "that the Court certifies that the Order herein is a final judgment pursuant to R. 4:42-2." (Id., Ex. I).(Rule permitting enforcement of an order upon fewer than all the claims as to all the parties, when, *inter alia* there was a complete adjudication of a separate claim or upon complete adjudication of all the rights and liabilities asserted in the litigation as to any party; otherwise an order which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims and it shall be subject to revision at any time before entry of final judgment).

PROCEDURAL HISTORY

On April 29, 2014, Plaintiffs filed a three-count Verified Complaint in Lieu of Prerogative Writ. It was served on both Defendant Carmela Riccie, the Municipal Clerk, and the Town of West New York on May 2, 2014. On June5 2014, counsel for the parties entered into an agreement to extend Defendants' time to file an Answer or otherwise respond. In accord

with the agreement, Defendants served a Motion to Dismiss on counsel for the Plaintiffs on June 16, 2014. Given the holiday schedule, this motion will be heard on July 11, 2014. Plaintiffs now submit their response asserting that none of the doctrines known under the umbrella of *res judicata* apply to the matter herein and thus, the Motion should be denied.

LEGAL ARGUMENT

I. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED BASED ON PLAINTIFFS' VERIFIED COMPLAINT AND CAREFUL REVIEW OF JUDGE BARISO'S DECISION AND ORDER IN DOCKET NO. L-754-14.

In their papers supporting their Motion to Dismiss, Defendants make no mention of the specific factual allegations or claims supporting Plaintiffs' Verified Complaint. Instead, they rest their arguments solely on the related concepts of res judicata, collateral estoppel and the entire controversy doctrine, and simply state, without careful analysis, that the claims raised in the Verified Complaint are "identical" to those raised by Mr. Ferreiro when he appeared *pro se*. A close comparison of the three legal claims asserted in the Verified Complaint, and Judge Bariso's 7-page decision and Order, dated March 25, 2014 (which was drafted by counsel for the current Defendants) indicates that the legal claims are not the same (but for one legal theory), though they all share the common goal of Mr. Ferreiro's initial Order to Show Cause, which is to secure an order declaring Resolution-20 invalid for various reasons. As Plaintiffs will address below, this "commonality of interests," as coined by the N.J. Supreme Court in McNeil v. Legislative Apportionment Comm'n, 177 N.J. 364, 396 (2003), is not fatal to their current complaint because Judge Bariso did not render a final judgment on the merits on any factual or legal issue discussed during the March 25, 2014 hearing. Without the defense of *res judicata*, Defendants' Motion to Dismiss must fail.

On a motion to dismiss made pursuant to R. 4:6-2(e), the court's inquiry is confined to an examination of the legal sufficiency of the alleged facts supporting the challenged

claims. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989); P. & J. Auto Body v. Miller, 72 N.J. Super. 207, 211 (App. Div. 1962). A complaint adequately states a claim when one is merely "suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). Upon a motion to dismiss for failure to state a claim, the court's analysis is limited to the facts alleged in the complaint, and not to extraneous evidence that seeks to dispute those facts. Bustamante v. Borough of Paramus, 413 N.J. Super. 276, 296 (App. Div. 2010) (internal quotations omitted). When examining the facts pled in a complaint, the court must assume they are true, and must draw every reasonable inference of fact in the plaintiff's favor. County of Warren v. State, 409 N.J. Super. 495, 503 (App. Div. 2009). The court's analysis must be painstaking and "undertaken with a generous and hospitable approach." Id. (internal quotations omitted). The court should not consider materials "outside the pleadings;" for if it does, "the motion is treated as a motion for summary judgment," which is subject to different standards than a motion to dismiss. Enourato v. New Jersey Bldg. Auth., 182 N.J. Super. 58, 64-65 (App.Div.1981) (citing R. 4:6-2).

