2014 IL App (1st) 130104-U
No. 1-13-0104

THIRD DIVISION
AUGUST 13, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FANE LOZMAN and BLUE WATER PARTNERS, INC., et al.,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	No. 09 L 5831
v.	)	
GERALD D. PUTNAM, TERRA NOVA TRADING, LLC, STUART TOWNSEND, MARRGWEN TOWNSEND, GDP, INC., and TOWNSEND ANALYTICS, LTD,	)	The Honorable Bill Taylor and Frank Castiglione, Judges Presiding.
Defendants-Appellees.	)	

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Review of the dismissal of certain defendants was waived by plaintiffs where they included the issue in their notice of appeal but made no argument concerning this dismissal below in their section 2-1401 petitions or in their brief on appeal. (2) Consideration of a deposition transcript and a public letter attached to a combined motion to dismiss is appropriate where defendants raised section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)) as well as section 2-615 (735 ILCS 5/2-615 (West 2010)). (3) The circuit court did not err in denying plaintiffs' motions for discovery and an evidentiary hearing, as plaintiffs did not cite to any disputed issue of material fact in their motion for such discovery and hearing. (4) Review of the merits of the circuit court's dismissal of plaintiffs' original and amended section 2-1401 petitions was barred by *res judicata* because the arguments raised by plaintiffs in both

petitions were already adjudicated in the prior direct appeal of the underlying action and plaintiffs raised no new evidence, as the same purported evidence was before the trial court and also addressed in the prior appeal. (5) Count II of the section 2-1401 petitions, alleging that the judgment should be vacated based on a defendant's use of a "false" spelling of his last name, failed to establish the fraudulent concealment exception to limitations and was untimely because a public letter in the record, considered as part of the affirmative matter in a section 2-619 motion to dismiss, refuted plaintiffs' claim of fraudulent concealment of the spelling of the defendant's name.

¶ 2 BACKGROUND

¶ 3 Plaintiffs appeal the court's denial of their motion to vacate orders denying both their original and amended 2-1401 petitions, motion for discovery, and motion for an evidentiary hearing. Their original 2-1401 petition was filed on November 10, 2010, and their amended 2-1401 petition was filed on October 18, 2011. Plaintiffs sought to vacate the judgment entered on July 25, 2005 in favor of defendants in the underlying usurpation of business opportunities case, after a four-week jury trial and two interlocutory appeals. This court affirmed those judgments in the underlying case in *Lozman v. Putnam*, 379 Ill. App. 3d 807, 817, 819 (2008). More than five years later, plaintiffs filed their original section 2-1401 petition to vacate the prior judgments, claiming fraudulent concealment by defendants of certain facts which would not have resulted in those prior judgments. Plaintiffs sought discovery and an evidentiary hearing with their original 2-1401 petition, which were denied. Plaintiffs' amended section 2-1401 petition raised the same argument and was dismissed pursuant to sections 2-615 and 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2010)). Plaintiffs appeal the dismissal of both petitions and the refusal to grant discovery and an evidentiary hearing.

¶ 4 The parties in this case had a relatively short business relationship, followed by a long and complicated procedural history, both of which we briefly summarize. Plaintiff Fane Lozman and defendant Gerald D. Putnam were business partners whose relationship soured. In March 1994, Lozman and Putnam incorporated plaintiff Blue Water Partners, Inc. (BWP) to sell

computer software used by traders to display trading and price data. Putnam was president and CEO of BWP and a shareholder, and Lozman was vice-president and a co-shareholder. Putnam and Lozman were also directors of and equal shareholders in BWP. Lozman relied on Putnam as a broker/dealer to obtain a broker/dealer license. The original business plan for BWP was to be a securities broker-dealer that marketed its broker-dealer services by furnishing computer trading software to brokerage customers in order to obtain their brokerage business.

¶ 5 In November 1994, Putnam incorporated Terra Nova Trading, L.L.C. (Terra Nova), a broker-dealer business which was reasonably incident to BWP's line of business. Putnam owned 100% of Terra Nova, while Putnam and Lozman each owned 50% of BWP. Terra Nova and BWP shared office space. Lozman alleges that beginning in October 1994, Putnam began to divert the broker/dealer business from BWP to Terra Nova.

¶ 6 On April 17, 1995, Lozman and Putnam entered into a written agreement regarding the sharing of revenues and commissions for BWP. But in mid-1995, Lozman and Putnam decided to part ways. According to Lozman, he was "kicked out."

On October 9, 1995, Lozman and Putnam entered into a mutual release of claims. The release signed by Lozman stated:

> "I, Fane B. Lozman, as Chairman[1] of Blue Water Partners, Inc., hereby release Analytic Services, Terra Nova Trading L.L.C., Gerald D. Putnam and Samuel Long from any obligations past and present arising from my past association with those entities and persons and as a result of the attached agreement.

[1] The release states Lozman was the "Chairman," although there is no indication by the parties in their briefing of any citations to the record to substantiate that Lozman was the chairman of the Board of Directors in addition to being the Vice President.

> Further, I Fane B. Lozman personally release Analytic Services, Terra Nova Trading L.L.C., Gerald D. Putnam and Samuel Long from any obligations as a result of my past association with those entities and persons and as a result of the attached agreement.
>
> I agree to release and hold harmless Analytic Services, Terra Nova Trading L.L.C., Gerald D. Putnam and Samuel Long from any obligations resulting from the attached agreement.
>
> I further agree not to disclose the details of this agreement or to discuss Terra Nova Trading L.L.C., and Analytic Services or my past business relationship with Gerald D. Putnam, Samuel R. Long, Terra Nova Trading L.L.C., and Analytic Services, with my current or future prospects or clients."

The "attached agreement" mentioned in the releases was the parties' commission sharing agreement. The word "Void' was written on the agreement on October 9, 1995, but the agreement was valid from its execution on April 17, 1995, up until October 9, 1995.

¶ 7 Putnam conveyed his interest in BWP to Lozman in consideration of the release. Putnam returned his BWP stock to Lozman and BWP on November 21, 1995, at which time Putnam and plaintiffs also signed a termination agreement.

