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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) and CLH HOLDINGS, Defendants. MAXUS ENERGY CORPORATION AND TIERRA SOLUTIONS, INC., Third-Party Plaintiffs, v. 3M COMPANY, et al., Third-Party Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY DOCKET NO. ESX-L9868-05 (PASR) <u>Civil Action</u> BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST MAXUS ENERGY CORPORATION

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[1] Attached to this Brief as Appendix A is a Glossary of Terms to assist the Court in identifying the various entities and terms used throughout this Brief.

PRELIMINARY STATEMENT

Pursuant to Rule 4:46(a), Plaintiffs, the New Jersey Department of Environmental Protection (the "DEP"), the Commissioner of the DEP and the Administrator of the New Jersey Spill Compensation Fund (collectively, "Plaintiffs" or the "State"), file this Brief in support of their Motion for Partial Summary Judgment ("Brief") against Defendant Maxus Energy Corporation ("Maxus"). As a matter of law, Maxus is strictly, jointly and severally liable under New Jersey's Spill Compensation and Control Act (the "Spill Act") for all past and future cleanup and removal costs associated with the hazardous substances discharged at and/or from its former chemical plant located at 80 Lister Avenue (the "Lister Plant," which together with the real property located at 120 Lister Avenue is referred to as the "Lister Site"). Maxus's liability arises from (i) well-established corporate successor law, (ii) its contractual assumption of Lister Site liabilities from Occidental Chemical Corporation ("OCC"), (iii) its alter ego relationship with the current owner of the Lister Site, Tierra Solutions, Inc. ("Tierra"), and (iv) the indisputable conclusion that Maxus is "in any way responsible" for the hazardous substances discharged from the Lister Site under the Spill Act.

Our Supreme Court held that it always has been unlawful to discharge hazardous substances into the waters of the State of New Jersey. Dept. of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 494-495 (1983). Liability for such discharges, including the egregious activities at the Lister Site, cannot disappear by contract or through the artful manipulation of the corporate form. Through a series of byzantine corporate restructurings between 1983 and 1986, Maxus attempted to quarantine Lister Site liabilities from over $1.5 billion in assets already subject to actions arising from operations at the Lister Plant. The incontrovertible and uncontested evidence demonstrates that, by these restructurings, Maxus would have traded its strict, joint and several statutory liabilities to New Jersey for a contract claim by OCC, and Maxus would have converted the State's direct claims against it into claims against Maxus's purposefully penniless subsidiary, Tierra.

Indeed, as a direct legal successor to Diamond Shamrock Chemicals Company ("DSCC") and as the current owner of the Lister Site, OCC and Tierra, respectively, are jointly and severally liable for the Lister Site liabilities. On July 17, 2011, this Court entered judgment against OCC, finding it strictly, jointly and severally liable under the Spill Act for all past and future cleanup and removal costs associated with the discharges of hazardous substances from the Lister Site. See Order, dated July 17, 2011. And, just one month later, this Court provided the State the same relief against Tierra. See Order, dated August 24, 2011. However, the State faces a Pyrrhic victory here unless Maxus—and ultimately its parent companies[2]—are also held accountable and responsible to pay for the enormous cleanup and removal costs that are the subject of these judgments and the remainder of the State's claims. Tierra is essentially assetless, and OCC continues to challenge its liability, including preserving its right to appeal the liability finding against it. These circumstances make it of paramount importance that the State be granted partial summary judgment against Maxus based on the undisputed evidence set forth in this Brief and its accompanying Statement of Undisputed Material Facts.

Relying upon black-letter corporate law, this Court ruled that OCC is liable to the State because it is the legal successor to the operator of the Lister Plant and admitted discharger, referred to herein as "Old Diamond." While rejecting OCC's arguments opposing Plaintiffs' motion, this Court cited the Supreme Court case of Nieves v. Bruno Sherman Corp., 86 N.J. 361

[2] Plaintiffs allege that, a decade after Maxus restructured Diamond Shamrock Corporation to strip substantially all of its assets and isolate its liabilities, Repsol YPF, S.A., YPF, S.A., and their foreign subsidiaries acted to further sequester Maxus's oil and gas assets and reserves overseas and far away from New Jersey and the liabilities now at issue. Plaintiffs' claims against Maxus's parent companies are the subject of Track IV, are set for trial in November, 2012, and are not the subject of this motion or Trial Track III.

(1981), for the proposition that Maxus could also be a liable successor to Old Diamond, in addition to—not instead of—OCC. See Ex. 51, Transcript of Hearing, July 19, 2011. In fact, at the same hearing, Plaintiffs' counsel agreed with the Court, but advised as follows:

> The response of OCC that goes through a lot of corporate machinations and reorganizations, and the like, we believe, and previously argued to your Honor that a lot of those transactions and issues might suggest that under a Ventron-like analysis that Maxus would be akin to Velsicol and would be liable as in any way responsible under the Spill Act for the interest that they had in the hazardous substances and the profits from them, and the like. We were convinced, and we had a 50-page motion ready to go, as well, but there were enough fact issues and enough discovery that needed to be conducted with respect to Maxus, as OCC points out repeatedly, that we didn't feel it appropriate to file that motion at this time. We need discovery on Maxus [on the subject of] the ["]in any way responsible["] liability issues. . . . We hope to be back before the Court at some point, either a trial or on another summary judgment as to those issues, but they are not before you today. [See Ex. 51, Transcript of Hearing, July 15, 2011.]

That time has now come.

Additional discovery in this case has shown that OCC's and Tierra's liability is only part of the story. Immediately after the dioxin contamination discovered at the Lister Site added to the already-significant Agent Orange liabilities, Old Diamond underwent a drastic reorganization. As part of its restructuring, substantially all of Old Diamond's assets were transferred to brand-new corporations designed to hold high-value assets without the contingent liabilities of Old Diamond. Well over a billion dollars in assets left Old Diamond, never to return. The chemical-business remnant of the once-diversified corporation was renamed DSCC and sold to OCC. Meanwhile, a new Diamond Shamrock Corporation (referred to herein as "New Diamond" and/or "Maxus") continued the businesses of the diversified Old Diamond completely uninterrupted. As such, Maxus is liable as a successor and mere continuation of Old Diamond under New Jersey law. See, infra, Point II.

In the sale of DSCC to OCC, Maxus agreed to indemnify OCC for the enormous Lister Site liabilities to the State, and others, that both parties knew existed. Consistent with its indemnity obligations, Maxus has for over two decades made payments towards the remediation of the Lister Site. Such payments have even been made directly to the State. Notwithstanding its past compliance, in this litigation and elsewhere, Maxus has sought to avoid its clear indemnity obligations that were meant to benefit not only OCC, but also the taxpayers of New Jersey. Accordingly, under New Jersey and Delaware law, the State, as a third-party beneficiary, is entitled to enforce Maxus's contractual indemnity obligations to ensure the complete remediation of the Lister Site and its surroundings. See, infra, Point III.

Maxus's liability to the State also stems from its use of Tierra to shield Maxus from landowner liability under the Spill Act. Tierra was created in March 1986 to hold title to the Lister Site, and other contaminated sites, precisely because Maxus was well aware that landowner liability existed under the Spill Act and other environmental laws. An undercapitalized corporate shell was therefore established to do Maxus's bidding while Maxus actually controlled the environmental activities at the Lister Site and the funding and operations of Tierra. Thus, under well-recognized veil-piercing principles, Tierra is merely the alter ego of Maxus, making Maxus liable to the State as owner of the Lister Site. See, infra, Point IV.

Finally, Maxus's liability to the State is based on the broad reach of the Spill Act's liability provisions. The Spill Act is an integral component of a comprehensive series of statutes that require that past industrial pollution be cleaned up, and that the cost burden of remediation should not be borne by the taxpayer. Instead, the cost of cleaning up New Jersey's substantial legacy industrial pollution should be imposed on those "in any way responsible" for hazardous substances. Those persons include, for example, operators of industrial facilities that were to be sold or shut down, sellers of property where discharges had taken place, and purchasers of contaminated property who failed to exercise environmental due diligence and are not eligible to assert the statutory "innocent purchaser" defense.

A person "in any way responsible" also includes a parent corporation like Maxus that is integrally associated with and responsible for hazardous substances. Maxus has repeatedly argued that it cannot be liable for Old Diamond's historical pollution because it was created after the pollution occurred. Maxus is wrong. While New Jersey law allows entities to limit the extent of their <u>future</u> liabilities, by entering into asset purchase agreements, establishing parent/subsidiary relationships, creating land holding subsidiaries and reorganizing, it does not allow a corporation to reorganize and divest itself of <u>incurred</u> liabilities at the expense of the public, the environment and the taxpayers of the State of New Jersey.

In considering the Spill Act liability of successor and parent corporations, our Supreme Court has recognized that the ordinary protections of corporate law must give way to the legislative directive that persons "in any way responsible" for hazardous substances that pollute our waters must be held accountable for their remediation and restoration. <u>See</u> <u>Ventron</u>, <u>supra</u>, 94 <u>N.J.</u> at 500. In <u>Ventron</u>, the Court found both the successor and parent liable as persons "in any way responsible" under the Spill Act and concluded:

> [T]he Legislature intended that the privilege of incorporation should not, under the circumstances that obtain here, become a device for avoiding statutory responsibility. A contrary result would permit corporations, merely by creating wholly-owned subsidiaries, to pollute for profit under circumstances when the Legislature intended liability to be imposed. [<u>Id.</u> at 502-503].

Just as OCC is legally jointly and severally liable to the Plaintiffs for its predecessors' liabilities, Maxus also is liable as a person "in any way responsible" for the hazardous substances discharged at and from the Lister Site. <u>See</u>, <u>infra</u>, Point V.

Based upon the overwhelming evidence of discharges and the inter- and intra-corporate relationships of the Defendants in this case, the Spill Act mandates that each and every one of these entities must be held strictly, jointly and severally liable for cleanup and removal costs associated with discharges from the Lister Site. In this way, the legislative intent of imposing the costs of cleaning up contamination upon the polluter, and not the public, will be fulfilled.

STATEMENT OF FACTS

Plaintiffs incorporate by reference their Statement of Undisputed Material Fact In Support of Plaintiffs' Motion for Partial Summary Judgment Against Maxus Energy Corporation filed simultaneously herewith.

FACTUAL SUMMARY

Diamond Alkali Company operated the Lister Plant from 1951-1967 and made, among other things, Agent Orange, a herbicide used in the Vietnam War. Diamond Alkali Company became Diamond Shamrock Corporation ("Old Diamond") in 1967, when it merged with Shamrock Oil & Gas Company, to become a conglomerate with operating units in the oil and gas, minerals and chemicals industries. Old Diamond continued to operate the Lister Plant until it closed in 1969, and Old Diamond sold the real property at 80 Lister Avenue soon thereafter. Service members exposed to Agent Orange in Vietnam filed personal injury litigation in the late 1970s, alleging that they had been harmed by dioxin, a contaminant found in Agent Orange. In mid-1983, dioxin was discovered at the Lister Site and Old Diamond was put on notice of even more substantial liabilities related to Lister Plant operations. To settle a lawsuit over the dioxin contamination at the Lister Site brought by the then-owner of 80 Lister Avenue, Old Diamond (then known as "DSCC") bought the Lister Site back in January 1984. See Statement of Facts at ¶¶ 1-5, 9-13, 141.

A. The Corporate Transformation Begins; Old Diamond Gives Away Its Assets to New Diamond/Maxus.

In mid-1983, at the same time the extent of the dioxin contamination was becoming apparent, Old Diamond acquired an oil and gas company, Natomas. As part of the Natomas transaction, Old Diamond created a new parent company to hold Old Diamond as one subsidiary and Natomas as another subsidiary. The new parent was aptly named "New Diamond Corporation," referred to herein as "New Diamond" and/or "Maxus." At the end of the Natomas transaction, New Diamond had taken many of the corporate attributes of Old Diamond, beginning with its name. Specifically, New Diamond was renamed Diamond Shamrock Corporation, and Old Diamond was renamed Diamond Chemicals Company and later Diamond Shamrock Chemicals Company ("DSCC"). See Statement of Facts at ¶¶ 14-31.

In 1984, a second phase of the reorganization saw Old Diamond's non-chemicals assets moved out of Old Diamond. These assets were transferred to newly-created subsidiaries of Old Diamond. Soon thereafter, Old Diamond's subsidiaries were given to New Diamond, with no compensation to Old Diamond whatsoever. Instead, Old Diamond gave away well over a billion dollars of assets to its "parent" New Diamond as a dividend. Old Diamond was thus transformed from an industrial conglomerate with assets worth over $2 billion to a subsidiary—DSCC—containing a fraction of its former assets yet retaining substantial legacy environmental liabilities. In fact, Diamond Shamrock management chose the form of Old Diamond's reorganization expressly to avoid saddling New Diamond with Old Diamond's liabilities. See Statement of Facts at ¶¶ 32-58.

After "substantially all" of Old Diamond's assets were extracted from Old Diamond and given to the new subsidiaries, and after the stock of the new subsidiaries was given to New Diamond, the assets were operated in an uninterrupted manner by New Diamond. The annual reports and Form 10-Ks filed before and after the reorganization describe one continuous business enterprise. Indeed, New Diamond represented to courts and the public alike that it was a mere continuation of Old Diamond. See Statement of Facts at ¶¶ 59-71.

In September 1986, pursuant to a Stock Purchase Agreement ("SPA"), Maxus sold the stock of DSCC to an affiliate of OCC and agreed to indemnify and hold harmless OCC from liabilities, including those related to the Lister Site. At the time of the SPA, Maxus, DSCC and OCC were aware that the liabilities associated with the Lister Site were real and significant and that Maxus's indemnification of them was a material consideration in the sale of DSCC to OCC. In fact, it is clear that OCC would not have purchased DSCC if it thought Maxus would not cover DEP's claims relating to the Lister Site. See Statement of Facts at ¶¶ 72-96.

B. Tierra Becomes the Owner of the Lister Site but Exists for the Benefit of Maxus and Is Undercapitalized and Financially Dependent on Its Parent.

Tierra was formed in March 1986, just prior to the September 1986 SPA. According to Maxus, Tierra's function was to hold title to certain real property, principally former chemical plants operated by Old Diamond, which were contaminated. The real property Tierra held title to included the Lister Site, the former Kearny plant site (the "Kearny Site") and the former plant site in Painesville, Ohio (the "Painesville Site"). The Lister Site, the Kearny Site and the Painesville Site are collectively referred to as the "Sites." See Statement of Facts at ¶¶ 101-112.

In connection with the SPA, and just prior to it, Maxus directed DSCC to transfer title to the Sites to Tierra, in what was termed "an intra-holding company transfer of title," so that the Sites were not transferred to OCC but were, instead, "kept in the Diamond Shamrock family." See Statement of Facts at ¶ 114. The Sites were transferred to Tierra to "facilitate Maxus's remediation [of them] on OCC's behalf in response to claims for indemnity under the SPA." See

Statement of Facts at ¶ 117. Tierra never charged Maxus any fee or rent in connection with any activities it performed in this regard. See Statement of Facts at ¶ 118.

In reality, Tierra simply could not conduct any activities, by itself, in connection with its land ownership. From its inception in March 1986 through 1994, the "Time Period" at issue in Track III, Tierra had no employees, bank accounts or independent financial statements and tax returns, and it never paid a dividend to any shareholder. It conducted no revenue-generating or income-producing business operations other than the sale of certain parcels of land associated with the Painesville Site. And it never intended to generate revenue or earn a profit from business operations, beyond the sale of these lands. It had relatively nominal expenses, such as the payment of property taxes, which were paid using funds supplied by Maxus—funds that Tierra was under no agreement and in no position to reimburse. See Statement of Facts at ¶¶ 120-127, 133.

In short, Tierra existed for the benefit of Maxus. In fact, Dexter Peacock, outside counsel, explained to Defendant YPF, S.A. that Tierra's assets "consist[ed] mainly of contaminated properties previously used in connected with discontinued operations of [Maxus's] former chemicals business or purchased by Maxus or its predecessors as part of [Maxus's] overall environmental defense strategy." See Ex. 97 at YPF0210163, ¶ 3 (emphasis added); Statement of Facts at ¶¶ 148-151.

