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Re: NJDEP v. Occidental Chemical Corp., et al.
Docket No. ESX-L-9868-05

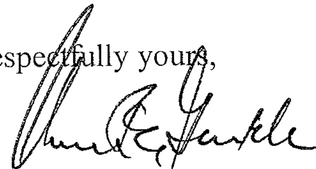
Dear Sir or Madam:

This firm represents Defendants Maxus Energy Corporation and Tierra Solutions, Inc. in the above-referenced matter. Enclosed for filing please find one original and two copies of the following documents:

1. Sur-Reply Brief in Support of Track III Cross-Motion for Partial Summary Judgment of Maxus Energy Corporation and in Opposition to Plaintiffs' and Occidental Chemical Corporation's Track III Motions for Partial Summary Judgment;
2. Defendant Maxus Energy Corporation's Objections and Responses to Plaintiffs' Supplemental Statement of Material Facts;
3. Defendant Maxus Energy Corporation's Objections and Responses to Occidental Chemical Corporation's Supplemental Statement of Material Facts; and
4. Supplemental Certification of Vincent E. Gentile in Support of Maxus Energy Corporation's Track III Cross-Motion for Partial Summary Judgment.

Any filing fees may be charged to this firm's Superior Court account, no. 25325. Thank you for your courtesies.

Respectfully yours,



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Enclosures
cc: Honorable Sebastian P. Lombardi (via hand delivery, w/encls.)
Honorable Marina Corodemus (Ret.) (via federal express, w/encls.)
All Counsel (via Electronic Posting to CT Summation)

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, *et al.*, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO. L-9868-05 (PASR) CIVIL ACTION

SUR-REPLY BRIEF IN SUPPORT OF TRACK III CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT OF MAXUS ENERGY CORPORATION AND IN OPPOSITION TO PLAINTIFFS' AND OCCIDENTAL CHEMICAL CORPORATION'S TRACK III MOTIONS FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT

POINT I. MAXUS IS NOT AN EQUITABLE SUCCESSOR TO OLD DIAMOND SHAMROCK CORPORATION 4

A. The Mere Continuation Exception and De Facto Merger Exception Do Not Apply to Maxus 8

1. Arevalo does not support application of the mere continuation exception to Maxus 8

2. Neither Wilson nor other case law supports application of the mere continuation exception to Maxus 9

3. The Woodrick factors do not support application of the mere continuation or de facto merger exception to Maxus 12

4. The de facto merger exception does not apply to Maxus. 16

5. Plaintiffs' and OCC's Watered-Down Successor Theories Improperly Cast Aside Bedrock Principles of Corporate Law 17

6. Maxus did not injure Plaintiffs or OCC 21

7. Alleged inadequate consideration does not support liability of Maxus 23

B. The Fraud Exception Does Not Apply to Maxus 24

C. DS Corporate Did Not Expressly Assume the Lister Liabilities of Old Diamond Shamrock 33

D. Maxus's Representations Do Not Support Plaintiffs' or OCC's Successor Liability Argument 36

1. OCC's Kidder Peabody Argument 38

2. Plaintiffs' and OCC's Tax Arguments Have No Basis 39

POINT II. PLAINTIFFS CANNOT PROVE BY CLEAR AND CONVINCING EVIDENCE EACH OF THE ELEMENTS REQUIRED TO IMPOSE ALTER EGO LIABILITY 44

A. Maxus Did Not So Dominate Tierra That Piercing Is Required 44

1. Tierra Was Not Undercapitalized 44

2. Tierra Had a Separate Corporate Existence 46

B. No Fraud or Injustice Was Visited Upon Plaintiffs 48

TABLE OF CONTENTS
(continued)

		Page
POINT III.	MAXUS IS NOT "IN ANY WAY RESPONSIBLE" UNDER THE SPILL ACT BECAUSE IT WAS NOT INVOLVED IN POLLUTING ACTIVITY	50
POINT IV.	PLAINTIFFS ARE NOT THIRD PARTY BENEFICIARIES OF MAXUS'S AGREEMENT TO INDEMNIFY OCC NOR DO PLAINTIFFS HAVE A DIRECT ACTION AGAINST MAXUS UNDER THE SPILL ACT	57
A.	Section 12.06 Of The SPA Does Not Name Plaintiffs As Intended Third Party Beneficiaries	57
B.	OCC And Maxus Did Not Intend To Benefit Plaintiffs	58
C.	An Intended Third-Party Beneficiary To The SPA Does Not Have A Direct Action Against Maxus	60
D.	Plaintiffs Do Not Have a Direct Action Against Maxus Under The Spill Act	60
1.	Maxus is not an insurer	62
2.	Maxus did not "provid[e] evidence of financial responsibility" through its contractual indemnity agreement.	63
3.	Even if Maxus were found to be an insurer, it would not be an insurer subject to a direct action under Section S	66
CONCLUSION		69

TABLE OF AUTHORITIES

Page(s)

CASES

In re Acushnet River & New Bedford Harbor Proceedings,
712 F. Supp. 1010 (D. Mass. 1989) 17, 41

Adler's Quality Bakery, Inc. v. Gaseteria, Inc.,
32 N.J. 55 (1960) 46

In re Adoption of N.J.A.C. 7:26B,
250 N.J. Super. 189 (App. Div. 1991) 54, 55

In re Agent Orange Prod. Liab. Litig.,
597 F. Supp. 740 (E.D.N.Y. 1984) 29, 30, 31

Allied Corp. v. Frola,
701 F. Supp. 1084 (D.N.J. 1988) 55

Analytical Measurements, Inc. v. Keuffel & Esser Co.,
843 F. Supp. 920 (D.N.J. 1993) 55

Arevalo v. Saginaw Mach. Sys.,
344 N.J. Super. 490 (App. Div. 2001) 8, 9, 13

Berg Chilling Systems, Inc. v. Hull Corp.,
435 F.3d 455 (3d Cir. 2006) 14

Bergknoff v. A. Bessenyei & Son Inc.,
1995 WL 854721 (N.J. Super. Ct. Law Div. 1995) 63, 67, 68

Caldwell Trucking PRP Group v. Spaulding Composites Co.,
890 F. Supp. 1247 (D.N.J. 1995) 63, 66, 67, 68

Canter v. Lakewood of Voorhees,
420 N.J. Super. 508 (App. Div. 2011) 47

Carlo v. Okonite-Callender Cable Co.,
3 N.J. 253 (N.J. 1949) 68

Castleberry v. Goldome Credit Corp.,
418 F.3d 1267 (11th Cir. 2005) 62

Cinocca v. Baxter Labs.,
400 F. Supp. 527 (D. Okla. 1975) 42

D.R. Horton Inc. - N.J. v. Dynastar Dev., L.L.C.,
No. MER-1808-00, 2005 WL 1939778 (N.J. Super. Ct. Law Div. Aug. 10, 2005) 4, 49

Deleet Merchandising Corp. v. Aetna Life & Casualty,
No. C-79-98, slip op. (N.J. Super. Ct. Ch. Div. Nov. 20, 2003) 67

Delmar News Inc. v. Jacobs Oil Co.,
584 A.2d 531 (Del. Super. Ct. 1990) 60

Dep't. of Labor v. Berlanti,
196 N.J. Super. 122 (App. Div. 1984) 20

Dept. of Env'l Prot. v. Ventron,
94 N.J. 473 (1983) 48

Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co.,
258 N.J. Super. 167 (App. Div. 1992) 29, 30

In re Estate of Dawson,
136 N.J. 1 (1994) 67

Explosives Corp. v. Garlan Enters. Corp.,
615 F. Supp. 364 (D.P.R. 1985) 15

Fink v. EdgeLink, Inc.,
2012 WL 1044312 (D.N.J. Mar. 27, 2012) 23

Flaugher v. Cone Automatic Mach. Co.,
No. CA84-05-040, 1986 Ohio App. LEXIS 6349 (Ohio Ct. App. Apr. 14, 1986) 11

Gillett v. Fairleigh Dickinson Univ.,
2011 WL 2935651 (N.J. Sup. Ct. App. Div. July 22, 2011) 27, 26

Harrah's Atl. City, Inc. v. Harleysville Ins. Co.,
288 N.J. Super. 152 (App. Div. 1996) 63

Interstate Power Co. v. Kansas City Power & Light Co.,
909 F. Supp. 1241 (N.D. Iowa 1993) 11

Jackson v. Diamond T. Trucking Co.,
100 N.J. Super. 186 (Law Div. 1968) 6

Keating v. ABC Detachable Container,
No. 12152-90, slip op. (N.J. Super. Ct. Law Div. Dec. 1, 1992) 64, 67

Kelly v. Alstores Realty Corp.,
130 N.J. 313 (1992) 4

In re Kimber Petroleum Corp.,
110 N.J. 69 (1988) 53

Koch Materials Co. v. Shore Slurry Seals, Inc.,
205 F. Supp. 2d 324 (D.N.J. 2002) 14

Lapollo v. Gen. Elec. Co.,
664 F. Supp. 178 (D.N.J. 1987) 14

Leo v. Kerr-McGee Chem Corp.,
37 F.3d 96 (3d Cir. 1994)..14

Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.,
13 F.3d 69 (3d Cir. 1993)..16, 17

Madison Realty Partners 7, LLC v. Ag ISA, LLC,
No. CIV.A. 18904, 2001 WL 406268 (Del. Ch. Apr. 17, 2001) 59, 60

Manukas v. American Ins. Co.,
98 N.J. Super. 522 (App. Div. 1968) 61

McKee v. Harris-Seybold Co.,
109 N.J. Super. 555 (Law Div. 1970) 17

New Jersey Dep't of Envtl. Prot. v. Dimant,
418 N.J. Super. 530 (App. Div. 2011) 52, 53

New Jersey Turnpike Authority v. PPG Industries,
No. 93-2037, slip op. (D.N.J. Mar. 7, 1996)..66

Nieves v. Bruno Sherman Corp.,
86 N.J. 362 (1981) 13, 14

Nini v. Mercer County Cmty. Coll.,
202 N.J. 98 (2010) 62

P.V. ex. rel. T.V. v. Camp Jaycee,
197 N.J. 132 (2008) 4

Pacius v. Thermtoll Corp.,
611 A.2d 153 (N.J. Super. 1992) 18

Pacius v. Thermtroll Corp.,
259 N.J. Super. 51 (Law Div. 1992) 14

Pearson v. Component Tech. Corp.,
247 F.3d 471 (3d Cir. 2003)....20

Petersen v. Township of Raritan,
418 N.J. Super. 125 (App. Div. 2011)....35

Pharmacia Corp. v. Motor Carrier Servs. Corp.,
No. 04-3724, 2006 WL 3533881 (D.N.J. Dec. 7, 2006)....47, 49

Portfolio Fin. Servicing Co. v. Sharemax.com, Inc.,
334 F. Supp. 2d 620 (D.N.J. 2004)....6

Ramirez v. Amisted Industries, Inc.,
86 N.J. 332 (1981)....13, 23

Ray v. Alad,
560 P.2d 3 (Cal. 1977)....13, 14

In re Sch. Asbestos Litig.,
No. 83-0268, 1993 WL 209719 (E.D. Pa. June 15, 1993)....4

Schmoll v. ACandS, Inc.,
703 F. Supp. 868 (D. Ore. 1988)....6, 24, 25

Seltzer v. I.C. Optics, Ltd.,
339 F. Supp. 2d 601 (D.N.J. 2004)....47

Shelcusky v. Al Garjulio,
172 N.J. 185 (2002)....26, 27

State, Dept. of Envtl. Prot. v. Arlington Warehouse,
203 N.J. Super. 9 (App. Div. 1985)....54

State of New Jersey Dep't Envtl. Prot. v. Arky's Auto Sales,
224 N.J. Super. 200 (App. Div. 1988)....53, 54, 56

Estate of Thomas v. Southworth, Inc.,
No. 99-712, 2001 U.S. Dist. LEXIS 26512 (D.D.C. Jan. 29, 2001)....11

Transmark Equities Ltd. Partnership v. Preston Lock Inc.,
No. 46-96E, slip op. p. 3 (N.J. Super. Ct. June 7, 1996)....67, 68

Transmodal Corp. v. EMH Assocs., Inc.,
No. 09-3057, 2010 WL 3937042 (D.N.J. Oct. 1, 2010)....44

Tung v. Briant Park Homes, Inc.,
287 N.J. Super. 232 (App. Div. 1996)....44

United States v. Best Foods,
524 U.S. 51 (1998) 56

Verni ex rel. Burnstein v. Harry M. Stevens, Inc.,
387 N.J. Super. 160 (App. Div. 2006) 44, 45, 46, 47

W.R. Grace & Co. v. Weja & Co. v. Weja, Inc.,
2006 WL 3435047 (N.J. Super. App. Div. Nov. 30, 2006) 53

W9/PHC Real Estate LP v. Farm Family Cas. Ins. Co.,
407 N.J. Super. 177 (App. Div. 2009) 63

White Oak Funding v. Winning,
341 N.J. Super. 294 (App. Div. 2001) 53

Wilson v. Fare Well Corp.,
140 N.J. Super. 476 (Law Div. 1976) 9

Woodrick v. Jack J. Burke Real Estate, Inc.,
306 N.J. Super. 61 (App. Div. 1997) 12

STATUTES, RULES & REGULATIONS

26 C.F.R. § 1.368-1(b) 42

IRC § 368 .... 39, 41, 42

DEL. CODE ANN. Title 8, § 211(b) & (c) 47

N.J.A.C. 7:14B-15.2 63

N.J.S.A. 1:1-1 62

N.J.S.A. 13:1E-68 64

N.J.S.A. 17B:17-2 62

N.J.S.A. 58:10-23.11f.g(2) 65

N.J.S.A. 58:10-23.11g.c.1 54

N.J.S.A. 58:10-23.11g2 65

N.J.S.A. 58:10-23.11s 1, 60, 61, 66

N.J.S.A. 58:10-23.11d5 65

N.J.S.A. 58:10A-24.4(b) 64

N.J.S.A. 58:10A-25(a)(8) 64

N.J.S.A. 58a:10-23.11d5 65

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004) 64

Restatement (Second) of Conflict of Laws § 307 4

Restatement (Third) of Torts § 12 .... 17, 18

WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.33 at 652 (Perm. Ed., Rev. Vol. 1999) 45

INTRODUCTION

Plaintiffs' and OCC's reply briefs are remarkable for what they do and what they fail to do. Plaintiffs in their reply raise new claims, the most obvious being that they have a direct action against Maxus under N.J.S.A. 58:10-23.11s of the Spill Act. Doing so is improper but understandable given the weakness of their other claims.

In reply to Maxus's point that Plaintiffs have suffered no injury, Plaintiffs rely on litigation risk. That is certainly a new twist on the rationale for equitable relief and should not be countenanced. The undisputed facts of this case – a thirty-year history of unfailing satisfaction of Old Diamond's historic obligations and liabilities, without the slightest default by DSCC, or by Maxus on OCC's behalf, throughout the entire period – provide not the slightest evidence of any injustice, injury or fraud.

Plaintiffs and OCC also try to ignore that they bear the burden of proof. Their statements seem designed to suggest that the parties are on an equal footing. They are not. To succeed on their motions for partial summary judgment, Plaintiffs and OCC must submit undisputed admissible evidence to prove each and every necessary element of their claims and, as to their claims of alter ego and fraud, that proof must be clear and convincing. Contrasted with that heavy burden, Maxus must merely demonstrate that the movants cannot meet the applicable standard of proof on any one element of a claim for that claim to fail. For example, to prove that Maxus is the mere continuation of Old Diamond, Plaintiffs urge the Court to undertake a multi-factor analysis, requiring the balancing of an expansive array of factors, but this type of factual weighing process provides no grounds for summary judgment.

Equally striking is Plaintiffs' and OCC's failure to address the evidence contained in numerous witness affidavits and certifications – by both fact and expert witnesses –

presented by Maxus. Instead, Plaintiffs try to distract the Court with hearsay descriptions of the Agent Orange litigation -- but with no evidence that that litigation had any impact whatsoever on the corporate transactions at issue -- and efforts to impugn Maxus's character by resurrecting thirty-year old accusations of document spoliation – irrelevant accusations that, in any case, were found to be without merit.

By contrast, based on the undisputed facts, Maxus's brief in support of its cross-motion showed that Plaintiffs' and OCC's arguments fail to meet the well-established doctrines for equitable successor liability, alter ego liability or Spill Act liability. In reply, Plaintiffs and OCC try to combine selected fragments of existing doctrines to reach their desired result. In doing so, they abandon even the "expansive approach" to successor liability that New Jersey courts have adopted, as Plaintiffs recite with great repetition, and blatantly ask this Court to adopt novel and ad hoc versions of the existing doctrines, thus transforming legal issues involving the application of established principles and precedent into an unfounded and subjective factual evaluation. That is clearly not the standard, much less one on which Plaintiffs and OCC can prevail on summary judgment.

Plaintiffs and OCC try to justify their extreme positions on a general notion of fairness, but the invocation of fairness here is based on an entirely false premise. They accuse Maxus of being the original polluter, but that is obviously untrue. As all parties acknowledge, Maxus was a stock holding company, with no operations, that never made a discharge, and that did not even exist at the time of the discharges. The liability-causing business continued to be operated by Old Diamond, renamed DSCC, which was then sold to and merged with OCC. This Court has already found that the legal successor

to Old Diamond is OCC -- which was and is a substantial company -- and Plaintiffs do not suggest that OCC is unable to address its liabilities. Ironically, despite movants' repeated focus on the equities, they cannot come to grips with the irrefutable fact that there is simply no need to cast aside the established rules of successor liability or parent corporation liability in this case.

Fundamentally, in equating Maxus to the original polluter, and in their various arguments, Plaintiffs and OCC are espousing a radical proposition. That is, quite simply, Plaintiffs and OCC assert that they are entitled to override New Jersey's well-established and overarching legal principle that honors the separate identity of corporations. While New Jersey has developed exceptions to that rule, movants fail to recognize that those are the only exceptions and new ones are not to be created, either expressly or through an interpretation that has the same effect, just to give effect to Plaintiffs' and OCC's desire to impose liability on Maxus. Rather, each exception must be interpreted consistently with its express requirements and with the purposes underlying its creation. With that proper approach, it is clear that Plaintiffs' and OCC's claims fail as a matter of law, and Maxus's counter-motion should be granted.

ARGUMENT[1]

POINT I. MAXUS IS NOT AN EQUITABLE SUCCESSOR TO OLD DIAMOND SHAMROCK CORPORATION.

In asking this Court to find that Maxus is the equitable successor of Old Diamond, Plaintiffs and OCC would lead this Court down a path that no Court in this State, and perhaps any state, has ever taken before. Plaintiffs rely on two well-established equitable exceptions -- mere continuation and fraud. OCC relies on a third – de facto merger. Both Plaintiffs and OCC are asking this Court to apply these exceptions in circumstances in which New Jersey courts have never applied them. Granting their request would constitute an unprecedented expansion of equitable doctrines that is unsupported by case law, unprincipled, problematic and entirely unwarranted based on the undisputed facts.

Plaintiffs argue that the mere continuation exception applies to the corporate reorganization of Old Diamond and, in particular, to Maxus as the new parent holding company created in the Reorganization. Plaintiffs cite a number of factors that they

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[1] Plaintiffs challenge Maxus's observations about the choice of law issues to be applied here. Pls.' Reply Br. at 16. Plaintiffs argue that New Jersey law applies to all its claims. Reply Brief in Support of Pls.' Motion for Partial Summ. J. Against Maxus Energy Corp. ("Pls.' Br.") at 13. With respect to any alter ego issues raised, section 307 of the Restatement (Second) of Conflict of Laws applies. Restatement (Second) of Conflict of Laws § 307 ("The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts."). Kelly v. Alstores Realty Corp., 130 N.J. 313, 320 (1992) (adopting the Restatement (Second) of Conflicts §307 stating that state of incorporation may control shareholder liability on dissolution); D.R. Horton Inc. - N.J. v. Dynastar Dev., L.L.C., No. MER-1808-00, 2005 WL 1939778, *20 (N.J. Super. Ct. Law Div. Aug. 10, 2005) (noting that the "apparent weight of authority agrees that veil-piercing analysis is governed by the law of the state of formation and applying section 307 of the Restatement (Second) of Conflicts); see also In re Sch. Asbestos Litig., No. 83-0268, 1993 WL 209719, *3 (E.D. Pa. June 15, 1993) (applying §307 of the Restatement (Second) of Conflicts and holding that the law of New Jersey, the state of incorporation, applied to alter ego issues). Maxus and Tierra are both incorporated in Delaware. Accordingly, to the extent any conflict does exist regarding the State's and OCC's alter ego claims, Delaware law governs.

On the issue of successor liability, New Jersey has adopted the Second Restatement's "most significant relationship" test for determining choice of law. P.V. ex. rel. T.V. v. Camp Jaycee, 197 N.J. 132 (2008). The "most significant relationship" analysis takes place on an issue-by-issue basis. Id. at 143. With respect to the successor liability issues raised, a court first must determine whether there is actual conflict between the state laws. Id. New Jersey and Delaware apply similar tests in determining successor liability, except that Delaware has not accepted or rejected the "products line exception." Since the

argue make Maxus the mere continuation of Old Diamond. However, as explained by the undisputed certifications of Maxus's experts, corporate reorganizations such as the reorganization of Old Diamond, from multidivisional conglomerates to parent holding companies with multiple operating subsidiaries, are very common. Many American businesses include parent holding companies formed as a result of these reorganizations. Yet, the factors that Plaintiffs cite for applying the mere continuation exception in this case are common to these other corporate reorganizations. As a result, if Plaintiffs' argument were correct – which it clearly is not – then parent holding companies formed in these reorganizations could be found to be equitable successors and be at risk of losing their limited liability for certain acts of their subsidiaries and former subsidiaries – much to the surprise and dismay of American businesses that have relied for years on the fundamental principle of corporate separateness between parent and subsidiaries.

As discussed in detail below, the mere continuation exception does not apply in this case. Under that exception, a stock-holding parent corporation with zero operations, such as Maxus, does not represent the "mere continuation" of an entire corporate conglomerate such as Old Diamond that operated four separate global businesses. Apparently recognizing that fact, Plaintiffs urge the Court to adopt a watered-down version of the mere continuation exception, citing among other things cases related to a different, more expansive exception governing a different circumstance – the product line exception[2] – and simply grounding their argument on a vague notion of "fairness" to

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"products line exception" is not applicable in the instant case, there is no "actual conflict." Hence, for the purposes of the motions here regarding successor liability, New Jersey or Delaware law may be applied.

[2] Maxus explained in its initial brief why the product line exception does not apply here, and Plaintiffs do not claim otherwise.

attempt to hold Maxus liable as "the original Lister Site polluter."[3] Of course, Plaintiffs are incorrect. Maxus was not "the original polluter." Moreover, Plaintiffs cannot actually identify any injury resulting from the Reorganization that "fairness" must redress, because there is none. Plaintiffs are simply trying to ignore the fact that the Reorganization established new and separate corporations, but they utterly disregard the reasons why the law respects the corporate form and, specific to this case, that the mere continuation exception and the other equitable successor exceptions reflect a careful balancing of creditors' interests and society's interest in the preservation of corporate law principles and corporate forms. See, e.g., Portfolio Fin. Servicing Co. v. Sharemax.com, Inc., 334 F. Supp. 2d 620, 626 (D.N.J. 2004) ("it is deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries") (quotations and internal quotes omitted); Jackson v. Diamond T. Trucking Co., 100 N.J. Super. 186, 196 (Law Div. 1968) ("the policy protecting corporate creditors must be weighed against the equally important policy respecting separate corporate entities").

In their reply brief, Plaintiffs add the charge that the Reorganization was fraudulent, focusing for the first time on the Agent Orange litigation. They rely on one of the Raymark/Raytech cases, in which fraud was the basis for finding a parent corporation liable for the acts of its subsidiary. The reorganization in that case was expressly undertaken for the purpose of escaping asbestos liabilities by stranding them in a subsidiary that was "no more than a corporate shell unable to satisfy its asbestos-related obligations." Schmoll v. ACandS, Inc., 703 F. Supp. 868, 874 (D. Ore. 1988), aff'd, 977 F.2d 499 (9th Cir. 1992). However, the Raymark/Raytech cases have no applicability here where the liabilities continued to be held by DSCC, an ongoing business that met all

[3] Pls.' Reply Br. at 6, 8.

its obligations. While Plaintiffs have submitted documents with their reply brief in a desperate attempt to create an issue of fact on the issue of intent, those documents amount to nothing. There is almost a thirty-year history between the Reorganization and today, providing a long track record. During the time that DSCC was a subsidiary of Maxus, it met every one of its obligations to remediate the Lister Site, and the Agent Orange product liability claims were all met, settled and/or covered by insurance proceeds. Likewise, since DSCC was sold to OCC, Maxus and Tierra have continued to perform all the remediation related to the Lister Site under the indemnity provisions of the SPA. If the intent was to avoid their obligations, someone forgot to tell DSCC, Maxus and Tierra. Their actions speak louder than words and contradict Plaintiffs' arguments to the contrary.

OCC's successor arguments are high on disparaging remarks and low on citations, but present nothing new of substance. While some of OCC's equitable successor arguments parallel those of Plaintiffs, there are also fundamental inconsistencies between the arguments of Plaintiffs and OCC. For example, OCC relies on the de facto merger exception; Plaintiffs have argued that de facto merger does not apply.[4] Plaintiffs assert fraud; OCC does not.[5] OCC argues that Maxus, through Diamond Shamrock Corporate Company, expressly assumed liability for the Lister Site; Plaintiffs refute OCC's argument and argue the Lister Site liabilities were stranded in DSCC.[6] The fact that Plaintiffs and OCC cannot settle on a theory for holding Maxus liable as an equitable successor of Old Diamond helps demonstrate that there is no valid basis for the result that they seek.

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[4] OCC's Reply Br. at 11.
[5] Pls.' Reply Br. at 27.

A. The Mere Continuation Exception and De Facto Merger Exception Do Not Apply to Maxus.

The facts material to the planning and implementation of Old Diamond's Reorganization, as set forth in Maxus's initial brief (pages 8-21), are undisputed by Plaintiffs or OCC and show that the equitable exceptions do not apply.[7]

1. Arevalo does not support application of the mere continuation exception to Maxus.

Plaintiffs concede that "typical" mere continuation cases involve "a corporation buying the assets of an unrelated corporation whose operations have injured a plaintiff."[8] In their reply, however, Plaintiffs argue that the mere continuation exception should now be extended to corporate reorganizations and parent holding companies such as Maxus.[9] To support their argument, Plaintiffs rely on an extensive discussion of a single case, Arevalo v. Saginaw Mach. Sys., 344 N.J. Super. 490 (App. Div. 2001), which they assert "demonstrates the propriety and soundness of Plaintiffs' requested relief."[10] In fact Arevalo is wholly inapplicable to this case. First, Arevalo is not even a successor liability case. It is a case where the court imposed liability on the legal successor of the manufacturer of a defective machine. After sorting through the legal evolution of the

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[6] OCC's Reply Br. at 5; Pls.' Reply Br. at 19.