¶ 8 On August 9, 1999, Lozman filed the underlying action against defendants Putnam, Terra Nova Trading and GDP, Inc. (Putnam defendants), as well as defendants Stuart Townsend, Marrgwen Townsend, and Townsend Analytics (Townsend defendants), seeking rescission of the October 9, 1995 release. Defendants Stuart and Marrgwen Townsend were computer programmers who programmed brokerage and trading software for BWP, and Townsend Analytics, Ltd. was their programming firm. Lozman introduced the Townsends to Putnam. Lozman alleged that before he signed the October 9, 1995 release Putnam failed to disclose to

Lozman that Putnam had met with the Townsends and another trader, Lewis Borsellino, "to discuss the creation of a SOES trading organization."[2] *Lozman*, 379 Ill. App. 3d at 812. Lozman alleged that Putnam breached his fiduciary duties to BWP by usurping BWP's corporate opportunities in the electronic trading field and the electronic stock exchange by diverting business to Terra Nova. Two years later, Putnam changed the name of Terra Nova to Archipelago, LLC. Putnam also incorporated GDP, Inc. Plaintiffs allege that GDP, Inc. (GDP) also received corporate opportunities usurped from BWP. Putnam is the sole shareholder and director of GDP. Archipelago, LLC, Archipelago Holdings, LLC, and GDP were also named defendants in the underlying action. Chicago Trading and Arbitrage, L.L.C. (CTA) was the small order execution system (SOES) trading business formed by Putnam and the Townsends and was also named as a defendant.

¶ 9 Lozman did not file the underlying action until August 9, 1999. Lozman alleges that he could not file the underlying action earlier, and that as early as September 1995 he tried to find a lawyer to pursue an action, but at the time he signed the release he did not have the financial resources necessary to retain counsel to proceed against defendants. The parties stipulated that

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[2] "SOES" stands for "Small Order Execution System," which was a system implemented to facilitate clearing trades of low volume in Nasdaq market securities and some Nasdaq small cap securities. The parties also refer to this system as an "SOES room business." This system required market makers to accept SOES orders that matched their advertised bid and ask prices, and allowed individual traders to execute orders with no more than 1,000 shares, and for stocks trading at no more than $250 per share, and thus gave small investors and traders the opportunity to compete with larger investors for access to orders and execution.

on September 15, 1995, 24 days before signing the release, Lozman sought legal advice from an intellectual property partner at a large firm. According to Lozman, the attorney sought a large retainer to take Lozman's case and Lozman did not have the funds at that time.

¶ 10 Lozman and BWP filed a 22-count first amended complaint on December 6, 1999, naming various defendants. After a series of motions to dismiss and motions for summary judgment by various defendants, only Counts II, IV, XIV, XVIII, XIX, and XX against Putnam, Terra Nova, and GDP remained. Counts II and IV were equitable claims for usurpation of corporate opportunities. Count XIV was for the equitable remedies of rescission, cancellation and reformation of the October 9 release, Count XVIII was for damages for breach of the April 17, 1995 agreement, Count XIX was for damages for breach of an alleged oral contract by defendants Putnam and Terra Nova to pay BWP "revenues and brokerage commissions" due under a brokerage trading agreement, and Count XX was for damages against defendants Putnam and Terra Nova, resulting from Putnam's alleged promise to Lozman to deliver a 50% ownership interest in Terra Nova. These claims were tried in a dual bench and jury trial over approximately four weeks, from November 16, 2004 to December 16, 2004. Before trial, the court ruled that any jury findings regarding the equitable claims for usurpation of corporate opportunities (Counts II and IV) to be tried by the jury were merely advisory.

¶ 11 At trial, Putnam testified that he did not discuss an SOES room business with anyone in October of 1995, and did not engage in any SOES room planning until late 1995 and early 1996. Lozman was told that Terra Nova was created simply to allay the fear of the Townsends that partial ownership in BWP might have an adverse impact on their relationships with existing broker-dealer customers and to insulate the Townsends from any trading liability.

¶ 12 The jury returned an advisory verdict in favor of BWP on the claim of usurpation of corporate opportunities and the claim for breach of fiduciary duties against Putnam and Terra Nova (Counts II and IV). The jury returned a verdict in favor of defendant Putnam and the remaining defendants on Count XVIII for breach of the commission contract and on count XIX, plaintiffs' claim for breach of an alleged oral contract. The trial court, however, did not enter judgment on those advisory verdicts.

¶ 13 The jury also answered 12 special interrogatories. In response to special interrogatories, the jury found that the release was: unconditional; "just and equitable" to Lozman; "signed with full disclosure"; "supported by consideration"; "not limited"; and "ratified" by Lozman and BWP.

¶ 14 One week after the December 16, 2004, jury verdict, plaintiffs filed their motion for "equitable relief" on December 23, 2004.

¶ 15 On July 25, 2005, the trial court entered judgment for defendants Putnam, Terra Nova and GDP on Counts II, IV, XVIII, XIX and XX. The court amended its judgment on August 23, 2005 to add judgment for defendants also on Count XIV (rescission, cancellation and reformation of the October 9 release). The trial court found that the October 9 release was valid, and the trial court agreed with the jury's special findings:

> "Taking all of the evidence surrounding the [October 9, 1995] release, this Court agrees with the jury's finding that [d]efendants proved fairness of the transaction by full and complete disclosure of all material facts surrounding their desire to be released from all obligations to the other party."

¶ 16 But the trial court ultimately found that plaintiffs' claims for usurpation of a corporate opportunity (Counts II and IV) against the Putnam defendants were barred under the doctrine of

laches. The circuit court specifically found that: (1) Lozman had "enough facts" before signing the release such that he had been placed on notice of his equitable claims against the Putnam defendants; and (2) that Lozman's four-year delay in filing the underlying lawsuit was prejudicial to defendants. The court found the following:

> "Plaintiff Lozman testified that he attempted to find counsel in September 1995 but lacked the financial resources to pay the necessary retainer. He also notified Defendant Putnam, the Townsends, congressional committees, and government agencies of his impending suit. However, as we previously analyzed, at the time of the release signing, Plaintiff Lozman knew that Defendant Putnam intended to continue operating Terra Nova trading, a broker-dealer reasonably incident to Blue Water. Further, in November 1995, Plaintiffs hired Craig Fowler to represent Blue Water, for which he drafted a Termination Agreement. Here, we see that Plaintiffs had two opportunities when they could have filed a usurpation claim but failed to seek prompt redress. Even if Plaintiffs had no actual knowledge of the specific facts, we believe that under the *Eckberg* court's reasonable person standard, Plaintiffs had enough facts from the circumstances surrounding the release and legal representation to realize that Defendant Putnam was going to continue with Terra Nova solely as his broker-dealer business. [*Eckberg v. Benso,*] 182 Ill. App. 3d 126, 132 *** (1st Dist. 1989). Defendants also developed and substantially changed the business structure of Terra Nova Trading with the understanding that he was completely released from any obligations. Defendants would be prejudiced should we allow Plaintiffs to file a claim so many years after their claim was ripe for suit but they had failed to diligently file suit. Accordingly, Plaintiffs' usurpation claim is barred by Defendants' *laches* affirmative defense."