At best, Tierra was initially capitalized with $1,000 after issuing 1,000 shares of Common Stock. Even if Tierra's only expenses and anticipated liabilities were the "nominal expenses" of land ownership, such as the payment of property taxes, Tierra was grossly undercapitalized from inception. See Statement of Facts at ¶¶ 118, 120-122, 124-126, 128-132.

But, in addition to its "nominal" expenses, Tierra's primary assets were the Sites. At the time Tierra acquired title to the Sites, Maxus and Tierra knew the Sites were subject to significant remedial measures that could cost millions of dollars. It was never intended that Tierra would ever be able to satisfy the cost of remediating the Sites. And, at no time during the Time Period, could Tierra have paid these costs. See Statement of Facts at ¶¶ 116, 134-147.

C. Maxus Knew That Landowner Liability Could Be Substantial.

Instead of Maxus acquiring title to the Sites in order for Maxus to respond to OCC's claims for indemnity under the SPA, Maxus designated Tierra to do so. This is because Maxus understood the risks and potential exposure that environmental statutes, i.e., the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Spill Act, and the Environmental Cleanup and Responsibility Act ("ECRA"), imposed on owners of contaminated sites. See Statement of Facts at ¶¶ 113, 153-155.

For instance, in April 1985, before Tierra acquired the Lister Site, Maxus personnel wrote to explain the liabilities facing then-Lister Site owner Marisol, Inc., stating that "[t]he recent development (1984) by New Jersey (ECRA) to require cleanup of all manufacturing facilities before a sale can be made would now be a considerable liability to [Marisol] if [it] should attempt to sell on the open market. It would cost [Marisol] what it is going to cost us." See Ex. 113 at MAXUS0330031-32.

Similarly, Marisol also faced Spill Act liability to the DEP as owner of the Lister Site. In March 1984, it was named as a Respondent along with DSCC in an Administrative Consent Order ("ACO") related to the cleanup of the Lister Site. To resolve Marisol's "continuing liability" under the ACO "and to dispose of litigation claims by Marisol against Diamond Shamrock[,]" DSCC settled claims with Marisol by agreeing to purchase the Lister Site. See Statement of Facts at ¶¶ 157-158.

In addition, in connection with the ACOs related to the Lister Site, the DEP required that the respondents to the ACOs provide financial assurances in the amount of $12 million and $4 million to ensure that "funds will be available when needed" for the performance of remedial actions. Initially, these financial assurances were provided by DSCC. But, after the Lister Site was transferred by DSCC to Tierra, the financial assurances were established on the account of Tierra, whose only connection to the Lister Site was as landowner. See Statement of Facts at ¶¶ 159-164.

In other correspondence, attorneys for Maxus explained the status of landowner liability. For example, in 1989, in-house counsel Paul Herring wrote to the DEP and acknowledged that Tierra "may arguably be responsible for remediation of the [Kearny Site] to which it took title in 1986[.]" See Ex. 123 at NJDEP00399962-72. Even more telling is a letter that Maxus's litigation counsel, Bill Warren, wrote to Maxus about the 1990 ACO relating to the Kearny Site. Mr. Warren explained that Tierra was a "respondent [to the ACO] simply by virtue of its relatively recent acquisition of the [Kearny Site.]" See Ex. 124 at AA-YPF-0038921, ¶ 1. Consequently, "both [Tierra] and Occidental have responsibility for the [Kearny Site]." Ibid. at ¶ 2. This was because, "[a]t the time the ACO was entered [in 1990], the prevailing view of the [DEP] was that [Tierra's] mere ownership of the [Kearny Site] gave rise to liability under [the Spill Act] with respect to that site because ownership made [Tierra] 'a person in any way responsible' for the Kearny Site." See id. at AA-YPF-0038921-22. Mr. Warren concluded: "If you view the liability of Occidental as successor to Diamond Shamrock and the liability of [Tierra] arising solely from its acquisition of the [Kearny Site], the language of the ACO makes perfect sense as does the application of the Spill Act to these two companies." See id. at AA-YPF-0038923, ¶ 2.

In the end, by creating Tierra for the purpose of holding title to the Sites, Maxus sought to escape strict statutory liability to regulatory agencies, like the DEP in this case.

LEGAL ARGUMENT

POINT I

SUMMARY JUDGMENT STANDARD AND CHOICE OF LAW

A. Partial Summary Judgment Is Appropriate Under the Standards and Circumstances Presented Here.

A court may grant summary judgment where no genuine issue of material fact exists:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. [R. 4:46-2(c).]

When determining whether a genuine issue of material fact exists, a court is to "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995).

Plaintiffs seek partial summary judgment, as provided for by R. 4:46-1. "A party seeking any affirmative relief may . . . move for a summary judgment or order on all or any part thereof or as to any defense." R. 4:46-1. When the summary judgment requested does not entirely dispose of the case, the court is to determine which facts have been determined by the partial judgment and make an order specifying those facts, which are then deemed established. R. 4:46-3. Thus, this Court can render partial summary judgment on any issue, reserving the remaining issues for trial.

As set forth below, the discovery and the stipulations agreed to by the parties demonstrate that partial summary judgment is appropriate as to Maxus's direct liability in this case. While a significant volume of evidence has been presented to the Court, there is no legitimate dispute as to the material facts, and the evidence presented is "so one-sided, that plaintiff must prevail as a matter of law." See BOC Group, Inc. v. Chevron Chemical Co., LLC, 359 N.J. Super. 135, 150 (App. Div. 2003).

B. While No Conflict Exists Between the Laws of Any Affected States, New Jersey Law Should Govern the Issues Before the Court.

New Jersey courts decide choice-of-law questions on an issue-by-issue basis. That is, in a given case, the law of one state might apply to one cause of action or issue and the law of another state might apply to a second cause of action or issue. In Re Consolidated Parlodel Litigation, 182 F.R.D. 441, 447 (D.N.J. 1998) (noting that "New Jersey's choice of law rules incorporate doctrine of depecage whereby 'the laws of different states may apply in the same case to different issues in the case'").

In this case, New Jersey law applies to all of Plaintiffs' claimed bases for entitlement to partial summary judgment. New Jersey law certainly governs the issue of whether Maxus is liable for the discharges of Old Diamond as the mere continuation of Old Diamond. Under New Jersey's "governmental interest" test, no state has a greater interest than New Jersey in determining which corporations should pay for the cleanup of contamination within the boundaries of the State of New Jersey. Bussell v. DeWalt Products Corp., 259 N.J. Super. 499, 512 (App. Div. 1992) (finding New Jersey law applied to issue of successor liability because of New Jersey's governmental interest in products liability claim); Sentient Colors, Inc. v. Allstate Ins. Co., 388 N.J. Super. 374, 387 (App. Div. 2006) (noting that New Jersey courts also apply New Jersey law in cases involving the cleanup of hazardous substances in New Jersey).

New Jersey law also applies to the question of whether Plaintiffs are intended beneficiaries under the SPA. Although the SPA contains a choice-of-law provision providing for Delaware law, New Jersey courts may choose to apply New Jersey law when the question is whether an indemnification provision will allow cleanup of pollution in New Jersey. See Curtis T. Bedwell & Sons, Inc. v. Geppert Bros., Inc., 280 N.J. Super. 391, 396 (App. Div. 1995) ("[W]e can imagine no interest more compelling than that of New Jersey in determining the availability of funds for the cleanup of hazardous substances within its borders."); Kramer v. Ciba-Geigy, 371 N.J. Super. 580, 588-600 (App. Div. 2004) (citing Bedwell as an example of a case establishing a compelling New Jersey interest that would justify overriding a contractual choice-of-law provision). Additionally, while the Spill Act is a New Jersey statute, it can be interpreted in light of case law regarding federal environmental statutes such as CERCLA. See GEI Int'l Corp. v. St. Paul Fire & Marine Ins. Co., 287 N.J. Super. 385, 393-94 (App. Div. 1996) (using CERCLA to interpret Spill Act contribution provision).

In any event, a choice of law analysis is necessary only where a conflict exists between New Jersey law and an alternative state's law. Bussell, supra, 259 N.J. Super. at 512. New Jersey and Delaware successor law do not conflict. Forman Ind., Inc. v. Blake-Ward, 2008 WL 4191155 (App. Div. Sept. 15, 2008) ("Because the discrete issue of relevance here was whether the sale constituted a de facto merger or a mere continuation of the purchased business and New Jersey and Delaware principles of law are the same in this regard, there was no conflict between the two states and the court could have applied New Jersey law.").[3] Accordingly, a choice of law analysis is not required and the Court should apply New Jersey law.

[3] Attached as Appendix B is the unpublished opinion of the Appellate Division in Forman Ind., Inc. v. Blake-Ward, 2008 WL 4191155 (App. Div. Sept. 15, 2008). Pursuant to R. 1:36-3, a copy of this opinion has been provided to the Court and all parties. Counsel is not aware of any contrary unpublished opinions.

POINT II

MAXUS IS THE MERE CONTINUATION OF OLD DIAMOND AND, THEREFORE, IS LIABLE UNDER THE SPILL ACT

Maxus is the mere continuation of Old Diamond and, therefore, is liable with OCC as a successor to Old Diamond and to the liabilities associated with the hazardous substances discharged at and from the Lister Site. As Maxus has vehemently repeated throughout this litigation and in its dealings with Plaintiffs regarding the Lister Site, there are two Diamond Shamrock Corporations. The first Diamond Shamrock Corporation operated the Lister Plant and used the Passaic River as a convenient and inexpensive disposal system for its wastes. The second Diamond Shamrock Corporation was incorporated in 1983 and is now named Maxus Energy Corporation. The fact that the two corporations shared the same name is not a confusing coincidence. It was part of a plan to shift the corporate identity from a Diamond Shamrock burdened with substantial personal injury and environmental liabilities, to a "new" Diamond Shamrock that would continue Diamond Shamrock's business operations but hoped to be insulated from the environmental liabilities of its namesake. This is exactly the situation the "mere continuation" doctrine is designed to address, ensuring that companies like Maxus cannot transform or recreate themselves to avoid their historical obligations.

A. A Corporation That Is Merely the Continuation of Another Corporation Is Liable for the Former's Liabilities.

The general rule is that the transfer of assets from Corporation A to Corporation B does not transfer A's liabilities to B. New Jersey follows this general rule. Lefever v. K.P. Hovnanian Enterprises, Inc., 160 N.J. 307, 310 (1999) (citing 15 William & Fletcher, Cyclopedia of the Law of Corporations § 7122, nn. 9-15 (1990)). However, there are several widely-recognized exceptions to this general rule: (1) the successor expressly or impliedly assumes the predecessor's liabilities; (2) there is an actual or de facto consolidation or merger of the seller and the purchaser; (3) the purchasing company is a mere continuation of the seller; or (4) the transaction is entered into fraudulently to escape liability." Ibid.

Two of these theories, de facto merger and mere continuation, are often treated together. Woodrick v. Jack J. Burke Real Estate, Inc., 306 N.J. Super. 61, 72-73 (App. Div. 1997). "Because these two exceptions to the general rule of non-liability tend to overlap, with much of the same evidence being relevant to each determination, these exceptions are often treated in unison." Woodrick, supra, 306 N .J. Super. at 73 (citing Glynwed, Inc. v. Plastimatic, Inc., 869 F.Supp. 265, 276 (D.N.J. 1994), which was applying New Jersey law on the issue of corporate successor liability); Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc., 13 F.3d 69, 73 (3d Cir. 1993) (also applying New Jersey law); Lumbard v. Maglia, Inc., 621 F.Supp. 1529, 1535 (S.D.N.Y. 1985)); Wilson v. Fare Well Corp., 140 N.J. Super. 476, 484 (Law Div. 1976).

New Jersey courts will look to the following multiple lines of evidence to determine whether the "de facto merger" or "mere continuation" doctrines apply:

- continuity of management, personnel, physical location, assets, and general business operations;
- a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible;
- assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and
- continuity of ownership/shareholders.

Woodrick, supra, 306 N.J. Super. at 73. Importantly, not all of these factors need be present for a "de facto merger" or "mere continuation" to be found. Id. at 74. Rather, "[t]he crucial inquiry is whether there was an 'intent on the part of the contracting parties to effectuate a merger or consolidation rather than a sale of assets.'" Ibid. (quoting Luxliner, 13 F.3d at 73). In fact, "'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.'" Woodrick, supra, 306 N.J. Super. at 74 (quoting Wilson, supra, 140 N.J. Super. at 490-91).

In applying these factors, courts look at whether the transfer of the assets resulted in them being used in a new business, or whether the company acquiring the assets simply continued the business that was already in place. This is the crux of the determination of successor liability. "When an ongoing business assumes all the benefits of its predecessor and continues to function in the same manner as its predecessor, tort liability should attach." Wilson, supra, 140 N.J. Super. at 490-91. A successor will be found to be the mere continuation of the predecessor where the "intent was for the successor to assume all the benefits and burdens of the predecessor's business, with the successor becoming a 'new hat' for the predecessor." Woodrick, supra, 306 N.J. Super at 74-75.

B. New Diamond/Maxus Is "Merely the Continuation" of Old Diamond.

The 1983 and 1984 reorganizations establish that New Diamond/Maxus was merely a "new hat" for Old Diamond.

1. New Diamond shared "continuity of management, personnel, physical location, assets, and general business operations" with Old Diamond.

On August 31, 1983, a set of officers and directors managed business assets worth almost $3 billion for a company named Diamond Shamrock Corporation, located at 717 Harwood in Dallas, Texas. Diamond Shamrock Corporation was a publicly traded corporation, trading under the symbol "DIA," and so was owned by shareholders owning Diamond Shamrock Corporation stock.

On September 1, 1983, the same set of officers and directors managed the same business assets at the same location for a "new" company with the same name—Diamond Shamrock

Corporation. The stock of this new corporation, owned by the same shareholders, traded under the same symbol "DIA." See Statement of Facts at ¶¶ 22-30.

In other words, after New Diamond/Maxus's creation, the officers of Old Diamond became the officers of New Diamond/Maxus, the board of directors of Old Diamond became members of the board of directors of New Diamond/Maxus, the shares of stock of Old Diamond became shares of stock of New Diamond/Maxus, and the corporate offices of Old Diamond became the corporate offices of New Diamond/Maxus. See Statement of Facts at ¶¶ 22-30. Furthermore, during the second phase of the reorganization, Old Diamond transferred substantially all of its assets to New Diamond/Maxus leaving behind only the chemicals business assets, which New Diamond/Maxus continued to hold through its ownership of Old Diamond's stock. See Statement of Facts at ¶¶ 32-48.

2. New Diamond assumed the liabilities ordinarily necessary for the uninterrupted continuation of the business of Old Diamond.

As part of the reorganization, New Diamond/Maxus assumed the corporate debt of Old Diamond necessary for the continuation of operations. See Statement of Facts at ¶¶ 53-54. On January 26, 1984, Old Diamond filed a Form 8-K with the Securities and Exchange Commission ("SEC") describing the transfer of its corporate debentures to New Diamond. See id. at ¶ 53. The principal amount of debt that New Diamond took on during this transfer was $289,024,000. See id. at ¶ 54.

3. New Diamond had "continuity of ownership/shareholders" with Old Diamond.

There was complete continuity in ownership between Old Diamond and New Diamond. Old Diamond was a publicly traded corporation. During the reorganization, the shareholders of Old Diamond were given one share of stock in New Diamond for each share of stock they held in Old Diamond. See Statement of Facts at ¶ 25. In fact, stock holders in Old Diamond were not even given new stock certificates. The stock certificates for Old Diamond simply became stock certificates in New Diamond. See id. New Diamond even publicly represented that it was the same corporation as Old Diamond in its 1983 Annual Report. See Statement of Facts at ¶ 63; Ex. 24 at MAXUS0059185 (describing to stockholders an uninterrupted chain of operations).

4. After the 1983 and 1984 reorganizations, New Diamond continued the business of Old Diamond as a "new hat" for Old Diamond.