Applying these principles, this Court should limit its analysis to the facts contained in the Plaintiffs Verified Complaint (which does include Judge Bariso's decision and order). To the extent that Defendants dispute the factual predicates of Plaintiffs Verified Complaint, such as WNYCR's "at least 7-member status" or its relationship to Mr. Ferriero --- those disputed contentions must be ignored in favor of the relevant allegations set forth in the Complaint. As such, given that this Court must assume that the facts contained in the Complaint are true, and must make every reasonable inference in the non-moving parties favor, it follows that the Defendants' Motion to Dismiss must be denied.

II. PLAINTIFF WNYCR, A GROUP OF VOTERS AND TAXPAYERS WHO ARE ACTIVE IN SCHOOL BOARD AFFAIRS, HAS STANDING TO BRING THIS ACTION AGAINST THE CLERK AND TOWN OF WEST NEW YORK.

In their motion papers, Defendants imply that Plaintiff WNYCR does not have standing to bring this action because it has not provided the "identities of the individuals comprising this entity" and has not alleged anything more than a "generalized grievance." (Defs. Br. at 16). In other words, Defendants imply that WNYCR is not a real party of interest in this matter, pursuant to R. 4:26-1, because the group has not "clarified" the "type of formation of this group," there are no named members but Matthew Cheng, and there is no evidence in the complaint that the entity consists of seven or more members. Id.[3] Accordingly, Plaintiff WNYCR does not have the "distinct injury" required to maintain this suit. Nothing can be further from the truth. The allegations contained in Plaintiffs' Verified Complaint belie Defendants' assertions.

As a threshold matter, Plaintiffs acknowledge that a party must have standing; that is, "the ability or entitlement to maintain an action before the court." New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402 (App. Div. 1997); see also Watkins v. Resorts Int'l Hotel and Casino, Inc., 124 N.J. 398, 417 (1991) ("Standing is . . . a threshold issue."). A plaintiff has standing when: (1) the litigant has a sufficient stake in the outcome, (2) genuine adverseness exists between the parties, and (3) there is substantial likelihood that the plaintiff would suffer some harm through an unfavorable decision. Spinnaker Condominium Corp. v. Zoning Bd. of City of Sea Isle City, 357 N.J. Super. 105, 110 (App. Div. 2003).

New Jersey courts generally take a liberal approach to standing by giving "due weight to the interests of individual justice, along with the public interest, always bearing in mind that

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[3] But see Paragraphs 1, 6, 20, 30, and 37 of Plaintiffs' Verified Complaint.

throughout our law we have . . . sweepingly reject[ed] procedural frustrations in favor of 'just and expeditious determinations on the ultimate merits.'" Crescent Park Tenants Ass'n. v. Realty Equities Corp., 58 N.J. 98, 111-112 (1971) (citations omitted).

More specifically, the New Jersey Supreme Court has recognized that "[b]oth our statutes and appellate decisions have given wide recognition to suits by associations." Id. at 111. See also Common Cause v. N.J. Election Law Enforcement Comm'n, 74 N.J. 231 (1977) (nonprofit advocacy group); People for Open Government v. Roberts, 397 N.J. Super. 502, 515 (App. Div. 2008) (unincorporated citizen group). Accordingly, New Jersey statute provides that nonprofit corporations may "sue and be sued, complain and defend and participate as a party or otherwise in any judicial . . . proceeding." N.J.S.A. 15A:3-1. Similarly, unincorporated associations "consisting of 7 or more persons and having a recognized name, may sue or be sued in any court of this state by such name in any civil action affecting its common property, rights and liabilities." N.J.S.A. 2A:64-1.

In Crescent Park, for example, tenants in a high-rise luxury apartment building formed an association "for the protection and mutual benefit of the [building's] tenants." Crescent Park, 58 N.J. at 99. The association filed suit against the buildings landlord asserting "various mismanagement charges all of which [had] a common relationship to the tenant body as a whole." Id. at 100. The New Jersey Supreme Court held that the tenants association, which was an incorporated nonprofit organization, had standing to sue the landlord. Id. at 111-112. There, the Court reasoned that the tenants "understandably chose to act instead entirely through their Association which was formed to help balance the bargaining power of the landlord and to enable them to deal from a position of strength with the acknowledged strength of their landlord." Id. at 108.