¶ 17 The circuit court extended the time for plaintiffs to file their post-trial motion to September 14, 2005, and plaintiffs filed a post-trial motion on that date. The court entered an order denying plaintiffs' post-trial motion on March 14, 2006.

¶ 18 On March 31, 2006, plaintiffs appealed. Plaintiffs argued, in relevant part, that the trial court erred in holding after trial that the October 9 release was valid and that *laches* barred plaintiffs' recovery for usurpation of a corporate opportunity. *Lozman v. Putnam*, 379 Ill. App. 3d 807, 819-20 (2008). This court affirmed the trial court's judgment. This court found that plaintiffs waived their fraudulent concealment argument because they "failed to specify the facts that defendant failed to disclose, with the dates when plaintiff actually discovered those facts" and, indeed, "failed to even allege – let alone prove – the dates of their discovery, facts uniquely within their possession." *Lozman*, 379 Ill. App. 3d at 823. This court denied plaintiffs' petition for rehearing on March 26, 2008. The Illinois Supreme Court denied plaintiffs' petition for leave to appeal. *Lozman v. Putnam*, 229 Ill. 2d 626 (2008).

¶ 19 On November 10, 2010, more than five years after the entry of the underlying judgments, plaintiffs filed their original section 2-1401 petition (735 ILCS 5/2-1401 (West 2010)) to vacate the underlying judgment. The original trial court, Judge Goldberg, recused himself from plaintiffs' section 2-1401 proceeding. The section 2-1401 petition was assigned to the Honorable William Taylor.

¶ 20 Plaintiffs' original section 2-1401 petition alleged two counts: (1) non-disclosure of the SOES room partnership and fraudulent concealment; and (2) Putnam's use of a false spelling of his last name, and fraudulent concealment of the use of this false spelling as well. Although plaintiffs' original and amended section 2-1401 petitions sought to vacate the entire judgment, the allegations of the petition centered on the fraudulent concealment of the usurpation of

corporate opportunities claims. Plaintiffs alleged that Putnam failed to disclose a partnership he entered into with the Townsends and Borsellino in October and November of 1995. Plaintiffs alleged that Putnam's testimony in a later action filed by Borsellino, *Borsellino, et al. v. Putnam, et al*., Case No. 04 L 003326, was different than his testimony in the underlying action in this case, and shows fraudulent concealment. The *Borsellino* case was tried in October and November of 2009, after the trial and appeal of the *Lozman* case.

¶ 21 Plaintiffs specifically alleged in their original section 2-1401 petition that: "At the trial of the underlying case, *Lozman v. Putnam, et al.*, Putnam testified that he did not discuss a SOES room business with anyone in October of 1995, and did not engage in any SOES room planning until late in 1995 and early 1996." Plaintiffs allege the following regarding the differing testimony in the later case filed by Borsellino:

> "In the trial of the case of *Borsellino, et al. v. Putnam, et al.*, which trial was conducted in October and November of 2009 in the Court, case no. 04 L 003326, Putnam gave a different version of the formation of a SOES room business, and admitted that he had agreed to a SOES room partnership with the Townsends and Borsellino in the time range between the October 9, 1995, signing of the release, and the November 21, 1995, completion of the release transaction on the terms identified by Putnam."

¶ 22 Plaintiffs alleged that "[t]he testimony given in *Lozman, et al. v. Putnam, et al.* was therefore materially misleading and false." Plaintiffs alleged fraudulent concealment in the following:

> "Putnam misrepresented the true facts about the SOES room partnership with the Townsends and Borsellino, which misled the Petitioners at the time and during the pendency of the underlying case, *Lozman, et al. v. Putnam, et al.*, and prevented the

> Petitioners from discovering the true facts for presentation to the judge and jury in the trial of that underlying case, *Lozman, et al. v. Putnam, et al.* Petitioners did not discover the true facts about the foregoing SOES room partnership until after the conclusion of the *Borsellino v. Putnam* trial in November of 2009, and until after the trial transcripts from that trial were reviewed and studied an legal research undertaken and finished in view of that recently discovered trial testimony."

¶ 23 Plaintiffs also argued that they were misled by the misspelling of Putnam's name as "Putnam" instead of "Putman," which allegedly misled plaintiffs in their discovery efforts in the underlying *Lozman* case. The only argument plaintiffs made on this point was that they would have undertaken further discovery regarding what reasons Putnam had to use a different name, and that as a result of this "perjury" the judgment in the underlying case was entered.

¶ 24 Defendants filed their combined motion to dismiss plaintiffs' original section 2-1401 petition, pursuant to both section 2-615 and section 2-619 (735 ILCS 5/2-615, 2-619 (West 2010)), on April 20, 2011. Defendants argued that plaintiffs' petition should be dismissed pursuant to section 2-615(a) because the conclusory allegations failed to state a cause of action and because it was time-barred as well past the two-year limitations period under section 2-1401. Defendants also argued that plaintiffs' petition should be dismissed pursuant to section 2-619(a)(5) and (9) based on the judgment in the underlying Lozman case and subsequent appeal and also based on plaintiffs' public filing of a letter dated February 22, 2006 from Lozman to the United States Securities and Exchange Commission (SEC), in which plaintiffs complained to the SEC of Putnam's use of a different spelling than his alleged real name, Putman, which is publicly available on the SEC's website,[2] thus showing that plaintiffs had prior notice of the spelling of

[2]

Putnam's name. The motion to dismiss attached materials concerning the underlying litigation, as well as the February 22, 2006 letter from Lozman to the SEC.

¶ 25 On July 5, 2011, plaintiffs filed a motion to allow discovery and to grant an evidentiary hearing. Plaintiffs argued that where a section 2-619 motion to dismiss relies on material extrinsic to the pleadings, plaintiffs should be given the opportunity to conduct discovery and receive a hearing to answer and resolve the evidentiary disputes, but did not identify any such evidentiary disputes in their motion.

¶ 26 On September 15, 2011, the court denied plaintiffs' motion for leave to take discovery, finding that plaintiffs had not "identified any disputes of material fact, any evidentiary disputes between the parties or any issues where discovery would provide a resolution." The court also denied plaintiffs' request for an evidentiary hearing, finding that plaintiffs had "not asserted what issues they seek to have resolved through an evidentiary hearing or what material facts raised by the Section 2-619 motion are in dispute." Also on September 15, 2011, the court dismissed plaintiffs' petition pursuant to section 2-615 and section 2-619. Plaintiffs were given leave to file an amended petition, which they did.