After the reorganization, New Diamond held virtually the same assets as Old Diamond, with the addition of the new oil and gas assets it acquired in the 1983 acquisition of Natomas, and New Diamond operated these same assets in an uninterrupted manner. See Statement of Facts at ¶¶ 59-65. In its Form 10-K filings, New Diamond explained its operations to shareholders by comparing them to operations during previous years when New Diamond did not even exist. See id.; Ex. 24 at MAXUS059210, MAXUS059215; Ex. 30 at MAXUS056387. For example, in the specialty chemical business segment, Old Diamond reported its principal production plants in its 1982 Form 10-K. The 1983 Form 10-K of New Diamond reported each and every one of these same assets. Similarly, in its 1984 Form 10-K, New Diamond listed these same production plants, noting that New Diamond had sold three of the plants. See Statement of Facts at ¶ 60.

New Diamond also publicly represented that its businesses were the seamless continuation of Old Diamond's businesses. In its 1983 Form 10-K, New Diamond defined "Diamond Shamrock Corporation" to mean both Old Diamond and New Diamond. See Statement of Facts at ¶ 62; Ex. 30 at MAXUS056387. And, in its 1983 Annual Report, New Diamond proudly discussed its "history" of successful operations. See Statement of Facts at ¶ 63; Ex. 24 at MAXUS0059184, 0059186. The 1983 Annual Report does not explicitly mention the fact that the annual report is for a new and different corporation until page 35, where under the title "Holding Company Formed: Reorganization[,]" the public was informed that a new parent corporation had been formed that had taken the name of the old Diamond Shamrock Corporation, and that shares in the two had been exchanged share-for-share. See Ex. 24 at MAXUS059215, ¶ 3.

Moreover, the distinction between Old Diamond and New Diamond is completely absent from the operating and financial information provided in the 1983 Annual Report and Form 10-K of New Diamond. See Statement of Facts at ¶ 61; Ex. 24 at MAXUS059217 (showing sales and operating revenues, operating profit, depreciation and other financial metrics for 1983, 1982 and 1981); Ex. 30 at MAXUS056390 (detailing "[d]rilling activities of the Company for the three years ending December 31, 1983" with no indication that a change in owner of the assets had occurred).

Additionally, in the Kidder Peabody litigation, New Diamond/Maxus argued that the reorganization actually resulted in Old Diamond sitting atop the corporate family tree as New Diamond/Maxus. See Statement of Facts at ¶¶ 66-71, Ex. 27 at MAXUS0049791. In that case, Maxus argued that, in reality, Old Diamond simply became New Diamond, citing the fact that the officers and directors moved from Old Diamond to New Diamond, that the stockholders went from Old Diamond to New Diamond, that the assets went from Old Diamond to New Diamond, and that the corporate name—Diamond Shamrock Corporation—went from Old Diamond to New Diamond. See Statement of Facts at ¶ 70. Maxus even urged the court to give effect to "corporate reality" – not technicalities. See id. at ¶ 71; Ex. 27 at MAXUS0049808.

Finally, New Diamond wore the same hat as Old Diamond with respect to the Lister Site remedial activities. This remediation had begun by the time the 1984 Reorganization was complete. New Diamond/Maxus simply stepped in the shoes of Old Diamond in communicating with DEP and EPA. See Statement of Facts at ¶ 86. Maxus funded environmental studies and represented to the investing public that is was addressing the liabilities associated with its plant. See Statement of Facts at ¶¶ 82-84; Ex. 62 at OCCNJ0003694, ¶ 2.

C. Equitable Successorship Exceptions Apply to Reorganizations as Well as Acquisitions.

The typical "mere continuation" case involves a corporation buying the assets of an unrelated corporation whose operations have injured a plaintiff. The reorganization in this case was not a purchase of assets, but instead was the transfer of assets from one corporation to a related corporation. Cases involving the transfer of assets among related corporations are less common than cases involving the sale of assets between unrelated corporations, but courts have used the same tests for determining whether the corporate relatives are liable for one another's liabilities. See, e.g., Schmoll v. ACANDS, Inc., 703 F. Supp. 868 (D. Or. 1988), aff'd 977 F.2d 499 (9th Cir. 1992) (listing four exceptions to general rule of non-liability, i.e., assumption, de facto merger, mere continuation and intent to escape liability, and finding parent corporation liable for subsidiary's asbestos liability because transaction was designed to escape liability).

In fact, the form of reorganization can inform a court's decision on imposing liability on a reorganized corporation. Income tax law allows corporations to move assets within a group of related corporations, or for a reorganization to occur in which no change of control occurs. These reorganizations are tax-free pursuant to Section 368 of the Internal Revenue Code. The fact that a corporation has claimed that a reorganization is tax-free under Section 368 has been repeatedly used by courts as a basis for imposing the liabilities of the pre-reorganization entity on the post-reorganization entity. Courts have found that the use of Section 368 "militates" a finding that the reorganized corporation underwent a de facto merger with its liable predecessor. See In Re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution, 712

F. Supp. 1010, 1018 (D. Mass. 1989); HRW Sys., Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 336 (D. Md. 1993) (considering use of Section 368 by parties to transaction to support the imposition of CERCLA liability); Cinocca v. Baxter Labs, Inc., 400 F. Supp. 527, 530-31 (D. Okla. 1975) (finding use of Section 368 supported the imposition of liability on the party resulting from Section 368 reorganization). The tax-free status of a Section 368 reorganization is premised on the continuity of the business enterprise under the modified form. See Honbarrier v. C.I.R., 115 T.C. 300, 310 (2000) (noting that a "requisite to a reorganization under the Code [is] a continuity of the business enterprise under the modified corporate form") (internal quotes omitted).

Here, New Diamond/Maxus used Section 368 to move more than a billion dollars in assets out of Old Diamond into three of its new subsidiaries without incurring any tax liability by representing to the Internal Revenue Service that the transaction met the requirements of Section 368. See Statement of Facts at ¶ 58; Ex. 50 at MAXUS3834653, ¶ 4. Having availed itself of these tax benefits, New Diamond/Maxus must accept the responsibility for liabilities of the reorganized entity that lost the assets in the transfer.

D. Corporate Reorganizations Can Result in Liability Being Imposed on a Second Corporation in Addition to the Liability Imposed on Another Corporate Successor.

While courts will of course impose successor liability on the legal corporate successor of a corporation whose activities have harmed a plaintiff, such as OCC here, courts will also impose liability on a second corporation when it has a sufficiently close relationship to the injuring corporation through corporate reorganizations. Courts will examine the structure of the corporation at the time the injury occurred to identify those segments of the corporation that existed at the time of injury. If a corporation is structured into operating units or divisions, the profits of all of the unincorporated divisions are available to satisfy the judgment of an injured plaintiff, even though the judgment is the result of the activities of one division. Arevalo v. Saginaw Machine Systems, Inc., 344 N.J. Super. 490, 498 (App. Div. 2001). The liabilities remain attached to the entire enterprise even if the injury-causing division is incorporated into a separate corporation later. Arevalo, supra, 344 N.J. Super. at 498 ("Thus, at the time of manufacture by its unincorporated unit, Wickes, as a single integrated business enterprise, was answerable in tort to claims of harm caused by this product and remained potentially liable despite the subsequent incorporation of this division."). When a corporation maintains its corporate identity through "the common identity of its directors, officers, or shareholders," New Jersey courts will follow the corporate identity through its variation in form to impose liability. Id. at 499.

Likewise, when a corporate reorganization takes valuable assets away from injured plaintiffs and leaves liabilities in the original corporation, courts can impose liability on the corporation that received those assets. Raytech Corp. v. White, 54 F.3d 187, 194 (3d Cir. 1992) (describing rationale for lower court decision to impose liability on parent created to receive untainted assets of subsidiary Raymark as being, in part, that "the restructuring left Raymark's creditors without access to the potential stream of profits generated by [the transferred assets]").

In this case, Old Diamond was an integrated corporation with multiple divisions before the dioxin was discovered and reorganization efforts began. See Statement of Facts at ¶¶ 6-8. All of its assets were available to satisfy any of the incurred liabilities associated with the activities of any division. The reorganization removed substantially all of the assets from Old Diamond, and the form of the reorganization was chosen expressly to allow New Diamond to receive the assets without being "saddled with" Old Diamond's contingent liabilities. See Statement of Facts at ¶¶ 33-34. New Diamond simply could not take those encumbered assets, reorganize them, purposefully isolate the liabilities associated with those assets, and continue to operate as Diamond Shamrock Corporation minus its incurred liability. Equitable successorship law does not allow an entity to continue a profitable business and ignore the liabilities associated with it. See Arevalo, supra, 344 N.J. Super. at 498 (finding that availability of legal successor to liabilities did not prevent a court from imposing liability on a second corporation that maintained the corporate identity of the original integrated corporation).

E. The Continued Existence of DSCC Does Not Prevent Application of the Equitable Successorship Doctrine Here.

In the usual "mere continuation" case, the selling corporation ceases to exist. If the selling corporation continues to exist, then it may not seem necessary for the law to create liability through the "mere continuation" doctrine, or other doctrines, because the plaintiff can simply sue the selling corporation, which, after all, continues to be liable and which presumably received the purchase price of the transferred assets. See Arevalo, supra, 344 N.J. Super. at 498. However, the situation before this Court is different. There was no "buying and selling" involved. Instead, Old Diamond quite literally gave away $1.6 billion—substantially all—of its assets to a newly-created parent, New Diamond, receiving absolutely no consideration whatsoever. See Statement of Facts at ¶¶ 40-52.

As such, New Diamond/Maxus cannot rely on the continued existence of the small fragment of Old Diamond that remained after New Diamond/Maxus received substantially all of Old Diamond's assets. The remaining fragment, renamed DSCC, is liable for Old Diamond's discharges because it was what remained of the original discharger after substantially all of its assets were removed. The continued existence of the selling corporation (Old Diamond) after the sale of the assets does not, however, prevent the purchasing corporation (New Diamond) from being liable to a third party. Koch Materials Co. v. Shore Slurry Seal, Inc., 205 F. Supp. 2d

324, 337 (D.N.J. 2002) (noting that the continued existence of the selling corporation did not negate liability for the purchasing corporation because in the context of modern business, a corporation might sell an entire division and carry on in business after the sale). When the asset sale results in the continued operation of the business by the same employees in the same office space and continuing under the same contracts, a reasonable finder of fact could conclude that the purchasing corporation was the successor to the selling corporation. Id.

In Nieves v. Bruno Sherman Corp., 86 N.J. 361 (1981), our Supreme Court expressed the rationale for holding two corporate successors liable for a plaintiff's injuries caused by a defective machine manufactured by their predecessor. The intermediate successor corporation had argued that the existence of a viable corporation that continued the offending product line and was therefore capable of providing a remedy to the injured plaintiff obviated the need to impose liability upon the intermediary. Id. at 370. The Court rejected this argument, explaining that it was not just the availability of redress but rather the role that the intermediary played in the destruction of the plaintiff's remedies against the original manufacturer that justified the imposition of liability on the intermediate successor. Id. at 370-371. In Nieves, the intermediate successor contributed to the destruction of the plaintiff's remedy against the original manufacturer by acquiring its assets. In this case, New Diamond/Maxus jeopardized Plaintiffs' remedy against Old Diamond—the original polluter—by transferring its significant assets to other related companies, prior to the sale to OCC. While OCC assumed the liabilities of Old Diamond through a stock purchase, it attempted to limit its exposure through the indemnification agreement in the SPA.

Likewise, in Nieves, the intermediate successor and the continuing successor contractually addressed their respective obligations for the original wrongdoer's liability through an indemnification agreement. The Supreme Court noted:

> As between the two successor corporations the provisions of this indemnification agreement, if applicable to the particular fact situation presented, should be given their intended effect as a risk-spreading and cost-avoidance measure. While the Ramirez rationale is concerned with imposing strict tort liability for damages caused by defects in units of the product line acquired and continued by successor manufacturers, neither Ramirez nor the injured plaintiff -- if he successfully proves his case against the successors, who stand in the shoes of the original manufacturer -- is concerned with how that liability will be allocated or borne as between two successor corporations. [Nieves, supra, 86 N.J. at 372].

Similarly, the indemnification agreement between Maxus and OCC should be given its intended effect as a risk spreading measure as between them, but it does not limit Plaintiffs' direct claim against New Diamond/Maxus as a successor to Old Diamond.

F. Reorganizations Should Be Scrutinized for Their Impact on Liabilities.

Maxus is not the first corporation to engage in creative corporate re-structuring to limit liabilities.[4] But Maxus's attempt should be no more successful than that of other corporations who have tried but failed to sidestep their liabilities using corporate restructurings. As was noted by the Seventh Circuit:

> To avoid a judgment in an impending lawsuit or avalanche of suits the seller might have sold all its assets to a new corporation owned by its predecessor's owners and retained all its liabilities in an assetless shell; if so, then … the successor corporation would be liable. [Chaveriat v. Williams Pipeline Company, 11 F.3d 1420, 1425 (7th Cir. 1993) (internal citations omitted).]

Other courts, when faced with similar facts, have also imposed the liabilities of a corporation on new corporations formed during restructuring. Asbestos litigation has led to a

[4] Unfortunately, Maxus is likewise not the last corporation to undertake such activities . . . in this case. The environmental liabilities that Maxus has tried so desperately to avoid, together with the contractual obligations that it tried to exchange for statutory liabilities, were even further isolated from its assets a decade later by Maxus's parent companies, YPF and Repsol. These claims will be tried in Track IV.

corporate restructuring almost exactly like the one that Diamond Shamrock Corporation undertook. See, e.g., Schmoll, supra, 703 F. Supp. at 868. Like Diamond Shamrock Corporation with its Agent Orange lawsuits and Lister Site liabilities, Raymark Industries was named as a defendant in numerous cases involving asbestos products. Id. at 869. In 1982, Raymark Industries created Raymark Corporation as a holding company for Raymark Industries. By 1985, Raymark Industries' assets included two profitable operating divisions and the stock of a German subsidiary and other assets, plus the asbestos liabilities. In 1986, Raymark created Raytech as a wholly-owned subsidiary. Id. at 870. Raytech in turn created Raysub as its wholly-owned subsidiary. Then Raymark Corporation merged into Raysub, with Raymark Corporation being the surviving entity. At the end of the transaction, Raymark Corporation had created a parent that owned 100% of its stock, just as New Diamond was created as a parent for Old Diamond. One share of Raymark common stock was exchanged for one share of Raytech stock. Therefore, Raytech became a holding company that was owned entirely by the former shareholders of Raymark Corporation, exactly as in the Old Diamond/New Diamond reorganization. The next year, the profitable assets of Raymark Industries were transferred to Raytech, just as Old Diamond transferred its profitable assets to New Diamond, leaving behind the chemical assets and associated liabilities.

Asbestos plaintiffs sought to hold Raytech liable for Raymark Industries' sale of asbestos-containing products, contending that they were in essence the same corporate entity. Raytech argued that it was an innocent successor corporation that was not liable for the acts of its predecessors. Id. at 872. The court disagreed, finding "that, although the corporate restructuring meets the technical formalities of corporate form, it was designed with the improper purpose of escaping asbestos-related liability." Id. at 874. The court concluded by noting that "[u]pholding the integrity of such transactions would unjustly elevate form over substance." Id. at 875; see also In re Raytech Corp., 217 B.R. 679 (D. Conn. 1998) (applying doctrine of collateral estoppel based on Schmoll decision to find unlimited liability for corporation that, like Diamond Shamrock Corporation, underwent a corporate reorganization in which it created a new parent, became a subsidiary of the parent, and gave the parent its untainted assets); Raytech Corp. v. White, 54 F.3d 187 (3d Cir. 1995) (affirming Pennsylvania lower court decision holding Raytech liable due to the collateral estoppel effect of the Schmoll decision, and noting that Oregon law was not substantively different than other jurisdictions on the issue of corporate successor law).