[7] Maxus's Br. at 54. OCC insinuates that there is a factual dispute by asserting that "Maxus has stepped through the looking glass" and quoting Maxus as stating that Old Diamond "transferred all its assets" to the new subsidiaries created in the Reorganization and "transferred only ownership of the stock of those subsidiaries to Maxus." What Maxus actually stated was that "Old Diamond transferred all its assets related to the oil and gas and coal subsidiaries to new operating subsidiaries that continued those businesses." In that regard, as part of the Reorganization, Old Diamond/DSCC entered into Assignment and Assumption Agreements with each new operating subsidiary pursuant to which it transferred to the subsidiary "all assets of whatsoever kind of [Old Diamond] that are necessary for the operation of or used principally in connection with or related to the . . . business of the [subsidiary], both real and personal, tangible and intangible, wherever situated." There is no factual dispute here: in its own initial brief at 4-5, OCC described these same Assignment and Assumption Agreements and the transfer of the "businesses, assets and operations" from Old Diamond to the new subsidiaries. Similarly, there is no dispute that Old Diamond transferred the stock of the subsidiaries to Maxus, consistent with its status as a holding company, and "Maxus did not operate or hold the assets of any businesses."

[8] Pls.' Reply Br. at 21.

[9] Pls.' Reply Br. at 11-14.

manufacturer, Wickes, the court held that defendant Collins & Aikman Products Co., was liable because it was "the same corporation . . . that manufactured and distributed the allegedly defective product." Id. at 497. Here, the Court has already ruled on the comparable issue, finding OCC is the legal successor to DSCC, the operator of the Lister Site.

To be clear, the Arevalo court applied neither the mere continuation exception nor any other theory of successor liability. In fact, the court specifically stated that "the law relating to successor liability does not apply." Id. at 495. In addition, unlike the Old Diamond Reorganization, the restructuring in Arevalo did not create a holding company. Instead, Wickes, the same corporation that manufactured the defective product, became the parent of the reorganized enterprise. Liability attached to it, not because it was the parent, but because it was the same company that made the defective product.

2. Neither Wilson nor other case law supports application of the mere continuation exception to Maxus.

Plaintiffs' and OCC's argument that Maxus, a stockholding corporation with no operations, is the mere continuation of Old Diamond is fundamentally at odds with the mere continuation exception. The court in Wilson v. Fare Well Corp., 140 N.J. Super. 476 (Law Div. 1976), adopted the "modern" or "expansive" approach to the mere continuation exception that Plaintiffs repeatedly reference, and OCC refers to Wilson as "the seminal case."[11] In oft-quoted language, by both Plaintiffs and OCC, the Wilson court explained that "the most relevant factor is the degree to which the predecessor's business entity remains intact. The more a corporation physically resembles its predecessor, . . . the more reasonable it is to hold the successor fully responsible." Id. at

[10] Pls.' Reply Br. at 11.

490. Trying to meet this test, OCC asserts that "Maxus was . . . the spitting image . . . of Old Diamond Shamrock,"[12] and Plaintiffs assert that "Old Diamond was transformed into New Diamond."[13] The undisputed facts show these statements are not true.

Old Diamond contained four separate major businesses.[14] Each of the four businesses had its own senior management, its own headquarters at a different location than Old Diamond's corporate headquarters, its own physical assets (including manufacturing plants, research and other facilities, oil wells, coal mines, as well as manufacturing, production, processing, refining, mining and other units and equipment), its own large staff of engineers, technicians and other personnel to operate and maintain all the equipment, its own administrative and support staff, as well as sales offices and personnel.[15] These physical assets and personnel were located throughout the United States and the world, and all were contained in the Old Diamond corporate conglomerate.[16] By contrast, none of these assets, personnel and operations were transferred to Maxus. Rather than keeping Old Diamond intact, the Reorganization divided the business entity into separate parts, moving the operations to subsidiaries and only transferring the corporate headquarters in Houston to Maxus.[17] Indeed, Plaintiffs themselves characterize the Reorganization as a "'divisive' process." [18] Applying Wilson, Old Diamond's business entity obviously did not remain intact, Maxus did not physically resemble Old Diamond, and the mere continuation exception does not apply.

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[11] OCC's Reply Br. at 16.
[12] OCC's Reply Br. at 17.
[13] Pls.' Reply Br. at 16.
[14] See e.g., Diamond Shamrock Corporation 1981 Form 10-K, at MAXUS3510544, Gentile Cert., Ex. 5.
[15] Id.
[16] Id. at MAXUS3510544 – 56.
[17] See generally 1985 Annual Report to Shareholders, Gentile Cert. Ex. 85.
[18] Pls.' Reply Br. at 5.

Significantly, none of the cases cited by Plaintiffs or OCC apply the mere continuation exception to a parent holding company such as Maxus. Neither Plaintiffs nor OCC cite to a single case in which a court held a parent holding company to be the equitable successor of a predecessor corporate conglomerate or subsidiary under the mere continuation exception, and we have found no such case. To the contrary, courts have refused to impose successor liability on parent holding companies, finding that such companies do not resemble or otherwise conduct the business operations of the alleged predecessor. See, e.g., Estate of Thomas v. Southworth, Inc., No. 99-712, 2001 U.S. Dist. LEXIS 26512, at *22 (D.D.C. Jan. 29, 2001) (finding that the mere continuation exception did not apply under D.C. law to a parent holding company because, among other reasons, "[the alleged successor] functions as a holding company, or a corporate parent to four different subsidiaries, a function [the alleged predecessor] never assumed") (Supp. Gentile Cert. Ex. 138); Flaugher v. Cone Automatic Mach. Co., No. CA84-05-040, 1986 Ohio App. LEXIS 6349 (Ohio Ct. App. Apr. 14, 1986) (refusing to hold a company a successor that was merely an "inactive holding company" that did not continue the manufacturing operations of the alleged predecessor) (Supp. Gentile Cert. Ex. 139); see also Interstate Power Co. v. Kansas City Power & Light Co., 909 F. Supp. 1241, 1277 (N.D. Iowa 1993) (refusing to find a parent company liable as its subsidiary holding company's equitable successor for CERCLA liability and stating that "it cannot be said" that the subsidiary had the "same business operations" as the parent holding company that had no "operations").

3. **The Woodrick factors do not support application of the mere continuation or de facto merger exception to Maxus.**

Plaintiffs and OCC also attempt to rely on the four factors listed in Woodrick v. Jack J. Burke Real Estate, Inc., 306 N.J. Super. 61, 73 (App. Div. 1997), for the mere continuation and de facto merger exceptions, but these factors serve only to highlight why these exceptions do not apply to this case.

The above discussion of Wilson makes obvious the clear absence of "continuity of management, personnel, physical location, assets, and general business operations" between Old Diamond and Maxus, and therefore the first Woodrick factor for finding successor liability is not met. Woodrick, 306 N.J. Super. at 73. As stated in Wilson, "[a] continuation of a business may be said to occur where the operations of the selling corporation become those of the buying corporation." Wilson, 140 N.J. Super. at 485. But the operations of Old Diamond did not become the operations of Maxus. Maxus had no operations. Rather than transfer the assets, management or personnel necessary to operate any of its businesses to Maxus, Old Diamond retained the chemicals business assets, management and personnel and transferred the other businesses' assets, management and personnel to the new operating subsidiaries.[19] These clear facts simply cannot sustain Plaintiffs' and OCC's contention that Maxus, and not those subsidiaries, is the mere continuation of Old Diamond.

The second Woodrick factor, "a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible," 306 N.J. Super. at 73, is also not met. In fact, the reverse is true: the alleged predecessor corporation, Old Diamond, was renamed DSCC and continued business operations after the Reorganization.

Plaintiffs admit, as they must, that this factor is not met.[20] Indeed, they do not even include this factor in their discussion of the Woodrick factors.

The absence of the second factor should preclude application of the mere continuation exception, based on both the rationale for the exception and the weight of authority. Equitable relief is provided to an innocent third party that would otherwise have no recourse for an injury caused by the predecessor corporation, because the predecessor no longer exists or no longer is viable. "In this way, the innocent, injured [party] is protected [from] being left without a remedy." Wilson, 140 N.J. Super. at 490. Accordingly, New Jersey courts routinely rely on the unavailability or nonviability of the predecessor corporation in finding equitable successor liability.[21] As stated in Arevalo, "[t]he central thesis of this [successor corporation liability] methodology is premised on the elimination by the successor of an effective remedy. That is an essential condition precedent to recovery." 344 N.J. Super. at 496 n. 4 (brackets in original) (quoting Ramirez v. Amisted Industries, Inc., 86 N.J. 332, 358 (1981) (Schreiber, J., concurring)).

Nevertheless, Plaintiffs argue that the unavailability of the predecessor is only one factor, not a requirement, for application of the mere continuation exception. Plaintiffs rely on two product line exception cases, Nieves v. Bruno Sherman Corp., 86 N.J. 362 (1981), and Ray v. Alad, 560 P.2d 3 (Cal. 1977).[22] However, rather than holding that this factor was not required, the Nieves court specifically relied on "the destruction of the plaintiff's remedies against the original manufacturer," and explained that the California

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[19] The four subsidiaries were Diamond Shamrock Exploration Company, Diamond Shamrock R&M Company, Diamond Shamrock Coal Company.
[20] Pls.' Reply Br. at 9.
[21] See cases cited in Maxus's Br. at 53-54.
[22] Pls.' Reply Br. at 15-16. Plaintiffs claim that Maxus "ignores" Nieves, (id. at 15), but Maxus addresses and totally distinguishes that case. See Maxus's Br. at 61.

court in Ray v. Alad was concerned "with the unavailability of the original manufacturer by reason of its divestiture of assets and dissolution." Nieves, 86 N.J. at 370-71. See also Pacius v. Thermtroll Corp., 259 N.J. Super. 51, 56 (Law Div. 1992) (observing that "[t]he emphasis in Ray and Nieves was that the company which manufactured the product was not viable").[23] Plaintiffs also cite one federal district court decision, Koch Materials Co. v. Shore Slurry Seals, Inc., 205 F. Supp. 2d 324 (D.N.J. 2002), which applied the exception and found that this factor was not met, and Berg Chilling Systems, Inc. v. Hull Corp., 435 F.3d 455 (3d Cir. 2006), a Third Circuit conflict of law decision that discussed Koch. However, Koch is contrary to both the weight of New Jersey state authority and other federal court decisions interpreting New Jersey law. See Leo v. Kerr-McGee Chem Corp., 37 F.3d 96, 99 (3d Cir. 1994) ("if the selling corporation remains a viable entity . . . , a successor . . . will not be liable for injuries caused by the predecessor's product); Lapollo v. Gen. Elec. Co., 664 F. Supp. 178, 184 (D.N.J. 1987) (holding where predecessor corporation is viable, successor liability will not be imposed).[24]

The third Woodrick factor, "assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor," only reinforces the conclusion that the exception does not apply. 306 N.J. Super. at 73. First, since Maxus did not continue any of the business operations of Old Diamond, this factor cannot apply – Maxus had no business to interrupt. Second, under

[23] The Pacius court further observed: "As noted, both cases, particularly Nieves, make it clear that successor corporations are liable, where the company which had manufactured the product is no longer viable, and therefore cannot afford a remedy to a plaintiff. The Court holdings were public policy determinations to afford a remedy to an injured person who would otherwise be remediless." Id.

[24] In any case, even if the unavailability of the predecessor corporation was not a requirement, it would not change the result. It is still a factor against applying the exception and, in combination with the first factor

the Reorganization, Old Diamond/DSCC assigned all the liabilities associated with the assets of the separate businesses to the operating subsidiaries or they were retained by DSCC.[25] These included ordinary trade debts that were needed for business continuity.[26] DSCC also transferred the long term corporate debt to Maxus, but the "transfer of the corporate debt would not impact continuity of business operations."[27] Thus, the debts necessary for the uninterrupted continuation of the businesses were transferred to the subsidiaries, not to Maxus.[28]

Finally, only by ignoring that Natomas shareholders held 44% of Maxus can Plaintiffs assert that the last Woodrick factor, continuity of ownership, is met. But, even if there was no such change, continuity of ownership is a fact of life common to myriads of corporate transactions. That factor alone falls far short of establishing either mere continuation or de facto merger.[29] Thus, the Woodrick analysis only confirms that the mere continuation and de facto merger exceptions do not apply here.

(lack of business continuity plus availability of predecessor corporation), certainly precludes application of the exception in the instant case.

[25] See Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Exploration Company and Diamond Chemicals Company, Bryant Cert., OCC Ex. 20; Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Refining and Marketing Company and Diamond Chemicals Company, Bryant Cert., OCC Ex. 21; Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Coal Company and Diamond Chemicals Company, Bryant Cert., OCC Ex. 22.

[26] Macey Cert. at ¶16.

[27] Id.

[28] Plaintiffs cite to several leases transferred to Maxus, but these exceptions do not disprove the rule set forth in the Assignment and Assumption Arguments that each subsidiary was to receive all liabilities relating to the assets of its business. See Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Exploration Company and Diamond Chemicals Company, Bryant Cert., OCC Ex. 20; Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Refining and Marketing Company and Diamond Chemicals Company, Bryant Cert., OCC Ex. 21; Nov. 1, 1983 Assignment and Assumption Agreement of Diamond Shamrock Coal Company and Diamond Chemicals Company, Bryant Cert., OCC Ex. 22.

[29] See Explosives Corp. v. Garlan Enters. Corp., 615 F. Supp. 364, 368-69 (D.P.R. 1985) (a case cited by Plaintiffs, which held that common management and ownership are not sufficient for establishing mere continuation).

4. The de facto merger exception does not apply to Maxus.

In its reply, OCC argues at length about the applicability of the Woodrick factors, which apply to both mere continuation and de facto merger. OCC argues that de facto merger applies but leaps past the threshold issue of whether the corporate transaction at issue is in substance a merger. OCC Reply br. at 17. Plaintiffs agree that there was not a merger and hence refuse to make this argument. As Maxus explained in its principal brief, to be a de facto merger, a transaction must be in substance a merger with the same "effect" as a statutory merger.[30] However, OCC failed to address this or explain how a "divisive" reorganization, such as Old Diamond's Reorganization that created multiple new corporate entities in place of a single prior entity, could possibly be characterized as a merger. In fact, in describing the Reorganization, OCC itself concedes that Old Diamond "split itself apart."[31] None of the cases OCC cites applies to the context of a "divisive" transaction, precisely because such reorganizations are not mergers. The "divisive" Reorganization in this case is not a corporate transaction subject to the de facto merger exception.

Furthermore, OCC also tries to avoid the black letter law requirement of mergers that one of the corporations must go out of existence, a requirement not met here, by taking out of context a statement that no one factor is necessary or sufficient.[32] Similarly, OCC distorts the case law to support its position. For example, OCC reports that the court in Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc., 13 F.3d 69 (3d Cir. 1993), stated "[t]here is no evidence that [the alleged predecessor] has ever been formally dissolved," but it omits that in the preceding sentence the court stated that the company was "no

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[30] See Maxus's Br. at 58.
[31] OCC's Reply Br. at 4.

longer an active entity." Id. at 74. Similarly, OCC lists the reasons why the court applied the de facto merger exception in In re Acushnet River & New Bedford Harbor Proceedings, 712 F. Supp. 1010 (D. Mass. 1989), but omitted the fact that one of the specific reasons given by the court was that the predecessor corporation "did cease business operations, liquidate, and dissolve promptly after the closing." Id. at 1017.

OCC also cites Wilson for a number of "characteristics indicative of a de facto merger."[33] Dissolution appears conspicuously absent, but that is only because, in the passages OCC quotes, the Wilson court merely paraphrases some of the de facto merger factors indentified in McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 566 (Law Div. 1970). Wilson later listed the characteristics of a de facto merger as stated in McKee as including that the "seller ceases operations and dissolves," 140 N.J. Super. at 489, and it described the entity in the Wilson case as having "disable[d] itself from responding to liability." Id. at 491. Thus, in these de facto merger cases, the predecessor corporation either formally dissolved or the effect was the same as dissolution.

5. Plaintiffs' and OCC's Watered-Down Successor Theories Improperly Cast Aside Bedrock Principles of Corporate Law.

With no authority or doctrinal basis for applying the established equitable exceptions, Plaintiffs preface their argument by urging this Court to choose elements from different theories and combine them on an ad hoc basis without any legal authority, so long as their objective is met to find Maxus liable.[34] In support of this untethered watered-down approach, Plaintiffs cite the Third Restatement of Torts to argue New Jersey employs "a very liberal test for corporate successor liability, a test premised on

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[32] OCC's Reply Br. at 21.
[33] OCC's Reply Br. at 16-17.

maximizing recovery rather than on . . . substantial deprivation of remedies for plaintiffs against the predecessor corporation."[35] But Plaintiffs miscite the Restatement. It actually states:

> In an earlier drafting of these Reporters' Notes, New Jersey was characterized as a jurisdiction that employs a very liberal test . . . . In support of this position Pacius v. Thermtoll Corp., 611 A.2d 153 (N.J. Super. 1992), was cited . . . . Recently, however, New Jersey has reined in the "deep pocket" approach set forth above by the Pacius Court . . . .
>
> Almost all of the reported decisions applying the [equitable bases for successor liability] involve predecessors that transfer all of their assets to successors and then dissolve or otherwise cease operations. Indeed the predecessor's termination is the circumstance that, as a practical matter, most often gives rise to the need for a post-transfer tort plaintiff to look to the successor for recovery.

Restatement (Third) of Torts §12, Reporters' Notes comment c. (2011) (emphasis added).

Given that their argument finds no support in established equitable doctrine, Plaintiffs can only hope for an extremely loose approach to successor liability. Moreover, although they do not acknowledge it, Plaintiffs seek to ignore corporate forms and perform their analysis as if separate corporations were all still one. Thus, they admit that Old Diamond's assets and operations were transferred to subsidiaries, not to Maxus.[36] But they then argue that it makes no difference that Maxus and the subsidiaries were separate corporations; their analysis is the same as it would be if the separate corporations were all still a single entity.[37]

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[34] See, e.g., Pls.' Reply Br. at 11 ("the doctrine of equitable successorship consists of multiple, sometimes interrelated bases that are in turn influenced by a series of largely non-exhaustive factors").
[35] Plfs.' Reply Br. at 9.
[36] See, e.g., Pls.' Reply Br. at 13 (referring to the "newly created subsidiaries that contained all the assets and liabilities associated with the former integrated Old Diamond").
[37] See, e.g., id. at 17 n.5 ("Placing those assets into wholly-owned subsidiaries . . . does not change the nature of the transaction or alter Maxus's fate").

Like Plaintiffs, OCC, too, pretends that there were no separate corporate entities. Despite the facts that Old Diamond was a single corporate conglomerate while Maxus was only a stock holding parent, OCC asserts that "Maxus is, in substance, the same corporation as Old Diamond Shamrock."[38] That only makes "sense" because OCC tries to treat Maxus and its subsidiaries as somehow being one and the same, as is also true of OCC's statement that "Maxus was . . . the spitting image . . . of Old Diamond Shamrock."[39] However, there is no legitimacy to disregarding corporate separateness to find business continuity under the successor liability exceptions by treating a parent and its subsidiaries as a single entity and, on that basis, holding a parent holding company liable, as Plaintiffs and OCC advocate.

Ironically, Plaintiffs and OCC go to some length to establish that equitable successor analysis is separate from veil piercing analysis and to disavow any interest in piercing the corporate veil between Maxus and its subsidiaries, no doubt in recognition of the heightened showing that would be required.[40] Yet their own arguments ignore their stricture by focusing their successor arguments on disregarding corporate forms and treating separate corporations as if they were one entity. Unlike any of the equitable successor cases they cite, Plaintiffs and OCC make disregarding corporate forms critical to their argument. But they cannot have it both ways. Under equitable successor analysis, a holding company is not the mere continuation of an entire corporate conglomerate. Nor is a holding company formed in a divisive reorganization the product of a de facto merger or of any merger. Plaintiffs and OCC attempt to avoid this reality by

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[38] OCC's Reply Br. at 15.
[39] Id. at 17.
[40] Pls.' Reply Br. at 27; OCC's Reply Br. at 14-15.

arguing, in effect, that the Court should ignore corporate forms (the "formalistic approach") and treat the parent corporation and each subsidiary corporation as a single corporate entity (the "substantial nexus" approach)[41], their strategy being that by pretending Maxus is not the parent holding company, but is instead the same as the entire business enterprise, they might convince the Court that their successor arguments suddenly work.

Plaintiffs' and OCC's legal arguments do violence to bedrock economic and legal principles of corporate independence and limited shareholder liability, "principles [that] are equally applicable when the shareholder is, in fact, another corporation." Pearson v. Component Tech. Corp., 247 F.3d 471, 486 (3d Cir. 2003). As stated in Dep't. of Labor v. Berlanti, 196 N.J. Super. 122, 128 (App. Div. 1984), the "corporate entity is a well used, highly regarded and accepted form of organization in the economic life of the nation." Concerns about the impact of disregarding the corporate form are reflected in the balances struck by the various equitable doctrines, balances that Plaintiffs would be only too quick to discard.

There is another reason Plaintiffs' and OCC's argument goes too far. It threatens to unsettle well-settled principles that guide similar corporate transactions undertaken by a substantial part of American industry. Plaintiffs try to establish equitable successorship with factors common to corporate reorganizations of major corporations.[42] As explained by Maxus's experts (and undisputed), corporate reorganizations such as the Reorganization of Old Diamond, which transform multidivisional conglomerates into

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[41] Pls.' Reply Br. at 10.

[42] These factors include the transfer of operating assets to the subsidiaries; Maxus's ownership of the stock of the subsidiaries; the continuity of ownership between Old Diamond and Maxus; overlap of officers; no

parent holding companies with multiple operating subsidiaries, and reallocate operating assets among the new subsidiaries, were and continue to be very common.[43] In fact, the multi-subsidiary form became the dominant structure in major American businesses. Plaintiffs cite factors that are standard, well-accepted and common mechanisms and structures.[44] As a result, if Plaintiffs' and OCC's argument that Maxus is an equitable successor were accepted, this would establish a precedent for finding parent holding companies formed in other reorganizations to be equitable successors liable for the prior acts of their subsidiaries, thus challenging their status as limited liability corporations and upsetting the longtime expectations and reliance of American business on these structures.

6. **Maxus did not injure Plaintiffs or OCC.**

Consistent with their utter disregard for corporate forms, Plaintiffs try to cast Maxus as "the original Lister Site polluter," and "the polluting entity responsible for [Plaintiffs'] damage."[45] They then try to justify extraordinary relief against Maxus as "not an affront to fairness."[46] Plaintiffs know these statements are false. Maxus did not exist until 1983, long after the discharges ended. Maxus never polluted anything. It had no operations, much less any discharges of contaminants. Plaintiffs once again try to cast blame by treating Maxus, the parent holding company, as if it were the same as the entire business enterprise, and thereby wrongly attribute the past actions of former subsidiaries to it.

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change in corporate headquarters location; Maxus's taking Old Diamond's name; and Maxus's assumption of Old Diamond's corporate debt. Pls.' Reply Br. at 22-26.

[43] In this regard, the fact that Old Diamond faced contingent environmental and other liabilities does not distinguish it from many other corporations that reorganized from multi-divisional to multi-subsidiary enterprises with parent holding companies.

[44] Macey Cert. ¶ 19-28; Gordon Cert. ¶ 22-27.

[45] Pls.' Reply Br. at 6 & 22-26.

Plaintiffs state that Maxus "has been integrally associated with the Lister Site and its discharges for decades."[47] That statement is correct, though misleading. Maxus's connection is not with site discharges but with the site remediation. As to the remediation, Maxus has acted in a totally responsible manner. DSCC (former discharger), Maxus (indemnitor) and Tierra (current owner) have performed remediation related to the Lister Site since 1983. All Lister-related obligations have been addressed and met.[48]

Fundamentally, Maxus has not injured Plaintiffs. The only potential harm that Plaintiffs can point to are litigation risks, and their only argument is that Maxus should be found directly liable to reduce these potential risks. Putting aside that such risks utterly fail to justify the requested relief, Plaintiffs' arguments in this regard are absurd. Despite their and OCC's repeated references to the size of assets transferred out of DSCC (and putting aside that most of that amount was offset by liabilities that were also transferred from DSCC), the 1983-84 Reorganization and subsequent sale of DSCC to OCC's parent left Plaintiffs no worse off. As a result of the Court's rulings, OCC remains directly liable for the Lister liabilities as legal successor and Maxus is an indemnitor under the terms of the SPA. Plaintiffs professed fear that they will be left without a viable party to pay damages is baseless. Because of the absence of injury, equitable intervention in this case cannot be justified.

OCC is another step removed. It makes its arguments against Maxus to establish Maxus's liability <u>to Plaintiffs</u> under the Spill Act. OCC does not base its arguments on

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[46] <u>Id.</u> at 14.
[47] <u>Id.</u> at 6.

any harm to itself, and its tenuous connection to the Track III issues does not in any way change the fact that there simply is no injury here to redress.

7. **Alleged inadequate consideration does not support liability of Maxus.**

Finally, Plaintiffs argue that Maxus is liable as a successor because the transfer of assets out of Old Diamond was not for adequate consideration. While this is sometimes listed as a fifth exception for successor liability, research has not disclosed any cases where a New Jersey court has applied it independently and imposed successor liability. Nor would imposing successor liability be consistent with the exception's purpose, because no evidence has been offered by the Plaintiffs or OCC that DSCC was left unable to satisfy its obligations and liabilities following the transaction at issue. See, e.g., Ramirez v. Amsted Industries, Inc., 86 N.J. 332, 341 (1981) (recognizing that legal principles related to limited successor liability and exceptions thereto "were developed to protect the rights of commercial creditors and dissenting shareholders following corporate acquisitions, as well as to determine successor corporation liability for tax assessments and contractual obligations of the predecessor"); Fink v. EdgeLink, Inc., 2012 WL 1044312, at *6 (D.N.J. Mar. 27, 2012) (noting the "original purpose behind imposing liability onto a successor company was to protect consumers: if the selling company dissolves after its assets are acquired by a successor, a plaintiff injured by a defective product manufactured by the selling company is left without a remedy") (Supplemental Certification of Vincent E. Gentile in Opp. to Pls.' and OCC's Replies and Mot. for Partial Summ. J. and in Support of Maxus Energy Corp.'s Cross-Motion for Partial Summ. J. ("Supp. Gentile Cert."), Ex. 137.)

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[48] See Maxus Energy Corp.'s Counterstatement of Undisputed Material Facts in Support of Cross-Motion for Partial Summ. J. and in Opp. to Pls.'s and OCC's Mot. For Partial Summ. J. ("Maxus's SUMF") at

Here, the assets of Old Diamond were redeployed to new subsidiaries along functional lines, following conventional mechanisms for valid business purposes. Significantly, Plaintiffs "do not contend that the types of corporate transactions which Old Diamond and Maxus undertook were invalid or illegal under New Jersey and Delaware law, uncommon or all that remarkable."[49] This is confirmed by Maxus's experts.

Factually, the claim of inadequate contribution are unsupported. In addition to transferring assets to the other subsidiaries, DSCC also transferred all the liabilities associated with the assets of those businesses. Further, DSCC transferred the corporate debt on its books to Maxus. Thus, rather than "stripping" DSCC of assets, the Reorganization fairly distributed the assets and liabilities of the various businesses to their corresponding subsidiaries and Plaintiffs and OCC have not offered any proof to the contrary.

In sum, for all the above reasons, Plaintiffs' and OCC's requests would constitute an unprecedented expansion of the equitable doctrine of successor liability that is unsupported by case law, unprincipled, problematic and entirely unwarranted based on the undisputed facts.