¶ 27 On October 18, 2011, plaintiffs filed an amended section 2-1401 petition. Plaintiffs again pled the same two counts: (1) non-disclosure of the SOES room partnership; and (2) Putnam's use of a false spelling of his last name. Plaintiffs did not, however, seek discovery or an evidentiary hearing in connection with their amended section 2-1401 petition. In plaintiffs' amended section 2-1401 petition plaintiffs again pled fraudulent concealment by Putnam,

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We take judicial notice that Lozman's letter to the SEC can be found at the following link to the SEC's website: http://www.sec.gov/rules/sro/nyse/nyse200577/flozman022206.pdf.

through Terra Nova, of his usurpation of a corporate business opportunity invalidating the release and alleged the following additional detailed facts regarding the nature of this business opportunity:

> "Terra Nova was in the same line of business as Blue Water Partners ***. The broker/dealer enterprise was diverted away from Blue Water and lodged in Terra Nova. Prior to the diversion, Blue Water had a specific, concrete opportunity to do soft-dollar brokerage business utilizing ScanShift and Townsends' software RealTick. Defendants Putnam and Terra Nova usurped this opportunity when, after setting up Terra Nova, Putnam kicked Lozman out of the office space occupied by BWP and Terra Nova and began to develop the broker/dealer business opportunities with the Townsend Defendants through Terra Nova ***."

¶ 28 Plaintiffs alleged that:

> "Lozman was not told about the existence of, and details regarding, the SOES room trading business in which Putnam was engaging when he and Putnam signed the Termination Agreement *** on November 20, 1995. According to Putnam, Borsellino and Brad Sullivan, Putnam was involved in the SOES room business by late November of 1995."

¶ 29 Plaintiffs also again alleged in Count II of their amended petition that Putnam fraudulently concealed the correct spelling of his name. Plaintiffs alleged that they did not discover Putnam's use of a "false" name until Putnam admitted to a different spelling of his name in a deposition taken on March 31, 2009 in *Blue Water Partners, et al. v Mason*, No. 06-L-9280, a legal malpractice action filed by BWP and Lozman against defendants Foley & Lardner and Edwin D. Mason, a partner with Foley & Lardner, as counsel for BWP, grounded on the same

events alleged in this case, but pertaining to Foley & Lardner and Mason's representation of BWP.[3]

¶ 30 On November 10, 2011, defendants filed a combined motion to dismiss plaintiffs' amended section 2-1401 petition, again arguing that the petition should be dismissed pursuant to section 2-615 (a) for failure to state a claim due to plaintiffs' conclusory allegations and the running of the two-year limitations period for section 2-1401 petitions. Defendants again also argued that the petition should be dismissed pursuant to section 2-619(a)(5) and (9) due to the judgment in the underlying case, pointing specifically to Lozman's deposition testimony that Borsellino told Lozman he became partners with Putnam and the Townsends in November 1995. Defendants also argued that Lozman's February 22, 2006 letter to the SEC showed Lozman had prior notice of the variation in the spelling of Putnam's name and did not file the section 2-1401 petition until approximately four and a half years later, well beyond the limitations period.

¶ 31 On July 2, 2012, the court ruled against plaintiffs on their amended section 2-1401 petition. The order entered on July 2, 2012, however, merely stated that the court granted leave to plaintiffs to file their response to defendants' motion to dismiss, instanter, and allowed plaintiffs leave to file portions of the record with their response.

¶ 32 On July 3, 2012, the court entered a corrected order, stating that the July 2, 2012 order was the result of a scrivener's error. The court's July 3, 2012 order stated that the court denied Lozman's amended section 2-1401 petition to vacate the judgment. In the July 3, 2012 order the court found that plaintiffs "have failed to sufficiently set forth bases showing that they were

[3] This appeal does not present any of the same issues presented in *Blue Water Partners, et al. v Mason*.

diligent in presenting their claims to the Court in the original action." On August 1, 2012, plaintiffs filed a motion to vacate the court's July 2, 2012 and July 3, 2012 orders "dismissing" plaintiffs' amended section 2-1401 petition. On November 8, 2012, the court denied Lozman's motion to vacate the orders of July 2 and July 3, 2012. This appeal followed.

¶ 33 Plaintiffs appeal the following: (1) the denial of plaintiffs' request for discovery and an evidentiary hearing on plaintiffs' original section 2-1401 petition and the dismissal of plaintiff's original section 2-1401 petition; (2) the dismissal of plaintiffs' amended section 2-1401 petition pursuant to section 2-615 and section 2-619 and the denial of the motion to reconsider and vacate this dismissal; and (3) all orders leading up to these dismissals.

¶ 34 STANDARD OF REVIEW

¶ 35 The Illinois Supreme Court has held that when the circuit court dismisses a section 2-1401 petition, or enters judgment on the pleadings, without an evidentiary hearing, the review is *de novo*. *Vincent*, 226 Ill. 2d at 14-15. But, after *Vincent*, there has been some debate as to the applicable standard of review for section 2-1401 petitions under all circumstances. In *Cavalry Portfolio Services v. Rocha*, 2012 IL App (1st) 111690, ¶ 10, a panel of this Court explained that "the *Vincent* decision dealt with a narrow issue under section 2–1401(f) in which a judgment was challenged for voidness. The *Vincent* decision "did not involve the due diligence, meritorious defense, and two-year limitation requirements that apply to other actions brought under section 2-1401." *Rocha*, 2012 IL App (1st) 111690 at ¶ 10 (citing *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 326-27 (2010)). The *Borgetti* court held that a typical section 2-1401 analysis is two-tiered: (1) the issue of a meritorious defense is a question of law and subject to *de novo* review; and (2) if a meritorious defense exists, then the issue of due diligence is subject to abuse of discretion review. *Borgetti*, 403 Ill. App. 3d at 327. This court has adopted

the holding and reasoning in *Borgetti*. *Rocha*, 2012 IL App (1st) 111690, ¶ 10. We thus apply the *de novo* standard in reviewing grants or denials of section 2-1401 petitions without a hearing based on whether plaintiffs presented a meritorious defense in their section 2-1401 petitions, and apply the abuse of discretion standard in reviewing whether they complied with the due diligence requirements.