The Schmoll court found persuasive outright statements by Raymark that the purpose of reorganization was to compartmentalize the asbestos liability. However, New Jersey law does not require this Court to find that the corporate reorganization of Diamond Shamrock was conducted in order to escape Agent Orange or Lister Site-liabilities in order to hold New Diamond/Maxus liable. In the Arevalo case, for example, the reorganization was unrelated to the plaintiffs' claims. See Arevalo, supra, 344 N.J. Super. at 498.

Regardless, the evidence in this case establishes that Old Diamond was considering other forms of reorganization, but ultimately made its choice based on substantial impending claims related to the chemical businesses and to avoid saddling New Diamond with Old Diamond's contingent liabilities. See Statement of Facts at ¶¶ 15, 33-34. In fact, according to New Diamond's Vice President and General Counsel, one of the primary reasons for the reorganization was the new pollution control legislation and federal and state legislation requiring that Old Diamond clean up plant sites, groundwater and address other problems under Superfund and other laws and regulations that came into effect during the early 1980s. See Ex.

11 at OCCNJ0026059-60. Accordingly, by way of reorganization, New Diamond acted to strand Old Diamond's contingent liabilities in Old Diamond. See Ex. 32 at PL No. 153581, p. 1 ¶ 2.

But for the creation of New Diamond and the stripping of substantially all of Old Diamond's corporate assets (except for the chemical business assets and liabilities) there is no doubt that New Diamond/Maxus would be liable as a discharger – because it would still be Old Diamond. But creating a "new" corporation is not a get-out-of-jail-free card for corporations in New Jersey. Cases such as Ventron, Arevalo, Nieves and Raymark allow courts to look at the reality of the corporate structures and activities to reach related corporations that are also responsible for a plaintiff's injuries.

POINT III

PLAINTIFFS ARE THIRD PARTY BENEFICIARIES OF THE STOCK PURCHASE AGREEMENT AND CAN HOLD MAXUS RESPONSIBLE FOR ADDRESSING THE SPILL ACT LIABILITY OF DSCC

This Court has already determined that Maxus must indemnify OCC under the SPA for the claims brought against OCC for the discharges of hazardous substances from the Lister Site. See Order, dated August 24, 2011. Furthermore, the Court has already determined that OCC is liable for those discharges for which Maxus must indemnify OCC. See Order, dated July 19, 2011. However, Plaintiffs are also entitled to bring a claim directly against Maxus as a third party beneficiary to the SPA.

A. Intended Beneficiaries (Including Creditor Beneficiaries) May Enforce a Contract.

Under both New Jersey and Delaware law, intended third party beneficiaries to a contract can enforce the contract. See, e.g., Rieder Communities, Inc. v. Township of North Brunswick, 227 N.J. Super. 214 (App. Div. 1988) (noting that an incidental beneficiary derives no right to enforce a contract); Delmar News Inc. v. Jacobs Oil Co., 584 A.2d 531, 534 (Del. Super. Ct.

1990) (noting that incidental beneficiaries have no rights under a contract). There are three categories of third party beneficiaries: creditor beneficiaries, donee beneficiaries and incidental beneficiaries. Insituform of N. Am., Inc. v. Chandler, 534 A.2d 257, 270 (Del. Ch. 1987). Creditor beneficiaries and donee beneficiaries are intended beneficiaries and can sue to enforce the contract. Incidental beneficiaries, by contrast, might receive a benefit under the contract, but have no right to enforce the contract to receive a benefit. See id.

Both New Jersey and Delaware follow the Restatement (Second) of Contracts with respect to the third party beneficiary doctrine. The elements to establish intended third party beneficiary status are the following:

- the contracting parties must have intended that the third party beneficiary benefit from the contract,
- the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and
- the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract.

Madison Realty Partners 7, LLC v. Ag ISA, LLC, C.A. No. 18094, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001).[5] As explained by one court, the right to recover as a third-party beneficiary depends upon whether the language of the contract shows an intent to protect or confer a benefit on the third party. See Royal Indemnity Co. v. Alexander Inds., Inc., 211 A.2d 919 (Del. 1965). The Restatement (Second) of Contracts § 302 further provides:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:

[5] Attached as Appendix C is the unpublished opinion of the Delaware Court of Chancery in Madison Realty Partners 7, LLC v. Ag ISA, LLC, C.A. No. 18094, 2001 WL 406268 (Del. Ch. Apr. 17, 2001). Pursuant to R. 1:36-3, a copy of this opinion has been provided to the Court and all parties. Counsel is not aware of any contrary unpublished opinions.

> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary[6]; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. [Restatement (Second) of Contracts § 302.]

B. New Jersey Is an Intended Third Party Beneficiary of the SPA.

1. Maxus and OCC intended that New Jersey benefit from the SPA.

Parties to a contract often specifically disavow that they intend to benefit third parties. This is not the case with the SPA. Rather, the SPA provides that:

> Article XII. Section 12.06 Third Parties. Except as specifically set forth or referred to herein (including, without limitation, Articles IX and X and Section 12.03 hereof), nothing herein expressed or implied is intended or shall be construed to confer upon or give any Entity,[7] other than the parties hereto and their successors and permitted assigns, any rights or remedies under or by reason of this Agreement. [See Statement of Facts at ¶ 77; Ex. 57 at OCCNJ0000373].

Thus, third parties who are intended to benefit from the contract may be those referenced in Article IX and X. Article IX is the indemnification provision. Article X is the cost-sharing provision for the active sites or operations. Section 12.03 is the provision providing for assignment of the rights and obligations the parties have under the SPA. In all of these provisions, the claims for which Maxus must indemnify OCC include the environmental claims of state entities like the State of New Jersey in this case. Moreover, Section 12.11 (entitled

[6] The Comment also provides:

> b. Promise to pay the promisee's debt. The type of beneficiary covered by Subsection (1)(a) is often referred to as a "creditor beneficiary." In such cases the promisee is a surety for the promisor, the promise is an asset of the promisee, and a direct action by beneficiary against promisor is normally appropriate to carry out the intention of promisor and promisee, even though no intention is manifested to give the beneficiary the benefit of the promised performance. Promise of a performance other than the payment of money may be governed by the same principle if the promisee's obligation is regarded as easily convertible into money, as in cases of obligations to deliver commodities or securities which are actively traded in organized markets. Less liquid obligations are left to Subsection (1)(b).

[7] Entity is a defined term in the SPA. The definition does not include governmental agencies. But elsewhere in the SPA, it is clear that governmental agencies such as the DEP are considered to be an "Entity" in the SPA. See Ex. 57 at OCCNJ0000344, at Section 9.03(a) (indemnifying parties for claims "by any Entity, including without limitation, any Governmental Agency.…").

Historical Obligations), although not specifically mentioned above, requires Maxus to obtain "amendments, novations, releases, waivers, consents or approvals necessary to have each of the DSCC Companies released from its obligations and liabilities under the Historical Obligations" and to "remain in compliance with its … Historical Obligations." Section 12.11 also requires Maxus to provide a guarantee in return for any necessary amendments, novations, releases, waivers, consents or approvals.

The "Third Party" section of the SPA specifically references third parties referred to in Articles IX and X. Parties contemplated by those articles include governmental entities, like Plaintiffs, who have outstanding environmental claims against DSCC. Pursuant to these Articles and related attachments, the Lister Site (or Newark) was included as an identified obligation and liability. See Statement of Facts at ¶ 77; Ex. 57 at OCCNJ00001202-03. Therefore, Plaintiffs were intended to be covered by the indemnification provisions of the SPA.

As this Court has previously stated:

> Now I do think the State could probably make out an argument that they were a third party beneficiary at the time of the contract concerning the sale and indemnification because, admittedly, both parties that we have … Maxus and OCC, they were aware at that time and they did discuss, and they did incorporate, and they did determine under certain sections where any liability for the Lister Site would be. [See Ex. 51, Hearing Transcript at p. 213, July 15, 2011].

The additional discovery taken in this case only affirms these facts and further demonstrates how integral the promised indemnification for Lister Site liabilities was to the stock sale of DSCC that ultimately occurred.

2. The third-party benefit was an established obligation to New Jersey that was a material component of the SPA.

The dioxin contamination at the Lister Site was and is a significant environmental problem. Maxus knew before the SPA was signed that it faced significant exposure to the State, and had already incurred financial costs in connection with that liability. See Statement of Facts at ¶ 78; Ex. 56 at OCCNJ0001213. Therefore, when Maxus promised to indemnify OCC for this liability, New Jersey was more than a mere incidental beneficiary of that promise.

Maxus, DSCC and OCC were aware that the liabilities were real and significant and that Maxus's indemnification was a material consideration in the sale of DSCC to OCC. See Statement of Facts at ¶¶ 78-79; Ex. 56 at OCC0001213 (citing that handling of DSCC liabilities will have a significant effect on the overall value of the sale of DSCC and specifically listing the Lister Site liabilities); Ex. 128, OCC's Track III Admissions, at Request No. 3 (OCC admits that it and Maxus were aware of potential Environmental Liabilities associated with … discontinued operations of the Lister Plant.). Indeed, Maxus has subsequently spent millions of dollars defending OCC in litigation related to the Lister Site pursuant to this significant indemnification responsibility. See Statement of Facts at ¶ 146.

Additionally, OCC would not have purchased DSCC from Maxus if it thought Maxus would not cover DEP's claims relating to the Lister Site. See Ex. 128, OCC's Track III Admissions, at Request No. 1 (admitting that OCC "would not have executed the Stock Purchase Agreement without indemnification for the Environmental Liabilities associated with the Lister Plant"). Moreover, OCC admits that it expected Maxus to provide its necessary guarantees to cover the Historical Obligations of the Lister Site. See Ex. 128, OCC's Track III Admissions, at Request No. 6 (admitting that OCC intended that Maxus (1) use its best efforts to have OCC released from its Historical Obligations, or otherwise remain in compliance with its Historical Obligations and (2) provide a guarantee in consideration of any amendments, novations, releases, waivers, consents or approvals related to the Historical Liabilities). Compliance with this provision of the SPA would necessarily inure specifically to the benefit of Plaintiffs.

Significantly, Maxus itself has recognized in the past that the indemnification of OCC for what was owed the State was a critical part of the sale of DSCC. See Statement of Facts at ¶¶ 78-79; Ex. 56 at OCC0001213 (citing that handling of DSCC liabilities will have a significant effect on the overall value of the sale of DSCC and specifically listing the Lister Site liabilities). Maxus also provided a copy of the indemnification provisions of the SPA to the DEP to assure it that it would cover the environmental costs related to the Lister Site. See Statement of Facts at ¶ 81; Ex. 129 at MAXUS0694274-75.

Finally, the Restatement recognizes that a determining factor of intended third-party beneficiary status is whether the indemnifying party under the agreement pays the debt directly to the plaintiff. See Restatement (Second) of Contracts § 302, at Comment b, Illustration 3:

> B promises A to pay whatever debts A may incur in a certain undertaking. A incurs in the undertaking debts to C, D and E. If the promise is interpreted as a promise that B will pay C, D and E, they are intended beneficiaries under Subsection (1)(a); if the money is to be paid to A in order that he may be provided with money to pay C, D and E, they are at most incidental beneficiaries.

Maxus and later, Tierra, paid OCC's debts directly to Plaintiffs and even represented that Maxus was handling the Lister Site obligation directly. See Statement of Facts at ¶ 87, Ex. 66 at OCCNJ0022724, ¶ 1; Ex. 85 at MAXUS0047560, ¶ 1. Thus, Plaintiffs are intended beneficiaries who are allowed to directly enforce the SPA in order to receive its benefits.

POINT IV

MAXUS IS THE ALTER EGO OF TIERRA AND IS LIABLE AS A PROPERTY OWNER UNDER THE SPILL ACT

Tierra has been found liable under the Spill Act based on its ownership of the Lister Site. See Order, dated August 24, 2011. From the time of its incorporation to the present, however, Tierra has been unable to satisfy these liabilities. See Statement of Facts at ¶¶ 116, 134-136. In fact, Tierra was never intended to be able to pay the costs of remediating the Sites that it owned.

See id. at ¶ 136. Instead, Tierra was created merely to hold title to contaminated properties for the benefit and purposes of Maxus. See id. at ¶¶ 110-119. Tellingly, in 1996, outside counsel explained to Defendant YPF, S.A. that Tierra's assets "consist[ed] mainly of contaminated properties previously used in connection with discontinued operations of [Maxus's] former chemicals business or purchased by Maxus or its predecessors as a part of [Maxus's] overall environmental defense strategy." See Ex. 97 at YPF0210163, ¶ 3. That strategy included the placement of legacy contaminated properties in a "Chemical Land Holdings" company—a/k/a Tierra—so that strict statutory landowner liability would not attach to Maxus. See Statement of Facts at ¶¶ 153-170. Therefore, under the well-established law of New Jersey, Maxus is the alter ego of Tierra and is liable under the Spill Act by virtue of its ownership of the Lister Site. See Ex. 124 at AA-YPF-0038918-24.

A. The Law of Alter Ego Is Well-Established in New Jersey.

As explained by our Supreme Court in Ventron, and in other New Jersey case law, the elements for establishing that one company is the alter ego of another are straightforward and well-established. Ventron, supra, 94 N.J. at 500-01. In general, "a corporation is a separate entity from its shareholders." Id. at 500. This remains so when the shareholder is, in fact, another corporation. "[M]ere ownership of a subsidiary does not justify the imposition of liability on the parent." See Verni v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 198 (App. Div. 2006) (internal quotations omitted). Nevertheless, courts will pierce the corporate veil of a parent when the alter ego elements are established. Veil piercing is an equitable remedy whereby "the protections of corporate formation are lost" and the parent corporation may be found liable for the actions of the subsidiary. Interfaith Cmty. Org. v. Honeywell Int'l, Inc. ("Interfaith"), 215 F.Supp.2d 482, 497 (D.N.J. 2002). In that regard, "piercing the corporate veil is not technically a mechanism for imposing legal liability, but for remedying the fundamental unfairness [that] will result from a failure to disregard the corporate form." Verni, supra, 387 N.J. Super. at 199 (internal quotations omitted).

In order to warrant piercing the corporate veil of a parent corporation, two elements must be established: (1) that the subsidiary was dominated by the parent corporation; and (2) that adherence to the fiction of a separate corporate existence would perpetuate a fraud or injustice or otherwise circumvent the law. Ventron, supra, 94 N.J. at 500-01; Verni, supra, 387 N.J. Super. at 199. With respect to the first prong, our courts consider whether "the parent has so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent." Ventron, supra, 94 N.J. at 500-01. Factors that aid in this analysis include:

1. Whether the subsidiary was grossly undercapitalized;
2. The day-to-day involvement of the parent's directors, officers and personnel with the subsidiary;
3. The nonfunctioning of the subsidiary's officers and directors;
4. The failure to observe corporate formalities;
5. Insolvency of the subsidiary;
6. Whether the subsidiary lacks corporate records;
7. The siphoning of funds from the debtor corporation by the dominant stockholder;
8. The absence of corporate funds;
9. The failure of the subsidiary to pay dividends; and
10. Whether the corporation is merely a façade for the operations of the dominant stockholder.

Ventron, supra, 94 N.J. at 501; Verni, supra, 387 N.J. Super. at 200; Interfaith, supra, 215 F.Supp.2d at 497; Pharmacia Corp. v. Motor Carrier Servs. Corp., et al. ("Pharmacia"), 2006 WL 3533881 at *15 (D.N.J. Dec. 7, 2006).[8] These interrelated factors are not dispositive but are useful in determining both the degree and extent of any corporate dominance by the parent over

[8] Attached as Appendix D is the unpublished opinion of the United States District Court for the District of New Jersey in Pharmacia Corp. v. Motor Carrier Servs. Corp., et al., 2006 WL 3533881 (D.N.J. Dec. 7, 2006). Pursuant to R. 1:36-3, a copy of this opinion has been provided to the Court and all parties. Counsel is not aware of any contrary unpublished opinions.

its subsidiary and whether such dominance is different both in kind and degree from the typical parent/subsidiary relationship.