B. The Fraud Exception Does Not Apply to Maxus.

Plaintiffs argue that Maxus is directly liable for the Lister Site liabilities because, they claim, the purpose and effect of the Old Diamond Reorganization was to avoid liabilities.[50] To support their argument, Plaintiffs rely on one case, Schmoll v. ACandS, Inc., 703 F. Supp. 868 (D. Or. 1988), and a detailed description of the corporate

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¶¶103, 110, 111, 116-19.
[49] Pls.' Reply Br. at 29.

restructuring of Raymark which was the subject of that case.[51] The Schmoll decision, however, only reinforces that Maxus cannot be directly liable here. Plaintiffs ignore a critical factual difference between Raymark and Old Diamond. In the Raymark restructuring, the liabilities were retained by a corporation that, the evidence demonstrated, was "a corporate shell unable to satisfy its asbestos-related obligations." Schmoll, 703 F. Supp. at 874. In this case, DSCC was left as an ongoing business, with considerable assets, and for which OCC paid a substantial price just two years later. What is more, there is not evidence whatsoever that DSCC or its legal successor (OCC) has ever failed to meet any of it obligations or liabilities, whether in the litigation context, the environmental context, or otherwise. Indeed, there is no dispute that DSCC, and now Maxus and Tierra, have continued over a history of almost thirty years to meet their obligations and perform all the remediation related to the Lister Site, and no liabilities were stranded.[52] As a matter of law, the continuation of the original corporation (DSCC/OCC), without any evidence that the corporation is unable to satisfy its obligations, precludes application of the fraud exception.

In addition, however, unlike Schmoll, in which the court specifically finds that the reorganization at issue was "designed with the improper purpose of escaping asbestos-related liabilities,"[53] the evidence overwhelmingly shows that Old Diamond undertook the Reorganization for valid business purposes, not to strand liabilities. Plaintiffs and OCC have no real answer to the certifications from Professors Macey and Gordon that show that the Reorganization followed standard, common and well-accepted corporate

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[50] Pls.' Reply Br. at 38.
[51] See Pls.' Reply Br. at 42-44.
[52] See Diamond Shamrock Annual Report 1983, at OCCNJ0006532, Bryant Cert., OCC Ex. 60.
[53] Schmoll, 703 F. Supp. at 874.

practices that served legitimate business purposes. Nor do Plaintiffs and OCC have any answer to the statements of former Maxus executives that attest to the business purposes for the Reorganization and deny that avoidance of liabilities as a motivating factor.

- Affidavit of James F. Kelley,[54] former General Counsel:
    - "This reorganization was undertaken for several [business] purposes."[55]
    - "The purpose of the reorganization was not to avoid any liabilities."[56]
    - "The expectation of Old Diamond and New Diamond senior management, including myself, was that after the reorganization DSCC would be fully able to pay for the environmental liabilities arising from the Lister Site and any of the other environmental remediation sites where it had operations. DSCC was a very large and profitable chemical company and management believed that any such liabilities could easily be met by DSCC. At the time of the reorganization, we believed the environmental costs were readily manageable. Environmental cleanups were much more limited and the attendant costs much less in 1983 than what they

[54] Plaintiffs attempt to portray Mr. Kelley's affidavit as a "sham affidavit," referencing a doctrine that applies only when an affidavit is "clearly or blatantly" inconsistent with prior deposition testimony. Shelcusky v. Al Garjulio, 172 N.J. 185 (2002). An affidavit is not rejected where the "contradiction is reasonably explained, where an affidavit does not contradict patently and sharply the earlier deposition testimony or where confusion or lack of clarity existed at the time of the deposition questioning and the affidavit reasonably clarifies the affiant's earlier statement." Id. at 201-02. Here, Mr. Kelley's affidavit simply describes steps taken during the 1983/84 Reorganization and reasons for the Reorganization. Although Plaintiffs assert that Mr. Kelley earlier stated the reason to sell DSCC was "due in part to the increased environmental costs and liability associated with the chemical business," Pls.' Reply Br. at 30, Mr. Kelley reasonably explains that his testimony referred to some of the reasons for selling DSCC to OCC in 1986, not to the Reorganization, and the reference to costs were primarily relating to operating plants, not historic liability claims like those asserted by Plaintiffs. Contrary to Plaintiffs' _________ (Reply br. at 40), Mr. Kelley's prior testimony is in no way inconsistent with his explanation that he believed Lister Site liabilities were manageable. Notably, Plaintiffs and OCC have no answer to the sworn statements of Messrs. Fretthold, Murrin and Hutton, all of which independently echo the statements made by Mr. Kelley and thus provide a further basis for rejecting the sham affidavit doctrine. See also Gillett v. Fairleigh Dickinson University, 2011 WL 2935651, *13 (N.J. Sup. Ct. App. Div. July 22, 2011) (holding that none of the allegedly contradictory statements amounted to patent or blatant inconsistencies and that any credibility issues "must be resolved by a jury, not a judge on a summary judgment motion.").

[55] Kelley Aff. ¶ 5.

[56] Kelley Aff. ¶ 6 (emphasis added). Plaintiffs accuse Maxus of misleading the Court by saying that the Reorganization was not undertaken in response to environmental liabilities while omitting any mention of the Agent Orange liabilities that they assert were a motivating force behind the Reorganization. In fact, Mr. Kelley's affidavit made clear that the Reorganization was not a device to manage liabilities of any shape or form. Moreover, as detailed infra, there is absolutely no proof supporting Plaintiffs' conjecture that the Reorganization was a response to the Agent Orange lawsuits.

are today. In 1983, levels of scientific knowledge and regulators' expectations were more limited. In fact, I do not recall anyone expressing concerns about environmental liabilities in connection with the reorganization or the ability of DSCC to pay for those liabilities. At no time did we view the reorganization of Old Diamond as a vehicle to avoid Lister Site liabilities or any other environmental obligations."[57]

- Certification of Timothy J. Fretthold, former Corporate Secretary
  - "Old Diamond's business strategy was to become an integrated oil and gas company. The purpose of the 1983-84 corporate reorganization was to support that strategic objective and improve management and operations."[58]
  - "It was never a purpose of the corporate reorganization to strand or escape any environmental liabilities. There were historic manufacturing sites of Old Diamond with contamination, but they were being managed. Liability in the environmental cleanups was not a significant consideration in the company's strategy or the reorganization."[59]
- Certification of William C. Hutton, former Director of Health and Environmental Affairs Department:
  - "The Corporate reorganization of 1983 was implemented for strategic business reasons. Reasonable estimates of remediation

[57] Kelley Aff. ¶ 8. Plaintiffs attempt to portray Mr. Kelley's affidavit as a "sham affidavit," referencing a doctrine that applies only when an affidavit is "clearly or blatantly" inconsistent with prior deposition testimony. Shelcusky v. Al Garjulio, 172 N.J. 185 (2002). An affidavit is not rejected where the "contradiction is reasonably explained, where an affidavit does not contradict patently and sharply the earlier deposition testimony or where confusion or lack of clarity existed at the time of the deposition questioning and the affidavit reasonably clarifies the affiant's earlier statement." Id. at 201-02. Here, Mr. Kelley's affidavit simply describes steps taken during the 1983/84 Reorganization and reasons for the Reorganization. Although Plaintiffs assert that Mr. Kelley earlier stated the reason to sell DSCC was "due in part to the increased environmental costs and liability associated with the chemical business," Pltfs. Reply Br. at 30, Mr. Kelley reasonably explains that his testimony referred to some of the reasons for selling DSCC to OCC in 1986, not to the Reorganization, and the reference to costs were primarily relating to operating plants, not historic liability claims like those asserted by Plaintiffs. Contrary to Plaintiffs' assertion (Pls.' Reply Br. at 40), Mr. Kelley's prior testimony is in no way inconsistent with his explanation that he believed Lister Site liabilities were manageable. Notably, Plaintiffs and OCC have no answer to the sworn statements of Messrs. Fretthold, Murrin and Hutton, all of which independently echo the statements made by Mr. Kelley and thus provide a further basis for rejecting the sham affidavit doctrine. See also Gillett v. Fairleigh Dickinson Univ., 2011 WL 2935651, *13 (N.J. Sup. Ct. App. Div. July 22, 2011) (holding that none of the allegedly contradictory statements amounted to patent or blatant inconsistencies and that any credibility issues "must be resolved by a jury, not a judge on a summary judgment motion.")
[58] Fretthold Cert. ¶3.
[59] Id. ¶4.

costs at the time were manageable and well within the financial capabilities of a company such as DSCC."[60]

- Planning for the Reorganization began in late 1982[61] months before Old Diamond learned of dioxin contamination at the Lister Avenue Site.[62]

- Certification of Professor Jonathan R. Macey, expert on corporate governance, corporate law and corporate transactions:

  - "Corporate reorganizations such as the Reorganization are very common and well-accepted corporate activities. Often reorganizations are necessary in order to permit corporations to maximize value for shareholders. These reorganizations are permitted by state corporation laws."[63]

  - "In the context of this case, there is no question that the Reorganization was done in a way that was objectively logical and served a valid corporate purpose. The result of the Reorganization was to move operations (and their related assets and liabilities) into subsidiaries along functional lines. The Reorganization served valid business purposes. It was needed to meet corporate strategic goals, which included transforming Diamond Shamrock into an integrated oil & gas/energy company and growing the business through active deal-making."[64]

- Certification of Professor Jeffrey N. Gordon, expert on corporate finance, mergers and acquisitions:

  - "I have reviewed the reorganization of Diamond Shamrock Corporation in the 1983-84 period. In my opinion this reorganization was a quite common undertaking by many firms in the period and indeed, subsequently. It provides a means by which a multi-divisional company converts itself to a multi-subsidiary form. This facilitates mergers and acquisitions activity and, in particular, the strategic redirection of the corporate enterprise. These reorganizations are commonplace, not nefarious, and do not carry the badge of liability avoidance."[65]

Confronted with the record evidence establishing that the Reorganization was undertaken for legitimate business reasons, not to strand liabilities, Plaintiffs seek to

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[60] Hutton Cert. ¶7.
[61] Kelley Aff. ¶ 9, Murrin Cert. ¶3.
[62] Kelley Aff. ¶ 7, Hutton Cert. ¶ 4.
[63] Macey Cert. ¶ 19.
[64] Id. at ¶ 23.

divert the Court by arguing, for the first time, that Old Diamond engaged in its 1983-84 Reorganization because of an overriding fear of massive Agent Orange liability. The problem for the Plaintiffs' here is they offer no evidence of any such fear and are forced to rely on numerous citations to irrelevant hearsay articles concerning the Agent Orange litigation, many of which were rooted in the sensationalized news coverage of the day, including a plaintiff attorney's boast that the Agent Orange cases could result in a victory exceeding $40 Billion in damages.[66] In fact, a close examination of what Plaintiffs do cite actually shows that the Agent Orange cases were not the basis for the corporate changes involving Maxus or DSCC. Certainly, the substantial sale price for DSCC in 1986 demonstrates that OCC had little concern about Agent Orange claims, which by then had fully disappeared.[67]

The actual Agent Orange litigation facts tell a different story:

- DSCC was a defendant, along with a number of other corporations, in several hundred lawsuits in which the plaintiffs alleged personal injuries from exposure to Agent Orange sold to the U.S. Government for use by the United States military during the Vietnam War. Those lawsuits were consolidated to the Eastern District of New York.[68]

- As Plaintiffs' own Exhibits make clear, DSCC only produced between 3 to 6% of all Agent Orange sold to the United States government and subject to the Agent Orange litigation. In re Agent Orange Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984).[69]

- Not only did the litigation with the manufacturers of Agent Orange settle for just $180M, but also DSCC's share of the settlement was only $24M, a fraction of the total. Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co., 258 N.J. Super. 167, 193 (App. Div. 1992).

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[65] Gordon Cert. ¶ 1.
[66] Pls.' Reply Br. at 30.
[67] Pls.' Reply Br. at 37; Petit Cert., Pls.' Ex. 136.
[68] Petit Cert., Pls.' Ex. 30 at MAXUS0056400-401.
[69] Petit Cert., Pls.' Ex. 132 at MAXUS3978626; Petit Cert., Pls.' Ex. 134 at MAXUS0196979.

- Following the 1984 global Agent Orange settlement, Maxus retained the right in the SPA to litigate the insurance coverage dispute with Aetna over the Agent Orange claims, and although Maxus was ultimately unsuccessful, Aetna offered DSCC almost $11M to settle the coverage dispute. Critically, until that Aetna decision in 1992, Maxus believed all Agent Orange claims were insured.[70] Diamond Shamrock Chem. Co., 258 N.J. Super. at 194.

- Finally, as Plaintiffs sheepishly admit, by 1985, the remainder of the claims by the opt-out plaintiffs who were not part of the global $180M settlement in the Agent Orange cases were dismissed based on their failure to establish causation and the government contractor defense. Agent Orange Prod. Liab., 611 F. Supp. 1223 (E.D.N.Y. 1985).

In short, DSCC was a small player in a litigation for which it believed it was fully insured until the 1992 Aetna decision, which was well after the 1983-84 Reorganization. Indeed, by the time of the Reorganization, the global settlement had nearly been reached, and well before the 1986 sale of DSCC, the remaining cases had fully fizzled with Judge Weinstein's 1985 dismissal. Thus, it is not surprising that Plaintiffs proffered no evidence that the presence of the Agent Orange litigation motivated either the 1983-84 Reorganization or the sale of DSCC.

Trying to further impugn DSCC's integrity, and, by guilt of association, Maxus, the Plaintiffs claim DSCC illicitly destroyed documents. Yet, they offer no court ruling, admissible statement or valid evidentiary submission to show that a single document was wrongfully disposed of:

- DSCC produced over 30,000 documents in the Agent Orange litigation, and the Court made no finding as to spoliation. Agent Orange Prod. Liab., 597 F. Supp. 740 (E.D.N.Y. 1984).[71]

- As Plaintiffs' own exhibits state, the document destruction undertaken by DSCC between May 16-20, 1983, related to the potential hostile-takeover of Natomas,

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[70] See Bryant Cert., Ex. 53 at OCCNJ0000324 (Section 8.14 of Stock Purchase Agreement).
[71] See also Petit Cert., Pls.' Ex. 145.

not because of the 1983-1984 reorganization, which is neither mentioned in the depositions nor subject to the terms of the document destruction memorandum.[72]

- The documents that were destroyed were unrelated to 80 Lister or the 1983-1984 Reorganization, but were documents that appear to have related to a joint venture involving "electric chemistry" with "[n]o relationship whatever on the Ag chem. business."[73]

- No documents generated after 1980, including no documents concerning the 1983-84 reorganization, were destroyed. (Pls.' Ex. 144; Pls.' Ex. 145).

- Plaintiffs' own exhibits contain 1981 and 1983 DSCC records retention memoranda stating that any documents relating to the Agent Orange litigation, as well as those needed for the performance of company operations or to be retained as required by law, were to be maintained.[74]

Simply put, there is no evidence of any ruling that there was spoliation in the Agent Orange cases or that any Lister Avenue documents were destroyed. Agent Orange Prod. Liab., 597 F. Supp. 740 (E.D.N.Y. 1984).

There is no place for unsupported arguments about Agent Orange in this case. There is even less excuse for such arguments where the events show the Agent Orange litigation was unrelated to any corporate transaction at issue in Track III.

Plaintiffs' other arguments that the Reorganization was motivated by a desire to escape liabilities are similarly insufficient to create issues of fact that would defeat Maxus's counter-motion for summary judgment:

- Plaintiffs point out that in 1983 the profit of the chemicals business dropped to $12 million. However, this completely distorts the financial picture. Despite a difficult economic period, the chemicals business performed well in 1983 with revenue of $900 million. The $12 million figure reflected a one-time write off for a joint venture.[75] Plaintiffs fail to reference the year immediately following the Reorganization, when

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[72] Petit Cert., Pls.' Ex. 152 at MAXUS0944565; MAXUS0944566-67 MAXUS0944586-87; Petit Cert., Pls.' Ex. 154 at MAXUS3496085-86; Petit Cert., Pls.' Ex. 144.
[73] Petit Cert. Pls.' Ex. 154 at MAXUS1025667-668; MAXUS3496086; Petit Cert., Pls.' Ex. 152 at MAXUS 0944572).
[74] Petit Cert., Pls.' Ex. 144; Petit Cert., Pls.' Ex. 145.
[75] Petit Cert., Pls.' Ex. 24 at MAXUS0059204.

DSCC's revenues were $820.1 million and its profits were $116.3 million.[76]

- Plaintiffs attempt to paint a picture that Maxus's estimates for the Lister Site remediation were $500 million to $2 billion,[77] but three documents they rely on that postdate the Reorganization by as ____ as nine or ten years, and therefore could have had no impact on planning for the Reorganization and are irrelevant. Documents contemporaneous to the Reorganization were presented in Maxus's principal brief and show that the actual estimates were in the range of $1.1 million to $25 million.[78]

- Plaintiffs continue to rely on a single statement in a quote from a memo drafted by Craig Murrin to James Kelley and Timothy Fretthold dated August 2, 1983 that New Diamond would not be "saddled" with Old Diamond's "contingent liabilities."[79] Both Mr. Kelley and Mr. Fretthold have explained that this document related only to the narrow issue of transfer of Old Diamond's corporate debt to the parent corporation.

    - Mr. Fretthold: "The memorandum dealt with a very narrow issue, how to transfer the corporate debt to the parent corporation. That was the sole purpose of the memorandum. Mr. Murrin's argument, on page 3 of the memorandum, that the transfer would be more favorable to the debt holders because New Diamond would not carry Old Diamond's contingent liabilities, added little or nothing of significance to the legal analysis and had no broader implications."[80]

    - Mr. Kelley: "Mr. Murrin observed that the debt holders would be in a more favorable position because the parent would not hold the contingent liabilities of the subsidiary. However, the status of the contingent liabilities was not a significant factor in the analysis. The transfer of the debt was fully justified because New Diamond owned 100% of the stock of the operating subsidiaries. The contingent liabilities were not the reason for undertaking the reorganization or for why the reorganization was structured as it was. The transfer of the long-term corporate debt was approved by

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[76] Petit Cert., Pls.' Ex. 26 at MAXUS0061687.
[77] Pls.' Reply Br. at 41.
[78] See July 20, 1983 Proposal for 80 Lister Ave., Prepared by Ryckman's Emergency Action and Consulting Team, MAXUS1465049-51, Gentile Cert., Ex. 94; July 27, 1983 Proposal for Former Diamond Alkali Plant, Prepared by Rollins Environmental Services, MAXUS1464960-80, at MAXUS1468979, Gentile Cert., Ex. 95.
[79] Pls.' Reply Br. at 40.
[80] Fretthold Aff. ¶7.

the trustees of the indentures under which various debentures were issued, and by the other holders of the long-term debt."[81]

The overwhelming evidence establishes that the Reorganization had neither the purpose nor intent to escape Lister Site liabilities.

C. DS Corporate Did Not Expressly Assume the Lister Liabilities of Old Diamond Shamrock.

OCC leads its opposition to Maxus's cross motion with an argument that Plaintiffs themselves say has "fatal legal problems" and "factually does not hold water."[82] OCC's argument depends on distorting the unambiguous language of the January 1, 1984 Assignment and Assumption Agreement ("Corporate Agreement") between DSCC and DS Corporate Company ("DS Corporate"). In particular, OCC's position rests on its construction of two words ("and business") and the use of the past tense ("owed") in paragraph (iv) of pages 3 and 4 of the Corporate Agreement to mean something entirely inconsistent with everything else in that Agreement.[83] OCC's argument also contradicts (and does not even mention) the affidavit of Mr. Kelley.

For OCC to be asserting this argument at all evidences the weakness of its position. After all, OCC admitted that, in connection with the purchase of DSCC in 1986, it and its sophisticated outside counsel thoroughly reviewed the documents relating to the Reorganization, including the Corporate Agreement, and were aware "that DSCC had assigned, and DS Corporate Company had assumed, the liabilities relating to the assets DSCC had transferred to DS Corporate Company."[84] That OCC knew the historic Lister liabilities were ***not*** assumed by DS Corporate but instead remained with DSCC is

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[81] Kelley Aff. ¶22.
[82] Pls.' Reply Br. In Support of Mot. For Partial Summ. J. dated July1, 2011 ("Pls.' July 1, 2011 Reply Br."), at 14, Gentile Cert., Ex. 126.
[83] Bryant Cert., Ex. 25, at MAXUS022694-95.
[84] Maxus/Occ Stipulation ¶¶ 12, 13, Gentile Cert., Ex. 92.

confirmed by OCC's own conduct over the more than twenty years since the acquisition. During that time, OCC admits that it ***never*** asserted that Maxus had retained or assumed any of DSCC's historic liabilities, but instead acknowledges that Maxus only acted as an indemnitor.[85] OCC's resort to this argument now—when even Plaintiffs agree it is meritless—shows its position is baseless.[86]

The clear language of the Corporate Agreement rebuts OCC's argument. As Plaintiffs recognize, "each paragraph [of the Corporate Agreement] explicitly limited the liabilities transferred to those liabilities 'relating to or based upon' the assets or business activities that were assigned."[87] That was entirely consistent with the Corporate Agreement's recited purpose to "transfer certain assets to the Subsidiary [DS Corporate], as a contribution of capital to the Subsidiary[.]"[88] The Corporate Agreement went on to list specific assets that were being transferred (including SDS Biotech Corporation), and "[a]ll business operations and activities of [DSCC] other than the Chemicals businesses or the business operations and activities of the Principal Subsidiaries [i.e., DS R&M, DS E&P and DS Coal]." None of those assets or business operations or activities included the historic liabilities associated with the Lister Site.[89]

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[85] OCC's Objs. And Resps. To Maxus and Tierra's Reqs. To Admit re Track III Trial Issues, Gentile Cert., Ex. 1, at No. 6.
[86] OCC tries to make much of Mr. Kelley's letter of April 1986, but that letter was clearly part of negotiations preceding the SPA. Moreover, OCC makes no attempt to refute the statement by Mr. Kelley that, in negotiating over the purchase of DSCC, OCC sought to have Maxus "assume direct liability for the Lister Site and other contaminated inactive sites formerly operated by Old Diamond, but [Maxus] refused to assume such direct liability." Kelley Aff. ¶ 17.
[87] Gentile Cert., Ex. 126, at 17.
[88] Bryant Cert., Ex. 25, at MAXUS022692.
[89] Although OCC argues otherwise, the SDS Biotech business did not include any historic liabilities from DSCC. See Maxus's Br., at 26-27. The Transfer and Assumption Agreement between DSC-1 and Showa Denko assigned to the SDS Biotech joint venture assets associated with the "Business," defined as the animal health and agricultural chemicals products businesses "all as carried on by [DSC-1] through its Agricultural Chemicals and Animal Health Divisions and certain Subsidiaries . . . as of the close of business on June 30, 1983." Gentile Cert., Ex. 20, at OCCNJ0086948; see Kelley Aff. ¶¶ 13-14.

OCC does not dispute that DSCC did not own the Lister Site and, thus, could not have been an asset assigned under the Corporate Agreement. Rather, OCC argues that this plain fact is somehow "misleading."[90] But as evidenced by each of the specific numbered paragraphs on pages one through three, the Corporate Agreement covered only "the assets assigned" or the "operations and business activities being transferred."[91] Nothing in the Agreement covered historic DSCC operations or businesses, *i.e.*, those that had been discontinued, such as the former Ag Chem plant at Lister Avenue. That, too, is indisputable from the face of the Agreement. The liabilities assigned to and assumed by DS Corporate included only those liabilities relating to or based upon "the assets or business activities assigned and transferred."[92] Since the Lister plant was not then an asset or business of DSCC, it could not have been assigned or transferred to DS Corporate.

OCC argues that the words "and business" in paragraph (iv) mean something different from what they mean in every other part of the Corporate Agreement. That reading is unsupportable. In addition, the use of the past tense ("owed") in that same paragraph cannot magically transmute the Agreement into a far broader assumption of liabilities than one tied solely to the "assets and businesses so assigned and transferred."[93] Rather, the Agreement must be read "as a whole in a fair and common sense manner...." Petersen v. Township of Raritan, 418 N.J. Super. 125, 133 (App. Div. 2011). See also Nevets C.M., Inc. v. Nissho Iwai American Corp. 726 F. Supp. 525, 532-33 (D.N.J.

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[90] OCC's Reply Br. at 6.

[91] Bryant Cert., Ex. 25, at MAXUS022692-94.

[92] Bryant Cert., Ex. 25, at MAXUS022694-95.

[93] OCC's argument depends entirely on its contortion of a few words in paragraph (iv) and it offers no response to James F. Kelley's affidavit, which confirms the intent and meaning of the Corporate Agreement. See Kelley Aff. ¶12 ("Under the Assignment Agreement, DSCC assigned certain assets to

1989) ("general policy of contract law requires that the contract be construed as a *533 whole whenever possible").

Despite OCC's attempt to sow confusion, there is no uncertainty about what happened to the historic Ag Chem liabilities. As OCC notes, "[t]he DSC-1 Reorganization did not orphan them."[94] The reason for that is simple: those liabilities remained with DSCC because they did not relate to any of the assets or business activities transferred and assigned in the Corporate Agreement. OCC clearly knew that, which is why it demanded an indemnity from Maxus for those historic liabilities when it purchased DSCC in 1986.

D. Maxus's Representations Do Not Support Plaintiffs' or OCC's Successor Liability Argument.

In their original briefs, Plaintiffs and OCC asserted that Maxus represented itself to be the successor of Old Diamond. Faced with the overwhelming evidence presented in Maxus's principal brief that Maxus repeatedly and routinely communicated information about the Reorganization and specifically that Maxus was not Old Diamond's corporate successor, Plaintiffs and OCC now try to shore up their argument by charging that Maxus changed its representations when "convenient"[95] or like a "chameleon."[96] But the new documents that they submit only show that these arguments unfairly distort the record, are incorrect and unfair.

Plaintiffs argue that certain of Maxus's public statements "did not distinguish between Old Diamond and New Diamond and Maxus represented itself as the

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Diamond Shamrock Corporate Company and [Corporate Company] assumed liabilities associated with those assets.").

[94] OCC's Reply Br. at 8.

[95] Pls.' Reply Br. at 46.

[96] OCC's Reply Br. at 3.

continuation of Old Diamond."[97] Plaintiffs point to a 1984 Diamond Shamrock brochure which stated, "we started life as a chemical company." The brochure covers the entire family of Diamond Shamrock companies and joint ventures under the parent holding company umbrella. Plaintiffs, however, fail to mention that the brochure clearly explains how Diamond Shamrock operates as five separate companies, and describes each subsidiary individually. The challenged statement is made in the description of DSCC and is perfectly true. Diamond Shamrock started as a chemicals company. It is simply a way of referencing the long history of the chemicals company and says nothing about the relationship of Old Diamond and New Diamond. This is yet one more example of how Plaintiffs and OCC take isolated statements out of context and try to assign legal meaning that is just not there.

OCC argues that Maxus represented that it succeeded to and retained the Lister liabilities,[98] again citing Maxus's 1983 10-K, which stated that Diamond Shamrock Corporation was incorporated "as the successor to various corporations, the oldest of which was founded in 1910." Just as it failed to do in its principal brief, OCC fails to mention that the same introductory paragraph distinguishes between the new "Diamond Shamrock Corporation" beginning in August 31, 1983, and Diamond Shamrock Chemicals Company which was formerly named Diamond Shamrock Corporation. Furthermore, OCC also fails to mention that the 10-K specifically incorporates by reference sections of the 1983 Annual Report, which provided additional explanation of the Reorganization, including formation of the new holding company, its relation to DSCC, the formation of the operating subsidiaries, and transfer of long-term corporate

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[97] Pls.' Reply Br. at 48.
[98] OCC's Reply Br. at 23.

debt from DSCC to the parent. Once again, OCC has isolated a single statement in a lengthy document, but ignored the more detailed information in the very same documents providing the full context and explanation.