¶ 36 *Borgetti* involved a grant of a section 2-1401 petition, while *Rocha* involved a denial of a section 2-1401 petition. But this case presents another type of disposition in this changing area of the standard of review of section 2-1401 petitions: dismissal due to the passage of the two-year limitations period. The present case does not involve issues concerning the regular meritorious defense and due diligence requirements for timely petitions. *Vincent* expressed "no opinion" on which standard of review to apply to any other disposition under section 2-1401 and left "further discussion on the subject to another day." *Vincent*, 226 Ill. 2d at 17 n. 5. Because the disposition of the petitions in this case was dismissal without a hearing, and because the ultimate ruling was based on the matter of law that the petitions were untimely as beyond the limitations period, pursuant to *Vincent*, the standard of review should be *de novo*.

¶ 37 Likewise, "review of a dismissal under either section 2-615 or 2-619 is *de novo*. *Patrick Engineering v. City of Naperville*, 2012 IL 113148, ¶ 31. See also *MB Financial Bank N.A. v. Ted & Paul, LLC*, 2013 IL App 1st 122077, ¶ 12.

¶ 38 ANALYSIS

¶ 39 I. Review of the Dismissal of the Townsend Defendants Has Been Waived

¶ 40 We initially address the status of the Townsend defendants in this appeal. Plaintiffs appeal the dismissal of both section 2-1401 petitions and the order denying Plaintiffs' motion to

vacate and reconsider the orders dismissing the petitions, but plaintiffs also state the following as their third ground of their notice of appeal:

> "The Circuit Court's orders and rulings that were a step in the procedural progression to the foregoing specified orders and judgments, and/or all other orders and rulings that were and are subsumed by the order and judgments from which plaintiffs' appeal is taken."

¶ 41 The order dismissing the Townsend defendants seems to be included in plaintiffs' notice of appeal. However, plaintiffs made no argument concerning the dismissal of the Townsend defendants in their amended section 2-1401 petition below and make no argument in their brief on appeal concerning the dismissal of the Townsend defendants. Therefore, as defendants argue, plaintiffs have waived this ground of their appeal. See *In re Liquidations of Reserve Insurance Co.*, 122 Ill. 2d 555, 568 (1991) (arguments not raised in the trial court are waived on appeal). See also Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). We affirm the dismissal of the Townsend defendants.

¶ 42 II. Attachment of Materials to Defendants' Motion to Dismiss

¶ 43 Next, plaintiffs argue that defendants improperly attached materials concerning the prior appeal of the *Lozman* case to their combined motion to dismiss the section 2-1401 petition, arguing that under section 2-615 one admits the legal sufficiency of the complaint. A motion to dismiss a section a 2-1401 petition is reviewed under the same standards as any motion to dismiss a pleading. *In re Marriage of Reines*, 184 Ill. App. 3d 392, 404 (1989). Defendants filed

a combined motion to dismiss both plaintiffs' original and amended section 2-1401 petitions,[4] pursuant to both section 2-615 and 2-619 of the Illinois Code of Civil Procedure. See 735 ILCS 5/2-615, 2-619 (West 2010). See also 735 ILCS 5/2-619.1 (West 2012) (allowing use of combined motions to dismiss, provided that each part of the motion separately addresses each section, 2-615, 2-619, or 2-1005).

¶ 44 Defendants argued that both plaintiffs' original and amended section 2-1401 petitions should be dismissed under section 2-615(a) for failure to state a claim because plaintiffs' petitions were time-barred by the two-year limitations period in section 2-1401, and that dismissal of Count I was also warranted under section 2-619(a)(5) and (9) because the facts alleged were already adjudicated in the underlying *Lozman* case and prior direct appeal. Defendants also argued that Count I of both petitions should be dismissed where plaintiffs had notice of any corporate opportunity usurpation claim where Lozman testified at his deposition in the underlying case that Borsellino told him in November 1995 that he had become partners with Putnam and the Townsends. Defendants further argued that Count II of both petitions should be dismissed as barred by limitations because plaintiffs had prior knowledge of Putnam's name spelling.

¶ 45 A section 2-615 motion challenging a 2-1401 petition admits all well-pleaded facts and attacks only the legal sufficiency of the petition. *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 279-80 (1982). Section 2-619(a)(5) of the Illinois Code of Civil Procedure allows

[4] Defendants' combined motion to dismiss plaintiffs' original section 2-1401 petition was filed on April 20, 2011. Defendants' combined motion to dismiss plaintiffs' amended section 2-1401 petition was filed on November 10, 2011.

involuntary dismissal of an action that was not commenced within the time limited by law. 735 ILCS 5/2-619(a)(5) (West 2012). "The statute of limitations is normally an affirmative defense appropriate only to motions to dismiss pursuant to section 2-619; however, where it appears from the face of the complaint that the statute of limitations has run, such a defense can also be raised in a section 2-615 motion to dismiss." *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 456 (2006).

¶ 46 Here, although defendants asserted both section 2-615 and section 2-619, the defense of limitations does not appear from the face of the section 2-1401 petitions but, rather, from Lozman's deposition (regarding his knowledge of usurpation of corporate opportunity by Putnam) and Lozman's letter to the SEC (regarding his knowledge of the spelling of Putnam's last name), attached to defendants' motion. Thus, we analyze the dismissal based on the limitations period appropriately under section 2-619 which allows consideration of such material.

¶ 47 Defendants' attachment of plaintiff Lozman's deposition in the underlying case to show his prior knowledge of any usurpation of a corporate opportunity by Putnam in November 1995, defeating any fraudulent concealment claim, was not improper. In fact, a party offering facts from a deposition in connection with motion for involuntary dismissal pursuant to section 2-619 should generally file that deposition transcript with the court, or attach copies of the relevant pages as an exhibit. *Tolan and Son, Inc. v. KLLM Architects, Inc.*, 308 Ill. App. 3d 18, 31-32 (1999).

¶ 48 Defendants' attachment of Lozman's letter to the SEC, made public on the SEC's website, was also not improper. In a motion to dismiss based upon certain defects or defenses under section 2-619, the parties may ask the court to not only consider the pleadings and any affidavits and deposition evidence, but also to take judicial notice of facts contained in public records

where such notice will aid in the efficient disposition of the case. See *Advocate Health and Hospitals Corp. v. Bank One, N.A.*, 348 Ill. App. 3d 755, 759 (2004) (citing *Streams Condominium No. 3 Ass'n v. Bosgraf*, 219 Ill. App. 3d 1010, 1014 (1991)). We reject plaintiffs' contention that granted defendants' motion to dismiss was inappropriate on this basis.