The party seeking to pierce the corporate veil bears the burden of proving the legal elements that establish an alter ego relationship. Tung v. Briant Park Homes, Inc., 287 N.J. Super. 232, 240 (App. Div. 1996); Verni, supra, 387 N.J. Super. at 199. While the inquiry is fact-specific, in cases like this one where significant environmental liabilities are at issue, courts have held that either the presence or absence of the alter ego relationship can be established as a matter of law based on the review of dispositive facts. See Pharmacia, supra, 2006 WL 3533881; Interfaith, supra, 215 F.Supp.2d at 482.

B. The Undisputed Dispositive Facts Demonstrate that Maxus Is the Alter Ego of Tierra.

1. At all times during the Time Period, Maxus dominated Tierra such that Tierra existed solely for the benefit and purposes of Maxus.

Maxus and Tierra admit that, during the Time Period, Tierra's function was to hold title to certain real property, principally former chemical plants operated by Old Diamond (the "Sites"), which were contaminated. See Statement of Facts at ¶¶ 110-114. They further admit that Tierra held title to the contaminated Sites to "facilitate Maxus's remediation [of them] on OCC's behalf in response to claims for indemnity under the SPA." See id. at ¶ 117. As such, Maxus and Tierra admit that Tierra was a mere instrumentality of Maxus. See Verni, supra, 387 N.J. Super. at 200; Interfaith, supra, 215 F.Supp.2d at 497 (stating that "veil piercing is proper when a subsidiary is an alter ego or instrumentality of the parent corporation"). A closer look at their relationship reveals total domination over Tierra on the part of Maxus.

2. Dominance factors that focus on the subsidiary's funding.

Several of the dominance factors center on the overall funding or wealth of the subsidiary, including the degree to which a subsidiary is essentially unable to function financially without the parent. These factors include "undercapitalization," "insolvency" or "lack of corporate funds," and any "siphoning of funds" by the parent from the subsidiary.

Undercapitalization is not determined by negative net worth, low net worth, or necessarily a low amount of initial capitalization. Rather, inadequate capitalization means that "capitalization is very small in relation to the nature of the business of the corporation and risks … to such businesses." Verni, supra, 387 N.J. Super. at 200; see also Interfaith, supra, 215 F.Supp.2d at 499. "The adequacy of capital is to be measured as of the time of formation of the corporation," as a "corporation that was adequately capitalized when formed, but which subsequently suffers financial reverse is not undercapitalized[.]" Verni, supra, 387 N.J. Super. at 200. As the Verni court stated, the analysis centers on the business purpose of the corporation and whether or not the initial capitalization adequately covers the risks associated with that business purpose. See id. Moreover, this analysis is relevant to whether "the corporation was established to defraud its creditors or other improper purpose such as avoiding the risks known to be attendant to a type of business." Id.

In Pharmacia, the court found that a subsidiary was undercapitalized because it bought a previously contaminated property and did not have the funds to cover the environmental liabilities associated with it. Pharmacia, supra, 2006 WL 3533881 at *15. It was also uncontested in that case that the subsidiary, Motor Carrier Services Corp., had no revenues and could not demonstrate that it had the funds to cover any potential liabilities that would have arisen as result of the subsidiary's ownership of the Kearny hazardous waste site and the issuance of a DEP directive related to the Passaic River. Id. Following the reasoning set forth in Pharmacia and other case law, undercapitalization of the subsidiary and the other factors showing an inability to pay debts proves not only the dominance of the parent but also the possibility that the subsidiary was established to avoid debt or otherwise perpetrate an injustice. Id. at *15-16.

In this case, from the time of its incorporation to the present, Tierra has been completely unable to satisfy the liabilities that accompanied its original business purpose as a land holding company of properties laden with legacy environmental liabilities from Old Diamond's chemical operations. See Statement of Facts at ¶¶ 118, 120-122, 124-126, 128-132, 134-147. Maxus and Tierra admit that, at the time Tierra acquired title to the Sites, they knew the Sites were subject to significant remedial measures that could cost millions of dollars. See id. at ¶ 116. They also admit that Tierra was never intended to be able to satisfy the remediation costs associated with the Sites that it owned. See id. at ¶ 136. Moreover, they admit that Tierra never had the funds to pay these costs. See id.

Maxus and Tierra may argue that Tierra was initially capitalized with sufficient funds to pay for those expenses incidental to its land ownership. See Interfaith, supra, 215 F.Supp.2d at 499-500 (finding that plaintiff must show that the subsidiary was initially undercapitalized). But even that is not true. At best, Tierra was initially capitalized with $1,000 after issuing 1,000 shares of Common Stock. See Statement of Facts at ¶¶ 128-132. Even if Tierra's only expenses and anticipated liabilities were the "nominal expenses" of land ownership, such as the payment of property taxes, Tierra was grossly undercapitalized from inception. This is because Maxus and Tierra admit that Tierra's funding for even these nominal expenses was supplied by Maxus. See id. at ¶ 124. During the Time Period, Tierra had no bank accounts in its name, it never intended to generate revenue or earn a profit, and it, in fact, did not generate any revenue or earn a profit with the minor exception of the sale of certain parcels of land associated with the former chemical plant site in Painesville, Ohio. See id. at ¶¶ 120-122. Indeed, by the end of 1994, records indicate that Tierra had accrued nearly $3 million in intercompany payables—a liability to Maxus that Tierra was under no agreement, and in no position, to reimburse. See id. at ¶¶ 120-126.

Moreover, as in Pharmacia, the expenses and potential liabilities that Tierra acquired as landowner of contaminated properties were not limited to property taxes. Tierra has been adjudged Spill Act liable in this case, and it has for many years been a Respondent to the DEP's ACOs related to the Kearny Site. See Order, dated August 24, 2011; Ex. 124 at AA-YPF-0038918-24. At no time has Tierra been able to "demonstrate that it has the funds to cover any potential liabilities that may arise as a result of these [and other] proceedings." See Pharmacia, supra, 2006 WL 3533881 at *15.

Finally, while Tierra does not have any funds for Maxus to siphon, it has also not received any legal or financial benefit resulting from its purpose. Maxus and Tierra admit that Tierra never charged Maxus any kind of rent, access fees or services fees in connection with any activities that it performed "to facilitate Maxus's remediation [of the Sites] on OCC's behalf in response to claims for indemnity under the SPA." See Statement of Facts at ¶¶ 117-118. Therefore, Maxus has essentially siphoned whatever funds Tierra could have generated during the Time Period. See Interfaith, supra, 215 F.Supp.2d at 500 (finding no evidence of the parent extracting funds from the subsidiary).

3. Dominance factor regarding the failure to pay dividends.

Another one of the factors related to the dominance of the parent over its subsidiary is whether or not the subsidiary has ever paid dividends to its shareholders. Verni, supra, 387 N.J. Super. at 200; Interfaith, supra, 215 F.Supp.2d at 497; Pharmacia, supra, 2006 WL 3533881 at *15. Maxus and Tierra admit that, during the Time Period, Tierra never paid a dividend to any shareholder. See Statement of Facts at ¶ 133.

4. Dominance factors regarding corporate activities and formalities.

Another category of factors relates to the extent the parent corporation actually controls the business activities of the subsidiary. Such factors include: (1) the day-to-day involvement of the parent's directors, officers and personnel with the subsidiary; (2) the nonfunctioning of the subsidiary's officers and directors; (3) the observance of corporate formalities and keeping of records; and (4) whether the subsidiary is merely a façade for the dominant stockholder (the parent corporation). Verni, supra, 387 N.J. Super. at 200; Interfaith, supra, 215 F.Supp.2d at 497; Pharmacia, supra, 2006 WL 3533881 at *15. In Pharmacia, the court found it persuasive that the subsidiary, Motor Carrier, had no employees and existed only as a holding company for the contaminated Kearny property. Pharmacia, supra, 2006 WL 3533881 at *16.

Similarly, in Brown-Hill Morgan, LLC v. Lehrer, 2010 WL 3184340 (App. Div. 2010),[9] the court found that it was appropriate to pierce the corporate veil of a commercial real estate entity and require the moving force behind the entity to cover the liabilities of that entity. In that case, "Lehrer," the "moving force" in the real estate deal at issue, worked through the entity "JC Morgan," which consisted of his son and his nephew. Id. at *11. The court found, however, that it could not ignore corporate reality. Id. According to the court, "Lehrer was the moving force in JC Morgan[,]" and he directed that the property that was the subject to particular liabilities be developed in a specific way. Id. "[Lehrer] had the initial concept to develop [the property] into a modern, multi-use structure. He was intimately involved in all aspects of the project, and he took on the responsibility to see to the critical first step, obtaining the necessary entitlements." Id. The court found that although Lehrer was free to structure his business operations as he saw

[9] Attached as Appendix E is the unpublished opinion of the Appellate Division in Brown-Hill Morgan, LLC v. Lehrer, 2010 WL 3184340 (App. Div. 2010). Pursuant to R. 1:36-3, a copy of this opinion has been provided to the Court and all parties. Counsel is not aware of any contrary unpublished opinions.

fit, and was also entitled to benefit from tax savings incident to his efforts, he could not do so at the expense of avoiding liability for what were his actions. Id. As the court stated, "Lehrer was entitled to structure the transaction in a manner to maximize his own return, but he [could not], in a court of equity, be permitted to walk away from the reality of the transaction, [as] [e]quity regards substance rather than form." Id. (citing Assoc. Home Equity Servs. Inc. v. Troup, 343 N.J. Super. 254, 276 (App. Div. 2001); Fortugno v. Hudson Manure Co., 51 N.J. Super. 482, 500-01 (App. Div. 1958); Ardito v. Bd. of Trustees, Our Lady of Fatima Chapel, 281 N.J. Super. 459, 468 (Ch. Div. 1995).

In this case, Tierra has been completely dominated by Maxus and had no significant business purpose other than to serve Maxus. As in the Pharmacia case, Tierra was simply the holding company for properties, like the Lister Site, that Maxus was contractually obligated to address. See Statement of Facts at ¶¶ 110-114. Maxus, not Tierra as landowner, has controlled and funded the remediation efforts related to the Lister Site. See id. at ¶ 151. Meanwhile, Tierra had no independent business purpose other than to "facilitate" Maxus's remediation efforts as landowner. See id. at ¶¶ 117-118, 151. Tierra had no bank accounts or employees, was not adequately capitalized, never paid dividends, and "received all or substantially all of its funding from Maxus." See id. at ¶¶ 148-149. Even activities incidental to land ownership, such as the payment of taxes and the negotiation of lease agreements or land sales, were carried out by Maxus "on behalf of Tierra" since Tierra had no employees or bank accounts of its own. See id. at ¶ 150. All of Tierra's officers and directors during the Time Period also held positions with Maxus. See id. at ¶ 152. Tierra simply could not function on its own; rather, Tierra was a holding company that simply existed to serve its parent corporation, Maxus. In other words, Tierra is merely a façade for the operations of Maxus.

5. Maxus designated Tierra as the landowner of contaminated sites to avoid strict statutory landowner liability.

In addition to the dominance factors, courts also look to whether adherence to the corporate fiction would perpetuate a fraud or injustice or otherwise circumvent the law. Verni, supra, 387 N.J. Super. at 199-200. One of the hallmarks of a corporation being used to perpetuate fraud or injustice is where its parent has controlled a subsidiary for its own benefit, while rendering it unable to satisfy its liabilities. Id. at 203. In Pharmacia, the court found that there was sufficient evidence to establish this key element because the inability of the subsidiary to satisfy a potential adverse judgment would mean that adherence to the corporate form would necessarily perpetuate an injustice. Pharmacia, supra, 2006 WL 3533881 at *16. Following the reasoning in Pharmacia, this key element for alter ego liability has also been satisfied in this case.

In addition, other courts have found it significant and dispositive when a parent corporation forms a subsidiary specifically to divest itself of assets or liabilities. See Trachman v. Trugman, 117 N.J. Eq. 167 (Ch. 1934). In Trugman, for example, a wholesale producer transferred property to a corporation he formed, and the court found a "deliberate intention to escape [legal] responsibility . . . by divesting himself of his business and his real estate holdings." Id. at 168.

In this case, Tierra, as the subsidiary of Maxus, did not simply purchase the Lister Site and other contaminated sites as part of an independent business plan. Tierra is also not an example of a legitimate attempt of a parent corporation to limit environmental risk associated with prospective business operations. Instead, Tierra was formed incident to and after Maxus realized that the Lister Site was laden with significant environmental risk. See Statement of Facts at ¶¶ 116, 153-170. Before Tierra ever acquired title to the Sites, including the Lister Site, Maxus and Tierra knew they were subject to significant remedial measures that could cost millions of dollars to address. See id. at ¶ 116. Maxus also understood the risks and potential exposure that strict liability environmental statutes imposed on owners of contaminated sites. See id. at ¶¶ 153-170.

Before Tierra was ever created, environmental statutes, like CERCLA, the Spill Act and ECRA, imposed liability on landowners for the remediation of contaminated property. See Statement of Facts at ¶¶ 153-155. Maxus and Tierra were on constructive notice of these laws. See Karam v. Dept. of Envtl. Prot., 308 N.J. Super. 225, 241 (App. Div. 1998), aff'd, 157 N.J. 187 (1999), abrogated on other grounds, 190 N.J. 307 (2007); Buecher v. Simon, 104 N.J. Eq. 572, 577 (Ch. 1929). Maxus had actual notice of them, too. See Statement of Facts at ¶¶ 156-170.

For example, in April 1985, before Tierra acquired the Lister Site, Maxus personnel wrote to explain the liabilities facing then-Lister Site owner, Marisol, Inc., stating that "[t]he recent development (1984) by New Jersey (ECRA) to require cleanup of all manufacturing facilities before a sale can be made would now be a considerable liability to [Marisol] if [it] should attempt to sell on the open market. It would cost [Marisol] what it is going to cost us." See Ex. 113 at MAXUS0330031-32. As landowner of the Lister Site, Marisol also faced Spill Act liability to the DEP. In March 1984, it was named as a Respondent along with DSCC in an Administrative Consent Order ("ACO") related to the cleanup of the Lister Site. To resolve Marisol's "continuing liability" under the ACO "and to dispose of litigation claims by Marisol against Diamond Shamrock[,]" DSCC settled claims with Marisol by agreeing to purchase the Lister Site. See Statement of Facts at ¶¶ 157-158.

Similarly, in connection with the ACOs related to the Lister Site, the DEP required respondents to provide financial assurances in the amount of $12 million and $4 million to ensure that "funds will be available when needed" for the performance of remedial actions. Initially, these financial assurances were provided by DSCC. But, after the Lister Site was transferred by DSCC to Tierra, the financial assurances were established on the account of Tierra, whose only connection to the Lister Site was as landowner. See Statement of Facts at ¶¶ 159-164.

The formation of Tierra was part of an elaborate plan to divest DSCC and Maxus of the liability associated with owning the Lister Site and place it into an entity with no revenue and no conceivable means to pay for it. Although Maxus ultimately agreed vis-à-vis OCC (DSCC's legal successor) to assume responsibility for the Lister Site liabilities, it avoided independent statutory liability as the landowner by placing the legacy property into Tierra. By doing so, Maxus sought to escape direct liability to the State of New Jersey and supplied it with the means to challenge its contractual obligations to OCC – an activity it has been pursuing for years, including in this case. Such injustice cannot stand under our laws.

POINT V

MAXUS IS "IN ANY WAY RESPONSIBLE" UNDER THE SPILL ACT

Under the discussed common-law principles, Maxus is liable for the hazardous substances discharged from the Lister Site. But even if Plaintiffs cannot establish one or more of the elements necessary to hold Maxus liable under the common-law doctrines discussed above, Maxus is "in any way responsible" for Lister Site liabilities under the expansive reach of the Spill Act. The standard for Spill Act liability is broadly stated as follows: "Any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred." N.J.S.A. 58:10-23.11g.c(1).