1. **<u>OCC's Kidder Peabody Argument</u>**

In its reply, OCC does not dispute Maxus's response that the Kidder Peabody litigation contained no misstatements and did not somehow make Maxus the successor to Old Diamond Shamrock. Nonetheless, Plaintiffs repeat the contention that through its statements in the Kidder Peabody litigation, Maxus represented it to be the successor to Old Diamond.[99] However, as Maxus made clear in its response brief, Plaintiffs' own cited exhibit (a brief Maxus had filed in that distant litigation) accurately explained to the court what was meant by the reference to the Natomas transaction where it "was treated for accounting purposes as an acquisition by New Diamond Shamrock, as the successor to Old Diamond, of Natomas."[100] Maxus made it clear in the Kidder Peabody litigation, in answering to the charge of Ivan Boesky that Maxus had no standing to pursue the litigation, that Maxus was assigned Old Diamond's claims and was the party with the right to recover. In no instance in that litigation was Maxus representing it was a corporate successor to Old Diamond Shamrock, only that it was the successor to those claims by assignment. And, as assignee, Maxus would naturally be treated as successor to Old Diamond for accounting purposes for those claims.

Plaintiffs reluctantly concede the issue in their answer to Maxus's statement of facts that Maxus succeeded to Old Diamond's claims because they were *assigned* to them by DS Corporate Company (who had received them from Old Diamond) who then

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[99] Pls.' Reply Br. at 46-48.
[100] Pls.' Reply Br. at 47, citing Petit Cert., Pls.' Ex. 52 at MAXUS0209116.

merged into Maxus.[101] As Maxus thoroughly explained to the Court in its initial brief, Plaintiffs repeatedly have taken remarks out of context, which remarks bear no relation to the instant case.[102] Yet, in their reply, Plaintiffs paradoxically continue to contend that Maxus claimed in the Kidder Peabody case that it was successor to Old Diamond instead of conceding (as it did in its answer to Maxus's statement of facts) that Maxus repeatedly said only that Maxus was a successor to Old Diamond's claims by assignment.[103] In their reply, Plaintiffs still offer no excuse for having included incomplete exhibits and misleading statements from the Kidder Peabody litigation in their original briefing. As can be seen from the exhibits provided, a full and fair reading of each pleading, brief, or discovery document from the Kidder Peabody case leaves no doubt that Maxus never contended it was the successor to Old Diamond Shamrock.

2. Plaintiffs' and OCC's Tax Arguments Have No Basis.

Plaintiffs and OCC continue to misinterpret the tax law in an attempt to argue that Maxus's tax positions show that Maxus is a successor to DSCC. Plaintiffs do not deny that the Reorganization qualified under §368(a)(1)(D) of the Code and not under §368(a)(1)(C). Plaintiffs can cite to no case that applies a §368(a)(1)(D) reorganization as evidence of successor liability. Nor have they supplied any expert affidavit to controvert Maxus's tax expert, David Weisbach.[104] Instead, Plaintiffs now make a different and more sweeping claim than the one they made in their initial brief: they

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[101] Pls.' Resp. to Maxus Energy Corp.'s Statement of Undisputed Material Facts in Support of Its Cross-Motion for Partial Summ. J. and in Opp. to Pls.' and OCC's Motions for Partial Summ J. ("Pls.' Resp. to Maxus SUMF"), ¶ 230 (emphasis added).

[102] Maxus's Br. at 78-82.

[103] Plfs Reply Br. at 46-47.

[104] Plaintiffs quibble that David Weisbach states that a (D) reorganization "appears to have been used in the Diamond Shamrock restructuring" in his affidavit. Pls.' Resp. to Maxus SUMF at 84. This is, however, simply a statement by a careful affiant relying on a document which states that a §368(a)(1)(D) reorganization took place. Weisbach Aff. ¶ 23. Plaintiffs offer nothing to the contrary.

argue that ***all*** transactions covered by Section 368, which include numerous transaction forms that differ, each having its own unique set of requirements, share characteristics resulting in successor liability.[105] As explained below, they offer no support for this contention, which is hardly surprising because it would lead to absurd results.

Plaintiffs assert that the fact reorganizations under §368 must satisfy a "continuity of business enterprise" requirement was "a basis for all the court decisions holding the reorganized entity liable for pre-reorganization liabilities."[106] But Plaintiffs identify only two decisions that contain any meaningful discussion of the relationship between reorganization status under §386 and the de facto merger doctrine, and only one of those cases (Cinocca v. Baxter Labs, Inc.) quotes from a regulation that uses the term "continuity." When that quotation is read in context, it is clear the court is citing the regulation for a much more limited proposition, namely, where a transfer of all the assets of a corporation to another corporation qualifies as a reorganization transaction under §368(a), such qualifications is but "one factor" that supports the view that the "transaction must be a merger" as opposed to "a mere sale of assets." From this limited reference to the continuity principle in a single case, Plaintiffs construct a fanciful argument that all reorganizations or recapitalizations under §368 constitute de facto mergers. But, plainly, if all reorganizations or recapitalizations under the Tax Code constituted de facto mergers, the successor liability *exception* would nullify the traditional non-liability rule and nearly every corporate reorganization would result in successor liability.[107] Plaintiffs' interpretation of §368 is completely illogical.

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[105] Pls.' Reply Br. at 49.
[106] Id.
[107] This type of corporate transaction is a common and popular reorganization, especially during the 1983-1984 time period. Gordon Aff. ¶ 22.

Moreover, Plaintiffs ignore the fact that the manner in which the continuity principle applies varies among the different forms of reorganization according to the particular requirements of each such form.[108] In the context of a (C) reorganization, the principle requires that the transferee acquire and continue to conduct essentially all of the transferor's businesses, while in the context of a divisive (D) reorganization (the case here), the principle requires that each of the transferee and the transferor continue to conduct at least one of the transferor's historic businesses. This is a critical difference between the two forms of reorganization that make a divisive (D) reorganization, as distinct from a (C) reorganization, very unlike a merger

Notably, Plaintiffs cannot provide any case that analyzes divisive §368(a)(1)(D) transactions in support of their argument. The court in In Re Acushnet River & New Bedford Harbor Proceedings does not help their cause because it involved a §386(a)(1)(C) reorganization:

> Specifically, subsection (a)(1)(C) of section 368 provides that, under specified conditions, a stock-for-assets acquisition will be treated as a "reorganization." The purpose of this section of the statute is to 'permit changes in corporate structure that are primarily changes in form similar to statutory mergers.'"

In Re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution, 712 F. Supp. 1010, 1018 (D. Mass. 1989) (emphasis added). Furthermore, the court emphasized that the (C) reorganization at issue was "structured to provide the maximum continuity possible" and was "essentially [an] unchanged company" after the dissolution. Id. at 1019. The court focused on factors which resemble a de jure merger when determining that the §368(a)(1)(C) transaction constituted a de facto merger and a mere

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[108] In fact, application of the continuity requirement to §368(a)(1)(E) or §368(a)(1)(F) reorganizations was historically questionable, and regulatory amendments adopted several years ago clarified that the continuity

continuation, namely that there seller transferred "all or substantially all" of its assets to the purchaser, that the seller liquidated in full as a part of the sale, and that the purchaser continued to operate the same business enterprise. Ibdid. None of these elements occur in a divisive (**D**) reorganizations and none occurred in the case of Maxus.

The court in Cinocca v. Baxter Labs., 400 F. Supp. 527, 530 (D. Okla. 1975) also differentiated between (C) and (D) reorganizations when it held that a §368(a)(1)(C) reorganization was a factor that supported a finding of a de facto merger. First, the court noted that a merger is "defined as the absorption of one corporation by another, which retains its name and corporate identity with the added capital, franchises and powers of the merged corporation. It is the uniting of two corporations by the transfer of property to one of them, which continues in existence, the other being merged therein." Id. at 530. The court noted that the §368(a)(1)(C) transaction involved the purchaser acquiring "substantially all of the assets" and that the seller dissolved, thus "[m]ost of the essential elements of a merger . . . [were] provided for" in the transaction. Id. at 531. These "essential elements" simply are not present in a divisive §368(a)(1)(**D**) reorganizations generally and were not present in the Maxus reorganization.

OCC's entirely different argument depends on its interpretation of a statement Maxus made to the IRS in defending the deductability of amounts paid under its indemnity obligations to OCC pursuant to the SPA as a business expense.[109] Like Plaintiffs, OCC does not offer any expert rebuttal to Maxus's tax expert, or cite to a single case or regulation, or anything for that matter, to support its argument. Rather,

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requirement does not apply to those forms of reorganization. 26 C.F.R. §1.368-1(b).

[109] OCC's Reply Br. at 27. Earlier in its response, OCC erroneously asserts that Maxus "has taken the position in filing with the IRS that Old Diamond Shamrock was dissolved" when in fact Maxus never stated that Old Diamond Shamrock dissolved under state law.

OCC continues to misconstrue the §338(h)(10) "tax fiction," which OCC itself agreed to in the 1986 SPA. Pursuant to §338(h)(10), Maxus and OCC mutually agreed to treat the sale of DSCC's stock as an asset sale for federal income tax purposes even though Maxus actually (i.e., under state law) sold DSCC's stock to OCC.[110] The joint elections under Section 8.16(b) of the SPA essentially allowed Maxus to treat a stock sale as something different (i.e. a "fiction") for tax purposes, as permitted by the Code. But the "tax fiction" allowed under §338(h)(10) does not make that "fiction" the reality or lead to Maxus retaining liability for DSCC.

Moreover, the assertion that Maxus knew it would not be entitled to deduct those costs absent an actual dissolution of DCSS is simply incorrect. As shown in Maxus's Brief, Maxus's Director of Tax & Chief Tax Counsel's statement addressed solely the tax treatment of the liability and does not constitute a representation, or even a suggestion, that Maxus succeeded to the liability of DSCC as a matter of law. [111] Rather, all that Maxus was seeking from the IRS was recognition that its indemnity obligation for DSCC's liabilities be treated as a loss to be deducted when incurred pursuant to the applicable provisions of the Code.[112] OCC surely knew this at the time and agreed that the tax election was appropriate. OCC should not be permitted to argue (more than 20 years later) that the election means something else simply because it finds it convenient to do so.

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[110] Bryant Cert., OCC Ex. 53, at OCCNJ0000326.
[111] See Weisbach Aff. ¶¶28, 30.
[112] See Bryant Cert., OCC Ex. 120, at MAXUS3819569; Bryant Cert., Ex. 121, at AA-YPF-0031465; Bryant Cert. OCC Ex. 122, at AA-YPF-0038937; see also Weisbach Aff. ¶ 30.

POINT II. PLAINTIFFS CANNOT PROVE BY CLEAR AND CONVINCING EVIDENCE EACH OF THE ELEMENTS REQUIRED TO IMPOSE ALTER EGO LIABILITY

Plaintiffs gloss over the fact that their request to pierce Tierra's corporate veil and impose alter ego liability on Maxus seeks "an exception to the fundamental principle" of corporate separateness and is "extraordinary." Tung v. Briant Park Homes, Inc., 287 N.J. Super. 232, 240 (App. Div. 1996); Transmodal Corp. v. EMH Assocs., Inc., No. 09-3057, 2010 WL 3937042, at *6 (D.N.J. Oct. 1, 2010) (Gentile Cert. Ex. 123). Plaintiffs do, however, acknowledge that there are two elements required to impose alter ego liability, each of which must be established by clear and convincing evidence: (i) the parent's domination of the subsidiary and (ii) adherence to the corporate form would perpetuate a fraud or injustice or otherwise circumvent the law. Based on the undisputed relevant facts, Plaintiffs have not made a prima facie showing to prove either of these elements under any proof standard, let alone by clear and convincing evidence. Because their own representative witness could not identify any fraud or injustice, Plaintiffs cannot establish the necessary second element. Accordingly, the Court should grant Maxus's cross motion for summary judgment on the alter ego claim.

A. Maxus Did Not So Dominate Tierra That Piercing Is Required

1. Tierra Was Not Undercapitalized

Plaintiffs spend the first four pages of their alter ego argument citing a plethora of alleged facts that have little or no relevance,[113] and without referencing the well-defined factors courts consider in a domination analysis. See Verni ex rel. Burnstein v. Harry M.

[113] See Pls.' Reply Br. at 50-54.

Stevens, Inc., 387 N.J. Super. 160, 200 (App. Div. 2006).[114] And when Plaintiffs finally get to addressing one of the specific factors courts will consider, capitalization of the subsidiary, they do not offer the requisite analysis.

A plaintiff must show not only that the subsidiary is under-capitalized, but also that it is "grossly under-capitalized." Id. This inquiry is based on the "nature of the business of the particular corporation" and is "measured as of the time of formation of the corporation." Id. at 200 (quoting WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §41.33 at 652 (Perm. Ed., Rev. Vol. 1999)). In Verni, the plaintiff did not present evidence as to the level of capitalization required for the defendant subsidiary's business at the time it was formed, pointing only to a tax return showing a loss years later. Id. at 201. Under those circumstances, the court found the record "devoid of any evidence as to the level of capitalization required…" Id.

In this case, much like Verni, Plaintiffs have not and cannot establish by clear and convincing evidence that, measured as of the time of formation of the corporation, Tierra was grossly undercapitalized. For example, Plaintiffs claim that Tierra was not sufficiently capitalized in 1986 to meet even the routine expenses of a landowner because it was "capitalized with between $10 and $1,000."[115] However, Plaintiffs ignore the fact that in 1986 Tierra owned substantial real estate which it subsequently sold for millions of dollars.[116] If anything, the evidence shows Tierra was sufficiently capitalized at the time of its inception. The best Plaintiffs can come up with is a document showing a $3

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[114] A court analyzing whether domination of a subsidiary requires piercing should consider (1) the day-to-day involvement of the parent's directors, officers, and personnel in the business of the subsidiary; (2) the functioning of the subsidiary's officers and directors; (3) the observance of corporate formalities; (4) the maintenance of separate corporate records; (5) whether the subsidiary was grossly undercapitalized given its business purpose; and (6) whether the subsidiary was merely a façade. Id.
[115] Pls.' Reply Br. at 54.
[116] See Maxus's SUMF ¶195.

million intercompany credit in 1994, eight years after Tierra was created. This is the exact type of evidence the Verni court found insufficient to prove under-capitalization.

Plaintiffs also argue that Tierra did not have the means to pay for cleanup at the time it acquired the Lister Site, so it must have been undercapitalized. But Plaintiffs fail to acknowledge the surrounding facts. The nature of the business of Tierra, then CLH, was to hold title to various properties. Its purpose was not to remediate properties. The cleanup was already underway at the time Tierra took title, with financial assurances in place. Moreover, the cleanup proceeded during the relevant time period without the need for contribution from Tierra, which proves definitively that Tierra did not need its own capital to satisfy cleanup costs.[117]

Tierra was not at its inception "grossly undercapitalized, given its purpose." Plaintiffs have failed to carry their burden, and summary judgment in Maxus's favor is required.

2. Tierra Had a Separate Corporate Existence

Plaintiffs avoid referencing the remaining factors cited in Verni because they weigh in favor of Maxus. Instead, plaintiffs simply assert that Tierra did not "maintain a

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[117] Nor does the fact that 25 years later the Plaintiffs are now seeking to impose an enormous additional liability show that Tierra was undercapitalized for its stated business purpose in 1986. As this Court has held, OCC succeeded to DSCC's Lister Site liabilities in 1986, when Tierra was created. Contrary to Plaintiffs' argument, Tierra's liability is in fact secondary to OCC's, and depends only on its status as subsequent property owner—it was not involved in the actions that led to the contamination. See Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 80 (1960) (holding that "[a] person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability" and recognizing that "right of Indemnity rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party" and "secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties") (citations omitted). From its inception, Tierra would have had the right to assert a common law indemnification claim against OCC, as successor to the prior operator, to compel cleanup, a right which remains today.

separate corporate existence from Maxus," and rely on irrelevant or baseless facts to support this assertion.[118] For example,

- Plaintiffs state that "Maxus admits that Tierra's officers and directors overlapped completely with those of Maxus."[119] This is not a fact on which courts will rely to pierce—"[a] parent's domination or control of its subsidiary cannot be established by overlapping boards of directors." Verni, 387 N.J. Super. at 201 (quoting Seltzer v. I.C. Optics, Ltd., 339 F. Supp. 2d 601, 610 (D.N.J. 2004)) (emphasis added).

- Plaintiffs point to testimony about the lack of in-person Board meetings. However, neither Delaware law nor Tierra's by-laws required such meetings. See DEL. CODE ANN. tit. 8, §211(b) & (c).[120] Tierra adhered to the statutory and by-law requirements at all times.[121]

- Plaintiffs point to the fact that Maxus maintained the separate accounting records for Tierra as evidence of alleged domination. Of course, Plaintiffs do not cite the case law directly contradicting their position. Verni, 387 N.J. Super. at 202 ("centralized bookkeeping and accounting functions, without any evidence of comingling, is not in derogation of the separate existence of the subsidiaries").

- Plaintiffs dwell on the fact that other than its officers and directors, Tierra did not have any employees. However, the communications to which Plaintiffs point to "demonstrate that [] Maxus personnel" carried out Tierra's functions as landowner[122], were communications by people who were also serving as Tierra officers or directors.[123] And "the commonality of ownership and officer involvement does not establish participation in the control of [a subsidiary]." Canter v. Lakewood of Voorhees, 420 N.J. Super. 508, 521 (App. Div. 2011).

- Plaintiffs emphasize that expenses were funded by Maxus. Such evidence does not indicate dominance. Pharmacia Corp. v. Motor Carrier Servs. Corp., No. 04-3724, 2006 WL 3533881, at *16 (D.N.J. Dec. 7, 2006) (refusing to grant summary judgment despite undisputed evidence that the subsidiary's operating

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[118] Pls.' Reply Br. at 55.
[119] Pls.' Reply Br. at 55.
[120] See also Gentile Cert., Maxus Ex. 47.
[121] Maxus's SUMF ¶205.
[122] Pls.' Reply Br. at 56.
[123] See Gentile Cert., Maxus Exs. 49-54 & 59 (communications to or from R. Wilson, C. Begun, P. Herring, D.L. Smith, and W. Hutton); Supp. Gentile Cert., Maxus Exs. 133-135, at MAXUS3373306, MAXUS3373304 and MAXUS3373282 (showing R. Wilson, D.L. Smith, P. Herring and C. Begun's elections as officers of CLH). The one exception to this is Gentile Cert., Maxus Ex. 47, a letter from William Hutton, director of environmental affairs for Maxus. However, Mr. Hutton was addressing access to the recipient's property for the purpose of conducting the investigation and remediation on behalf of OCC, which was being reformed by Maxus, as opposed to ordinary activities of Tierra in its limited role as landowner.

expenses were paid from a joint fund established by the parent) (Gentile Cert., Ex. 120).

In short, Maxus and Tierra respected the corporate form and Tierra adhered to corporate formalities. As set forth in Maxus's opposition, Tierra had no day-to-day operations during the relevant time period, its officers and directors were fully functioning when required to act (as evidenced by the very correspondence cited by Plaintiffs), corporate formalities were observed, and separate corporate records were maintained.[124] This case is no different than Ventron, where the lower court found that the parent's personnel, directors and officers were constantly involved in the day-to-day business of the subsidiary, yet the New Jersey Supreme Court refused to pierce the corporate veil between the parent and subsidiary. Dept. of Env'l Prot. v. Ventron, 94 N.J. 473, 501 (1983). The relationship between Maxus and Tierra was exactly as one would expect of a parent and single purpose real estate holding subsidiary. A finding that Maxus dominated Tierra for purposes of imposing alter ego liability is not warranted or supported. At the very least, Plaintiffs have not established domination beyond dispute and, therefore, cannot obtain summary judgment.

B. No Fraud or Injustice Was Visited Upon Plaintiffs

As to the second necessary element for alter ego liability, the facts of record afford no basis to conclude that Plaintiffs suffered a fraud or injustice as a result of abuse of the corporate form. Thus, Maxus's cross motion for summary judgment on the alter ego claims must be granted. In arguing for alter ego liability, Plaintiffs are not asking the Court to shield them from a fraud or injustice that has caused them injury. Indeed, Plaintiffs' complaint of fraud or injustice boils down to their inability to hold an

[124] Maxus's SUMF ¶¶194-196, 204-211.

additional party (Maxus) liable.[125] But that does not amount to fraud or injustice. Here, Tierra has been held liable under the Spill Act as the property owner and OCC has been held liable under the Spill Act as successor to DSCC. Courts do not disregard the corporate form simply because the plaintiff wants to be in a better position than it otherwise would be. There is no right to expand the bounds of alter ego liability merely because Plaintiffs wish to extend liability to another party.

Instead, in order for the extraordinary remedy of piercing to apply, the alleged domination must cause an actual and unjust loss to the plaintiff. D.R. Horton Inc., 2005 WL 1939778, at *28-29 (N.J. Super. Ct. Law Div. 2005) (Gentile Cert., Ex. 116). In Horton, the plaintiff knew of the subsidiary's limited means, and was in no different a position as a result of the alleged domination – the plaintiff's own witnesses testified that they did not rely to their detriment and would have proceeded even if they knew in advance what they ultimately learned after the fact about the defendant entities, i.e. that the parent was controlling the subsidiary. Id. at *37. Thus, the court concluded that the unavailability of the parent's assets was not sufficient justification to pierce, and piercing would actually result in an injustice by extending liability to a party that was not previously available as a contractual obligor. Id.

Plaintiffs rely on Pharmacia, 2006 WL 3533881, at *16, a case where the court pierced the corporate veil both because the subsidiary failed to adhere to corporate formalities and because the parent's domination caused an unjust loss to the subsidiary's creditor. That is not the case here. In this case, Maxus's alleged domination of Tierra did

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[125] Pls.' Reply Br. at 53-54 ("Maxus attempted to avoid the strict, joint and several statutory liability to the State of New Jersey, which the Spill Act imposes on certain owners of contaminated property.").

not cause an unjust loss—or any loss at all. In fact, Plaintiffs' own representative witness has admitted Plaintiffs suffered no detriment:

> "Q It's true, isn't it, that Occidental Chemical Corporation was liable for the cleanup of the Lister site?
>
> "A Correct.
>
> "Q Now, it's true, isn't it, sir, that Maxus was the indemnitor of Occidental Chemical Corporation?
>
> "A That's correct.
>
> "Q It's true that both of those entities were financially viable parties? . . . you don't have any reason to disagree that that's the case, do you?
>
> "A No, I don't.
>
> "Q That being the case, how is the State injured by the fact that CLH, the title holder of the Lister site, may have no money?
>
> "A I don't – I don't know. If the work is proceeding and the work is getting done, then I think that's an irrelevant question.[126]

It is striking that Plaintiffs do not mention Mr. Schuit's testimony anywhere in their brief. Under these circumstances, piercing is not warranted, and Maxus's cross-motion should be granted dismissing the alter ego claim. Because Plaintiffs cannot establish either domination or that any alleged domination caused injustice, and Maxus's cross-motion should be granted dismissing the alter ego claim.

POINT III. MAXUS IS NOT "IN ANY WAY RESPONSIBLE" UNDER THE SPILL ACT BECAUSE IT WAS NOT INVOLVED IN POLLUTING ACTIVITY.

Neither Plaintiffs nor OCC claim that Maxus participated in any way in the polluting activity at the Lister Site. In approaching the question of whether Maxus is a person "in any way responsible" under the Spill Act, both Plaintiffs and OCC assume that

they cannot establish that Maxus is liable as Tierra's alter ego under standard veil piercing principles: Plaintiffs pursue Maxus's direct Spill Act liability as a fallback if they are unable to succeed in their effort to pierce the corporate veil, whereas OCC does not even attempt to establish standard alter ego liability.

As a result, the issue presented to the Court is this: whether Maxus can possibly be found liable as a person "in any way responsible" under the Spill Act even if it did not participate in any way in the discharges at the Lister Site and even if it is not found to be Tierra's alter ego. Both Plaintiffs and OCC claim that the answer to that question is in the affirmative, devising a truly unprecedented theory of Spill Act liability: "**alter ego-lite**." Plaintiffs and OCC refuse to acknowledge that alter ego liability is wholly separate from the direct liability of a party "in any way responsible" under the Spill Act. There is no basis to bleed alter ego liability concepts focusing on corporate domination into the standard for imposing direct liability under the Spill Act.[127]

In fact, Plaintiffs' and OCC's "alter ego-lite" theory flies in the face of the very cases on which they relied when originally urging Maxus's Spill Act liability. They centered their argument on Ventron, but the liability of the corporate parent there – Velsicol – rested on its own involvement in the discharges. As pointed out in Maxus's principal brief, OCC could only engraft the concept of corporate domination into the Ventron Court's discussion of Spill Act liability by importing language from the Court's

[126] Maxus's SUMF ¶202 (citing Schuit Dep. Tr. 232:24-233:23, Gentile Cert., Ex. 91); see also Schuit Dep. Tr. 229:10-20, Gentile Cert., Ex. 91 (acknowledging "the State is not injured" as a result of Tierra holding title to the Lister Site).

[127] Plaintiffs spend about half of their Spill Act brief point focusing on factual support for their contention that Maxus succeeded to the Old Diamond liabilities, but that entire discussion is simply misplaced because it has no relevance to the question of whether Maxus participated in the discharge at the Lister Site. See Pls.' Reply Br. at 71-77.

discussion of piercing the corporate veil.[128] Interestingly, OCC refuses even to acknowledge, much less explain its prior misreading of Ventron that these two concepts are related.

Plaintiffs now assert that the Ventron Court engaged in a "balancing of interests,"[129] but nowhere in Ventron does the Court so much as mention a balancing of interests. Contrary to Plaintiffs' current view, Velsicol's involvement in the discharging activity was not *just* one of many factors considered.[130] Velsicol was held liable because of its own involvement in its subsidiary's polluting activities and because it allowed the subsidiary to come onto its own property and dump hazardous wastes.[131]

Like Plaintiffs, OCC ignores the critical factual underpinning of the Ventron Court's holding, *involvement in the polluting activity*. OCC argues that the same facts that rendered Velsicol directly liable are present here, all the while ignoring that the Court deemed it critically important that Velsicol was constantly involved in Wood Ridge's activities at the time of the discharges and that Velsicol permitted Wood Ridge to dump toxic waste on Velsicol's own property, both when Wood Ridge was owned by Velsicol and later after Wood Ridge had been sold to Ventron. See Ventron, 94 N.J. at 502.

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[128] See Maxus's Br. at 103.
[129] See Pls.' Reply Br. at 80.
[130] See Pls.' Reply Br. at 70, 80.
[131] Plaintiffs latch onto Maxus's use of the word "contemporaneous" and make the straw man argument that one need not participate in the actual discharge to be held liable under the Spill Act. Pls.' Reply Br. at 70-72. But, Maxus has never argued that a person must be immediately involved in the discharge for liability to attach. Maxus has been consistent in its contention that "in any way responsible" requires a connection to the polluting activity. This connection can either consist of ownership or control over the property at the time of the damaging discharge or control over the hazardous substance that caused the contamination. New Jersey Dep't of Envtl. Prot. v. Dimant, 418 N.J. Super. 530, 543 (App. Div. 2011), cert. granted, 208 N.J. 381 (2011).