Moreover, even though the "wrongful action or inaction was nongovernmental" the Court noted that the "adverseness and private interest are present in at least [in] abundant measure and the public interest also served by an expeditious determination of the merits." Id. at 109. The Court further reasoned, on related policy grounds, that:

> It must be borne in mind that the complaint . . . is confined strictly to matters of common interest and does not include any individual grievance which might perhaps be dealt with more appropriately in a proceeding between the individual tenant and the landlord. So far as the common grievances are concerned they may readily and indeed more appropriately be dealt with in a proceeding between the Association, on the one hand, and the landlord, on the other, thus incidentally avoiding the procedural burdens accompanying multiple party litigation. Surely, techni[calities] aside, no one may question that the Association has a real stake in the outcome of the litigation nor many [sic] anyone question that there is real adverseness in the proceeding. All that being so, it is difficult to conceive of any policy consideration or any consideration of justice which would fairly preclude the Association from maintaining, on behalf of its member tenants, the present proceeding between itself as plaintiff and the landlord and its parent company as defendants.

Id. The New Jersey Supreme Court extended the reasoning of Crescent Park, to the analogous situation of an association of unit owners in a condominium project in Siller v. Hartz Mountain Associates, 93 N.J. 370 (1983). There, the Court stated that, "nothing in the legislative scheme governing condominiums [would] indicate policy considerations different from those expressed in Crescent Park." Id. at 379. In Siller, the Court held that the plaintiffs (individually and as an association) who brought suit "as individual unit owners and on behalf of others similarly situated," had standing to sue the homeowners' association of the condominium project for wrongful actions taken by the board of directors. Id. at 373, 374, 384.

Applying New Jersey's liberal standing principles to the facts of this case, it is clear that the Plaintiff, West New York Concerned Residents, has standing to sue the Defendants in this

case. WNYCR has standing as an unincorporated association, because its membership consists of significantly more than seven (7) members. See Verified. Compl. at ¶6.[4]

Furthermore, WNYRC was recently formed specifically to advocate around educational matters in West New York, and consists of persons who supported the November 2013 referendum to change the West New York school board from an appointed board to one where all members are elected, as well as several individuals who ran for the school board in January and/or who had intended to run in the April election had it been held when the public expected it to be held. See Am. Compl. at ¶6. Specifically, the WNYRC alleges that the Defendants have failed to follow several statutory rules governing public meetings and the adoption of a resolution to change the timing of local school board elections from April to the General Election day in November, all in an attempt to avoid public accountability, and prevent change of the status quo. Members of WNYCR want a full-elected school board as soon as possible, want the Board to operate independently of the Town Commission and Mayor, and, some of its members had every intention of running for Trustee last April, but for the Town's rushed decision to delay the election seven months.

Accordingly, like the association of tenant members in Crescent Park, and the association of unit members in Siller, WNYCR, as representative of its members and in its own right, has a stake in the outcome, real adverseness to the Defendants, and would likely suffer some harm with an unfavorable opinion by this Court. See Crescent Park, 58 N.J. at 111-12 (holding that a

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4 It should be noted that whether WNYCR in fact has seven or more members is factual question that is often subject to dispute. See Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 383 N.J. Super. at 57 (noting that the question of the Committee's standing "could not be appropriately be decided [even] on summary judgment because the number of persons who were members of CBTR at critical times was a fact in dispute.").

tenant association had standing to file suit against their landlord for alleged deficiencies with the maintenance of their building); see also Siller, 93 N.J. at 383-84 (holding that an association of unit owners had standing to sue a homeowners' association for alleged wrongful acts by its board). Therefore, contrary to the empty implications by Defendants, WNYCR has sufficient standing to prosecute its complaint. Cf. Roberts, 397 N.J. Super. at 515 (finding that "[b]ecause of the individual plaintiffs' standing [as taxpayers], the organizational plaintiff, POG, of which they are members, has standing as well.").