¶ 49 III. Denials of Motions for Discovery and an Evidentiary Hearing on Plaintiffs' Original Section 2-1401 Petition

¶ 50 Plaintiffs next argue that the court erred in denying their motions for discovery and an evidentiary hearing for their original section 2-1401 petition. Where the central facts of a section 2-1401 petition are controverted, an evidentiary hearing must be held. *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 286 (1982). "The 'central facts' are those which are sufficient to support an order vacating the judgment, not those which must be proven to succeed in the underlying action on its merits." *Smith v. Cole*, 256 Ill. App. 3d 806, 810 (1993). A petitioner has a right to conduct limited discovery proceedings in connection with a section 2-1401 petition, to prevent a party from reaping a benefit from his own fraudulent conduct. *People v. B.R. MacKay & Sons, Inc.*, 141 Ill. App. 3d 137, 140-41 (1986). See also *In re Marriage of Reines*, 184 Ill. App. 3d 392, 403 (1989). But section 2-1401 does not require the court to hold an evidentiary hearing when there are no material factual disputes to resolve. *Vincent*, 226 Ill. 2d at 9-10.

¶ 51 In this case, the court denied plaintiffs' motion for leave to take discovery, finding that plaintiffs had not "identified any disputes of material fact, any evidentiary disputes between the parties or any issues where discovery would provide a resolution." In denying plaintiffs' request for an evidentiary hearing, the court also found that plaintiffs had "not asserted what issues they seek to have resolved through an evidentiary hearing or what material facts raised by the Section

2-619 motion are in dispute." Our review of plaintiffs' motion supports the circuit court's conclusion, as plaintiffs indeed did not point to any dispute of material fact they sought to address with discovery or a hearing. We hold the court did not err in denying plaintiffs' motion for discovery and for an evidentiary hearing.

¶ 52 IV. Review of Fraudulent Concealment in Count I is Barred by *Res Judicata*

¶ 53 A legally sufficient section 2-1401 petition must affirmatively set forth specific factual allegations supporting each of the following elements: (1) a meritorious claim or defense; (2) due diligence in presenting the claim in the original action; and, (3) due diligence in filing the 2-1401 petition for relief. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). Section 2-1401 has a two-year maximum time limitations for seeking relief from judgment. 735 ILCS 5/2-1401(c) (West 2012). A section 2-1401 petition filed beyond the statute's two-year limitation period is barred and cannot be considered absent a clear showing the period should be tolled due to the exceptions of legal disability, duress or fraudulent concealment of the grounds for relief. 735 ILCS 5/2-1401(c) (West 2012); *People v. Caballero*, 179 Ill. 2d 205, 210-11 (1997). Section 2-1401(c)'s fraudulent concealment exception provides that "the time during which the ground for relief is fraudulently concealed from defendant shall not count against the two-year time period." 735 ILCS 5/2-1401(c) (West 2012).

¶ 54 Here, the judgment below was entered on July 25, 2005, and plaintiffs' original section 2-1401 petition was not filed until November 10, 2010, well beyond the two-year limitations period. Plaintiffs argue that the fraudulent concealment exception applies.

¶ 55 But consideration of the fraudulent concealment exception to the section 2-1401 limitations period is barred, as the same claim in Count I was already adjudicated and is *res judicata*. Count I of both plaintiffs' original and amended section 2-1401 petitions alleges

fraudulent concealment of defendants' usurpation of a corporate opportunity. Plaintiffs' cause of action below also brought a claim for fraudulent concealment of a corporate opportunity as a ground for rescission of the release. This claim was addressed in the prior direct appeal.

¶ 56 A section 2-1401 petition initiates a separate action. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002). "Because a section 2-1401 petition is a new action, it must be determined whether the doctrines of collateral estoppel and *res judicata* apply." *In re Marriage of Klebs*, 196 Ill. App. 3d 472, 479 (1990). Also, section 2-619(a)(9) also provides for dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2012). The subsection of 2-619 permitting dismissal of cause of action as barred by a prior judgment incorporates the doctrines of *res judicata* and collateral estoppel. *Illinois Non-Profit Risk Management Ass'n v. Human Service Center of Southern Metro-East*, 378 Ill. App. 3d 713, 719 (2008) (citing *Yorulmazoglu v. Lake Forest Hospital*, 359 Ill. App. 3d 554, 558 (2005)).

¶ 57 "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). For *res judicata* to apply, the following elements must exist: "(1) an identity of the parties or their privies; (2) an identity of the causes of action; and (3) a final judgment on the merits." *Cabrera v. First Nat'l Bank of Wheaton*, 324 Ill. App. 3d 85, 92 (2001) (quoting *Conner v. Reinhard*, 847 F.2d 384, 394 (7th Cir. 1988)).

¶ 58 The first requirement is met, as it is undisputed that there is an identity of the parties in this section 2-1401 proceeding and the parties in the underlying action.

¶ 59 The second requirement is also met, as there is an identity of the causes of action. The Illinois supreme court has adopted the "transactional test" in evaluating whether there is an identity of cause of action between two cases. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998). Under this test, "separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park*, 184 Ill. 2d at 311. Separate claims are considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. *Id*. at 311, 318. " 'If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted and *res judicata* bars the latter action.' " *People ex rel. Burris v. Progressive Land Developers, Inc*., 151 Ill. 2d 285, 295 (1992) (quoting *Morris v. Union Oil Co.*, 96 Ill. App. 3d 148, 157 (1981)).

¶ 60 Here, the same operative facts are at issue in the underlying proceedings and in plaintiffs' section 2-1401 proceeding to obtain relief from the judgments in the underlying case. In both instances plaintiffs sought claims against the Putnam defendants for fraudulent concealment of usurpation of a corporate opportunity.

¶ 61 Plaintiffs point to Putnam's testimony in the *Borsellino* case as suggested new evidence of "perjured" testimony proving fraudulent concealment that was not available at the time of the underlying judgment. The Illinois Supreme Court has held that "perjured testimony may form the basis for a new trial if raised in a motion for post judgment relief under section 2-1401 of the Code * * *." *People v. Burrows*, 172 Ill. 2d 169, 180 (1996). Where a section 2-1401 petition seeks relief based upon allegedly perjured testimony, it must be shown by clear, convincing, and

satisfactory evidence that the testimony was not only false, but that it was willfully and purposely falsely given. *Johnson v. Steiner*, 179 Ill. App. 3d 556, 561-62 (1988) (citing *Davis v. Retirement Board*, 4 Ill. App. 3d 221, 225 (1972)).