Both Plaintiffs and OCC previously relied on In re Kimber Petroleum Corp., 110 N.J. 69, 85 (1988), for the proposition that "[a] party even remotely responsible for *causing contamination* will be deemed a responsible party under the Act[.]" (Emphasis added). Following Kimber, courts have repeatedly required participation in the polluting activity. See, e.g., White Oak Funding v. Winning, 341 N.J. Super. 294, 296 (App. Div. 2001) (describing the critical factor which triggers Spill Act liability under the "in any way responsible" language as responsibility for the discharge that caused the contamination); W.R. Grace & Co. v. Weja & Co. v. Weja, Inc., 2006 WL 3435047 (N.J. Super. App. Div. Nov. 30, 2006) (holding that "[t]he resolution of [Spill Act liability] depends primarily on a determination of when spills occurred" and finding a corporate director liable because he "control[led] the property" at the time of the pollution) (Gentile Cert., Ex. 127). For example, the Appellate Division most recently confirmed that an entity is "in any way responsible" under the Spill Act under two circumstances: (1) if it owned or controlled the property at the time of the discharge or (2) controlled the hazardous substance that caused the contamination. Dimant, 418 N.J. Super. at 543. Yet, neither Plaintiffs nor OCC refer to the Kimber holding in their reply briefs.[132]

To counter the longstanding case law represented by Ventron, Kimber and their progeny, all of which require some level of involvement in the discharges at issue, Plaintiffs strain to find support for their position in the Appellate Division's decision in State of New Jersey Dep't Envtl. Prot. v. Arky's Auto Sales, 224 N.J. Super. 200, 206 (App. Div. 1988), which held the Arky's company liable as a party "in any way

[132] To be precise, OCC does cite to the Kimber case in one instance, but only to assert the most remarkable claim that it has been legislatively repealed. OCC's Reply Br. at 35. Among other things, OCC fails to explain why it cited to the case in its moving brief if it was no longer good law.

responsible" for the contamination on its property.[133] However, the Arky's company was held "in any way responsible" not because of some vague connection to a contaminated property and not under some modified alter ego theory. Rather, the company was held liable because the discharges occurred on its watch, during its ownership of the property, and thus it was involved in the polluting activity. Arky's, 224 N.J. Super. at 206-207; see also Ventron, 94 N.J. at 502 ("ownership or control over the property at the time of the discharge" is sufficient to hold a person liable for a discharge). The most significant aspect of the Arky's opinion, which both Plaintiffs and OCC ignore, is that the Arky brothers, who were the sole owners of the Arky's company and who clearly dominated it when the discharges occurred, were not held liable as a party "in any way responsible" -- even though their level of involvement in the company would surely have satisfied the fanciful "alter ego-lite" standard that Plaintiffs and OCC now urge. Arky's, 224 N.J. Super at 207.[134]

For its part, OCC tries to draw support from references in the case law recognizing that a parent can be found to be a person in any way responsible based on the polluting actions of its subsidiary. For example, it quotes In re Adoption of N.J.A.C. 7:26B, 250 N.J. Super. 189, 214 (App. Div. 1991), aff'd in part, rev'd in part, 128 N.J. 442 (1992), for the notion that Velsicol's liability was imposed for the acts of Wood Ridge. But Maxus does not dispute that, as in Ventron, a parent can be held liable under

[133] Pls.' Reply Br. at 80-81.
[134] Plaintiffs also cite to State, Dept. of Envtl. Prot. v. Arlington Warehouse, 203 N.J. Super. 9 (App. Div. 1985) and argue that the bailors in that case were held liable under the Spill Act because of their contractual responsibility for the bailed hazardous substances. However, the bailors in Arlington Warehouse were deemed "in any way responsible" because they owned the hazardous substances and "share[d] the risk of loss from their explosion, fire, discharge, surface run-off or subsurface leaching, whether occurring on their own premises or, as here, during storage elsewhere." Id. at 15. Plain and simple, the bailors were "in any way responsible for [their] hazardous substance[s]" under N.J.S.A. 58:10-23.11g.c.1. Maxus has no such

the Spill Act for the acts of its subsidiary as long as the parent, acting *along with* its subsidiary, participated in the polluting activities. The statements cited by OCC are thus hardly earthshaking and do not support its novel theory.

OCC also cites to a federal district court decision, Allied Corp. v. Frola, 701 F. Supp. 1084 (D.N.J. 1988), which characterized Ventron's standard for holding an entity "in any way responsible" under the Spill Act as a lesser standard than the veil piercing standard.[135] However, Frola is not only non-precedential, but it should be accorded little or no weight as persuasive authority. Put simply, in the twenty-four years since its publication, not a single court has ever cited to Frola for this proposition or ever referred to the "in any way responsible" standard as incorporating a lesser form of veil piercing. Indeed, in Analytical Measurements, Inc. v. Keuffel & Esser Co., 843 F. Supp. 920, 925 (D.N.J. 1993), Judge Debevoise reached the exact opposite conclusion, writing that "[t]he New Jersey Supreme Court has recognized two ways that a parent corporation can be held liable for actions of its subsidiary under the Spill Act": (1) by establishing facts sufficient to pierce the corporate veil or (2) by showing the parent was "in any way responsible for a discharge," for example, by having "ownership or control over the property at the time of the discharge[.]" See also In re Adoption of N.J.A.C. 7:26B, 250 N.J. Super. at 214-16 (recognizing that even if a parent corporation is not liable as the alter ego of its subsidiary it may still be held directly liable as a party "in any way responsible" under the Spill Act).

Finally, both Plaintiffs and OCC contend that involvement in the polluting activity is not the lynchpin of "in any way responsible" liability under the Spill Act,

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responsibility for the hazardous substances discharged at the Lister Site long before Maxus was created in 1983.

pointing to the fact that Tierra was found liable as a result of its purchase of the Lister Site, and not because of any discharges occurring during its ownership. Yet, as this Court recognized in its prior decision, the liability of owners of contaminated property has been the subject of repeated judicial and legislative attention focusing on the unique attributes of property ownership. The fact that the Legislature has defined special rules governing property owners hardly signals a wholesale displacement of the well-established understanding that direct liability under the Spill Act requires some connection to the polluting activity.[136] Moreover, there is no suggestion whatsoever in any of the legislative enactments or legislative history that parent corporations whose subsidiaries own contaminated property would become exposed to Spill Act liability under the novel "alter ego-lite" standard manufactured by Plaintiffs and OCC.

Plaintiffs and OCC ignore the practical consequences of their "alter-ego lite" standard: it would render corporate veil piercing claims in Spill Act cases superfluous. Courts would no longer have any reason to engage in a veil piercing analysis, as performed in Ventron and Arky's, as it would be nothing more than an academic exercise. But the fact that the Spill Act cases plainly do not dispense with veil piercing analysis is proof that it remains the touchstone for parent corporation liability. This precise reason was stressed by the United States Supreme Court in Best Foods, which required that a parent be involved in the polluting activity before imposing CERCLA liability. See United States v. Best Foods, 524 U.S. 51, 70 (1998) ("if the evidence of common corporate personnel acting at management and directorial levels were enough to

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[135] See OCC's Reply Br. at 31.

[136] Thus, in light of the fact that Tierra has been held liable under the Spill Act based on its status as a property owner (rather than as a discharger), it is clear the only basis for Maxus's liability as Tierra's parent would be under an alter ego theory. As we have shown, supra, there is no basis for that theory.

support a finding of a parent corporation's direct operator liability under CERCLA, then the possibility of resort to veil piercing to establish indirect, derivative liability for the subsidiary's violations would be academic").

In sum, there is no sound basis for this Court to stray from thirty years of precedent requiring a parent corporation's involvement in the polluting activity before finding "in any way responsible" liability under the Spill Act. Because Plaintiffs and OCC cannot show that Maxus was involved in the polluting activity at the Lister Site, Maxus cannot be held directly liable under the Spill Act.

POINT IV. PLAINTIFFS ARE NOT THIRD PARTY BENEFICIARIES OF MAXUS'S AGREEMENT TO INDEMNIFY OCC NOR DO PLAINTIFFS HAVE A DIRECT ACTION AGAINST MAXUS UNDER THE SPILL ACT.

A. Section 12.06 Of The SPA Does Not Name Plaintiffs As Intended Third Party Beneficiaries.

In their reply, Plaintiffs again try to argue that the SPA grants them intended third party beneficiary status by claiming that "Section 12.06 specifically states that third party beneficiaries were not intended except for the indemnity sections of the SPA, which are the sections that benefit Plaintiffs."[137] This, however, is an inaccurate and misleading reading because only a small, defined group of third parties -- and not Plaintiffs -- are specifically named as third party beneficiaries in the indemnity provisions of the SPA.

On the indemnity issue, Section 12.06 actually provides that, "[e]xcept as specifically set forth or referred to" in Article IX, the SPA shall not confer upon any third party beneficiaries "any rights or remedies under or by reason of this Agreement."[138] Article IX then explicitly identifies the third parties that Maxus agreed were third party

[137] Pls.' Reply Br. at 60.
[138] Bryant Cert., Ex. 53 at OCCNJ0000373.

beneficiaries who could enforce the indemnification agreement. In Section 9.03, Maxus agrees to indemnify "each of OPC, Oxy-Chem, Buyer, each of the DSCC Companies and each Pass-Through Purchaser, each of their respective subsidiaries and affiliates and each of their respective directors, officer, agents and representatives."[139] Nowhere does Section 9.03 list Plaintiffs, or persons like Plaintiffs or, for that matter, any claimants as parties Maxus will indemnify.

Further, the fact highlighted by Plaintiffs that the Lister Site is covered by the indemnity is simply irrelevant. The SPA references the Lister Site as something *for which Maxus will indemnify OCC*, but that in no way reflects a plan to establish enforceable rights in Plaintiffs.[140] Thus, Section 12.06's prohibition against third party beneficiaries does not contain any exception covering Plaintiffs and instead expressly denies them intended third party beneficiary status.

B. OCC And Maxus Did Not Intend To Benefit Plaintiffs.

Plaintiffs are hard pressed to contend that Maxus and OCC intended to provide them enforceable rights as third party beneficiaries when both contracting parties state the exact opposite. Plaintiffs try to claim that Maxus's certifications explaining its intent are conclusory, but the certifications detail exactly what was intended to be accomplished by the indemnity provisions -- and it was not to create a cause of action held by Plaintiffs. Plaintiffs can only complain that OCC's statement of its contracting intent is contained in a stipulation to which Plaintiffs were not a party. But Plaintiffs ignore that the stipulation

[139] Maxus's Br. at 111-115.

[140] Similarly, Section 12.11's discussion of historical obligations makes no mention of any claimant, including Plaintiffs, as a beneficiary and only intended to benefit OCC by including, as a component of best efforts, the possibility of using a guarantee to help the DSCC Companies to be released. See Maxus's Resp. Br. at 11; Bryant Cert., OCC Ex. 53 at 158-60.

was merely a device to avoid further deposition practice and to memorialize what an OCC corporate representative would have testified to at a deposition.[141]

Most fundamentally, Plaintiffs cannot point to any conflicting evidence. Thus, to counter the undisputed fact that neither contracting party intended to award Plaintiffs third party beneficiary status, Plaintiffs resort to surmise. They say that Maxus and OCC knew the extent of the Lister Site liabilities before entering into the SPA, that Maxus agreed to satisfy those obligations, and that the parties must have intended to benefit Plaintiffs. However, there is a monumental difference between providing indemnification to a contracting party for a known claim and granting the claimant the right to sue the indemnitor as a third party beneficiary. Here, the SPA reflects Maxus's intent to benefit OCC as an indemnitee by assuming an obligation for certain claims against OCC. Plaintiffs offer no case law to support their argument that the awareness by contracting parties of potential liability to a third party automatically makes that third party an intended beneficiary of an indemnification agreement.

In fact, the only case Plaintiffs cite supports the argument that Plaintiffs are merely incidental beneficiaries, not intended beneficiaries of the SPA. Madison Realty Partners 7, LLC v. Ag ISA, LLC, No. CIV.A. 18904, 2001 WL 406268 (Del. Ch. Apr. 17, 2001) (Supp. Petit Cert. Ex. 175). In Madison, plaintiff and defendant entered into a partnership agreement that required defendant to make capital contributions to the partnership that would be used as the sole source of payment for monies owed to two non-signatory third parties pursuant to a separate agreement. Id. at *1, 5. The court

[141] Further, the stipulation was not the only evidence on which Maxus relied when it spent four pages addressing the Restatement's three factors and explaining that Maxus and OCC only intended to benefit OCC (the indemnitee), that Maxus only offered indemnity for certain liabilities without expressing an

ultimately held that, even though the third parties were "expected creditors," they were only "incidental beneficiaries" with no right to sue on the contract. Id. at *5. Similarly, Maxus may have known that OCC had an obligation to Plaintiffs for the Lister Site liabilities and that Plaintiffs eventually would receive some benefit from its obligation to indemnify OCC; however, that benefit is merely *incidental* to the indemnity provision's material purpose and actual intent to benefit OCC. Thus, Plaintiffs (like an expected creditor) are nothing more than incidental beneficiaries to the SPA and are unable to sue to enforce the indemnification provision.

C. An Intended Third-Party Beneficiary To The SPA Does Not Have A Direct Action Against Maxus.

Plaintiffs also argue that, if found to be a third party beneficiary to the SPA, they would have a direct action against Maxus because "the Court has already determined that OCC is liable for those discharges for which Maxus must indemnify."[142] However, Plaintiffs ignore well-settled law that limits a third party beneficiary's rights to those for which the parties actually contracted.[143] The SPA only grants OCC the right of indemnity; therefore, even if Plaintiffs were intended third party beneficiaries, they would not have a right to sue for indemnity and could only enforce Maxus's obligation to indemnify OCC.

D. Plaintiffs Do Not Have a Direct Action Against Maxus Under The Spill Act.

In their reply brief, Plaintiffs introduce an entirely new argument claiming that Maxus's status as indemnitor grants Plaintiffs a direct action under N.J.S.A. 58:10-23.11s

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intent to satisfy OCC's debts, and that the material purpose for entering into the indemnity agreement was to protect and benefit OCC. See Maxus's Resp. Br. at 111-115.

[142] Pls.' Reply Br. at 62.

[143] See Maxus's Resp. Br. at 115-16; Delmar News Inc. v. Jacobs Oil Co., 584 A.2d 531, 534 n. 3 (Del. Super. Ct. 1990) (a third party beneficiary can have no greater rights under the contract than the signatories thereto).

of the Spill Act ("Section S"). This claim should be disregarded, because it is not pled in Plaintiffs' Third Amended Complaint, is not among the issues defined for Track III,[144] and is raised for the first time in a reply brief. The need for Plaintiffs to proceed with this argument nonetheless signals that Plaintiffs themselves recognize the tenuous nature of their third party beneficiary claim. Even if considered, however, this new claim does not improve their chances because Section S does not grant Plaintiffs a direct right to enforce the contractual indemnity. In fact, if Plaintiffs' right to sue under Section S were as clear as they contend, one is left to wonder why the claim is only now being raised as an afterthought.

Although the common law generally prohibits the filing of direct actions against an insurer, Manukas v. American Ins. Co., 98 N.J. Super. 522, 524-25 (App. Div. 1968), the Spill Act creates a limited exception to this rule. That exception is contained in Section S, which states in full that:

> Any claims for costs of cleanup, civil penalties or damages by the State, and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility.

N.J.S.A. 58:10-23.11s. The problem for Plaintiffs is that a contractual indemnitor does not qualify as an "insurer" covered by this provision or as a "person providing evidence of financial responsibility." Indeed, even when Section S claims have been made against real insurers, the courts have almost universally found that Section S only applies to

[144] The Consent Order on Track III limits Track III to four specific topics. Specifically, Part I.A.2 defines the issue as "[w]hether Maxus has direct liability based on one or more of the following theories:" (a) "Maxus is a 'successor,' at law or in equity, to DSCC;" (b) "Maxus is an alter ego of Tierra;" (c) "Plaintiffs are 'third-party beneficiaries'" to the SPA; and (d) "Maxus is 'in any way responsible' under the Spill Act for the hazardous substances discharged from the Lister Site based on the same alleged facts underlying one or more of the theories outlined in subparagraphs (a)-(c) above." Consent Order, Part I.A.2. Although Plaintiffs attempt to shoehorn this new statutory direct action claim into the third party beneficiary section

insurers that are providing evidence of financial responsibility as part of a regulated company's efforts to comply with the financial integrity requirements of the State's environmental statutes and rules.

1. Maxus is not an insurer.

In this litigation, Plaintiffs have accused Maxus of many things, but never before have Plaintiffs (or anybody else) accused Maxus of being an insurer. It is a gross understatement to say that Plaintiffs go beyond the plain meaning of the word. See Nini v. Mercer County Cmty. Coll., 202 N.J. 98, 108 (2010) (noting that N.J.S.A. 1:1-1 directs statutory interpretation to apply the "generally accepted meaning" and not seek further guidance if the language is "clear and unambiguous").

Trying to locate some support for their contention, Plaintiffs look to the definition of "insurer" in the insurance law, but misrepresent what the statute says. Plaintiffs claim that the Life and Health Insurance Code defines an "insurer" as "every person engaged as an indemnitor."[145] But what the Code actually says is that an "insurer includes every person engaged as an indemnitor or contractor in the business of life insurance, health insurance or of annuity." N.J.S.A. 17B:17-2 (emphasis added). A contractual indemnitor like Maxus is surely not "in the business of" providing indemnities.

Plaintiffs also turn to dictionary definitions that loosely refer to indemnity principles, but in no case do those definitions equate an indemnitor under a commercial contract to an insurer. Remarkably, Plaintiffs make no mention of the fact it is well settled that "'[w]hile a policy of insurance . . . is basically a contract of indemnity, not all contracts of indemnity are insurance contracts.'" Castleberry v. Goldome Credit Corp.,

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of their brief, it is not a third party beneficiary claim based on the SPA and is not eligible for consideration in Track III.

418 F.3d 1267, 1272 (11th Cir. 2005) (quoting COUCH ON INSURANCE § 1.7 (3d ed. 2005 update)). Moreover, it is commonly understood that there are fundamental differences between insurance contracts and commercial indemnity agreements. See W9/PHC Real Estate LP v. Farm Family Cas. Ins. Co., 407 N.J. Super. 177, 193 (App. Div. 2009) (noting that insurance contracts and indemnity agreements "cover separate matters"). In recognition of these differences, courts apply "[e]ntirely different principles of law apply to the interpretation of an indemnification agreement" from those applied to insurance policies. Harrah's Atl. City, Inc. v. Harleysville Ins. Co., 288 N.J. Super. 152, 159 (App. Div. 1996).

Plainly, not all indemnitors qualify as insurers. Here, Maxus's status as an indemnitor to OCC arises out of an indemnity agreement in a commercial contract. Maxus is certainly not in the business of providing indemnities, and the indemnity that it did provide fundamentally differs from an insurance contract. There is simply no fair claim that Maxus is an insurer.

2. Maxus did not "provid[e] evidence of financial responsibility" through its contractual indemnity agreement.

Having promulgated extensive regulations mandating that companies submit evidence of financial responsibility, see, e.g., N.J.A.C. 7:14B-15.2 (Underground Storage Tank Act financial responsibility regulations), Plaintiffs well know that the phrase "providing evidence of financial responsibility" is a term of art that does not apply to Maxus's contractual indemnification of OCC. See Caldwell Trucking PRP Group v. Spaulding Composites Co., 890 F. Supp. 1247, 1254 (D.N.J. 1995) ("evidence of financial responsibility" is a term of art); Bergknoff v. A. Bessenyei & Son Inc., 1995

[145] Pls.' Reply Br. at 64.

WL 854721 at *2 (N.J. Super. Ct. Law Div. 1995) (recognizing that "evidence of financial responsibility" is a term of art in environmental law with a "limited statutory meaning") (Supp. Petit Cert., Pls.' Ex. 177); Keating v. ABC Detachable Container, No. 12152-90, slip op. (N.J. Super. Ct. Law Div. Dec. 1, 1992) (Supp. Petit Cert., Pls.' Ex. 167) (recognizing that "financial responsibility" has a "very specialized meaning" under the law). The term refers to a variety of instruments submitted by a regulated party to the DEP to guarantee that financial resources are available to accomplish certain environmentally-necessary tasks or to respond appropriately if certain contingencies arise.

The term has historic application outside of the environmental context, e.g., the establishment of financial responsibility requirements in the motor vehicle laws,[146] and is now extensively employed in environmental law and regulation. One prime example is the Underground Storage Tank Act, which requires the DEP to establish rules "requir[ing] the maintenance of evidence of financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by a discharge." N.J.S.A. 58:10A-25(a)(8). The Underground Storage Tank Act also requires that businesses performing underground tank services "provide the department with evidence of financial responsibility." N.J.S.A. 58:10A-24.4(b). Likewise, the statutory scheme under which the DEP licenses hazardous waste disposal facilities requires every owner or operator to "provide evidence of financial responsibility." N.J.S.A. 13:1E-68.

In fact, the Spill Act employs this exact same device in multiple circumstances. In addition to the Spill Act's liability provisions at the core of this litigation, the Spill Act

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[146] Black's Law Dictionary defines "financial responsibility" as a "term commonly used in connection with motor vehicle insurance equivalents." Black's Law Dictionary (8th ed. 2004).

has regulatory provisions governing certain major facilities, pipelines and vessels. Among these provisions is N.J.S.A. 58:10-23.11d5 ("Section d5"), which is entitled "Evidence of financial responsibility to be filed with department." Section d5 provides, in pertinent part:

> The owner or operator of a major facility or transmission pipeline shall, at all times, retain on file with the department evidence of financial responsibility for cleaning up and removing a discharge or release of a hazardous substance, and for the removal of any abandoned structure owned or operated, as the case may be, by the owner or operator of a major facility or transmission pipeline. The amount, nature, terms, and conditions of the financial responsibility shall be determined by the department.

N.J.S.A. 58a:10-23.11d5. Similarly, owners and operators of vessels are required "to establish and maintain evidence of financial responsibility for the purpose of assuring adequate financial resources to pay for cost of cleanup or removal of a discharged hazardous substance." N.J.S.A. 58:10-23.11g2. Also, in the event that a vessel is impounded by the DEP after a discharge of hazardous substances, the impoundment will continue until, among other things, the owner or operator of the vessel "provide[s] evidence of financial responsibility." N.J.S.A. 58:10-23.11f.g(2).

These are all examples of the "evidence of financial responsibility" referred to in Section S: that statute encompasses financial instruments filed with the DEP to assure protection of the environment. By design, these instruments secure a cleanup or other similar obligations. They would fail to serve that intended purpose unless the DEP were able to proceed directly against them upon the occurrence of the events for which they were created, as expressly allowed by Section S.

But Maxus's contractual indemnification of OCC does not fit into this category. Quite simply, the contractual indemnity of OCC was never provided to the DEP as

evidence of financial responsibility. In fact, it came into existence long after operations at the Lister Site ceased and long before establishment of the Spill Act's requirement that major facilities provide evidence of financial responsibility to the DEP.[147] To be clear, Maxus and Tierra did arrange for the filing of evidence of financial responsibility when performing cleanup of the Lister Site under consent orders with the DEP. Those instruments were released long ago, but are the type of security governed by Section S: if the Lister Site cleanup did not proceed, the DEP was empowered by Section S to file a direct action against "the bond, the insurer or any other person providing evidence of financial responsibility." N.J.S.A. 58:10-23.11s.

3. Even if Maxus were found to be an insurer, it would not be an insurer subject to a direct action under Section S.

Although it appears that no party prior to this lawsuit has contended that a contractual indemnitor is covered by Section S, there has been extensive litigation over the scope of insurers subject to direct actions under that section. While no precedential rulings have resulted, there is hardly "a paucity of caselaw," as Plaintiffs assert.[148] By 1995, the federal district court in Caldwell counted 11 unpublished decisions; eight had found that Section S only covers insurers whose policies had been specifically supplied to the DEP to secure environmental obligations under the Spill Act, while three courts found that Section S authorized a direct action against all insurers. Caldwell, 890 F. Supp. at 1254. Four more decisions have now addressed the issue: the Caldwell decision itself, an unpublished federal court decision in New Jersey Turnpike Authority v. PPG Industries,

[147] There is no need to debate Plaintiffs' contention that the Lister Site might have qualified as a major facility. The plain fact is that site operations concluded before the regulation of major facilities commenced. At the time of site operations, there was no requirement to provide evidence of financial responsibility.

[148] Pls.' Reply Br. at 65.

No. 93-2037, slip op. at 4-5 (D.N.J. Mar. 7, 1996) (Supp. Gentile Cert., Ex. 136), and two unpublished State court rulings, Transmark Equities Ltd. Partnership v. Preston Lock Inc., No. 46-96E, slip op. p. 3 (N.J. Super. Ct. June 7, 1996) (Supp. Petit Cert., Pls.' Ex. 166) and Deleet Merchandising Corp. v. Aetna Life & Casualty, No. C-79-98, slip op. (N.J. Super. Ct. Ch. Div. Nov. 20, 2003) (Supp. Petit Cert., Pls.' Ex. 165). All four of those decisions adopted the majority view.[149] Thus, the overwhelming majority of courts addressing the question -- 12 out of 15 -- and all of the recent decisions have concluded that a direct action under Section S can only be brought against insurers whose policies are provided as evidence of financial responsibility.[150]

These court holdings rejected Plaintiffs' current contention for multiple reasons. First, they found that the direct action provision was required to be read in pari materia with the Act's regulatory requirement to provide evidence of financial responsibility. Caldwell, 890 F. Supp. at 1254-56 (finding that Section S should be read in pari materia with Section d5). One court observed that "[i]t is more than mere coincidence that the same language is used in the two sections," Bergknoff, 1995 WL 854721 at *2; another found it "incomprehensible...that the legislature did not intended these two provisions [i.e., Section S and Section d5], with their same use of language, to be read together[.]" Keating, slip op. p. 7.

These courts also took note of the specific language used by the Legislature in the direct action provision. The decisions focus on the Legislature's use of the definite

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[149] Although Plaintiffs assert that this motion represents the first time that the State has advanced its current contention that all insurers are subject to a direct action under Section S, the State pursued the same argument as Plaintiff-intervenors in Deleet and as an amicus in Keating. Neither court was convinced by their argument. In fact, the Deleet decision should properly preclude the State from repeating its same contention in this litigation under principles of collateral estoppel. In re Estate of Dawson, 136 N.J. 1, 20-21 (1994).

article "the" in connection with "bond" or "insurer" rather than the indefinite article "a", indicating that the statute refers to a specific and identifiable bond or insurer rather than any and all bonds and insurers. See Caldwell, 890 F. Supp. at 1253-54.; Transmark Equities Ltd. Partnership v. Preston Lock Inc., No. 46-96E, slip op. p. 3 (N.J. Super. Ct. June 7, 1996) (Supp. Petit Cert., Pls.' Ex. 166) (noting the use of "the" rather than "an"); Bergknoff, 1995 WL 854721 at *2 (noting the use of the restrictive article "the"). Further, courts have recognized that the use of the word "other" in the phrase "or any other person providing evidence of financial responsibility" can only mean that the words "the bond" and "the insurer" were designed to refer to the use of bonds and insurance as evidence of financial responsibility; otherwise, the word "other" would be rendered mere surplusage. Bergknoff, 1995 WL 854721 at *2.