III. THE DOCTRINE OF RES JUDICATA DOES NOT APPLY TO THIS MATTER.

The term "*res judicata*" refers broadly to the common-law doctrine barring a party from relitigating a second time what was previously fairly litigated and determined finally. City of Hackensack v. Winner, 162 N.J. Super. 1, 27 (App. Div. 1978). The general requirements of the doctrine are a final judgment by a court or tribunal of competent jurisdiction, and identity of parties, causes of action, and relief sought. Id. at 27-28 (**claim preclusion**). Collateral estoppel is that "branch of the broader law of *res judicata* which bars relitigation of any issue or fact 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 (1977)(**issue preclusion**). Both doctrines are not constitutionally or statutorily mandated, but rather rest upon policy considerations, which recognize that fairness to the defendant and sound judicial administration require a definite end to litigation brought by the same party over one particular controversy. Velasquez v. Franz, 123 N.J. 498, 505 (1991). Both doctrines also require that there be a "final judgment by a court or tribunal of competent jurisdiction." Culver v Insurance Co. of N. A., 115 N.J. 451, 405 (1989).

Notwithstanding these rationales, the New Jersey Supreme Court has recognized that the principle of claim or issue preclusion need not be applied "if there are sufficient countervailing interests," In re Coruzzi, 95 N.J. 568, appeal dismissed, 469 U.S. 802 (1984), or if "a new determination is warranted to avoid inequitable administration of the law." Plainfield v. Pub. Ser. Elec. & Gas Co., 82 N.J. 245, 259 (1980)(finding that issue preclusion or *res judicata* not appropriate where issue was purely one of law and a new determination was warranted to avoid inequitable administration of law with respect to contract between municipality and utility). That is, although judgments must in general be accorded finality despite flaws in the processes leading to a decision, there are some judgments that warrant reexamination if the "initial engagement on the merits was inadequate." Velasquez v. Franz, 123 N.J at 518 (J. Stein, dissent)(quoting Restatement (Second) of Judgments Introduction at 12 (1982)) This is just one of those cases where the initial engagement on the merits was inadequate: Neither Mr. Ferreiro nor the West New York Board of Education filed a complaint initiating any action, and Mr. Ferreiro did not submit any sworn testimony to the trial court on any of the claims he raised via his OTSC seeking temporary restraints. Judge Bariso acknowledged that Mr. Ferreiro's OTSC and action must be dismissed for that reason alone, and, most importantly, the Order he signed explicitly acknowledged that it was not a final judgment on the merits.

A. JUDGE BARISO'S ORDER WAS NOT A FINAL JUDGMENT ON THE MERITS .

In their Brief, Defendants write," Here, it cannot be disputed that there is a final judgment by a court of competent jurisdiction." They rest their assertion on the fact that the Order signed by Judge Bariso, which their counsel prepared, indicates that "Plaintiff's action was dismissed with prejudice," and the order was intended to be final enabling Mr. Ferreiro to appeal Judge Bariso's decision. (Defs. Br. at 15-16)(citing Miller Cert., Ex. I, and Ex. B, T73:6-8). First, there

is nothing in Judge Bariso's oral decision that indicates that he intended to dismiss Mr. Ferreiro's action with prejudice. To the contrary, there are several indications that he viewed his decision as a denial of a preliminary injunction, and that he dismissed the action simply because no complaint had been filed. See (Miller Cert., Ex. B, T71: 9-12)("So for all of those reasons, the order to show cause seeking a preliminary injunction precluding the change of the date of the Board of Education is hereby denied."); (T69:4-8)("I did not have to listen to anything today. I could have simply dismissed it in the first two minutes I was out here because you haven't given me a verified complaint or an affidavit."); (T73:18-23)("And the order will provide that the order to show cause was denied. There is no complaint . . .That's why it has to say that the action is dismissed."); and (T74: 23-25)("Because it's a --- it's dismissing the order to show cause. It's discharging the order [to show cause], so, of course, I'm dismissing the action.")(emphasis added).