¶ 62 Plaintiffs alleged in their amended section 2-1401 petition that in the underlying case Putnam testified that he did not discuss an SOES room business with anyone in October 1995 and did not engage in any SOES room planning until late 1995 and early 1996. Plaintiffs allege that in the *Borsellino* case, Borsellino testified that there was a meeting with Putnam and the Townsends concerning the SOES room in October 1995, and that Putnam testified that the SOES room meeting occurred "thereabouts," but that Borsellino "might be off a little bit on his timing exactly when it occurred ***." Brad Sullivan testified that he had discussions about doing SOES rooms with Putnam, the Townsends, and Borsellino in November 1995.

¶ 63 We find that this testimony is not contradictory and is not new evidence. In their brief before us, at best, plaintiffs argue that Putnam gave a "different version" in the *Borsellino* case and that Putnam "admitted that he had agreed to a[n] SOES room partnership with the Townsends and Borsellino in the time range between the October 9, 1995, signing of the release, and the November 21, 1995, completion of the release transaction ***." Putnam testified in the underlying case that he did not discuss an SOES room business with anyone in October 1995 and in the Borsellino case Putnam testified that Borsellino "might be off a little bit on his timing exactly when [the meeting] occurred ***." Testimony that Borsellino's recollection of the meeting having taken place in October 1995 "might be off a little bit" does not directly contradict Putnam's testimony in the underlying case that the meeting did not occur in October 1995. The minor discrepancy in Putnam's testimony can be explained by the fact that subsequent testimony was given almost ten years after the alleged meeting took place, and the discrepancy is a minor

one. See *Johnson v. Valspar Corp*., 251 Ill. App. 3d 564, 572 (1993) (held some discrepancies between witnesses' testimony in 1980 and the same witnesses' testimony at later hearings were "not nearly so great" as alleged by the petitioners, and such discrepancies could be easily accounted for by the fact that by the time of hearing the witnesses were being asked about events and procedures occurring as much as 20 years earlier).

¶ 64 There was never any definitive admission by Putnam that there was any meeting *before* the release was executed. The testimony was still that the meeting occurred *after* the execution of the release. Thus, there is no new evidence which would support any review of plaintiffs' original or amended section 2-1401 petitions. See *Davis v. Chicago Transit Authority*, 82 Ill. App. 3d 987, 989 (1980) (holding that the denial of the plaintiff's motion for relief from judgment was not an abuse of discretion where the plaintiff alleged no facts or circumstances which were not known to trial court at time of the directed verdict in favor of the defendants and merely reargued his post-trial motion and attempted to relitigate questions previously adjudicated by trial court and to revive those questions for appeal).

¶ 65 Moreover, even if there was any "new" evidence the fact remains that it has already been conclusively determined that Lozman already had enough facts to be on notice of any claims against Putnam, as Lozman knew at the time he signed the release that Putnam intended to continue operating Terra Nova as a broker-dealer business reasonably incident to BWP's business. The circuit court specifically found that Lozman had "enough facts" before signing the release such that he had been placed on notice of his claims against the Putnam defendants and waited too long to file suit and thus the fraudulent concealment of the corporate usurpation claim was barred by *laches*. On appeal we affirmed the dismissal based on *laches*. Any alleged new evidence does not change the conclusive determination that Lozman already had enough facts at

the time concerning his fraudulent concealment claims against Putnam. See *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008) (holding that although a witness's affidavit "did not materialize until the pendency of defendant's section 2-1401 petition, precedent instructs that evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of these facts may have been unknown, unavailable or uncooperative.").

¶ 66 The third requirement for *res judicata* is met as well, because there was a final judgment on the merits in the underlying action. We point out that although defendants argue that we specifically affirmed the trial court's ruling on appeal, we actually affirmed the court's ruling because plaintiffs waived their argument regarding the alleged fraudulent concealment. We held that "plaintiffs' brief failed to specify the facts that defendant failed to disclose, with the dates when plaintiff actually discovered those facts" and that "[s]ince plaintiffs have failed to even allege – let alone prove – the dates of their discovery, facts uniquely within their possession, plaintiffs have failed to explain how the trial court abused its discretion in computing the time when laches should have begun to run." *Lozman*, 379 Ill. App. 3d at 823. As a result, "[p]laintiffs' failure to provide evidentiary support waived any possible way this court could entertain their argument." *Id.*

¶ 67 Nevertheless, the *res judicata* effect of a dismissal extends to "bar not only every matter that was actually determined in the first suit, but also every matter that might have been raised and determined in that suit." *Hudson v. City of Chicago*, 228 Ill. 2d 462, 471 (2008). See also *In re Marriage of Baumgartner*, 226 Ill. App. 3d 790, 794 (1992) ("Issues which could have been raised on motion for rehearing or on direct appeal are *res judicata* and may not be relitigated in a proceeding for postjudgment relief, which is a separate action and not a continuation of the earlier action."). "[*R*]*es judicata* applies to all matters that were actually

decided in the original action, as well as to matters that *could* have been decided." (Emphasis added.) *Cooney v. Rossiter*, 2012 IL 113227, ¶ 18. The doctrine "promotes judicial economy by requiring parties to litigate all rights arising out of the same set of operative facts in one case." *Cooney*, 2012 IL 113227 at ¶ 35. It "also prevents a party from being unjustly burdened from having to relitigate the same case." *Id*. Plaintiffs had their opportunity to litigate the merits of their fraudulent concealment claim in their direct appeal, but waived that opportunity.

¶ 68 There is also no question the judgment is final, as not only was there a judgment in the court below, but plaintiffs have exhausted all appeals. The court ruled the claim was barred by *laches*, and this court affirmed the trial court's dismissal of plaintiffs' claims based on its *laches* finding. See *Lozman*, 379 Ill. App. 3d at 821. The Illinois Supreme Court denied plaintiffs' petition for leave to appeal our decision. See *Lozman v. Putnam*, 229 Ill. 2d 626 (2008). There is no possible avenue of appeal left for the underlying action and the judgment is final. Thus, *res judicata* applies and bars reconsideration of the same arguments in Count I of both of plaintiffs' section 2-1401 petitions.