Finally, courts have recognized that the broad interpretation of Section S urged by Plaintiffs violates established principles of statutory construction. When a statute abrogates the common law, it must be "evidenced by a clear expression of legislative intent and must be narrowly construed." Caldwell, 890 F. Supp. at 1254. See also Carlo v. Okonite-Callender Cable Co., 3 N.J. 253, 265 (N.J. 1949) ("It is well established, however, that statutes are to be construed with reference to the common law and that a statute which is claimed to impose a duty or establish a right which was not recognized by the common law will be strictly interpreted to avoid such asserted change"). Given the multiple signals that the Legislature intended to confine direct actions to specific instances, the Caldwell court, along with the overwhelming majority of other courts

[150] Plaintiffs mischaracterize these holdings as imposing an intent requirement, although they are unable to point to a single court decision employing that nomenclature.

examining the issue, have refused to adopt the broad abrogation of the common law ban on direct actions that Plaintiffs now advocate.

In sum, Plaintiffs' attempt at a direct action under the Spill Act against Maxus fails because it is a claim that has not been pleaded, that cannot be raised under Track III or in a reply brief, and that cannot be brought against a commercial indemnitor. For any one of these reasons, Plaintiffs' direct action argument must be rejected.

CONCLUSION

For all of the foregoing reasons, Maxus should be granted summary judgment and the motions of the Plaintiffs and OCC should be denied.

Respectfully submitted,

DRINKER BIDDLE & REATH LLP
Attorneys for Defendant/Third Party Plaintiff Maxus Energy Corporation

Dated: April 24, 2012

By: ______________________
Vincent E. Gentile

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, *et al.*, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO. L-9868-05 (PASR) CIVIL ACTION **SUPPLEMENTAL CERTIFICATION OF VINCENT E. GENTILE IN SUPPORT OF MAXUS ENERGY CORPORATION'S TRACK III CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Vincent E. Gentile, in lieu of oath or affidavit, certifies as follows:

I am an attorney at law of the State of New Jersey and a partner of the law firm Drinker Biddle & Reath LLP, counsel for defendant/third-party plaintiff Maxus Energy Corporation ("Maxus") in the above-captioned matter. I am familiar with the facts of this matter and qualified to make this Certification. This Supplemental Certification is submitted in opposition

to Plaintiffs' and Occidental Chemical Corporation's ("OCC") Motions for Partial Summary Judgment and in support of Maxus' Track III Cross-Motion for Partial Summary Judgment and to provide the Court with certain Exhibits.

1. Attached as **Exhibit 133** is a true and correct copy of a January 15, 1994 unanimous written consent of the board of directors of Chemical Land Holdings, Inc., as they were produced from business records kept in the ordinary course of business.

2. Attached as **Exhibit 134** is a true and correct copy of a February 14, 1989 unanimous written consent of the board of directors of Chemical Land Holdings, Inc., as they were produced from business records kept in the ordinary course of business.

3. Attached as **Exhibit 135** is a true and correct copy of a December 8, 1988 unanimous written consent of the board of directors of Chemical Land Holdings, Inc., as they were produced from business records kept in the ordinary course of business.

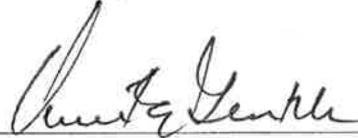
4. Attached as **Exhibit 136** is a true and correct copy of the court's slip opinion dated March 7, 1996 in New Jersey Turnpike Authority v. PPG Industries, No. 93-2037 (D.N.J. Mar. 7, 1996).

5. Attached as **Exhibit 137** is a true and correct copy of the court's opinion in Fink v. EdgeLink, Inc., 2012 WL 1044312 (D.N.J. Mar. 27, 2012).

6. Attached as **Exhibit 138** is a true and correct copy of the court's opinion in Estate of Thomas v. Southworth, Inc., No. 99-712, 2001 U.S. Dist. LEXIS 26512 (D.D.C. Jan. 29, 2001).

7. Attached as **Exhibit 139** is a true and correct copy of the court's opinion in Flaugher v. Cone Automatic Mach. Co., No. CA84-05-040, 1986 Ohio App. LEXIS 6349 (Ohio Ct. App. Apr. 14, 1986).

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Vincent E. Gentile

Dated: April 24, 2012

EXHIBIT 133

CHEMICAL LAND HOLDINGS, INC.

Unanimous Written Consent of the
Board of Directors in Lieu of a Special Meeting

Pursuant to Section 141(f) of the Delaware General Corporation Law, the undersigned, constituting all the members of the Board of Directors of CHEMICAL LAND HOLDINGS, INC., a Delaware corporation (the "Company"), do hereby adopt the following resolutions as of January 15, 1994 with the same force and effect as if they had been unanimously adopted at a duly convened meeting of the Board of Directors of the Company:

RESOLVED that the resignation of H. R. Smith as Vice President of the Company be, and hereby is, accepted effective January 15, 1994.

FURTHER RESOLVED that C. A. Begun be, and hereby is, appointed Vice President of the Company effective January 15, 1994 to hold office until his successor shall have been chosen and qualified.

David A. Wadsworth

R. L. Wilson

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EXHIBIT 134

CHEMICAL LAND HOLDINGS, INC.

Unanimous Written Consent of the
Board of Directors in Lieu of Special Meeting

Pursuant to Section 141(f) of the Delaware General Corporation Law, the undersigned, constituting all of the Board of Directors of Chemical Land Holdings, Inc., a Delaware corporation (the "Corporation"), hereby adopt the following resolution, with the same force and effect as if it had been unanimously adopted at a duly convened special meeting of the Board of Directors of the Corporation:

RESOLVED, that effective immediately, Paul W. Herring be, and he hereby is, nominated and elected as Assistant Secretary of the Corporation, to serve until his respective successor is elected and qualifies.

EXECUTED this 14th day of February, 1989.

D. L. Smith, Director

R. L. Wilson, Director

9183

EXHIBIT 135

CHEMICAL LAND HOLDINGS, INC.

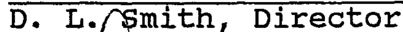
Unanimous Written Consent of the
Board of Directors in Lieu of Special Meeting

Pursuant to Section 141(f) of the Delaware General Corporation Law, the undersigned, constituting all of the Board of Directors of Chemical Land Holdings, Inc., a Delaware corporation (the "Corporation"), doe hereby adopt the following resolution, with the same force and effect as if it had been unanimously adopted at a duly convened special meeting of the Board of Directors of the Corporation:

RESOLVED, that effective December 1, 1988, the following persons be, and hereby are, nominated and elected to the office of the Corporation set opposite their respective names, to serve until their respective successors are elected and qualify:

President:	D. L. Smith
Vice President:	R. L. Wilson
Secretary:	N. R. Green
Treasurer:	G. R. Brown
Assistant Treasurer:	C. D. Beene

EXECUTED this 8th day of December, 1988.



D. L. Smith, Director

R. L. Wilson, Director

9130rsb/2

EXHIBIT 136

23-7-8157 78

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NEW JERSEY TURNPIKE AUTHORITY, :

Plaintiff, :

v. :

PPG INDUSTRIES, INC., et al., :

Defendants. :

Civil Action No. 93-2037

OPINION

FILED
MAR 07 1996
AT 8:30 .... M
WILLIAM T. WALSH
CLERK

APPEARANCES:

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(Attorneys for Defendant
The Travelers Ins. Co.)

BISSELL, District Judge

This matter comes before the Court on two separate motions to dismiss. On May 17, 1993, plaintiff New Jersey Turnpike Authority ("NJTA") filed a complaint against numerous defendants, including the moving defendants New Jersey Manufacturers Insurance Company ("Manufacturers") and The Travelers Insurance

Company ("Travelers"). The complaint charges the defendants with alleged violations of the New Jersey Spill Compensation and Control Act ("NJSCCA"), the New Jersey Environmental Rights Act ("NJERA") and the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA").

The moving defendants issued liability and property damage policies to the contractor-defendants. Specifically, plaintiff claimed that the contractors transported and/or disposed of hazardous substances on NJTA property, all cites being located in New Jersey, in connection with the work those defendants performed for NJTA. (Compl., ¶¶ 31-36). The complaint also contains a claim against the insurers of the contractor-defendants pursuant to § 20 of the NJSCCA. See, N.J.S.A. 58:10-23.11. Both Manufacturers and Travelers have moved for dismissal contending that the NJSCCA does not provide for a direct cause of action against an insurer for the conduct of its insureds. Plaintiff New Jersey Turnpike Authority has expressly advised the Court that it "has determined not to interpose any objection to the relief sought by [each] movant in its motion." (Letters of Roger C. Ward, Esquire, Feb. 6, 1996).

This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

ANALYSIS

I. Standard on a Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. Neitzke v. Williams, 490 U.S. 319, 326 (1989) (citing Hishon v.

King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In disposing of a motion to dismiss, the court operates on the assumption that the factual allegations in the complaint or counterclaim are true. Neitzke, 490 U.S. at 326-27. A motion to dismiss may be granted if the opposing party would not be entitled to relief under any set of facts consistent with the allegations in the complaint or counterclaim. As the Supreme Court stated in Neitzke:

> [n]othing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," Hishon, supra at 73, 104 S. Ct. 2229, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one. What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations.

(Id. at 327).

II. Defendants' Motions to Dismiss are Granted

The New Jersey Turnpike Authority seeks to assert a direct action against Manufacturers and Travelers pursuant to § 20 of the NJSCCA. See N.J.S.A. 58:23.11-10(s). Plaintiff contends that Manufacturers and Travelers are liable for the actions of their insureds. The relevant insureds allegedly violated the NJSCCA, NJERA and CERCLA by transporting and/or disposing of hazardous materials on NJTA property.

It is well settled that absent a statutory or contractual provision, a direct action filed by a third-party against an

insurer is not permitted. Manukas v. The American Ins. Co., 98 N.J. Super. 522, 524 (App. Div. 1968). Section 20 of the NJSCCA provides:

> Any claims for costs of cleanup, civil penalties or damages by the State, and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility.

N.J.S.A. 58:10-23.11(s). The NJTA claims that it may proceed against the defendant insurers as "other person[s] providing evidence of financial responsibility." (Compl., ¶¶ 180-81, 185).

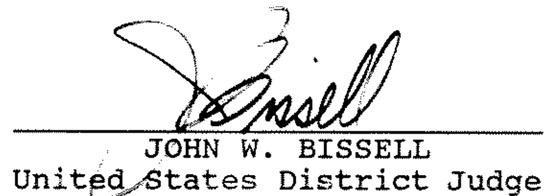
The scope of the exception to the prohibition of direct actions against an insurer found in the NJSCCA is limited. Caldwell Trucking v. Spaulding Co., 890 F. Supp. 1247, 1253 (D.N.J. 1995). The court held that the exception did not include an action against an insurer that issued a general comprehensive liability policy to an alleged polluter. Caldwell, 890 F. Supp. at 1253. Reading § 23.11(s) in conjunction with § 23.11(d)(5), the Caldwell court held that the NJSCCA "authorizes direct actions only against insurers of major facilities that are required to provide evidence of financial responsibility." See N.J.S.A. 58:10-23.11(s) and (d)(5). Evidence of financial responsibility requires that the insurance "policy must contain a specific endorsement by the insurer, stating that the policy is intended to cover the cost of corrective action to remedy a spill at a "major facility." Caldwell, 890 F. Supp. at 1255. The term "insurer" found within § 20 is defined as a category of evidence of financial responsibility. (Id.) Accordingly, "an insurer is

only responsible for pollution by an insured if the insurer has explicitly undertaken this obligation by endorsing its policy to provide Spill Act coverage." (Id. at 1256); see N.J.S.A. 7:1E.4-51(2).

Plaintiff NJTA does not claim that the insureds were "major facilities" as defined by the NJSCCA and does not claim that the contractor-defendants' insurers provided "evidence of financial responsibility." It is undisputed that Manufacturers and Travelers issued general comprehensive liability policies to plaintiff. As the relevant insurance policies do not contain any specific provision as to coverage under the NJSCCA, plaintiff may not maintain a direct action against Manufacturers and Travelers under the exception contained within § 20 of the NJSCCA.

CONCLUSION

For the foregoing reasons, defendants Manufacturers and Travelers' motions to dismiss are granted.



JOHN W. BISSELL
United States District Judge

DATED: March 6, 1996

EXHIBIT 137

H
Only the Westlaw citation is currently available.

United States District Court,
D. New Jersey.
John W. FINK, Plaintiff,
v.
EDGELINK, INC., and Kaydon A. Stanzione, Defendants.

Civil No. 09–5078 (NLH)(KMW).
March 27, 2012.

John W. Fink, Forest Hill, NY, pro se.

Kurt E. Kramer, Edward T. Fisher, White and Williams, Cherry Hill, NJ, for EdgeLink, Inc.

Gary M. Marek Law Offices of Gary M. Marek, Mount Laurel, NJ, for Kaydon A. Stanzione.

OPINION

HILLMAN, District Judge.

***1** This dispute concerns plaintiff's claims that defendants are obligated to pay on contracts plaintiff entered into with an alleged predecessor company of defendants. Presently before the Court are the motions of the defendants for summary judgment in their favor on all of plaintiff's claims against them.[FN1] For the reasons expressed below, defendants' motions will be granted.

FN1. Also pending is plaintiff's motion to seal portions of the record, which will be denied as moot. *See infra* note 4.

BACKGROUND[FN2]

FN2. The background facts are gathered from plaintiff's complaint.

In 2000, plaintiff, John W. Fink, began working as a financial consultant for Advanced Logic Systems, Inc. ("ALSI"), which was founded by defendant, Kaydon Stanzione. A year later, Fink entered into a series of credit agreements with ALSI to provide working capital to the company's operations. Fink provided over $500,000 to ALSI, and in return, he received rights to purchase a certain amount of stock in ALSI.

Eventually the financial condition of ALSI deteriorated. Fink ceased providing consulting services, and in March 2003, he ultimately filed suit against ALSI, Stanzione and other related entities in New Jersey Superior Court, claiming breaches of the various credit agreements, as well as fraud. Three years later, the parties entered into a settlement agreement. A year after that, in May 2007, a hearing was held in state court regarding Fink's claims that the state court defendants had breached their settlement agreement. The matter was referred to binding arbitration, and in July 2008, the arbitrator issued his decision, wherein the arbitrator found that ALSI did not breach the settlement agreement, but that ALSI owed Fink fees in his enforcement of the agreement, and the case was reactivated in state court.

Ultimately, ALSI filed for bankruptcy in October 2008, and Fink's state court case was dismissed without prejudice. Around this same time, ALSI failed to make a scheduled repayment to Fink, and Stanzione, as guarantor of the agreement, owed $100,000 to Fink.

On January 27, 2009, defendant, EdgeLink, Inc., was incorporated. Fink claims that ALSI's proceeds and assets were fraudulently transferred to Advanced Logic Systems, Inc., a corporation set-up by Kaydon Stanzione in his mother Katherine's name, in June 2005, and then upon her death in December 2008, were transferred to EdgeLink as a means of depriving Fink of his rightful ownership in ALSI's assets.

As a result, Fink has brought claims against EdgeLink for breach of contract for two agreements Fink entered into with ALSI: (1) the warrant agree-

ment (which included a methodology for calculating the price per share of ALSI common stock and the number of shares being offered to sale to Fink), and (2) the settlement agreement. Fink claims that EdgeLink is liable for these breaches because it is a "mere continuation of" or a "defacto merger with" ALSI.

Fink has also brought claims for unjust enrichment against EdgeLink. He also claims that the transfer of substantially all of ALSI's assets to EdgeLink violated New Jersey's Fraudulent Transfer Act, N.J.S.A. 25:2–25 et seq., and that EdgeLink and Stanzione are liable to Fink for this fraudulent transfer. Finally, Fink claims that Stanzione breached his fiduciary duties he owed to Fink as a creditor of ALSI.

***2** Since the filing of his complaint against EdgeLink and Stanzione in October 2009, the parties have engaged in extensive discovery, and have provided this Court with voluminous correspondence,[FN3] briefing, and exhibits relating to various discovery motions, as well as motions relating to Fink's legal representation, which have resulted in Fink's current *pro se* status after the termination of five law firms. After other protracted proceedings, the defendants' motions for summary judgment are now ripe for consideration.[FN4]

> FN3. On October 24, 2011, this Court admonished the parties to stop sending unauthorized letters to the Court. (Docket No. 134).

> FN4. Following a hearing with this Court on September 16, 2011 during which the Court granted Fink's attorney's motion to be relieved as counsel, the Court permitted Fink to submit a brief and other supporting documents to supplement the opposition to defendants' motions for summary judgment that his counsel had previously filed. (See Docket No. 125.) Defendants had already filed their reply briefs to the opposition Fink's former counsel had prepared, and they were not permitted to respond to Fink's supplemental materials, which are voluminous. (See Docket Nos. 134, 130.) Contemporaneous with filing his supplemental materials, Fink filed a motion to seal portions of those materials because he was unclear about the scope of the parties' confidentiality order. (See Docket No. 131.) In resolving defendants' motions for summary judgment, all materials sent to the Court have been reviewed. Because the redacted documents filed on the docket by Fink appear sufficient to comply with the protective order, those documents do not need to be filed in their unredacted form. Consequently, Fink's motion to seal will be denied as moot.

What this case boils down to is whether Fink has provided sufficient evidence to refute EdgeLink and Stanzione's position that they cannot be held liable for the conduct of ALSI. As explained below, Fink has failed to do so.

DISCUSSION

A. Jurisdiction

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000.

B. Summary Judgment Standard

Summary judgment is appropriate where the Court is satisfied that the materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, or interrogatory answers, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(a).

An issue is "genuine" if it is supported by evidence such that a reasonable jury could return a verdict in the nonmoving party's favor. *Anderson v.*

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Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is “material” if, under the governing substantive law, a dispute about the fact might affect the outcome of the suit. *Id.* In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence “is to be believed and all justifiable inferences are to be drawn in his favor.” *Marino v. Industrial Crating Co.,* 358 F.3d 241, 247 (3d Cir.2004) (quoting *Anderson,* 477 U.S. at 255).

Initially, the moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met this burden, the nonmoving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.* Thus, to withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and affirmative evidence that contradict those offered by the moving party. *Anderson,* 477 U.S. at 256–57. A party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements. *Saldana v. Kmart Corp.,* 260 F.3d 228, 232 (3d Cir.2001).

C. Analysis

***3** As stated above, Fink's claims against EdgeLink and Stanzione arise out of his relationship with the now-defunct ALSI. Believing that (1) he is still entitled to money from that failed relationship,[FN5] (2) he did not get the relief he desires from his prior litigation [FN6] with ALSI and related parties, and (3) ALSI and Stanzione transferred ALSI's assets-now owed to Fink-to EdgeLink to avoid payment to Fink, Fink has brought claims for breach of contract, fraud, unjust enrichment, and breach of fiduciary duty, against EdgeLink and Stanzione. The problem with Fink's claims, however, is that he has provided no evidence to support any successor liability or fraudulent transfer that would tie EdgeLink or Stanzione to ALSI's liabilities to Fink.

> FN5. Under the stipulation of settlement between Fink, ALSI and Stanzione, as personal guarantor, in the state court action, Fink received $524,398.90 in installment payments toward the agreed upon $1 million settlement amount prior to ALSI's bankruptcy. (Stanzione Decl. at 5–6.) In this case, Fink claims that he is owed $58 million for ALSI's breach of the warrant agreement, and an additional $2.6 million for ALSI's breach of the settlement agreement. (Pl. Opp. Br. at 1.)

> FN6. Defendants point out that six other actions have involved Fink's issues arising out his business relationship with ALSI. (See, e.g, Stanzione SOMF ¶ 2.)

In order to hold EdgeLink liable for ALSI's alleged breach of its warrant agreement and settlement agreement with Fink, Fink must show that EdgeLink is a successor company to ALSI, or somehow otherwise responsible for ALSI's obligations.[FN7] To do so, the key element Fink must first prove is a transfer of assets, either legitimate or fraudulent, from ALSI to EdgeLink. *See Colman v. Fisher–Price, Inc .,* 954 F.Supp. 835, 838 (D.N.J.1996) (quoting *Ramirez v. Amsted Indus., Inc.,* 86 N.J. 332, 431 A.2d 811, 816 (N.J.1981)) (explaining that under New Jersey corporate law, “ ‘where one company sells or otherwise transfers all its assets to another company’ “ the traditional approach was that “ ‘the latter is not liable for the debts and liabilities of the transferor, including those arising out of the latter's tortious conduct,’ “ except for four limited exceptions); N.J.S.A. 25:2–25 (“A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation ... a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or b. Without receiving a

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reasonably equivalent value in exchange for the transfer or obligation ....”).

> FN7. Defendants argue that Fink's claims also fail on *res judicata* principles. Because the Court finds that Fink has failed to offer sufficient facts to support his claims, the Court will not determine whether Fink's claims are otherwise precluded because of prior litigation.

Fink claims that ALSI's proceeds and assets were fraudulently transferred to Advanced Logic Services, Inc. (“ALServ”), a corporation set-up by Kaydon Stanzione in his mother Katherine's name, in June 2005, and then upon her death in December 2008, were transferred to EdgeLink after its creation in January 2009 as a means of depriving Fink of his rightful ownership in ALSI's assets. [FN8] Fink, however, has not provided any evidence showing a transfer of any asset from ALSI to ALServ, and then from ALServ to EdgeLink.

> FN8. In his October 11, 2011 supplemental brief, Fink claims that it is obvious that Stanzione—or someone else—forged Katherine Stanzione's name on ALServ's incorporation documents. Defendants were not provided with the opportunity to respond to that claim, and the Court finds that claim to be an unsupported assumption rather than a controverted fact.

Instead, arguing that he cannot prove concretely the asset transfer because “Stanzione orchestrated the asset-personnelcustomer slide to EdgeLink as far under the radar as he could push it,” (Docket No. 101 at 31), Fink attempts to show that because the technology EdgeLink owns is the same that was used by ALSI, and that EdgeLink has the same “principal functionaries” and customers as ALSI, a jury could conclude that ALSI's assets were transferred to EdgeLink. Fink's position is unpersuasive.

***4** First, as noted by the defendants, personnel of a company are not “assets” within the context of establishing successor liability or fraud. *See, e.g., Portfolio Financial Servicing Co. ex rel. Jacom Computer Services, Inc. v. Sharemax.com, Inc.,* 334 F.Supp.2d 620, 625 (D.N.J.2004) (distinguishing “assets” from “management” and “personnel”). Thus, even if Fink could show the two companies shared employees, [FN9] that does not evidence any transfer of assets for successor liability or fraudulent transfer purposes. [FN10]

> FN9. Fink and defendants both take great pains to explain how the personnel of the two companies are identical or completely different, respectively. We assume for purposes of the present motions that Fink, the non-moving party, could prove an overlap of employees.

> FN10. One exception to the general rule-that when one company sells or otherwise transfers all its assets to another company the latter is not liable for the debts and liabilities of the transferor-is that the purchasing corporation is merely a continuation of the selling corporation, which can be evidenced by a continuity of personnel and general business operations. *See Portfolio Financial Servicing Co. ex rel. Jacom Computer Services, Inc. v. Sharemax.com, Inc.,* 334 F.Supp.2d 620, 625 (D.N.J.2004). In order for this exception to apply, however, one company must have actually sold or transferred its assets to another company, in addition to the retention of the same employees. Fink's argument about the continuity of personnel skips the first step of showing an actual asset transfer. *See also infra* note 16.

Second, Fink's attempt to prove that ALSI's assets in its technology were transferred to EdgeLink is similarly unsupportable. Fink argues that EdgeLink's May 2009 website provides “the most comprehensive source of the rebranded ALSI products,” and he describes how the ALSI–ALServ

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products, as they were described on ALSI's 2007 website, mirror the products listed on EdgeLink's website. (Pl.'s Oct. 14, 2011 Br. at 7.) For example, Fink contends that ALSI's statement, “ALSI has developed the Alert Notification and Incident Command Systems (ANICS),” is the same product described on EdgeLink's webpage, “HD–911 for incident command and alert notifications.” (*Id.*) Fink lists other similarities, and more generally describes that EdgeLink's “HeteroDyne HD” services for alert notification and monitoring services as the same as ALSI's ANICS, only renamed. (Pl.'s August 8, 2011 Br. at 17–23.)

Even if a jury could make the same observations as Fink [FN11] regarding the similarities in product services that ALSI offered in 2007, and EdgeLink purported to offer on its May 2009 website, those observations do not evidence that ALSI had tangible technology rights that were transferred to EdgeLink. To the contrary, as shown by defendants, the technology used by ALSI that purportedly mirrors EdgeLink's services was either “open-source” or used pursuant to licensing or reseller agreements. Additionally, the defendants explain that the services intended to be offered by EdgeLink, but never realized, “would have been to supplement the readily available third-party notification system with the mobile asset tracking capability that it had under development but that was not yet commercially available.” (EdgeLink SOMF ¶ 96.) Simply because these two companies appeared to provide similar services by the descriptions on their websites does not demonstrate the requisite asset transfer necessary to establish that ALSI transferred assets to EdgeLink.

FN11. *But see, infra,* page 16, note 15.

Third, the evidence in the record concerning ALSI's and EdgeLink's financial situations do not reveal any asset transfers, either legitimate or fraudulent. EdgeLink demonstrates that its only asset is a laptop computer, it has never sold, licensed or leased any tangible or intangible assets, it does not have any licensing or purchasing agreements with third parties for computer software, and as of October 31, 2010, its total expenditures over revenues was $(232,880.00). (EdgeLink SOMF ¶¶ 81–90.) Fink has not provided any evidence to refute this.[FN12]

FN12. In his supplemental materials, Fink claims that he cannot fully prove ALSI's transfer of assets to EdgeLink because EdgeLink's general ledger had been accidentally destroyed by EdgeLink's accounting firm and no back-up exists. Fink argues that he is entitled to an adverse inference of spoliation at trial, because that general ledger would have shown, among other things, that EdgeLink has manufactured fraudulent documents in this case, and it has had more than one bank account, which would reveal business activity damaging to EdgeLink's case. (Pl.'s Oct. 14, 2011 Br. at 16–17.)

The deposition of EdgeLink's accountant, Joseph Troupe, explains how the electronic ledger was accidentally overwritten and corrupted. (Docket No. 103–6 at 174–184.) Troupe also explains that the general ledger is just a categorical summary of all the checks issued on the account, and because all the checks (108 of them) had been produced in discovery, the ledger could be recreated. (*Id.*)

“When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party that has prevented production did so out of the well-founded fear that the contents would harm him.” *Brewer v. Quaker State Oil Refining Corp.,* 72 F.3d 326, 334 (3d Cir.1995). “For the rule to apply, it is essential that the evidence in question be within the party's control. Further, it

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must appear that there has been an actual suppression or withholding of the evidence. No unfavorable inference arises when the circumstances indicate that the document or article in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for." *Id.* (citations omitted).

Fink has not demonstrated that the general ledger (1) would have shown EdgeLink's fraudulent activity, (2) that EdgeLink intentionally destroyed the document, or (3) that it cannot be recreated. The fact that the general ledger was destroyed-without more-does automatically raise the inference that it contained evidence of nefarious activity.