The phrase "in any way responsible" is not precisely defined in the Spill Act. However, our Supreme Court has interpreted this phrase broadly holding that "a party even remotely responsible for causing contamination will be deemed a responsible party under the Act." In re Kimber Petroleum Corp., 110 N.J. 69, 85 (1988) (citing Ventron, supra, 94 N.J. at 473). An expansive construction of the Spill Act's liability provision is consistent with the Legislature's express direction to the judiciary that the Spill Act "shall be liberally construed to effect its purposes." N.J.S.A. 58:10-23.11x; Marsh v. Dept. of Envtl. Prot., 152 N.J. 137, 146 (1997). Thus, the Spill Act intentionally "casts a broad net encompassing 'all other dischargers and persons in any way responsible for a discharged hazardous substance.'" Pitney Bowes, Inc. v. Baker Indus., Inc., 277 N.J. Super. 484, 488 (App. Div. 1994). "Indeed the operative language of the statute – 'in any way responsible' – could hardly be any broader." See Maxus's Response to Plaintiffs' Motion to Dismiss Counterclaims.

A. An Expansive Interpretation of the Spill Act Rests Upon a Well-Established Legislative Commitment to Comprehensively Address Legacy Pollution in New Jersey.

The Spill Act represents an evolving, "pioneering effort by government to provide the monies for a swift and sure response to environmental contamination." Buonviaggio v. Hillsborough Twp. Comm., 122 N.J. 5, 7 (N.J. 1991). At first, it streamlined traditional means of determining liability and "imposed strict liability on polluters." In re Adoption of N.J.A.C. 7:26E 1.13, 377 N.J. Super. 78, 86 (App. Div. 2005), aff'd, 186 N.J. 81 (2006). Soon after its enactment in 1976, and with an increased awareness of the extent of toxic pollution in the State, the scope of the Spill Act's liability provision was expanded. Buonviaggio, supra, 122 N.J. at 9 ("The cruder threat of the spreading oil slick was displaced as the primary concern by the vastly more complex hazard posed by the unseen and unknown contamination of natural resources."). Joint and several liability was added to the Spill Act's strict liability scheme, and liable "persons" expanded from "dischargers" to those "in any way responsible" for hazardous substances. L. 1979, c. 346, § 5; see also Kimber, supra, 110 N.J. at 88-89 (1988) (C.J. Wilentz, dissenting) ("The Legislature's decision to use unconventional remedies in the [Spill Act] was based on a valid perception that this state faces an enormous environmental problem and that a great deal of money will be required to address it.").

These early amendments reflected a growing awareness of and concern for the hazards posed by New Jersey's industrial pollution. The Legislature expressly recognized that "discharges of toxic chemicals dating back to early industrialization have left a legacy of contaminated industrial property in this State." N.J.S.A. 13:1K-7. At one time, the courts noted that there were more than 20,000 suspected contaminated industrial properties in New Jersey. Metex Corp. v. Federal Ins. Co., 290 N.J. Super. 95, 111 (App. Div. 1996). Our Supreme Court further observed that "the dumping of untreated hazardous waste is a critical societal problem in New Jersey, which the Environmental Protection Agency estimates is the source of more hazardous waste than any other state." Ventron, supra, 94 N.J. at 492-93.

The Spill Act was the first of several environmental statutes with broad remedies enacted by the Legislature to combat this enormous problem. The Spill Fund was established as the primary source for paying emergent cleanup and removal costs, and damage claims to those injured by a discharge. In turn, the Spill Fund was given a wide range of tools to recover funds from those deemed responsible. The legislative concern for protecting the corpus of the Fund from depletion is evident throughout the statute. In his dissent in Kimber, supra, Chief Justice

Wilentz reviewed the overall scheme of the Spill Act and detailed the various provisions that were enacted to prevent depletion of the Fund, but found as follows:

> Despite its size, the Fund does not begin to meet New Jersey's cleanup needs. The problem of remedying both today's new spills and the consequences of past pollution far exceeds the limits of the Spill Fund. [footnote omitted] It is obvious that more resources are needed. [Kimber, supra, 110 N.J. at 89-90.]

The Chief Justice concluded that the "Legislature decided that whatever else was needed would come not from the taxpayers but from the polluters themselves." Kimber, supra, 110 N.J. at 90-91.

B. Maxus's Actions Establish That It Is "In Any Way Responsible" Under the Spill Act.

As has been demonstrated throughout this Brief, Maxus is nothing more than a new hat for the corporation that used the Passaic River as its dump site for toxic wastes. New Diamond/Maxus took the Diamond Shamrock Corporation name and continued to benefit from its businesses. New Diamond/Maxus orchestrated the strategic reorganization of Old Diamond, assumed Old Diamond's valuable assets, and pursued a multiple year strategy designed to avoid statutory liability for the Lister Site by placing such responsibility with an undercapitalized subsidiary. Similarly, Maxus's efforts to place title to the land in Tierra, another grossly undercapitalized subsidiary, helped it evade established, independent liability as a landowner under the Spill Act.

There is no better example of New Jersey's refutation of such corporate maneuvering than the seminal Ventron case, which demonstrates that our laws do not allow a polluter to wash itself of liability through corporate metamorphosis and sleight of hand. In 1983, the same year that dioxin was discovered at the Lister Site, our Supreme Court considered the effect of the 1979 Spill Act amendment on corporations who were not dischargers but who were related to the actual discharger. Ventron, supra, 94 N.J. at 473. In Ventron, the Supreme Court imposed Spill

Act liability on a corporation's parent, as a person "in any way responsible" for its subsidiary's discharges, without piercing the corporate veil. Id. at 501-03.

The Supreme Court's reasoning provides a strong precedent for finding that Maxus is "responsible" within the meaning of the Spill Act. Ventron concerned DEP's efforts in response to mercury contamination of Berry's Creek resulting from the operation of a single mercury processing plant. Id. at 481, 483-84. F.W. Berk & Company, Inc. ("Berk") operated a plant from 1929 until 1960, first as a lessee and then as an owner. Id. at 483. In 1960, Velsicol Chemical Corporation ("Velsicol") decided to buy Berk's assets. Id. at 483-84. In order to accomplish the acquisition, Velsicol formed Wood Ridge Chemical Corporation ("Wood Ridge") "as a wholly-owned subsidiary for the sole purpose of purchasing Berk's assets and operating the . . . plant." Id. at 483. After the asset sale, Berk dissolved. Ibid.

Wood Ridge operated the plant until 1968, when Velsicol sold the stock of Wood Ridge to Ventron Corporation ("Ventron"). Id. at 484. Wood Ridge continued to operate the plant under Ventron until 1974, at which time Wood Ridge merged into Ventron. Id. at 485. Ventron then ceased operations and conveyed the tract to a commercial developer, Robert Wolf. Ibid.

During the course of plant operations, mercury-laden effluent was dumped and allowed to drain from the tract. Id. at 483-85. Ultimately, environmental authorities stepped in to remediate the mercury contamination, and the DEP filed suit to recover cleanup and removal costs against Ventron, Velsicol, Wood Ridge and Wolf. Id. at 482. The trial court and Appellate Division held Ventron liable because it expressly assumed the liabilities of Wood Ridge in their merger. Id. at 485, 486. The trial and Appellate Division also pierced the corporate veil of Velsicol to find Velsicol liable for Wood Ridge's discharges. Id. at 486 (noting trial court's finding that "Velsicol so dominated Wood Ridge as to justify disregarding the separate entity of that corporation and imposing liability on Velsicol for the acts of Wood Ridge").

On appeal, the Supreme Court addressed in detail "the propriety of imposing liability under the Spill Act on Ventron and Velsicol for the acts of Wood Ridge." Id. at 499-500. The Supreme Court noted that the lower courts struck that balance by piercing Velsicol's corporate veil, thereby imposing liability on Velsicol for the pollution caused by its subsidiary, Wood Ridge. Ibid. The Supreme Court disagreed with the basis of the lower courts' ruling, finding insufficient grounds to pierce Velsicol's corporate veil, noting that the lower courts found it "immaterial" that Wood Ridge was not undercapitalized and that it did not engage exclusively in business with Velsicol. Id. at 500-01. Instead, the Supreme Court relied upon the "in any way responsible" language of the Spill Act's liability provision to impose liability on Velsicol. Unlike the facts in Ventron, however, the evidence before this Court shows that Tierra was grossly undercapitalized and that its function was completely in servitude to Maxus's needs and protection from direct ownership liability, thereby meeting the criteria to pierce the corporate veil. Nevertheless, even if the facts were to be considered insufficient to pierce the corporate veil, the Spill Act, as in Ventron, provides a sufficient basis for imposing liability.

Therefore, even should this Court determine that all of the common law elements of equitable successor liability, alter ego, or third-party beneficiary status are not met, the overriding breadth of the Spill Act requires a finding that Maxus is "in any way responsible" for the Lister Site discharges and hazardous substances. Ventron instructs that the mere corporate form cannot be used as a shield to protect an entity from Spill Act liability. See In Re Adoption of N.J.A.C. 7:26B, 250 N.J. Super. 189, 215-16 (App. Div. 1991) (noting the import of Ventron is that the generally-applicable rules of corporate liability are loosened when considering Spill Act liability because the enabling statute specifically authorizes this result).

Functionally, Maxus is the driving force behind the Lister Site environmental litigation defense strategy. It has also been the party who has been consistently responsible for the hazardous substances discharged from the Lister Site, precisely because it has orchestrated where the assets available to address the liabilities associated with those discharges have been placed.[10] Moreover, the SPA, while intended to provide indemnification for OCC and protect the State, instead has become another tool in Maxus's defensive arsenal. Maxus has attempted to avoid its statutory liability by exchanging it for a contractual obligation to OCC that it is now determined to shake. Plaintiffs' recovery in this case necessitates finding Maxus directly liable for Old Diamond's discharges. Accordingly, this Court should hold that Maxus is "in any way responsible" for the Lister Site discharges under the Spill Act.

CONCLUSION

Plaintiffs respectfully submit that there is no genuine issue as to any material fact and that they are entitled to partial summary judgment as a matter of law that:

1. Maxus is jointly and severally liable under the Spill Act for the hazardous substances discharged at and/or from the Lister Site as detailed in this Court's prior orders.

2. Maxus is the mere continuation of, and, therefore, the equitable corporate successor to, Old Diamond and DSCC. OCC remains the legal successor to DSCC.

3. Plaintiffs are intended third party beneficiaries under the SPA and may enforce the SPA against Maxus.

4. Maxus is the alter ego of Tierra and is responsible for satisfying any judgment against Tierra for Lister Site Spill Act liability.

[10] Until, of course, the assets were subsequently moved further away from the environmental liabilities by YPF and Repsol in future reorganizations beginning circa 1995-1996.

5. Maxus is "in any way responsible" from the discharges from the Lister Site into the Passaic River from 1946-1969.

Plaintiffs respectfully request that, pursuant to R. 4:46-3, the Court enter an order accordingly and set the remaining issues for trial. However, if granted, no other issues will remain for trial in Track III.

Respectfully submitted,

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) and CLH HOLDINGS, Defendants. MAXUS ENERGY CORPORATION AND TIERRA SOLUTIONS, INC., Third-Party Plaintiffs, v. 3M COMPANY, et al., Third-Party Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY DOCKET NO. ESX-L9868-05 (PASR) <u>Civil Action</u> APPENDICES TO BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST MAXUS ENERGY CORPORATION

APPENDIX A

APPENDIX A
GLOSSARY OF CRITICAL TERMS/CORPORATE ENTITIES

Chemical Land Holdings, Inc. (CLH) Diamond Shamrock Chemical Land Holdings, Inc. (DSCLH) Tierra Solutions, Inc. (Tierra)	Tierra was formed in March 1986 as Diamond Shamrock Process Chemicals Inc. Its name was changed to Diamond Shamrock Chemical Land Holdings, Inc. (DSCLH) in July 1986. It assumed ownership of the Lister Site in August 1986. Tierra was originally a subsidiary of DSCC, but it became a subsidiary of DS Corporate/Maxus in September 1986. It changed its name to Chemical Land Holdings, Inc. (CLH) in December 1987 and to Tierra Solutions, Inc. in 2002. Tierra has been found liable under the Spill Act as the landowner of the Lister Site.
DEP	New Jersey Department of Environmental Protection.
Diamond Alkali Company Diamond Shamrock Corporation Old Diamond	Diamond Alkali Company was the owner and operator of the chemical plant at 80 Lister Avenue that discharged dioxins and other hazardous substances into the Passaic River from 1951-1967. In 1967, Diamond Alkali Company merged with Shamrock Oil & Gas Company to become Diamond Shamrock Corporation (a/k/a Old Diamond). Old Diamond operated the Lister Plant until 1969 when it closed. Old Diamond was an integrated company operating in various industries until 1983, at which time Old Diamond created a parent company New Diamond. After New Diamond became Old Diamond's parent, Old Diamond formed new subsidiaries in which to place cash and other assets from its various operations. Old Diamond then transferred the subsidiaries' stock to New Diamond. In this motion, "Old Diamond" refers to the corporation holding oil and gas, chemical and mineral assets until the time when the non-chemical assets were transferred to the new subsidiaries. After the asset transfers, this motion refers to the corporation as "DSCC." Old Diamond (as DSCC/OCC) has been found liable under the Spill Act for discharges of hazardous substances from the Lister Plant from 1951-1969.

Diamond Shamrock Chemicals Company (DSCC) Occidental Electrochemicals Company (OEC) Occidental Chemical Corporation (OCC)	DSCC was known from 1928 to 1967 as Diamond Alkali Company, and from 1967 to 1983 as Diamond Shamrock Corporation (Old Diamond). It was re-named Diamond Shamrock Chemicals Company (DSCC) during the 1983 reorganization. DSCC was purchased by an affiliate of OCC from New Diamond in September 1986. After the purchase, DSCC changed its name Occidental Electrochemicals Company (OEC). OEC merged with OCC in December 1987. OCC has been found liable under the Spill Act for discharges of hazardous substances from the Lister Plant from 1951-1969.
Diamond Shamrock Coal Company (DS Coal)	Diamond Shamrock Coal Company (DS Coal) was one of the four New Subsidiaries of Old Diamond, created in October 1983 to receive Old Diamond's coal assets.
Diamond Shamrock Corporate Company (DS Corporate)	Diamond Shamrock Corporate Company (DS Corporate) was one of the four New Subsidiaries Old Diamond created in 1983. Old Diamond gave DS Corporate Old Diamond's corporate assets, which were remaining in Old Diamond after its operating assets were transferred to the other three new subsidiaries. Old Diamond transferred the entity that would become Tierra to DS Corporate in September 1986. DS Corporate remained Tierra's parent company until DS Corporate merged into Maxus.
Diamond Shamrock Exploration and Production Company (DS E&P)	Diamond Shamrock Exploration and Production Company (DS E&P) was one of the four New Subsidiaries of Old Diamond, created in October 1983 to receive Old Diamond's exploration and production assets.
Diamond Shamrock Refining and Marketing Company (DS R&M)	Diamond Shamrock Refining and Marketing Company (DS R&M) was one of the four New Subsidiaries of Old Diamond, created in October 1983 to receive Old Diamond's refining and marketing assets.
Diamond Shamrock Corporation	Diamond Shamrock Corporation is the name held by two different corporations. Before August 31, 1983, Diamond Shamrock Corporation (Old Diamond) was the company that owned and operated the Lister Plant as part of an integrated corporation having oil and gas, mineral and chemical assets. After September 1, 1983, Diamond Shamrock Corporation (New Diamond) was a newly-created corporation. Later, New Diamond received the New Subsidiaries from Old Diamond and assumed Old Diamond's corporate debt.

Lister Site	The former plant site located at 80 Lister Avenue in Newark, New Jersey operated by Old Diamond, together with property located at 120 Lister Avenue.
Maxus Energy Corporation (Maxus)/ New Diamond	Maxus Energy Corporation was formed in 1983 under the name New Diamond Corporation. Its name was changed in September 1983 to Diamond Shamrock Corporation (New Diamond). See Diamond Shamrock Corporation, above. Its name was changed against in 1987 to Maxus Energy Corporation (Maxus).
Natomas Company	Natomas Company (Natomas) was an independent energy company acquired by Diamond Shamrock Corporation in 1983.
New Subsidiaries	In late 1983, Old Diamond created four new subsidiary corporations: DS E&P, DS R&M, DS Coal and DS Corporate.
SPA	The Stock Purchase Agreement (SPA) is the agreement by which Diamond Shamrock Corporation (New Diamond) sold the stock of DSCC to an affiliate of OCC. The SPA contains the indemnification agreement between Maxus and OCC relating to the Lister Site.