¶ 69 A proceeding under section 2-1401 cannot be used as a vehicle to review arguments that have already been adjudicated. Dismissal of section 2-1401 petitions raising the same arguments which were already adjudicated, and therefore barred by *res judicata*, is appropriate. See *Stacke v. Bates*, 225 Ill. App. 3d 1050, 1054 (1992) (holding that the trial court was barred from considering the attorney fees petitions by the doctrine of *res judicata* and acted properly in striking the section 2-1401 petition). As the Second District Court held in *Stacke*:

> "In light of (1) our affirmance of the trial court's order that [the defendant] be responsible for her attorney fees, (2) our refusal to entertain [the defendant's] motion to reconsider the assessment of attorney fees, and (3) our supreme court's denial of Mary's petition for

> leave to appeal on this matter, the case is, without doubt, *res judicata*. We hold that a section 2-1401 motion cannot be used as a substitute for appeal, nor can it be used to relitigate matters already validly adjudicated." *Stacke*, 225 Ill. App. 3d at 1054.

¶ 70 Similarly here, we have previously considered the same argument by plaintiffs concerning fraudulent concealment of usurpation of a corporate opportunity by defendants, affirmed the trial court's dismissal of such claim, denied plaintiffs' petition for rehearing, and the Illinois Supreme Court denied plaintiffs' petition for leave to appeal. Thus the issue of any alleged fraudulent concealment of usurpation of a corporate opportunity is, without doubt, *res judicata*.

¶ 71 Plaintiffs had their chance to litigate their claim of fraudulent concealment in the circuit court in the underlying action, and in their prior direct appeal, where they waived their argument by failing to present any evidence, resulting in affirmance of the dismissal of their claim. Now plaintiffs seek a third "bite at the apple" in the form of section 2-1401 proceedings. Plaintiffs' section 2-1401 petitions cannot be used as vehicles to relitigate an claim that has already been addressed and decided.

¶ 72 We determine that, as to Count I of both plaintiffs' original and amended section 2-1401 petitions, plaintiffs cannot relitigate the *res judicata* determination that their claim for fraudulent concealment of usurpation of a corporate opportunity was barred by *laches*. Given that plaintiffs cannot relitigate the *res judicata* determination that their claim for fraudulent concealment of usurpation of a corporate opportunity was barred by *laches*, plaintiffs cannot establish the fraudulent concealment exception to the two-year filing requirement for section 2-1401 petitions. See 735 ILCS 5/2-1401(c) (West 2012). As such, Count I of both of plaintiffs' section 2-1401 petitions were untimely and are barred.

¶ 73 V. Putnam's Alleged Use of a False Spelling of His Last Name

¶ 74 Plaintiffs allege in Count II of both their original and amended section 2-1401 petitions that Putnam had fraudulently used a "false" spelling of his last name, that this evidence was not known at the time of the underlying judgment, and that it should serve as a reason to vacate the judgment. Plaintiffs thus attempt to bootstrap a resurrection of their fraudulent concealment of usurpation of a corporate opportunity claim through Count II of their section 2-1401 petitions based on Putnam's use of a "false" spelling of his last name. Plaintiffs again argue, as they did in their prior direct appeal, that the running of time for *laches* is tolled where a fiduciary fraudulently fails to disclose material facts. Plaintiffs now argue that, had they known of Putnam's use of a false spelling of his last name, they would have been able to inform this court of what facts Putnam concealed in their prior direct appeal, and the trial court's dismissal based on *laches* would not have been affirmed by this court due to waiver as a result of plaintiffs not specifying any facts. This argument is not barred by *res judicata* or collateral estoppel, as this claim regarding Putnam's use of a false spelling of his last name was not argued below nor on direct appeal previously. See *Lozman*, 379 Ill. App. 3d 807. Regardless, however, Count II is also time-barred because plaintiffs' claim of fraudulent concealment fails.

¶ 75 Plaintiffs' allegations of fraudulent concealment are refuted by Lozman's letter to the SEC, dated February 22, 2006, showing that Lozman had knowledge of the correct spelling of Putnam's name within one year after the court's underlying judgment entered on July 25, 2005, yet did not file their section 2-1401 petition until November 10, 2010, nearly four and a half years later, well after the expiration of the two-year limitations period. We take judicial notice of Lozman's letter to the SEC, which can be found at the following link to the SEC's website: http://www.sec.gov/rules/sro/nyse/nyse200577/flozman022206.pdf. We may take judicial notice

of information on a public website, even where the information does not appear in the record. *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 118, n. 9 (citing *People v. Clark*, 406 Ill. App. 3d 622, 633-34 (2010)). In this case, we also have a copy of the letter in the record, attached to defendants' motion. As noted under section II of our analysis, such material is appropriately reviewed in considering a section 2-619 motion to dismiss.

¶ 76 Lozman's letter to the SEC clearly shows he had knowledge of the spelling of Putnam's name as of February 22, 2006, and so plaintiffs' claim of fraudulent concealment of this fact fails. Plaintiffs make no reply to defendants' argument and the letter. As such, we need not reach any further argument regarding the merits of this issue. We hold as a matter of law that plaintiffs failed to establish the fraudulent concealment exception for a section 2-1401 petition for Count II of both the original and amended section 2-1401 petitions.

¶ 77 CONCLUSION

¶ 78 We hold that, to the extent plaintiffs' notice of appeal includes the dismissal of the Townsend defendants, plaintiffs make no argument regarding this dismissal and have waived this ground of appeal.

¶ 79 We also hold that consideration of a deposition transcript and a letter pursuant to a combined motion to dismiss is appropriate, where defendants raised section 2-619 as well as section 2-615.

¶ 80 We also hold the circuit court did not err in denying plaintiffs' motions for discovery and an evidentiary hearing, as plaintiffs did not cite to any disputed issue of material fact in their motion for such discovery and hearing.

¶ 81 We hold the circuit court did not err in dismissing Count I of both plaintiffs' original and amended section 2-1401 petitions because the fraudulent concealment of usurpation of a

corporate opportunity claim raised in both petitions in Count I is barred by *res judicata*, as we adjudicated this claim in the prior appeal of the underlying action. We previously held on appeal that plaintiffs waived their appeal of the trial court's dismissal of the claim based on *laches* because plaintiffs had notice of the claim. Because the allegation of fraudulent concealment of usurpation of a corporate opportunity is barred, plaintiffs have failed to establish this exception to the two-year filing requirement under section 2-1401 and Count I was untimely.

¶ 82 We further hold that Count II of both section 2-1401 petitions, alleging that the judgment should be vacated based on Putnam's use of a false spelling of his last name, also is untimely because the SEC letter in the record, considered as part of a section 2-619 motion to dismiss, refutes plaintiffs' claim of fraudulent concealment of the spelling of Putnam's name. As such, Count II also is untimely and is barred.

¶ 83 Affirmed.