***5** With regard to ALSI's financial situation and its alleged transfer of assets, at the time Fink claims that ALSI's assets were funneled through ALServ to EdgeLink, ALSI was in the middle of its bankruptcy proceedings. During the proceedings, the bankruptcy court appointed a trustee, who made a "diligent inquiry into the financial affairs of the debtor and the location of the property belonging to the estate." (Stanzione Ex. Q, Docket Entry in 08–bk–31052, dated August 8, 2009.) Fink has not provided any evidence that the bankruptcy trustee discovered any asset transfers by ALSI—during or prior to its bankruptcy filing—to avoid its creditors,[FN13] or any record of ALSI's assets being legitimately transferred to ALServ. Moreover, Fink's $1.2 million lien on ALSI's assets, as well as the existence of ALServ, were recognized by the bankruptcy court. (*Id.* Ex. P.) Thus, ALSI's oversight by a trustee and the bankruptcy court, with the trustee's and bankruptcy court's knowledge of Fink's claim and the allegedly fraudulently created ALServ, do not support Fink's claim of ALSI's transfer of assets.

FN13. It would have been a crime if anyone connected with ALSI had done so. *See* 18 U.S.C. § 152(1), (7). (providing that a person shall be fined, imprisoned not more than 5 years, or both: "who knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor," or "who ... in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation ....").

Finally, Fink's attempt to show how EdgeLink's customers were the same as ALSI's fails to demonstrate a transfer of assets in that customer information. Although where "a company's business is to provide services, information about customers is a property right of the company," this is because "the names and addresses of its customers are not open to and ascertainable by every one; they are the private information and property of the company." *AYR Composition, Inc. v. Rosenberg,* 261 N.J.Super. 495, 619 A.2d 592, 597 (N.J.Super.Ct.App.Div.1993) (citations omitted). In this case, Fink alleges that customers listed on EdgeLink's website are the same as those serviced by ASLI, and that ASLI transferred its customers-as an asset-to EdgeLink. In addition to the defendants' proof that shows that these customers, among others not listed on EdgeLink's site, were not shared, those customers cannot be considered an "asset" because they were revealed openly to the world.[FN14]

FN14. Fink argues that Holt Logistics was a former customer of ALSI that used the ANICS system and then became a customer of EdgeLink. (See Oct. 14, 2011 Br. at

29–30.) As defendants demonstrate, and the email correspondence relied upon Fink supports, Holt used ANICS through a contract with ADT, that service ended, and EdgeLink attempted to offer Holt a newer technology, but that business arrangement was never consummated.

Recognizing that he cannot show concretely any asset transfers from ALSI to EdgeLink, Fink, in his final submission to the Court, asks the Court to consider all the evidence together as a whole—the entirety of the circumstances—to create a "broad definition" of a transfer. (Pl.'s Oct. 14, 2011 Br. at 44.) To summarize his arguments that are parsed out above, Fink argues that ALSI claimed to own proprietary technology prior to its bankruptcy, it did not have that technology at the time of its bankruptcy filing, but it later turned up on EdgeLink's website in a rebranded form. Fink contends that EdgeLink serviced the same customers as ALSI, and some of ALSI's key players were also involved in EdgeLink's operations. He also places strong weight on a May 2009 internet-posted resume of an EdgeLink consultant who referenced he did work for "EdgeLink (formerly ALSI)." (Docket No. 105–5.) These allegations, along with a missing general ledger, an alleged forged signature of Stanzione's mother in setting up ALServ, and defendants' alleged self-serving certifications and lies during depositions, Fink contends demonstrate that EdgeLink is ALSI, and, therefore, EdgeLink and Stanzione owe what Fink believes he is due under his contracts with ALSI.

***6** The Court recognizes that there is a lot of bad blood between the parties involved in this litigation and the lawsuits that precede this case. The Court also recognizes that Fink strongly believes that he was defrauded of money that he is contractually owed from his business relationship with ALSI. The Court does not discount the sincerity or strength of Fink's beliefs. But fervor and allegations are not substitutes for admissible proof. Other than Fink's own interpretation of how the ALSI puzzle pieces have reassembled to form EdgeLink,[FN15] Fink has not provided sufficient evidence to refute the defendants' showing that no assets were transferred from one entity to the other so that successor liability would attach.[FN16]

FN15. The Court does not suggest that an expert opinion would save Fink's case. Fink states in his October 14, 2011 supplemental brief that he has not provided an expert report, but that he "might do so ." (Br. at 32.) Even though the magistrate judge ordered that the issue of expert reports and disclosures would be determined after the resolution of any summary judgment motions, (Docket No. 69, January 25, 2011), that did not preclude Fink from obtaining an expert during the two years between the filing of his complaint and defendants' filing of their summary judgment motions. As documented in the parties' briefs, extensive discovery has been completed in this case, including 34 non-party subpoenas issued by Fink, and numerous depositions. It is Fink's burden to prove the claims in his complaint, and to withstand a properly filed motion for summary judgment.

FN16. Fink relies upon *Marshak v. Treadwell,* 595 F.3d 478, 490 (3d Cir.2009) and *Merrill Lynch Business Financial Services, Inc. v. Kupperman,* 441 Fed. Appx. 938, 941 (3d Cir.2011) to support the finding that EdgeLink was a "mere continuation" of ALSI. Neither case helps Fink. The *Marshak* case concerned whether an injunction and contempt order entered against one company could be imposed against two other companies. The Third Circuit affirmed the district court's imposition of the injunction on the two other companies because it found them to be successors-in-interest: "the personnel of each business were the same, the location

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of each business was the same, the assets of each business were the same, the general operations of each business were the same, and RCI folded shortly after DCPM was formed." *Marshak,* 595 F.3d at 490. In *Merrill Lynch,* "Arthur Kupperman, PITTRA's secretary and treasurer as well as a director and shareholder, created PGB in 2003 and transferred a substantial amount of PITTRA's assets to PGB. PGB operated the same type of business as PITTRA, used the same address, and had the same principals and employees. PITTRA did not inform Merrill of the asset transfer, of the organizational change, or of its ultimate demise." *Merrill Lynch,* 441 Fed. Appx. at 940. The Third Circuit upheld the district court's finding that PGB was PITTRA's successor: "It is undisputed that PITTRA and PGB were both importers of industrial foods, they were located at the same address, they were operated by the same principals, and there was a transfer of assets from PITTRA to PGB." *Id.* at 941.

These two cases demonstrate what Fink's case against EdgeLink and Stanzione lacks—evidence of a transfer of assets, which is the primary factor necessary to establish successor liability.

The original purpose behind imposing liability onto a successor company was to protect consumers: if the selling company dissolves after its assets are acquired by a successor, a plaintiff injured by a defective product manufactured by the selling company is left without a remedy. *LaPollo by LaPollo v. General Elec. Co.,* 664 F.Supp. 178, 180 (D.N.J.1987); *Cherry Hill Fire Co. No. 1 v. Cherry Hill Fire Dist. No. 3,* 275 N.J.Super. 632, 646 A.2d 1150, 1153 (N.J.Super.Ch.1994) (quoting *Parsons Mfg. Co. v. Hamilton Ice Mfg. Co.,* 78 N.J.L. 309, 73 A. 254 (N.J.1909) (It is a well known and long standing principle in New Jersey that a corporation 'having taken over the assets of the former company for the purpose of carrying on its business, without apparent change in the personnel of the concern, is liable for the payment of the debts of the former concern. It is held to take the benefits and advantages *cum onere* [subject to a charge or burden].' ")). When, however, there are no transfer of assets from one company to another, it is no longer a concern that the company shifted assets to avoid liability. The new company could run a similar business with many of the same employees, and even the same customers, but without acquiring the assets-such as money, intellectual property, or confidential client lists-of the prior company, it has not taken the benefits which are subject to any attached burdens. Based on the properly supported evidence presented in this case, that appears to be the situation here.

Because Fink's claims against EdgeLink fail because EdgeLink cannot be considered to be a successor, through legitimate or fraudulent means, to ALSI, Fink's claim against Stanzione for breach of his fiduciary duty, as well as Fink's claims for unjust enrichment, also fail because they are based on the theory that EdgeLink is the successor of ALSI. Consequently, summary judgment must be entered in defendants' favor on all of Fink's claims against them. An appropriate Order will be entered.

D.N.J.,2012.
Fink v. EdgeLink, Inc.
Slip Copy, 2012 WL 1044312 (D.N.J.)

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EXHIBIT 138

Analysis
As of: Apr 24, 2012

THE ESTATE OF JOSEPH THOMAS, et al., Plaintiffs, v. SOUTHWORTH, INC., et al., Defendants.

Civil Action No. 99-712 (CKK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2001 U.S. Dist. LEXIS 26512

January 29, 2001, Decided
January 30, 2001, Filed

SUBSEQUENT HISTORY: Dismissed by, in part Estate of Thomas v. Southworth, Inc., 2001 U.S. Dist. LEXIS 26511 (D.D.C., Dec. 11, 2001)

CORE TERMS: summary judgment, continuation, stock, successor liability, material facts, genuine, issue of material fact, lift, choice of law, assumption of liability, predecessor, shareholder, successor, state's law, genuine issue, implied agreement, impropriety, subsidiaries, disputed, newly, nonmoving party, transfer of assets, corporate form, significant relationship, arm's-length, entity, Rule LCvR, product lines, moving party, specific facts

COUNSEL: [*1] For ESTATE OF JOSEPH THOMAS, Personal Representative James Thomas, JAMES. THOMAS, MARGARET THOMAS, Plaintiffs: Thomas Teodori, LEAD ATTORNEY, CHASEN & BOSCOLO, CHARTERED, Greenbelt, MD; William A. Butler, Clinton, MD.

For SOUTHWORTH INCORPORATED, also known as SOUTHWORTH INTERNATIONAL GROUP, INCORPORATED, also known as SOUTHWORTH PRODUCTS, CORPORATED, Defendant: Traci Duvall Humes, LEAD ATTORNEY, FOLEY HOAG LLP, Washington, DC.

For SOUTHWORTH INTERNATIONAL GROUP, INCORPORATED, SOUTHWORTH PRODUCTS, CORPORATED, Defendants: Danell Palladine Dean, LEAD ATTORNEY, FELDESMAN, TUCKER, LEIFER, FIDELL & BANK, LLP, Washington, DC.

For UNITED STATES OF AMERICA, Defendant: Robin M. Earnest, LEAD ATTORNEY, Riverdale, MD; Mark E. Nagle, TROUTMAN SANDERS, LLP, Washington, DC.

For PFD MECHANICAL, Defendant, Cross Defendant: Edward Joseph Brown, LEAD ATTORNEY, Ellicott City, MD.

For FRED SCHNEIDER COMPANY INC, Defendant: Jeffrey R. Schmieler, LEAD ATTORNEY, LAW OFFICES OF SAUNDERS & SCHMIELER, Silver Spring, MD.

For AMERICAN RIGGING AND WELDING, Defendant: Kenneth Gary Roth, LEAD ATTORNEY, TRAVELER'S STAFF COUNSEL, Chantilly, VA.

HAWKINS MANAGEMENT AND ENGINEERING, Defendant, Pro se, Seat Pleasant, MD.

JUDGES: COLLEEN KOLLAR-KOTELLY [*2] , United States District Judge.

OPINION BY: COLLEEN KOLLAR-KOTELLY

OPINION

MEMORANDUM OPINION

This case comes before the Court on a motion by Defendants Southworth International Group Inc. ("SIGI") and Southworth Products Corporation ("SPC") for summary judgment. SIGI and SPC (collectively "Defendants") argue that they are entitled to summary judgment on the grounds that under Maine law, they are not liable for the acts of their predecessor Southworth Incorporated ("SI"), a defunct Maine corporation which, pursuant to an earlier Order by this Court, has been dismissed from this action as a defendant. In response, Plaintiffs argue that Maine law should not apply in this

instance and that Defendants are indeed liable as successors to SI. Based on the following, the Court finds that Maine law controls the issue of successor liability, and accordingly, Defendants SIGI and SPC are entitled to summary judgment.

I. BACKGROUND

A. Local Rule LCvR 7.1(h)

Typically, the Court would initiate its analysis of Defendants' summary-judgment motion by reciting the factual background of the case at bar. This case, however, warrants a departure from standard procedures because only one party has complied with Local Rule LCvR 7.1(h) [*3] . That rule requires a moving party for summary judgment to state concisely those material facts deemed not to be in dispute, while imposing a similar duty on the nonmoving party to direct the Court's attention to specific facts that are genuinely disputed and should be adjudicated at trial. The manifest importance of Rule LCvR 7.1(h) [1] is that it "places the burden on the parties and their counsel, who are most familiar with the litigation and the record, to crystallize for the district court the material facts and relevant portions of the record." *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 151, 322 U.S. App. D.C. 35 (D.C. Cir. 1996).

1 Prior to August 1, 1999, Rule LCvR 7.1(h) was identified as District of Columbia Local Rule 108(h).

Consistent with the obligations that Rule LCvR 7.1(h) of the Local Rules for this Court imposes. Defendants submitted a detailed "statement of material facts as to which the moving party contends there is no genuine issue." Rule LCvR 7.1(h). Additionally, Defendant's statement, as required, identified specifically where each factual allegation was supported in the accompanying materials.

Plaintiffs, in contrast, did not fulfill their [*4] symmetrical duty to comply with Rule LCvR 7.1(h). The relevant portion of Rule LCvR 7.1(h) provides that:

> An opposition to [a motion for summary judgment] shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement.

Id. In lieu of a proper statement, Plaintiffs filed their own, nine-page "Statement of Material Facts." Contrary to the instructions in Rule LCvR 7.1(h), Plaintiffs' statement does not identify which of the facts recited by the Defendants are disputed, and which are not. To the contrary, without indicating the presence of a dispute, Plaintiffs' statement largely repeats the same or similar facts recited in Defendants' Rule LCvR 7.1(h) statement and then adds numerous additional statements of facts. Thus, at least with regard to the additional facts provided by Plaintiffs, the Court is left without guidance as to whether these are to be treated as disputed facts, or simply as additional undisputed facts. Moreover, while Plaintiffs' statement does include specific [*5] factual allegations and, in many instances, corresponding references to the record, the failure to point out which facts are disputed deviates sharply from the format contemplated by Rule LCvR 7.1(h).

"As litigants repeatedly have been reminded, failure to file a proper [Rule LCvR 7.1(h)] statement 'may be fatal to the delinquent party's position.'" *Jackson*, 101 F.3d at 151 (quoting *Gardels v. Central Intelligence Agency*, 637 F.2d 770, 773, 205 U.S. App. D.C. 224 (D.C. Cir. 1980)). [2] Rule LCvR 7.1(h) itself cautions counsel that the Court, in adjudicating a motion for summary judgment, "may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." Rule LCvR 7.1(h). This Circuit has consistently affirmed the broad discretion that district courts possess to consider only those facts that counsel have identified. Concomitantly, the Circuit has liberated the lower courts from any duty to rummage independently through the voluminous records that often accompany summary judgment motions. *See, e.g., SEC v. Banner Fund Int'l*, 211 F.3d 602, 616, 341 U.S. App. D.C. 175 (D.C. Cir. 2000): *Jackson*, 101 F.3d at 151; [*6] *Twist v. Meese*, 854 F.2d 1421, 1425, 272 U.S. App. D.C. 204 (D.C. Cir. 1988); *Tarpley v. Greene*, 684 F.2d 1, 7 n.15, 221 U.S. App. D.C. 227 (D.C. Cir. 1982); *Gardels*, 637 F.2d at 773; *Thompson v. Evening Star Newspaper Co.*, 394 F.2d 774, 776-77, 129 U.S. App. D.C. 299 (D.C. Cir.), *cert. denied*, 393 U.S. 884, 89 S. Ct. 194, 21 L. Ed. 2d 160 (1968). Notably, a unanimous panel of the Circuit admonished that "'[w]hen counsel fails to discharge th[e] vital function' of filing a proper Rule 108(h) statement, counsel 'may not be heard to complain that the district court has abused its discretion by failing to compensate for counsel's inadequate effort.'" *Jackson*, 101 F.3d at 151 (quoting *Twist*, 854 F.2d at 1425) (brackets in original).

2 Although the specific facts in *Jackson* were limited to an instance in which counsel was tardy

> in submitting a Rule LCvR 7.1(h) statement, the quoted language and the numerous cases from which *Jackson* draws support all focus on the importance of a *proper* Rule LCvR 7.1(h) statement. That Plaintiffs filed their statement timely does not relieve them of the other obligations that the rule imposes. Lacking explicit description of the material facts which are in dispute, Plaintiffs' statement cannot be deemed "proper."

Fortuitously (for Plaintiffs), in this case, the [*7] material facts upon which the Court's decision shall be made do not appear to be in dispute. Moreover, in most instances, any seeming disagreement over the facts reflects a misreading of the record or a conflicting interpretation of the same, rather than a true dispute of material fact. In addition, in their statement of facts, Plaintiffs cite to additional facts not noted by Defendants, however, there is little indication that these facts are actually disputed. Rather, the additional facts cited by Plaintiffs are most often information which, when taken out of context, hold the implication of. improprieties in the transfer of assets. Yet, when viewed in context, these facts do not amount to real evidence of unfair dealing, nor do they undercut the arm's-length nature of the transactions. Relying on both parties' statements of facts, the facts of this case are as follows.

B. FACTS

On March 24, 1998, Joseph Thomas, a Maryland resident, was in the process of repairing a "lift table" at the loading dock of the United States Coast Guard Building in Washington, D.C. *See* Def. Stmt. of Mat. Facts Not in Dispute ("Def. Stmt.") ¶ 7. While performing repairs, the lift table fell on Mr. Thomas, [*8] causing injuries from which Mr. Thomas eventually died. *See id.* ¶¶ 9, 10. Approximately one year later the Estate of Joseph Thomas, through its personal representative James Thomas, and James and Margaret Thomas, Joseph's parents, (collectively "Plaintiffs") brought suit against Defendants, and other unnamed defendants. *See id.* ¶ 11.

The lift table involved in Mr. Thomas's accident was manufactured by SI in 1980. *See* Pl. Stmt. of Mat. Facts ("Pl. Stmt.") ¶ 20; Def. Stmt. ¶ 20. In 1986, because of numerous and diverse product lines, SI's directors voted to distribute the company's numerous lines to four newly formed, separate corporations and to discontinue and dissolve SI. *See* Def. Stmt. at ¶ 22. On September 26, 1986, ZA Administration, Inc. (later to be known as SIGI) was incorporated and, thereafter, issued 100 shares of its common stock to SI's sole shareholder, Lewis Cabot, in exchange for all of the outstanding shares of SI. *See* Def. Stmt. at ¶ 23; Pl. Stmt. at ¶ 26. On the same day, Zy-Ax Material Handling, Inc. was incorporated. *See* Def. Stmt. at ¶ 24. Soon after, SI transferred certain of its operating assets, those generally relating to the lift-table line, to Zy-Ax Material [*9] Handling, Inc. (later to be known as SPC) in exchange for that corporation's outstanding shares. *See id.* at ¶ 25. Zy-Ax also assumed $153,600 in accrued payroll, taxes, and other expenses of SI associated with the transfer of assets. *See id.* At the same time, SI transferred other operating assets, relating specifically to its other product lines to three other newly formed companies, ultimately known as Southworth Systems, Inc., Zy-Az Distribution Co., and Southworth Publishing Co. *See id.*

After transferring its primary operating assets, SI remained in business as a holding company, providing administrative services to its newly formed subsidiaries for over six months. During that time, SI was paid a fee for its services. *See id.* at ¶ 26. In March of 1987, SI's board and its sole shareholder, Zy-Ax Management Co., adopted a formal liquidation plan for SI. *See id* at ¶ 27. The next month, pursuant to the liquidation plan, SI distributed most of its remaining assets, including SI's stock in SPC and certain other companies, and SI's information systems, records, office supplies, and equipment, to ZA Administration, Inc. *See id.* at ¶¶ 28, 29. These transfers ultimately resulted in the establishment [*10] of SIGI as the corporate parent and provider of administrative services to SPC and the other subsidiaries. *See id* at ¶ 30. In September of 1987, SIGI (then know as Zy-Ax Corporation) assumed "all debts, obligations, and the like presently owed by [SI] to any person, corporation, association, partnership, or entity." *Id.* at ¶ 31 (internal quotes omitted). On October 29, 1987, SI was formally dissolved. *See id.* at ¶ 33. During subsequent name changes, the Zy-Ax Corporation, Zy-Ax Management, and ZA Administration all became known as SIGI. *See id.* at ¶ 35.

II. LEGAL STANDARD

A party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and affidavits demonstrate that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Tao v. Freeh*, 27 F.3d 635, 638, 307 U.S. App. D.C. 185 (D.C. Cir. 1994). Although a court should draw all reasonable inferences from the supporting records submitted by the nonmoving party, the mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. *See* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The adverse party's [*11] pleadings must evince the existence of a genuine issue of material fact. *See* *id.* at 247-48. To be material the factual assertion must be capable of affecting the substantive outcome of the litigation; to be genuine, the issue must be supported by suffi-

ciently admissible evidence such that a reasonable trier-of-fact could find for the nonmoving party. *See id.*; *Laningham v. United States Navy*, 813 F.2d 1236, 1242-43, 259 U.S. App. D.C. 115 (D.C. Cir. 1987). Mere allegations or denials in the adverse party's pleadings are insufficient to defeat an otherwise proper motion for summary judgment. Rather, the nonmoving party bears the affirmative duty to present, by affidavits or other means, specific facts showing that there is a genuine issue for trial. *See* id. at 248-49. The adverse party must do more than simply "show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

III. DISCUSSION

The central issue in Defendants' motion to dismiss is whether Defendants have assumed or otherwise succeeded to the liabilities of SI. Because this is a diversity action, the Court must determine which state's law to apply to the analysis of [*12] successor liability. *See* *Weyrich v. New Republic*, 235 F.3d 617, 344 U.S. App. D.C. 245, 2001 WL 10286 (D.C. Cir. 2001). The parties agree that a federal court hearing a case applies the choice of law rules of the jurisdiction in which it is located. *See* *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). This court looks to the choice of law rules prevailing in the District of Columbia, which employs the "governmental interests analysis." *See* *Vaughan v. Nationwide Mutual Ins. Co.*, 702 A.2d 198, 202 (D.C. 1997). In applying that analysis, the Court is instructed to consider, *inter alia*, the factors enumerated in the Restatement Second, § 145, [3] to assist in identifying the jurisdiction with the "most significant relationship" to the dispute. *See* *Hercules & Co. v. Shama Restaurant*, 566 A.2d 31, 40-41 (D.C. 1989). The *Hercules* court explained the interaction between the "government interests analysis" and the "most significant relationship test" as follows:

> [t]he "governmental interest analysis" and the "most significant relationship" test have sometimes been treated as separate approaches to conflict of law questions. See Robert R. Leflar, American Conflicts Law, §§§§ 135, 136 (3d ed. 1977). [The D.C. Court [*13] of Appeals has,] however, applied a constructive blending of the two approaches. *Estrada [v. Potomac Elec. Power Co.*, 488 A.2d 1359, 1361 n. 2. "In doing so this court concurs with the observation, made by Judge Joyce Green" in *In re Air Crash Disaster*, 559 F.Supp. 333, 342 (D.D.C. 1983), that "the state with the 'most significant relationship' should also be the state whose policy is advanced by application of [its] law." *Id.*

Hercules, 566 A.2d at 41 n.18. Thus, under the District of Columbia's choice of law standard, this Court must "evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review." *Id.* (quoting *Kaiser-Georgetown Community v. Stutsman*, 491 A.2d 502, 509 (D.C.1985)).

> 3 Section 145 remarks that, in a tort action, contacts to be taken into account in this analysis include the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation and place of business of the parties, and the place where the relationship, if any, between the parties is centered. *See* [*14] Restatement (Second) of Conflict of Laws § 145 (1969).

In the instant case, there may be multiple issues for which a choice of law analysis is required. However, "[t]he courts have long recognized that they are not bound to decide all issues under the local law of a single state." *Id.* (quoting Restatement (Second) of Conflict of Laws § 145, Comment d. (1971 and Supp.1988)); *see also* *Estrada*, 488 A.2d at 1361 ("choice of law involves examination not simply of various state interests generally, but of their interest regarding the various distinct issues to be adjudicated"). This practice is known, although rarely so identified, as "depecage." *See* *Stutsman v. Kaiser Foundation Health Plan*, 546 A.2d 367, 373 (D.C. 1988). "Depecage under the interest analysis in choice of law is simply the application of the rule of law that can most appropriately be applied to govern the particular issue." *Id.* (internal quotations omitted).

Only one issue is presently before the Court- which state's law to apply to determine the presence or absence of successor liability belonging to SIGI and SPC for the actions of SI. Although there are three jurisdictions, Maine, Maryland and the District of Columbia, which [*15] have a relationship to this case as a whole, *see* Pl. Opp. at 6, only Maine possesses interests relevant to the issue of successor liability. This is so because all three companies, SI, SIGI, and SPC, are or were incorporated in the state of Maine and had or have their principal places of business in Maine. *See* Def. Mem. at 7-8. Furthermore, the relevant transactions between the three corporations occurred in Maine. Thus, Maine clearly has a significant interest in the governance of its corporate relationships, specifically in terms of successor liability,

while Maryland and the District of Columbia have little, if any interest. *See* Webb v. Rodgers Machinery Mfg. Co., 750 F.2d 368, 374 (5th Cir. 1985) (holding that, under the Restatement's "most significant relationship" test, successor liability must be determined according to the location of the relationship between the original corporation and the succeeding business entity and not according to the location of the injury). Accordingly, Maine law shall determine the scope of SIGI's and SPC's successor liability.

Maine law provides that "a corporation that purchases the assets of another corporation in a bona fide, arm's-length transaction [*16] is not liable for the debts or liabilities of the transferor corporation." *Director of Bureau of Labor Standards v. Diamond Brands, Inc.*, 588 A.2d 734, 736 (Me. 1991). Applying this standard to the instant case, Plaintiffs argue that the transaction between SI and SIGI and SPG was neither "bona fide," nor arm's-length. *See* Pl. Opp. at 12. Plaintiffs argue that the transaction was not "bona fide" because it was entered into with the "improper purpose" and "fraudulent intent" of escaping corporate liability. *See id.* at 12-14. As evidence, Plaintiffs assert, in their statement of facts, that "at the time they are [sic] created, the four companies had stock which was not worth anything." *See* Pl. Stmt. ¶ 31. While true and undisputed, *see* Nordman Depo. at 44, this fact proves little. As Defendants explain, "[b]y selling its lift table assets to SPC in exchange for SPC's stock, SI received complete value for those assets because it received full ownership of the company which acquired the assets." *See* Def. Reply at 8. Thus, the lack of value in SPC's stock at the time it is created is of minimal relevance. Plaintiffs also imply impropriety with the statement that "SIGI paid nothing [for [*17] the remaining assets of [SI] because it already owned SI." This statement is also accurate and undisputed, but again reveals no impropriety. The justification for the lack of payment is plain, as Mr. Nordman explains, "[SIGI] owned the stock of Southworth Inc. When [SI] dissolves itself you distribute all remaining assets and liabilities to the shareholder." *See* Nordman Depo. at 36. In addition, Plaintiffs' generalized attack on the process by which SI was divided into four separate corporations is refuted by SI's legitimate purpose in refining its operations and continuing them in a more efficient manner. *See id.* at 13, 28-29. Plaintiffs do not appear to dispute the legitimate purpose in diversifying the four product lines, instead, Plaintiffs simply ignore this fact in making their assertions of impropriety. Most significantly, the fact that the newly formed corporations agreed to assume all of SI's then existing liabilities refutes Plaintiffs' suggestion that the transactions were undertaken to avoid liability. *See* Def. Reply at 10.