Furthermore, although there is little doubt that Judge Bariso's order was final, in contrast to interlocutory, that does not mean that he intended his decision to constitute a final determination on the merits. At best, as Defendants note in their brief, Judge Bariso determined (**if one does not consider his entire decision dicta**) that Mr. Ferreiro did not meet the standards articulated in Crowe v. DeGioia, 90 N.J. 126 (1986), governing applications for temporary restraints or preliminary relief, because he was not likely to succeed on the merits of his complaint. (Defs. Br. at 10) In the ordinary course of things, a plaintiff, if denied preliminary relief, would still be able to litigate his action, often be permitted to amend his complaint, and still be able to make a motion for summary judgment at a later date. However, in this matter, there was no complaint to amend. Accordingly, Judge Bariso dismissed the action, and explicitly indicated on the face of the Order that he signed, by crossing out a whole provision

drafted by Defendants' counsel, that "the Order entered herein is [not] a final judgment pursuant to R. 4:42-2." Such interpretation of Judge Bariso's decision is consistent with his statement to Mr. Ferreiro that he could "seek legal advice if [he] wants to file an alternative complaint, or if you want to file a new action seeking relief." (Miller Cert., Ex. B, T75:6-12).

Because the public interest in putting an end to litigation which underlies the principle of *res judicata* requires a final judgment, and that judgment is missing here, Mr. Ferreiro is entitled to a second chance to relitigate some of the claims that he raised in his OTSC. The patience and courtesy shown Mr. Ferreiro, representing himself *pro se*, by Judge Bariso support no other conclusion. Mr. Ferreiro was entitled to appeal his final order denying the OTSC and dismissing his action, but he also could start all over and initiate an action against Defendants the right way, *i.e.*, by a filing a complaint.

B. MEMBERS OF WEST NEW YORK CONCERNED RESIDENTS WERE NOT PARTIES TO MR. FERREIRO'S ORDER TO SHOW CAUSE NOR ARE THEIR CLAIMS IDENTICAL FOR PURPOSES OF CLAIM PRECLUSION.

In this case, there is not a complete identity of the parties – a central factor that Defendants simply ignore. That is, even if this court were to find that Mr. Ferreiro is barred from litigating the three counts asserted in the Verified Complaint (only one of which was included in his OTSC --- lack of compliance with statute's sixty day notice requirement), Defendants do not address why Plaintiff WNYCR should be similarly barred. They were not parties to Mr. Ferreiro's OTSC, and there is no indication from the transcript of the hearing that Mr. Ferreiro was representing anyone but himself.

As the Verified Complaint alleges (and must be assumed to be true), Mr. Ferreiro is a long time active participant in the public affairs of West New York, who is a founder of Residents for a Better West New York, an unincorporated association that was one of the proponents of the referendum to change the West New York school board from an appointed

board to one where all members are elected. (Comp., ¶5) Plaintiff WNYCR is also an unincorporated association, but it has a separate mission, identity and membership than Residents for a Better West New York. It was formed specifically to advocate around educational matters in West New York only, and consists of persons who supported the November 2013 referendum to change the West New York school board from an appointed board an elected one, but also individuals who are interested in serving on the school board themselves. (Id., ¶6). Until the filing of this Verified Complaint, there has been no coordination in strategy or action between Mr. Ferreiro and members of WNYCR, and there is no overlap in membership between the two organizations. To apply the doctrine of *res judicata* against WNYCR under such circumstances would be inappropriate and a perverse sense of fairness.