APPENDIX B

C
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
FORMAN INDUSTRIES, INC., Plaintiff-Appellant,
v.
Robert BLAKE-WARD and United Fixtures Company, Inc., individually and/or doing business as J & D Associates, National Store Fixtures, and Retail Service Solutions, Defendants-Respondents,
and
Joseph Mc Gowan, Consolidated Contractors, LLC, Lee Donat, Jamie De Reamer, Forte Carpentry, Inc., United Fixtures Company, individually and/or doing business as J & D Associates, National Store Fixtures and Retail Service Solutions, Defendants.

Argued May 7, 2008.
Decided Sept. 15, 2008.

West KeySummary**Labor and Employment 231H 123**

231H Labor and Employment
231HIII Rights and Duties of Employers and Employees in General
231Hk120 Post-Employment Duties
231Hk123 k. Duty Not to Compete in General. Most Cited Cases

An employee did not breach his duty of loyalty to his former employer when, after resigning, he worked for a company that was in direct competition with the employer's business, but did not solicit the employer's customers or divulge confidential information during the course of his employment. The employer failed to provide evidence that the employee diverted confidential information and customers to his new employer. The former employer also failed to provide an employee handbook which made it a violation of company policy to provide confidential or proprietary information to competitors.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-5332-06.
Craig L. Steinfeld argued the cause for appellant (Riker, Danzig, Scherer, Hyland & Perretti, attorneys; Mr. Steinfeld and Julian W. Wells, of counsel and on the brief).

Brian J. Waters argued the cause for respondent Robert Blake-Ward (Drinker Biddle & Reath, attorneys; Mr. Waters and John P. Mitchell, of counsel and on the brief).

John M. Dickman (Winston & Strawn) of the Illinois bar, admitted pro hac vice, argued the cause for respondent United Fixtures Company, Inc., individually and/or doing business as J & D Associates, National Store Fixtures and Retail Service Solutions (Winston & Strawn, and Mr. Dickman, attorneys; James S. Richter and Joshua D. Winneker, on the brief).

Before Judges SAPP-PETERSON, MESSANO and NEWMAN.

PER CURIAM.

***1** This appeal arises out of a former employment relationship between plaintiff, Forman Industries, Inc. (Forman), and defendant, Robert Blake-Ward. Plaintiff claimed that during the course of Blake-Ward's employment with Forman, he breached a duty of loyalty to it by diverting confidential information and customers to his new employer, defendant J & D Associates (J & D), a division of defendant United Fixtures Company, Inc. (UFCI), which induced Blake-Ward to engage in such conduct, and subsequently both Blake-Ward and UFCI reaped the benefits of Blake-Ward's disloyalty. Plaintiff also alleged that defendants' actions constituted unfair competition and misappropriation, tortious interference, breach of contract and unjust enrichment. Finally, plaintiff contended defendants breached state and federal computer protection statutes in the course of their scheme. The motion judge granted defendants' summary judgment motion in its entirety and dismissed plaintiff's complaint. The present appeal followed.

On appeal plaintiff raises the following points for our consideration:

POINT I

IN GRANTING THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, THE TRIAL COURT ERRED BY MISAPPLYING THE APPROPRIATE SUMMARY JUDGMENT STANDARD.

POINT II

BY MISAPPLYING THE SUMMARY JUDGMENT STANDARD, THE TRIAL COURT ERRED IN DISMISSING FORMAN'S CLAIMS FOR BREACH OF DUTY OF LOYALTY.

POINT III

THE TRIAL COURT ERRED IN DISMISSING FORMAN'S CLAIMS FOR MISAPPROPRIATION OF PROPRIETARY OR CONFIDENTIAL INFORMATION AND UNFAIR COMPETITION.

POINT IV

BY MISAPPLYING THE SUMMARY JUDGMENT STANDARD, THE TRIAL COURT ERRED IN DISMISSING FORMAN'S CLAIMS FOR TORTIOUS INTERFERENCE.

POINT V

BY MISAPPLYING THE SUMMARY JUDGMENT STANDARD, THE TRIAL COURT ERRED IN DISMISSING FORMAN'S CLAIMS FOR UNJUST ENRICHMENT.

POINT VI

THE TRIAL COURT ERRED IN DISMISSING FORMAN'S CLAIMS FOR VIOLATION OF THE NEW JERSEY COMPUTER RELATED OFFENSES ACT AND THE FEDERAL COMPUTER FRAUD AND ABUSE ACT.

POINT VII

THE TRIAL COURT ERRED IN DISMISSING FORMAN'S CLAIMS BASED ON BLAKEWARD'S BREACH OF HIS EMPLOYMENT AGREEMENT.

POINT VIII

IN HOLDING THAT UFCI CANNOT BE LIABLE TO FORMAN AS A SUCCESSOR TO UFC, THE TRIAL COURT ERRED IN APPLYING DELAWARE SUCCESSOR LIABILITY LAW AND IGNORING THE EVIDENCE DIRECTLY IMPLICATING UFCI IN BLAKEWARD'S WRONGFUL CONDUCT.

We have considered each of the points raised in light of the record, arguments of counsel, and applicable legal principles. We disagree with the court's determination that UFCI was not a successor corporation to United Fixtures Company (UFC) for liability purposes and the court's determination that “no rational fact-finder could admit the authenticity of [the alleged restrictive covenant],” but conclude that these rulings do not affect the court's grant of summary judgment in favor of defendants. With the exception of these two rulings, we affirm substantially for the reasons set forth in Judge LeBlon's May 25, 2007 comprehensive and well-reasoned written opinion.

***2** Plaintiff, formed in 1984, is a closely held New Jersey corporation that specializes in, among other things, remodeling work and inspection/maintenance services for racks, displays and lighting systems, product displays and storage solutions for the retail and commercial industry across the United States. Although its headquarters is in New

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Jersey, its retail repair operation, Retail Repair Services, where Blake worked, was set up in Atlanta because its biggest customer, Home Depot, is also located there. Forman's majority shareholders are Scott and Steven Forman.[FN1]

> FN1. For ease of reference we refer to Steven and Scott Forman by their first names and intend no disrespect in doing so.

Blake-Ward joined Forman in 2003 and brought with him more than ten years of service in maintenance, retail repair and operations in retail establishments such as Home Depot and The Sports Authority. As a result of his prior relationship with those companies, Blake-Ward had developed a number of contacts within the large retail industry that proved valuable to plaintiff. Blake-Ward reported to Joseph McGowan, who, until his voluntary resignation in January 2005, was Forman's chief operating officer and a director of Forman.

In December 2004, McGowan shared with Blake-Ward his intention to leave the company and to start a business that would compete with plaintiff. McGowan invited Blake-Ward to join him in this new venture. The two men had a number of discussions about the venture, Blake-Ward reviewed the proposed venture's business plan and provided biographical information to McGowan in the event he decided to accept the offer. He ultimately declined the offer. McGowan voluntarily left Forman, effective January 31, 2005, and directed all of his energy to Consolidated Contractors, LLC (Consolidated), a corporation created by the management group of Forman for the purpose of engaging in contracts for union work. When it was created, McGowan was the sole member of Consolidated and it billed Forman for providing union services. It was not formed to compete with plaintiff, but after McGowan left, it became a competitor of plaintiff.

During the same time period that McGowan was discussing Blake-Ward's possible involvement in his new venture, Blake-Ward was not happy with his own employment situation and claimed that he and Scott, whom he described as a “raving lunatic,” were constantly engaged in “bitter arguments” and “butting of heads” over the direction of the business. Blake-Ward shared his concerns about plaintiff's financial stability with a long-time friend, Jeffrey Nicklaus, president of J & D, a division of United Fixtures Company (UFC), who had worked with Blake-Ward when they were employed by Home Depot.

On December 15, 2004, Blake-Ward and Nicklaus met with McGowan to get advice on how to go about purchasing Forman. On December 22, 2004, Blake-Ward and McGowan held a meeting in Michigan with Nicklaus and Darryl Lovett, UFC's chief executive officer, to explore whether J & D was interested in acquiring Forman and to get further advice. Blake-Ward denies that any of plaintiff's financial information was presented during this meeting. J & D was not interested in the proposed venture, but after the meeting Nicklaus called Blake-Ward to inquire whether he was interested in joining J & D.

***3** Nicklaus' discussion with Blake-Ward continued during the month of January 2005 both telephonically and in person at different locations, including Atlanta and Pennsylvania. Blake-Ward also reviewed a document Nicklaus prepared entitled Technical Service Overview (TSO), which addressed expanding J & D's product lines and diversifying its sources of revenue within a growth oriented market. The TSO included a reference to Blake-Ward being retained. Blake-Ward's discussion with Nicklaus and two of J & D's vice-presidents in Pennsylvania on January 14, 2005, also included their disclosure to Blake-Ward of J & D's potential acquisition of Green Technical Services (GTS), a New Hampshire-based equipment service company. Blake-Ward acknowledged that he improperly submitted an expense reimbursement request for that meeting to plaintiff.

At the same time that Blake-Ward was explor-

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ing other employment opportunities, he continued to perform his responsibilities with plaintiff, which included traveling to Florida along with McGowan on January 20 to meet with Ed Costa and Jim Simmons of Office Depot to discuss renewal of plaintiff's contract with Office Depot. Costa and Blake-Ward had known each other since 1992 when Costa also worked at Home Depot with Blake-Ward. Costa did not recall any discussion about McGowan's plans during this meeting or Blake-Ward's employment plans. Simmons, on the other hand, got the impression during the meeting that Blake-Ward and McGowan were partners and that the lighting maintenance contract that Office Depot had with plaintiff would go where Blake-Ward went.

During the latter part of January, Blake-Ward met with Christopher Cruthis of The Sports Authority. Although Blake-Ward told Cruthis that he was leaving Forman, he did not tell Cruthis where he was going or attempt to solicit The Sports Authority's business for any company other than Forman.

On February 8, 2005, Blake-Ward tendered his resignation, was asked to reconsider and, apparently after doing so over a weekend trip to Florida, confirmed his intent to resign. He agreed, however, to delay his departure for one month. Despite being asked on a number of occasions where he was going and whether he would become a competitor, Blake-Ward did not reveal his plans. His resignation became effective March 4, 2005. He immediately joined J & D, which began operating under the name Retail Service Solutions in the same office complex as plaintiff's Retail Repair Services division.

Within a month after Blake-Ward left Forman, Office Depot switched from plaintiff to J & D. According to Costa, Blake-Ward never asked him to switch to J & D, although Nicklaus assumed that Blake-Ward had contacted Office Depot soon after he started at J & D because they met with Office Depot within a week after Blake-Ward joined J & D. Also, shortly after Blake-Ward left Forman, five of plaintiff's employees resigned and commenced employment with J & D. One such employee, Michael White, indicated that he approached Blake-Ward for a position, not the other way around. After commencing employment with J & D in April, White contacted several of plaintiff's employees to see whether they were interested in joining J & D.

***4** In addition to the loss of the contract plaintiff had with Office Depot and several employees to J & D, Scott claimed that plaintiff lost money from its Home Depot account. Blake-Ward denied disclosing confidential information regarding plaintiff to anyone at J & D and denied soliciting plaintiff's employees while still at plaintiff. Moreover, he denied taking any of plaintiff's files. He claimed that White was the only employee of plaintiff with whom he communicated about employment with J & D and did so only after White had contacted him.

On April 4, 2005, plaintiff filed a complaint in the Chancery Division of Superior Court seeking injunctive relief and damages against Blake-Ward, Joseph McCowan, Consolidated, former employees Lee Donat and Jamie DeReamer, and Forte Carpentry, Inc., a former subcontractor of plaintiff. Specifically, plaintiff claimed breach of the duty of undivided loyalty, misappropriation of confidential information, unfair competition, tortious interference, breach of contract, and unjust enrichment. Plaintiff sought preliminary and permanent injunctive relief. In an order dated May 17, 2005, the Chancery Division judge denied plaintiff's request for a preliminary injunction prohibiting defendants from using its confidential or proprietary information, soliciting its customers, and soliciting its employees.

In June 2005, UFCI, a Delaware corporation with headquarters in Indiana, purchased UFC. Like UFC, UFCI did not do business in its own name. Rather, it operated through three divisions, two of which are UFC's former divisions, J & D and National Store Fixtures.

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The parties subsequently reached a settlement of some claims and executed a voluntary stipulation of dismissal on June 14, 2006 as to those claims against Steve and Scott Forman,[FN2] McGowan, Donat, DeReamer and Consolidated. The remaining claims were transferred to the Law Division by order dated July 11, 2006.

FN2. Based on the caption of this and several other orders in the record, it appears that McGowan filed a third-party complaint against Scott and Steve Forman. However, there is no such complaint in the record. In any event, the stipulation of dismissal would have encompassed such a complaint.

Although not part of the record on appeal, plaintiff apparently filed two amended complaints because on July 28, 2006, plaintiff filed a third amended complaint adding UFC and UFCI, as well as J & D, National Store Fixtures, and Retail Service Solutions, as defendants. The latter three entities were the names under which UFC and UFCI did business. In addition, plaintiff added counts alleging violation of New Jersey and federal computer fraud statutes, as well as for conversion, and breach of a restrictive covenant.

Plaintiff retained an expert in corporate finances, Samuel J. Kursh. In his report, Kursh concluded that as a result of Blake-Ward's actions, plaintiff suffered economic damages in lost profits in business diverted to UFCI and Consolidated. Specifically, the report found that between June 1, 2005, and October 31, 2006, plaintiff lost $1,240,482 to UFCI, and would lose an additional approximately $1.5 million by the first quarter of 2008. With respect to Consolidated, the report concluded that plaintiff would lose $1,246,323 by the first quarter of 2008. In addition, the report claimed that plaintiff suffered a loss of $1,622,863 in other damages as a result of Blake-Ward's actions. The total economic loss estimated was $5,590,288.

***5** On April 30, 2007, Blake-Ward and UCFI filed motions for summary judgment. The court conducted oral argument on May 25, 2007 and, on that same date, issued its written decision granting summary judgment.[FN3] UFC did not make an appearance below, but plaintiff apparently never moved for a default.

FN3. Plaintiff voluntarily dismissed its claim against Forte Carpentry, Inc., a breach of subcontract claim, without prejudice on June 20, 2007. A dismissal without prejudice, absent a specific vacation provision or not taken with the sole purpose of rendering an otherwise interlocutory order appealable, is generally appealable. Pressler, *Current N.J. Court Rules,* comment 2.3.3 on *R.* 2:2-3 (2008). Here, there is no vacation provision in the order and nothing to indicate that the sole purpose of the order was to get the matter before the Appellate Division. In addition, because that claim was separate and distinct from plaintiff's claim against defendants, and arises from a different transaction, *Haelig v. Mayor & Council of Bound Brook Borough,* 105 *N.J.Super.* 7, 12, 250 A.2d 788 (App.Div.1969), the instant matter is appealable even if it is technically interlocutory. *Cf. Janicky v. Point Bay Fuel, Inc.,* 396 *N.J.Super.* 545, 550-53, 935 A.2d 803 (App.Div.2007) (addressing cases improperly certified as final under *R.* 4:42-2 where determination did not constitute a complete adjudication of a separate claim).

I.