Plaintiffs contend that the transfer of assets between SI and SIGI and SPC was not at arm's-length because, according to Plaintiffs, "SPC did not pay [*18] adequate consideration for the acquisition of essentially all of SI's assets." *See* Pl. Opp. at 14. This argument is a non-starter. Defendants explain in their Reply that, as a factual matter, Plaintiffs mischaracterize statements made during the deposition of SIGI's CFO Michael Nordman with the assertion that SPC acquired "essentially all of SI's assets." *See* Pl. Opp. at 14. Quite to the contrary, SPC acquired only one of SI's four business lines-namely, the lift-table line. *See* Def. Reply at 9; *see generally* Nordman Depo. Mr. Nordman explains thoroughly in his deposition that the transfers at issue were not, as Plaintiffs argue, a circular moving of assets, but were a legitimate means of dividing a large corporation into four, independent, specialized corporations, which were wholly owned subsidiaries of a single "parent" corporation. [4] *See* Nordman Depo. at 13, 28-29. Accordingly, in light of the full facts and circumstances of the relevant transactions, it appears that reasons for undertaking the transactions, as well as the value paid, be it in stock or assets, for each transfer of stock or assets was reasonable. Accordingly, Plaintiffs' theories of fraud and impropriety are without [*19] merit.

4 Defendant also recognizes that Plaintiffs make some attempt, though feeble, to imply that the Court should, in effect, pierce the corporate veil. Under Maine law Courts, a court may "pierce the corporate veil only if the corporate form is used fraudulently or illegally." Plaintiffs have not made any showing that the corporate form was used by SI, SIGI, or SGC in an improper manner. Accordingly, Plaintiffs' argument for ignoring the corporate form is without merit.

Along similar lines, Plaintiffs also argue that the transactions at issue were "little more than the shuffling of corporate forms, lacking fundamental change with independent significance." This argument appears to present the theory that SIGI is a "mere continuation" of SI. As an initial matter, the Court notes that it does not appear that Maine law recognizes the "mere continuation theory." *See* *Diamond Brands*, 588 A.2d at 736. Plaintiffs cannot expect a federal court, sitting in diversity, to blaze new trails in state law. *See* *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487, 497, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941) ("[T]he proper function of the [federal court applying state law] is to ascertain what the state law is, not what it ought to be."). [*20] Thus, strict application of Maine law results in the rejection of Plaintiffs' "mere continuation" argument, without addressing the merits of the same.

However, Plaintiffs raise their "mere continuation" argument in the context of their assertion that D.C. law should apply, and argue that under D.C. law, which recognizes the "mere continuation" approach, they have raised a genuine issue of material fact as to the validity of the transactions between SI, SIGI, and SPC. The District of Columbia, like Maine, follows the general rule that ordinarily, when a business entity acquires the assets of another business, it is not liable for its predecessor's liabilities and debts. *See* *Bingham v. Goldberg, Marchesano, Kohlman, Inc.*, 637 A.2d 81, 89 (D.C. 1994). However, unlike the courts in Maine, the D.C. Court of Appeals recognizes an exception to that general rule in situations where the buying corporation is a "mere continuation" of the selling corporation. *See* *id.* at 91. The opinion in *Bingham* explains that "[a] number of factors must be examined to determine whether one business is a mere continuation of a predecessor." *Id.* "Among these are a common identity of officers, directors, and stockholders [*21] in the purchasing and selling corporations." *Id.* Another factor is the sufficiency of the consideration paid to the seller. *See* *id.* at 92. Yet another factor to be considered is "whether there is a continuation of the corporate entity - not whether there is a continuation of the seller's business operation." *See id.* (quoting *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir. 1985)).

Addressing the merits of Plaintiffs' "mere continuation" claim, and disregarding, for the moment, the fact that Maine law, not D.C. law, properly applies to the issue of successor liability in this case, still does not further Plaintiffs' case. Said otherwise, even under D.C. law, Plaintiffs cannot satisfy the requirements set forth in *Bingham* to show a "mere continuation." First and foremost, Plaintiffs have failed to introduce evidence establishing a common identity of directors, officers and shareholders. To the contrary, Plaintiffs' Statement of Material facts only points to an identity between two directors of SIGI and SPC following SPC's purchase of SI's lift table assets. Moreover, Defendant takes issue with even this minimal showing, arguing that Lewis Cabot was not a director [*22] of SPC after the purchase, nor was he even a shareholder. [5] *See* Def. Reply at 16. Regardless of this dispute, the common identity of one or two directors is not sufficient to establish the complete identity of directors, officers, or shareholders indicative of a continuing enterprise. More significantly, Plaintiffs cannot show that SIGI or SPC carried on the same business that SI carried on prior to the sale of its assets. Prior to 1986, SI owned four business lines. SPC purchased only one of the business lines from SI, thus carrying-on, at the most, only one quarter of the business conducted by SI. In addition, SIGI functions as a holding company, or a corporate parent to four different subsidiaries, a function SI never assumed. Plaintiffs have also failed to show that SI received inadequate consideration for the sale of its lift table assets. To the contrary, SI received ample consideration for the sale of these assets in the form of the entire stock of SPC, the company which, thereafter, owned the lift table line. Based on these considerations, the Court finds that Plaintiffs have failed to raise a genuine issue of material fact showing that the transfer of assets in this case would [*23] satisfy the requirements of the "mere continuation" theory as it exists under D.C. law.

5 Rather, Lewis Cabot owns all of the stock in SIGI. SIGI, in turn, owns all of the stock of its four subsidiaries, including SPC.

Turning back to Maine law, in addition to providing the general, common-law-based rule for successor liability for Maine corporations, the *Diamond Brands* court also identifies two exceptions to the common-law rule that a legitimate successor corporation generally does not assume the liabilities of its predecessor: (1) a contrary agreement by the parties and (2) an explicit statutory provision in derogation of the common law rule. *See* *Diamond Brands*, 588 A.2d at 736. As a threshold matter, Plaintiffs have not argued that the latter exception applies, nor does Maine statutory law appear to contain any such provision in derogation of the common law. *See id.*; Pl. Opp. at 12-16. With regard to the former- an agreement by the parties-Plaintiffs argue that there exists an "implied agreement" between the parties. *See* Pl. Opp. at 16. In support of this alleged argument, Plaintiffs rely upon the analysis in *Ambrose v. Southworth Products Corp.*, 953 F.Supp. 728, 735 (W.D. Va. 1997).

Purporting [*24] to apply Maine law, the *Ambrose* court concluded that "the state courts of Maine have not addressed the issue of whether a successor may expressly or impliedly agree to assume a predecessor company's liabilities for personal injuries." *See* *Ambrose*, 953 F.Supp. at 735. In addition, the *Ambrose* court speculated that "such theories would not appear to be barred by Diamond Brands." *Id.* at 735. The *Ambrose* court went on to analyze the viability of the plaintiff's claim that an implied assumption of liability existed between the successor corporation in that case, also SPC, and the predecessor corporation in that case, SI. Examining the facts in that particular case, the *Ambrose* court found it significant that SPC continued to use the name "Southworth," and that SPC "continued to participate in repairs to the elevator, including paying for repairs and recommending changes." *Id.* at 736. The *Ambrose* court also noted that "SPC appears to have expressly agreed to see the project through to completion," and that "there is some evidence that SPC took credit for SI's work." *Id.* The sum of these facts, concludes the *Ambrose* court, is that the plaintiff in that case raised a genuine issue of material [*25] fact, as

to the existence of an implied assumption of liability, sufficient to withstand a motion for summary judgment. *Id.*

Endorsing the *Ambrose* court's conclusion, Plaintiffs in this case argue that there is at least a material question of fact as to whether such an implied agreement existed between SI and its successor corporations. *See* Pl. Opp. at 16. However, despite the fact that the same parties are involved in this case and in *Ambrose*, this case is quite distinct from *Ambrose*. Even if this Court chose to follow the speculation of the *Ambrose* court that Maine would recognize an implied assumption of liability, Maine law, as it currently exists, clearly requires "competent evidence in the record of an intent by both parties to create such a term at the time of the contract" in order to justify recognition of an implied term outside the written agreement. *See* Soucy v. Sullivan & Merritt, 1999 ME 1, 722 A.2d 361, 363 (Me. 1999). The *Ambrose* court, purporting to apply Maine law, though citing to Virginia law, found there was sufficient evidence of an implied assumption of liability to withstand a motion for summary judgment. *See* Ambrose, 953 F. Supp. at 736 (citing *City of Richmond v. Madison Mgt. Group, Inc.*, 918 F.2d 438, 450-51 (4th Cir. 1990) [*26] (applying Virginia and Delaware law)). However, the evidence in *Ambrose* is quite distinct from the evidence presented by Plaintiffs in this case.

Plaintiffs in *Ambrose* offered, as evidence of an implied agreement, a letter from the vice-president/general manager of SPC explaining that SPC "would like to take responsibility for fixing defects in the design and performance of the [machinery involved in that case] that originally were sold to [the plaintiff's employer] by SI." *See* id. at 735. No similar evidence exists in this case. At best, Plaintiffs in this case can point to the facts that SPC sold a replacement part to the Coast Guard for the lift-table in question and that SPC operated under the name "Southworth." *See* Pl. Opp., Ex. 11. Without more, the sale of a replacement part and the continued use of the Southworth name do not themselves raise a genuine issue of material fact over the existence of an implied assumption of liability.

However, Plaintiffs argue that there is more, and point to the absence of language regarding future liabilities in the "Assumption and Assignment" executed by SI and SIGI (then Zy-Ax Corp.) as "competent evidence" of an implied agreement. *See* Pl. Opp. [*27] at 16, Ex. 10. However, Plaintiffs' somewhat tortured reading of the "Assumption and Assignment" is unpersuasive. Contrary to Plaintiffs' argument, the express language of the "Assumption and Assignment," which provides that SIGI agreed to assume only "certain" liabilities of SI and limits the term "liabilities" to "all debts, obligations, and the like *presently* owned by [SI]," is strong evidence weighing against an implied assumption of liability. *See* Pl. Opp. at 16, Ex. 10. Thus, Plaintiffs have failed to put forth sufficient evidence to raise a genuine issue of material fact as to whether an implied agreement existed.

IV. CONCLUSION

Based on the foregoing, the Court finds that SIGI and SPC cannot, as a matter of law, be established as successors to the liability of SI. Because there is no genuine issue of material fact as to their liability, SIGI and SPC are entitled to summary judgment. An appropriate Order accompanies this Memorandum Opinion.

/s/ Colleen Kollar-Kotelly

COLLEEN KOLLAR-KOTELLY

United States District Judge

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is, this 29 day of January, hereby

ORDERED that Defendants' (Southworth International Group, [*28] Inc. and Southworth Products Corp.) Motion for Summary Judgment (# 30) is GRANTED; [1] and it is further

1 Accordingly, Defendants' Motion for a Hearing (#30-2) is DENIED AS MOOT.

ORDERED that Defendant Southworth Inc.'s Motion to Strike references to itself in the Amended Complaint (# 24) is GRANTED; and it is further

ORDERED that Plaintiffs' Motion for Leave to file a Second Amended Complaint (# 31), adding additional defendants is GRANTED, however, Plaintiffs must first correct the Second Amended Complaint so as to remove references to Southworth, Inc. as a defendant, as Southworth, Inc. has been dismissed from this action; and it is further

ORDERED that Plaintiffs shall file their Second Amended Complaint and shall serve notice upon the newly added defendants no later than March 1, 2001.

SO ORDERED.

/s/ Colleen Kollar-Kotelly

COLLEEN KOLLAR-KOTELLY

United States District Judge

EXHIBIT 139

LEXSEE

CARLA FLAUGHER, et al., Plaintiffs-Appellants vs. CONE AUTOMATIC MACHINE COMPANY, INC., et al., Defendants-Appellees

Case No. CA84-05-040

Court of Appeals, Twelfth Appellate District of Ohio, Clermont County, Ohio

1986 Ohio App. LEXIS 6349

April 14, 1986

DISPOSITION: [*1] Appellants' assignment of error is without merit and is overruled.

The assignment of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Clermont County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellants, by their counsel, except.

CASE SUMMARY:

PROCEDURAL POSTURE: In this products liability action, plaintiff challenged an order of the Court of Common Pleas of Clermont County (Ohio) either dismissing or granting summary judgment to defendants, the maker of the product (manufacturer), the company that purchased the manufacturer (purchaser), a holding company (holding company), and a successor company (successor). Only the successor and the holding company were involved in this appeal.

OVERVIEW: Plaintiff was injured by an allegedly defective product. Named as defendants in plaintiff's product liability suit were the manufacturer, the purchaser, the holding company, and the successor. The manufacturer was bought by the purchaser, who dissolved the manufacturer. The manufacturer's name was placed in the holding company. The purchaser and the holding company were combined into an enterprise that became the successor. When the trial court granted summary judgment or dismissal to all defendants, plaintiff appealed. This appeal concerned only the holding company and the successor. The court found the trial court properly granted summary judgment to the holding company and the successor because, while they were successors to the assets and property rights of the manufacturer, they were not liable under any recognized exception to the rule of successor non-liability. The contract between the successor and the purchaser clearly was limited to allowing liability for products manufactured by the successor in the successor's name. Moreover, the holding company was not subject to the continuing business exception because the holding company and the successor company merged.

OUTCOME: The court affirmed dismissal of the successor corporations.

CORE TERMS: successor, machine's, continuation, predecessor, assignment of error, summary judgment, product line, stock, non-liability, manufacture, purchaser, merger, seller's, warn, matter of law, products manufactured, defective product, successor liability, assumption of liabilities, subject to suit, theory of liability, general rule, original manufacturer, agreed to assume, manufacturing, acquisition, fraudulent, dissolved, impliedly, combined

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Evidence
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality

[HN1]In order for a defendant to be entitled to summary judgment under Ohio R. Civ. P. 56(C), the evidence before the court must be such that no genuine issue as to any material fact remains for litigation, the moving party is entitled to judgment as a matter of law, and it must appear that, viewing the evidence in a light most favorable to the non-moving party, reasonable minds can come to but one conclusion which is adverse to the motion's opponent.

Mergers & Acquisitions Law > General Business Considerations > General Overview
Mergers & Acquisitions Law > Liabilities & Rights of Successors > General Overview
Torts > Vicarious Liability > Corporations > Predecessor & Successor Corporations
[HN2]Generally, a successor corporation is not liable for the tortious conduct of its predecessor unless one of four exceptions applies. These four exceptions are: (1) The purchaser expressly or impliedly agreed to assume such an obligation; (2) the transaction amounts to no more than a consolidation or merger of the seller corporation with or into the purchaser corporation; (3) the purchaser corporation is no more than a continuation of the seller corporation; and (4) the transaction is a fraudulent attempt to escape the liability sought to be imposed.

Mergers & Acquisitions Law > Liabilities & Rights of Successors > General Overview
Mergers & Acquisitions Law > Sales of Assets > General Overview
[HN3]The sale of corporate assets by one independent entity to another does not generally, nor necessarily, make the purchaser liable for the seller's liabilities.

Mergers & Acquisitions Law > Liabilities & Rights of Successors > General Overview
[HN4]The first basis to impose successor liability is an express or implied agreement by the successor-purchaser to assume liability for the seller-predecessor.

Mergers & Acquisitions Law > General Business Considerations > General Overview
Torts > Vicarious Liability > Corporations > Predecessor & Successor Corporations
Trademark Law > Special Marks > Trade Names > General Overview
[HN5]Where a plaintiff is injured by a defective product manufactured by and purchased from a predecessor corporation, the defendant successor corporation which has merely purchased assets of the predecessor corporation may not be held strictly liable for those injuries absent an agreement by the successor to assume the liabilities of the predecessor, even if the defendant successor carries on the same business, manufactures the same product line under the same trade name, and profits from the goodwill, advertising and established market of its predecessor.

Mergers & Acquisitions Law > General Business Considerations > General Overview
Torts > Products Liability > Duty to Warn
Torts > Vicarious Liability > Corporations > Predecessor & Successor Corporations
[HN6]The Court of Appeals, Twelfth Appellate District of Ohio, Clermont County is unwilling, in the absence of an Ohio Supreme Court decision finding such liability exists, to require a trial court to consider whether a successor corporation is liable for failure to warn customers of a predecessor corporation of an alleged product defect in a product the successor did not manufacture.

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Rendigs, Fry, Kiely & Dennis, Edward R. Goldman, 900 Central Trust Tower, Cincinnati, Ohio 45202, [*2] for Defendants, Cone Automatic Machine Company, Inc. and Pneumo Corporation fka Pneumo Dynamics Corporation, Inc.

JUDGES: HENDRICKSON, P.J., and KOEHLER J., concur.JONES, J., concurs in judgment only.

OPINION

MEMORANDUM DECISION AND JUDGMENT ENTRY

PER CURIAM.

This cause came on to be heard upon an appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Clermont County, the transcript of proceedings, and the briefs and oral arguments of counsel.

Now, therefore, the assignment of error having been fully considered, is passed upon in conformity with App. R. 12(A) as follows:

This is an appeal from the granting of motions either for summary judgment or to dismiss in favor of all the named defendants in this products liability action. The facts necessary to a resolution of the summary judgment appeal are complicated by events which occurred after the manufacture of the allegedly defective product but before the injury.

Plaintiff-appellant, Carla Flaugher, was injured by an eight spindle Conomatic bar and screw machine on April 24, 1979. The machine which injured her was manufactured in 1953 by defendant, Cone Automatic Machine *Company* [*3] , Inc., a Vermont corporation, not a party to this appeal, (hereinafter "Cone 1").

Cone 1's stock and assets were acquired by Pneumo Dynamics Corporation (hereinafter "Pneumo Dynamics") on July 19, 1963. [1] Upon acquiring its stock and assets, Pneumo Dynamics dissolved Cone 1, the original manufacturer, on September 5, 1983. The next day Pneumo Dynamics created a new corporation called Cone Automatic Machine *Co*., Inc. (hereinafter "Cone 2") which held the "Cone" name and associated rights but was otherwise a dormant holding company. After Pneumo Dynamics purchased Cone 1, it combined its manufacturing capabilities with those of the Blanchard Machine Company and the Springfield Grinding Machine Company at a single location in Windsor, Vermont. These combined enterprises became known as the Pneumo Dynamics Machine Tool Group (hereinafter "PDMTG").

Cone-Blanchard Machine Company, a corporation created as a subsidiary of Oerlikon Motch Corporation in November, 1972, purchased PDMTG in December, 1972, for eleven million dollars buying both PDMTG's assets and the stock of Cone 2.

Named as defendants in appellants' suit were Cone 1, Cone 2, Pneumo Corporation, (formerly Pneumo Dynamics [*4] Corporation, Inc.) and Cone-Blanchard. The trial court granted each defendant's motion either to dismiss or for summary judgment. Appellants raise a single assignment of error in this appeal against only Cone 2 and Cone-Blanchard.

For their assignment of error, appellants allege the trial court erred in granting summary judgment to both Cone 2 and Cone-Blanchard. We start our analysis of this assignment with a review of summary judgment law and then discuss the liability of successor corporations for predecessor's products.

[HN1]In order for a defendant to be entitled to summary judgment under Civ. R. 56(C), the evidence before the court must be such that no genuine issue as to any material fact remains for litigation, the moving party is entitled to judgment as a matter of law, and it must appear that, viewing the evidence in a light most favorable to the non-moving party, reasonable minds can come to but one conclusion which is adverse to the motion's opponent. *Temple* v. *Wean United, Inc*. (1977), 50 Ohio St. 2d 317.

The trial court's basis for summary judgment in favor of Cone 2 and Cone-Blanchard was that they were not liable as a matter of law to appellants because, although [*5] they were both successors to the assets and property rights of Cone 1, the original manufacturer, they were not liable under any recognized exception to the general rule of successor non-liability. Our focus then is upon the propriety of this conclusion and its impact upon this case.

[HN2]Generally, a successor corporation is not liable for the tortious conduct of its predecessor unless one of four exceptions applies. 15 Cyclopedia of Law of Private Corporations (1973), Sections 7122-23. These four exceptions are: 1) The purchaser expressly or impliedly agreed to assume such an obligation; 2) the transaction amounts to no more than a consolidation or merger of the seller corporation with or into the purchaser corporation; 3) the purchaser corporation is no more than a continuation of the seller corporation; and 4) the transaction is a fraudulent attempt to escape the liability sought to be imposed.

Thus, [HN3]the sale of corporate assets by one independent entity to another does not generally nor necessarily make the purchaser liable for the seller's liabilities. *Knapp* v. *North American Rockwell Corp*. (C.A.3, 1974) 506 F. 2d 361, certiorari denied (1975), 421 U.S. 965.

I.

Cone-Blanchard's [*6] Liability

Cone-Blanchard was sued here because Pneumo Dynamics had purchased Cone 1's stock and assets and reorganized it into Cone 2 and Pneumo Dynamics Macine Tool Group, both of which Cone-Blanchard purchased from Pneumo Dynamics. Appellants do not contend Cone-Blanchard's acquisition of PDMTG and Cone 2 falls within the de facto merger exception (number two above) or the fraudulent transfer exception (number four above). It is readily apparent this was an arms length transaction with Pneumo Dynamics and not Cone 1. An examination of that purchase transaction is therefore appropriate to see whether it falls under either the first or third exception.

A.

Express or Implied Assumption of Liability

[HN4]The first basis to impose successor liability is an express or implied agreement by the successor-purchaser to assume liability for the seller-predecessor. It

is important to keep in mind that this agreement was between Pneumo Dynamics, Cone 1's sole successor, and Cone-Blanchard. Section 5.1 of the Cone-Blanchard/Pneumo Dynamics purchase agreement for PDMTG concerns assumption of liabilities. We agree with the trial court that an examination of that section reveals it is clearly limited [*7] to an agreement between Cone-Blanchard and Pneumo Dynamics to cover liability for products manufactured only by PDMTG as PDMTG. Contrary to appellants' assertion, it is not ambiguous as to whether such liability extends to predecessors of PDMTG, such as Cone 1. Furthermore, we are unpersuaded that alleging such an ambiguity's existence assists in resolving this issue for appellants because it is clear that Pneumo Dynamics, Cone 1's successor by merger to all aspects of Cone 1's business, still exists and would be liable under exception two above thus making them the appropriate defendant. Additionally, we agree with *Burr v. South Bend Lathe, Inc*. (1984), 18 Ohio App. 3d 19, that [HN5]where the plaintiff is injured by a defective product manufactured by and purchased from a predecessor corporation, the defendant successor corporation which has merely purchased assets of the predecessor corporation may not be held strictly liable for those injuries absent an agreement by the successor to assume the liabilities of the predecessor, even if the defendant successor carries on the same business, manufactures the same product line under the same trade name, and profits from the goodwill, [*8] advertising and established market of its predecessor. We therefore find no assumption of Cone 1's liability was undertaken in Cone-Blanchard's purchase of PDMTG.

B.

Continuation of Business Exception

Appellants also allege the continuation of the same business exception to the non-liability rule applies to Cone-Blanchard. The question posed by this aspect of the first assignment of error is whether Cone-Blanchard's purchase of PDMTG's assets and Cone 2's stock was nothing more than a reconstitution of Cone 1 under a new name. This poses an interesting situation since it appears that Cone-Blanchard's purchase of the stock of Cone 2 and PDMTG's manufacturing component which included Cone 1's equipment essentially rejoined aspects of the business severed under Pneumo Dynamic's management.

In considering this question we have examined appellants' suggestion that we make the continuation decision based on *Cyr* v. *B. Offen & Co., Inc*. (C.A.1, 1974), 501 F. 2d 1145. However, given that Cone-Blanchard could have done nothing twenty years ago during the manufacture of the alleged defective product to prevent the injury to appellants, we do not feel Cone-Blanchard's liability [*9] should be based upon an analysis of "public policy" as the basis of strict liability in tort where Pneumo Dynamics, who merged with Cone 1, is still in existence and subject to suit.

Ohio has little law relating to successor liability for a predecessor's alleged torts based on the continuation of business exception. However, it is apparent that the original merger of Cone 1 and Pneumo Dynamics and its reorganization into Cone 2 and PDMTG was not a mere continuation of Cone 1 chiefly because of the introduction of the Blanchard Machine Company and Springfield Grinding's assets into PDMTG. We therefore find that the creation of the PDMTG was not a mere continuation of Cone 1 under the third exception to the general rule of non-liability.

II.

Cone Automated Machine Co.'s (Cone 2's) Liability

Cone 2 came into existence when Pneumo Dynamics dissolved Cone 1 and replaced it with a new corporation with essentially the same name but only to act as a holding company for the "Cone" name.

A.

Express or Implied Assumption of Liability

We can find no document nor are we directed to any documents in the record which purport to support the contention that Cone 2 expressly or impliedly [*10] agreed to assume the liability of Cone 1 for matters such as this. We therefore find no support for Cone 2's liability to appellants on the basis of express or implied assumption of liability.

B.

Continuation of Business Exception

Given the inactive, holding company status of Cone 2 after Cone 1's acquisition by Pneumo Dynamics and its complete subordination to Pneumo Dynamics, we also find no merit to the contention that Cone 2 was simply a continuation of Cone 1. The record does not support this contention.

C.

Liability for Failure to Warn Separate from Successor Status

Appellants have suggested in an issue presented for argument that Cone-Blanchard and Cone 2 may be liable to appellants in spite of their non-liability as successor corporations because they failed to warn Carla Flaugher of the machine's defects. [HN6]This court is unwilling, in the absence of an Ohio Supreme Court decision find-

ing such liability exists, to require a trial court to consider whether a successor corporation is liable for failure to warn customers of a predecessor corporation of an alleged product defect in a product the successor did not manufacture. *Chadwick* v. *Air Reduction Co*. (N.D. [*11] Ohio 1965), 239 F. Supp. 247. Moreover, the record does not clearly show either appellee to have possessed knowledge of any specific defect which is alleged to have caused appellant's injury. We therefore find the trial court did not err in overruling this argument.

D.

The Product Line Theory

Appellants have argued this court should adopt the "product line" theory of liability in successor corporation product liability cases as set forth in *Ray* v. *Alad* (1976) 19 Cal.2d 22. One of the primary considerations underlying imposing liability on the basis of being a successor in the product line liability theory announced by *Alad* was that the original manufacturer and its successors were no longer in business. Suffice it to say in this regard that Pneumo Dynamics still exists and was subject to suit in this case had it been timely filed. Where appellants could have sued Pneumo Dynamics had they not filed their action against Pneumo Dynamics beyond the statute of limitations, we do not feel it appropriate to reward that lack of diligence by allowing appellants to point the finger at a new defendant simply because it is involved in the same product line. The equitable purpose [*12] of the *Alad* decision would be undermined if we were to allow a plaintiff to ignore the proper and existing corporate defendant (Pneumo Dynamics) and sue another corporation further from the crucial corporate transaction. We therefore decline to adopt the "product line" theory of liability in this cause.

Appellants' assignment of error is without merit and is overruled.

The assignment of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Clermont County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the court, being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellants, by their counsel, except.

HENDRICKSON, P.J., and KOEHLER J., concur.

JONES, J., concurs in judgment only.

1 Pneumo Dynamics is not a party to this appeal since appellants have not appealed its dismissal by the trial court.

[*13]

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