This conclusion is underscored by the fact that the "causes of action asserted in the present case are [not] identical to those asserted in Mr. Ferreiro's Order to Show Cause." Defs. Br. at 16. Mr. Ferreiro raised four claims, only one of which is presented in the Verified Complaint. Plaintiffs now raise two additional causes of action that were not raised by Mr. Ferreiro (though one of those two new claims was addressed by the Board of Education, who was permitted to intervene but did not file a complaint nor request any relief). The test for the identity of a cause of action for claim preclusion purposes is not simple. Culver v Insurance Co. of N. A., 115 N.J. at 405 (1989). To decide if two causes of action are the same, a court must consider, (1) whether the acts complained of and the demand for relief are the same; (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same; and (4) whether the material facts alleged are the same. Ibid. (citations omitted). The fact that Mr. Ferreiro did not file a complaint and did not produce any witnesses or documents in support of his OTSC makes this analysis quite difficult, and underscores the

inadequacy of the "initial engagement on the merits." Plaintiffs now contend, however, that except for Count Three of the Verified Complaint concerning the 60 day statutory notice requirement, there is no identity of claims warranting claim preclusion because the acts complained of are different, the request for relief is different, the predicate acts are different, the theories of recovery are different as are the witnesses and documents necessary to obtain the relief requested.

For the foregoing reasons, Defendants' defense of claim preclusion must be denied.

IV. THE DOCTRINE OF COLLATERAL ESTOPPEL ALSO DOES NOT APPLY.

Defendants also assert that Plaintiffs' Verified Complaint is defeated by the doctrine of collateral estoppel. (Defs. Br. at 17-18). Although Defendants correctly set forth the requirements that a party asserting the bar of collateral estoppel must satisfy in order to prevent a party from relitigating an issue, they fail to analyze each of those factors and merely conclude that the complaint must be dismissed on this ground as well. Because none of the issues raised in Plaintiffs' Verified Complaint were actually determined by a final judgment in a previous suit (involving different causes of action brought by the same parties or those in privity), collateral estoppel does not apply; thus, rendering Defendants' conclusion without merit. See e.g., Tarus v. Borough of Pine Hill, 189 N.J. 497 (2007)(judgment in federal court that officer had probable cause estopped citizen from relitigating same issue in suit for false arrest); Sacharow v. Sacharow, 177 N.J. 62 (2003)(noting that issue of domestic violence was not previously litigated in the Address Confidentiality Program).

A. NOT ALL THE ISSUES RAISED IN PLAINTIFFS COMPLAINT WERE ACTUALLY LITIGATED IN THE PRIOR PROCEEDING, AND NONE WERE DISMISSED PURSUANT TO A FINAL JUDGMENT ON THE MERITS.

For collateral estoppels to foreclose the relitigation of an issue, the party asserting the bar must demonstrate that: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the earlier 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 prior proceeding. Sacharow v. Sacharow, 177 N.J. at 76. Contrary to Defendants' representations, the doctrine of collateral estoppel does not extend to every fact which may have been litigated in the prior action. The doctrine is restricted to matters or facts directly in issue and does not extend to "any matter which came collaterally in question, . . . nor . . . any matter incidentally cognizable, nor . . . any matter to be inferred by argument from the judgment." Mazzilli v. Accident and Casualty Ins. Co., 26 N.J. 307, 315 (1958)(reversing and remanding 1957 appellate decision, 45 N.J Super. 137 cited by Defendants; because, in an action against husband's liability insurer based on judgment against wife for injuries inflicted by child, affidavit relying erroneously on doctrine of collateral estoppel was insufficient to warrant summary judgment).

As noted above, Counts I (alleged OPM violation due to lack of any public comment) and II (alleged violation of N.J.S.A. 19:60-1.1(a)) of the Verified Complaint were not mentioned by Mr. Ferreiro in his OTSC. The issue of whether the Town Commission allowed the public to speak prior to the adoption of Resolution-20 (which is relevant to Count I) was discussed, but was not essential to Judge Bariso's decision. See Miller Cert., Ex. B, T70-71. Similarly, the WNY Board of Education weighed in on a factual question relating to Count II, but did file a complaint putting Count II properly before the Court. There was an outstanding factual dispute created by conflicting certifications submitted by counsel for the Board of Education and counsel

for the Clerk of West New York --- i.e., the Clerk said that they gave notice to the Board of Education, and the Board of Education asserted that they did not receive any written notice from the Clerk,---- but the Court's discussion of that issue (id., T49-52) played no role in its denial of Mr. Ferreiro's application for preliminary relief. (Id., T7070-71)

Mr. Ferreiro did raise Count III of the Verified Complaint (alleged violation of N.J.S.A. 19:60-1.1(c)), and Judge Bariso's thoughts about the validity of that claim were central to his denial of Mr. Ferreiro's OTSC. (Ibid.) Nonetheless, as shown above infra. Point IIIA, the court did not issue a final judgment on the merits as required by the doctrine of collateral estoppel. At best, if his interpretation of N.J.S.A. 19:60-1.1(c) is determined to be more significant than dicta (since he acknowledged from the outset that Mr. Ferreiro's OTSC should be dismissed simply because there was no complaint), it constitutes a decision on an application for preliminary injunction, and not a final determination on the merits. If Mr. Ferreiro had filed a complaint and then made an OTSC for temporary restraints based on his assertion that N.J.S.A. 19:60-1.1(c) was violated, Judge Bariso's denial of the OTSC would be nothing more than a decision that Mr. Ferreiro was not likely to succeed on the merits of his claim, and he would be permitted to continue litigating his claim until it was dismissed pursuant to a final judgment on the merits.

For the foregoing reason, Mr. Ferreiro should be permitted to proceed with litigating the Verified Complaint filed in this action.

B. THERE IS NO PRIVITY BETWEEN MR. FERREIRO AND WNYCR.

As is the case with *res judicata*, the principle of collateral estoppel also requires that the party against whom the doctrine is asserted was a party to or in privity with a party to the prior proceeding. For the reasons set forth above in Point IIIA, infra., the doctrine cannot be asserted against Plaintiff WNYCR. Plaintiffs are cognizant of the concerns expressed in McNeil v.

Legislative Apportionment Comm'n, 177 N. J. 364 (2003), where the N.J. Supreme Court applied the res judicata test broadly because the matter at issue, i.e., concerns of racial gerrymandering, implicated public rather than private rights. The Court noted that because there are potentially large numbers of plaintiffs with standing in public law cases, were the court to allow different members of the public who shared a "commonality of interests" to raise issues continually, such public law claims would assume "immoratlity." Id. at 396. But unlike the plaintiffs in McNeil, there is no evidence that the citizens associated with WNYCR "engaged in tactical maneuvering to file their own claim" rather than joining the litigation initiated by Mr. Ferreiro.[5] Indeed, Matthew Cheng, one of the members of WNYCR, attempted to participate in Mr. Ferreiro's action, before it was dismissed because no complaint had been filed.

IV. THE ENTIRE CONTROVERSY DOCTRINE CANNOT BE APPLIED AGAINST A PRO SE CLIENT WHO FAILS EVEN TO FILE A COMPLAINT NOR A CITIZEN GROUP THAT IS INDEPENDENT OF THAT INDIVIDUAL.

The concept that a party is required to bring all possible claims growing out of one transaction in one proceeding is embodied in the entire controversy doctrine, yet another extension of the concept of *res judicata*. See Long v. Lewis, 318 N.J. Super. 449 (App. Div. 1999)(where neither the entire controversy doctrine nor doctrine of *res judicata* barred employee who failed to raise discrimination claim before the Merit Board from suing in court under Law Against Discrimination , because forums not equal). In New Jersey, R. 4-27-1 adopts the doctrine by stating that, "each party to an action shall assert therein all claims which he may have against any party thereto insofar as may be required by application of the entire controversy

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[5] In McNeil, Republican legislators and voters had challenged the Bartels redistricting plan twice in federal court, which twice had rejected their claims, and now the court was facing the fourth case in which a group of plaintiffs were attacking the redistricting plan. Id. at 399.

doctrine." To apply this rule against Mr. Ferreiro and other members of the public in this case would simply be unjust. The confusion Defendants caused by failing to adhere to statutory provisions regarding transparency, notice and public participation should not be employed against ordinary residents who just want to clean up the affairs of their school board and make sure that it operates independent from the Town Commission in a manner that is open and accountable to the public. The fact that Mr. Ferreiro had the savvy to try to challenge Defendants' actions, but not the technical know-how or resources to file a proper complaint, should not be used against him to preclude him from raising additional claims to those he raised in his OTSC. Especially, here, where he has now joined with other residents, who share his goal in defeating Resolution-20, but who took a bit more time to organize themselves and retain a public interest law firm to make a similar challenge, but on other grounds.

The entire controversy doctrine thus has no more than rhetorical relevance to this case, and should not be applied to bar either Plaintiff from proceeding with this matter.

V. THE TOWN OF WEST NEW YORK IS THE PROPER PARTY IN THIS ACTION.

In a last ditch effort to dismiss this action, Defendants claim that they are the wrong party to this action, because "Plaintiffs in the present suit demand that Defendants Town of West Newark and/or the Clerk be compelled to call a special election on the last Tuesday in September." Defs. Br. at 20. A cursory review of the relief requested in this action indicates that Plaintiffs make no such demand. Defendants are the proper party in this action, because each of the three alleged wrongs was committed by the Defendants.

Specifically, Plaintiffs seek,

> (A) a declaration that the Town of West New York ("Governing Body") violated the Open Public Meetings Law, N.J. S.A. 10:4-12(a) by failing to allow any public comment at its February 19, 2014, regular meeting, let alone, public comment on Resolution-20 "Establishing the Election of Members of the West

> New York Board of Education As the First Tuesday after the First Monday in November," an action that is of such significance that it can be initiated and taken with voter approval pursuant to statute; (B) a declaration that the Governing Body and the Municipal Clerk violated N.J.S.A. 19:60-1.1(a) by failing, prior to holding a meeting for the adoption of the resolution to move the date of the annual school election, to provide adequate notice or any notice of the meeting directly to the affected Board of Education; (C) a declaration that the Governing Body violated N.J.S.A. 19:60-1.1 (c) by failing to give notice, in writing, to change the date of a school election from the third Tuesday in April to the first Tuesday in November, to the county clerk "no less than 60 days prior to the third Tuesday in April"; and (D) an order declaring Resolution-20 invalid, permitting board terms to expire as would be the case if an election had occurred in April, N.J.S.A. 18A:12-19.2; and requiring the Hudson County Superintendent to fill the vacancies of those board members, pursuant to N.J.S.A. 18A:12-15(b), until a special school board election is held on the last Tuesday in September in accord with N.J.S.A. 19:60-2.

(Comp., ¶4).

It is evident that each of Plaintiffs' claims is seeking invalidation of Resolution-20, which was adopted by the Township, less than 60 days "prior to the third Tuesday in April," at a meeting of the Commission at which they did not permit any public comment, nor had the Clerk given adequate notice of such meeting to the WNY Board of Education. Accordingly, Plaintiffs' request for declaratory relief is properly lodged against Defendants. If the Resolution is invalid, the terms of four Trustees will expire; and pursuant to statute, the Hudson County Superintendent is able to appoint new trustees until a new election is held. The court does not have to issue an order to compel the Board of Election to hold a special election either in September or December; statute compels the Board of Election to do so.

Plaintiffs understand that pursuant N.J.S.A. 18A:12-15(b), Board vacancies may be filled in several ways. They have no objection to joining the Hudson County Superintendent to this action for relief purposes only, if this Court determines that it is necessary to do so.

CONCLUSION

For all the foregoing reasons, Defendants Motion to Dismiss should be denied, and Plaintiffs be permitted to proceed with this litigation.

Respectfully submitted,

NEW JERSEY APPLESEED
PUBLIC INTERST LAW CENTER

By_____
Renée Steinhagen, Esq.

Dated: July 2, 2014