We first dispense with the trial court's ruling that UFCI could not be held liable as a successor corporation to UFC. The court first determined that Delaware law should be applied because UFC and UFCI are Delaware corporations with no presence in New Jersey and there was also a Delaware choice of law provision in the asset purchase agreement. Analyzing the claim under Delaware law, the court rejected plaintiff's contention that UFCI's pur-

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chase agreement was merely a continuation of UFC's business. While the choice of law provision in the asset purchase agreement governs the parties to the agreement, *Kalman Floor Co. v. Jos. L. Muscarelle, Inc.,* 196 *N.J.Super.* 16, 21, 481 A.2d 553 (App.Div.1984), plaintiff was not a party to that agreement. Therefore, the resolution of which law should be applied required analysis under New Jersey's flexible "governmental interest" standard, which requires application of the law of the state with the greatest interest in resolving the particular issue that is raised in the underlying litigation. *Gantes v. Kason Corp.,* 145 *N.J.* 478, 484, 679 A.2d 106 (1996). In the absence of a conflict between the law of the forum state, New Jersey law is applied. *Ibid.* Because the discrete issue of relevance here was whether the sale constituted a de facto merger or a mere continuation of the purchased business and New Jersey and Delaware principles of law are the same in this regard, there was no conflict between the two states and the court could have applied New Jersey law.

II.

In New Jersey, generally, when a company sells its assets to another company, the acquiring company is not liable for the selling company's liabilities simply because it has succeeded in ownership to the seller's assets, "including those arising out of the [seller's] tortious conduct." *Ramirez v. Amsted Industries, Inc.,* 86 *N.J.* 332, 340, 431 A.2d 811 (1981) (citations omitted). Among the exceptions to this general rule is when (1) "the purchasing corporation is merely a continuation of the selling corporation;" or (2) "the transaction amounts to a consolidation or merger of the seller and purchaser [.]" *Woodrick v. Jack J. Burke Real Estate, Inc.,* 306 *N.J.Super.* 61, 73, 703 A.2d 306 (App.Div.1997), *appeal dismissed,* 157 *N.J.* 537, 724 A.2d 799 (1998). These two exceptions tend to overlap and are often treated together. *Ibid.* While the determination is fact sensitive and involves consideration of a number of factors, the critical inquiry is whether there was an intent on the part of the contracting parties to effectuate a merger or consolidation rather than a sale of assets. *Id.* at 74, 703 A.2d 306. The intent may be inferred from such factors as, did management continue with the same personnel, did the general business operations, physical location, and composition of personnel remain the same, as well as any express provisions contained in the purchase agreement, and continuity of ownership. *Id.* at 72, 703 A.2d 306.

***6** Here, after UCFI purchased UFC, J & D began performing lighting, rack repair, installation and service, and retail store remodeling. According to Nicklaus, J & D became more of a service business. However, Nicklaus's duties did not change, and J & D's customers and employees remained the same. Nicklaus was unsure whether UFC still existed. Of additional significance is the fact that both UFC and UFCI's operations were, and are, in South Bend, Indiana, and that there is no evidence in the record that UFC is anything but a shell corporation. Further, there is commonality in name between UFC and UFCI. In addition, UFCI made offers to, and subsequently hired, J & D's employees, including Nicklaus. Finally, J & D's customers remained the same after the sale. Therefore, in large part, continuity of personnel and physical location and cessation of the ordinary business of the predecessor, are present here. On balance, we are satisfied that these factors weigh more heavily towards a determination of successor liability. Nonetheless, the judge's ruling on this issue does not bar his ultimate decision to grant summary judgment. *See Isko v. Planning Bd. Of Livingston,* 51 *N.J.* 162, 175, 238 A.2d 457 (1968) ("It is a commonplace of appellate review that if the order of the lower tribunal is valid, the fact that it was [partially] predicated upon an incorrect basis will not stand in the way of its affirmance.").

III.

Turning to the merits of whether summary judgment was appropriate, a court should grant summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there

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is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46-2(c). If there exists a single unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a genuine issue of material fact. *Brill v. Guardian Life Ins. Co. of Am.,* 142 *N.J.* 520, 540, 666 A.2d 146 (1995). Thus, when the evidence is so one-sided that one party must prevail as a matter of law, summary judgment should be granted. *Ibid.*

Because the evidence must be viewed most favorably towards the non-moving party, together with all favorable inferences, when subjective elements of willfulness, intent or bad faith are material, such determinations are usually left to the trier of fact. *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.,* 189 *N.J.* 436, 447, 916 A.2d 440 (2007). Nonetheless, even where subjective intent is involved, summary judgment is appropriate when the facts are so one-sided no contrary conclusion could otherwise be reached. *Id.* at 450, 916 A.2d 440.

A. *Duty of Loyalty*

An employee has a duty, during his or her period of employment, not to act contrary to the employer's interest, not to compete with his or her employer, and not to assist an employer's competitor. *Lamorte Burns & Co. v. Walters,* 167 *N.J.* 285, 302, 770 A.2d 1158 (2001); *Cameco, Inc. v. Gedicke,* 157 *N.J.* 504, 516, 724 A.2d 783 (1999). "An employee's duty of loyalty to his or her employer goes beyond refraining from privately soliciting the employer's customers while still employed. The duty of loyalty prohibits the employee from taking affirmative steps to injure the employer's business." *Lamorte Burns, supra,* 167 *N.J.* at 305, 770 A.2d 1158.

***7** An employee has the right to plan and prepare for future employment, *id.* at 304, 770 A.2d 1158, but in doing so, is not entitled to solicit customers or do other acts in direct competition with the employer's business. *Id.* at 302, 770 A.2d 1158. Thus, in the absence of a covenant not to compete after termination of employment, an employee

> may anticipate the future termination of his employment and, while still employed, make arrangements for some new employment by a competitor or the establishment of his own business in competition with his employer. The only restriction to such action is that he may not solicit his employer's customers for his own benefit before he has terminated his employment. Nor may he do other similar acts in direct competition with the employer's business. This would constitute a breach of the undivided loyalty which the employee owes to his employer while he is still employed. It is the nature and character of the act performed that will determine if there has been an actionable wrong and whether or not the act has caused some particular injury to the employer. The mere planning, without more, is not a breach of an employee's duty of loyalty and good faith to his employer.
>
> [*Auxton Computer Enters., Inc. v. Parker,* 174 *N.J.Super.* 418, 423-24, 416 A.2d 952 (App. Div.1980 (citations omitted).]

Thus, the question of whether an employee has breached the duty of loyalty is fact sensitive. *Cameco, supra,* 157 *N.J.* at 516, 724 A.2d 783. Here, there is nothing in the record, when it is viewed most favorably towards plaintiff, which evidences any disloyalty towards plaintiff. Specifically, the record is devoid of any evidence, beyond plaintiff's mere assertions, that Blake-Ward took client information that he used to set up a competing business, that Blake-Ward solicited plaintiff's clients or misled plaintiff about his plans. *See Lamorte Burns, supra,* 167 *N.J.* at 305, 770 A.2d 1158 (finding breach of loyalty where defendants, who were subject to employment agreements that prohibited disclosure of confidential information and solicitation of company clients who nonetheless set up a competing business more than a year prior to resigning, solicited company clientele, leased office space on behalf of the new venture prior to leaving, and lied about resignation plans over a year before leaving). Rather, Blake-Ward's actions, in the absence of competent evidence that demonstrated otherwise, could only be viewed as an effort to plan and prepare for his future. *Id.* at 304, 770 A.2d 1158; *Auxton, supra,* 174 *N.J.Super.* at 424, 416 A.2d 952.

B. *Misappropriation and Unfair Competition*

In Points I and II, plaintiff argues that the trial court erred in dismissing its claim that defendants misappropriated proprietary or confidential information and engaged in unfair competition. Plaintiff claims Blake-Ward misappropriated plaintiff's financial and customer information, including balance sheets, income statements and financial reports, and that UFCI induced Blake-Ward to engage in such conduct. Judge LeBlon expressly found that the record, viewed most favorably towards plaintiff, did not support such a conclusion:

> ***8** There is no specific indication of what precautions Forman took to safeguard its allegedly confidential information. The absence of this factor is fatal to its claim. There is nothing concerning nondisclosure in the alleged Employment Agreement and it is undisputed that Forman has never required its employees to sign confidentiality agreements. While Forman contends that such a provision was included in its employee handbook, there is nothing to prove that RBW [Blake-Ward] was provided with a copy of the handbook.... The handbook, moreover, fails to describe the nature of the information that Forman considers to be confidential.

With respect to the unfair competition claim, the court held:

> Although plaintiff argues that UFCI participated in efforts to use RBW to steal plaintiff's business, it again fails to offer any substantiation of actual wrongdoing on the part of UFCI. Upon analysis, plaintiff's assertions demonstrate that UFCI sought to ultimately compete with Forman. There is no legal authority referred to by plaintiff that proscribes such intentions. Beyond that, there is nothing in the record of this case that demonstrates that UFCI utilized RBW to compete with plaintiff while RBW was still employed by plaintiff.

To be legally protectable, information need not rise to the level of a trade secret and may otherwise be publicly available. *Platinum Mgmt., Inc. v. Dahms,* 285 *N.J.Super.* 274, 294, 666 A.2d 1028 (Law Div.1995). The key to determining the misuse of information is the relationship of the parties at the time of disclosure and the intended use of the information. *Ibid.* Matters of general knowledge within an industry may not be classified as confidential. *Whitmyer Bros., Inc. v. Doyle,* 58 *N.J.* 25, 33-34, 274 A.2d 577 (1971).

While plaintiff met with his new employer, there is no evidence that he discussed which of plaintiff's customers he could bring to J & D, nor was he advised by plaintiff that such information was confidential. Plaintiff points to its employee handbook, which provided that it was “a violation of company policy to provide confidential or proprietary ... information to competitors, other organizations, or unauthorized [company] employees. Also, you are not permitted to work for a competing business while a [company] employee.” However, Blake-Ward claimed he never received a copy of the handbook, and assuming, for purposes of summary judgment, that plaintiff provided this handbook to Blake-Ward, it is undisputed that Scott Forman indicated that he did not tell Blake-Ward what information was considered confidential, nor were any company documents identified as confidential. According to Nelson Tirado, plaintiff's vice-president of business development, plaintiff did not treat its company information and documents as confidential. Moreover, plaintiff does not point to anything in the handbook that clarifies what information is confidential or proprietary.

Similarly, while customer lists can be considered confidential and subject to protection, *Lamorte Burns, supra,* 167 *N.J.* at 299, 770 A.2d 1158, where an entity's customers are a matter of

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general knowledge in an industry, or are easily discernable, and personal contacts are taken from job to job, the rule is different. *Subcarrier Commc'ns, Inc. v. Day,* 299 *N.J.Super.* 634, 642-43, 691 A.2d 876 (App.Div.1997). As we have previously stated, what an employee "br [ings] to his employer, he should be able to take away. This is little different than the tradesman who brings his tools to his employer and upon separation leaves with them...." *Coskey's Television & Radio Sales & Serv., Inc. v. Foti,* 253 *N.J.Super.* 626, 637, 602 A.2d 789 (App.Div.1992).

***9** Here, there is no evidence to indicate that plaintiff's customers were not known in the industry or that the service plaintiff provided required secrecy. As Tirado testified during his deposition, it was "not a secret who our accounts are." Moreover, there is nothing in the proofs to indicate that plaintiff's pricing and bid specifications were confidential. Plaintiff did not have any computer models or computer programs for creating bids, quotes or pricing. Nor did plaintiff have a model or formula relating to such matters. In addition, costs used to estimate bids changed daily. Nor was there any evidence in the record that plaintiff ever marked any of its documents as confidential.

Under these circumstances, no reasonable jury could resolve the question of whether defendants engaged in misappropriation and unfair competition in favor of plaintiff. Hence, Judge Malone properly granted summary judgment on these claims. *Brill, supra,* 142 *N.J.* at 540, 666 A.2d 146.

C. *Tortious Interference*

Plaintiff maintains that it presented sufficiently disputed facts demonstrating that defendants targeted and solicited its key clients sufficient to withstand summary judgment. We disagree.

In order to establish a claim of tortious interference, a plaintiff must establish a reasonable expectation of economic advantage, interference with that right intentionally and with malice, loss of prospective gain as a result of that interference, and resulting damages. *Printing Mart-Morristown v. Sharp Elecs. Corp.,* 116 *N.J.* 739, 751-52, 563 A.2d 31 (1989). Malice is not used in the literal sense to constitute ill will; rather, it means that harm was inflicted intentionally and without justification or excuse. *Lamorte Burns, supra,* 167 *N.J.* at 306, 770 A.2d 1158. The line is drawn at conduct that is fraudulent, dishonest or illegal, which as a result interferes with a competitor's economic advantage. *Id.* at 307, 770 A.2d 1158.

In *Lamorte Burns,* the Court found that the defendants used the plaintiff's confidential information to accomplish "a surprise weekend coup," evidencing malice and the wrongful taking of property. *Id.* at 308, 770 A.2d 1158. There was nothing in the record here remotely akin to the conduct at issue in *Lamorte Burns.* As discussed earlier, Blake-Ward did not form a competitor company, nor did he take any of plaintiff's customers while still employed by the company. Office Depot went with UFCI only after Blake-Ward had left and after proper notice had been given to plaintiff under the contract Office Depot had with plaintiff. In addition, there is no evidence that Blake-Ward solicited Office Depot's lighting maintenance contract for any entity other than plaintiff. That Simmons, during the January 20, 2005 meeting in which Blake-Ward, McGowan and Costa were in attendance, assumed the Office Depot lighting contract would follow Blake-Ward when he left plaintiff's employ, is not equivalent to Blake-Ward affirmatively soliciting Office Depot's business while still employed with plaintiff. *Id.* at 303, 770 A.2d 1158. Plaintiff does not suggest that Office Depot, once its contractual term with plaintiff expired, was not free to take its business elsewhere. Thus, the trial court properly dismissed plaintiff's tortious interference claim.

D. *Computer Fraud*

***10** In Points I and VII, plaintiff maintains that the trial court erred in granting summary judgment with respect to its claim that defendants violated federal and state computer fraud statutes. The trial court, in rejecting this claim found:

> Forman fails to demonstrate that either UFC or UFCI asked or encouraged RBW to take any actions regarding his Forman-issued computer. There is, therefore, an utter lack of the specific intent or recklessness required by the statutes as to UFC or UFCI.
>
> Forman seeks to reinforce its claim against RBW with its expert's opinion as to the intentional nature of the alleged deletion of files off of RBW's Forman-issued laptop. Yet, despite the expert's opinion, there is no indication by Forman as to the specific files it alleges were deleted or any showing of damages.

Under New Jersey's Computer Related Offenses Act (CROA), *N.J.S.A.* 2A:38A-1 to -6, a business may recover damages for the purposeful or knowing and unauthorized tampering with its computer or computer system. Plaintiff's expert report, however, only established that data on Blake-Ward's office computer had been deleted, most of which was recovered. Moreover, as the trial court noted, there is nothing in the record identifying what, in particular, was deleted and what, if any, damages plaintiff sustained as a result of Blake-Ward's conduct in this regard. Plaintiff's own systems administrator, Nancy McDermott, testified that while there was a reduction in memory, she did not find that any of plaintiff's files had been deleted. Moreover, while McDermott confirmed that employees were not supposed to use their personal e-mail address for company business, the policy was not enforced. Finally, the record also disclosed that while Blake-Ward was employed with the company, plaintiff did not have any policy in place prohibiting employees from deleting computer files. Hence, the undisputed fact that there were deletions on Blake-Ward's computer is not, standing alone, dispositive. Consequently, the court did not err when it granted summary judgment on this claim.

IV.

In points I and VII, plaintiff asserts that the trial court erred in dismissing its breach of employment agreement claim. Plaintiff maintains that the court failed to view the alleged agreement in the light most favorable to it and that the duration and extent of the restrictive covenant contained in the agreement was reasonable.

The court found that “no rational fact-finder could admit the authenticity of [the court] document. It was allegedly initialed six (6) months following RBW's commencement of work with Forman[.] It is not dated [and i]t is not witnessed. Moreover, there is no consideration for the three-year noncompete clause.”

According to Blake-Ward, when he was negotiating his employment with plaintiff in 2003, Scott sent him a draft employment agreement which contained a restrictive covenant as well as a provision giving Blake-Ward an equity interest in the company. However, because the other owners of the company could not agree as to stock ownership, Scott Forman asked him to join the company without signing an employee agreement.

***11** At a hearing on the order to show cause in April 2005, plaintiff's attorney represented to the Chancery Division judge that there was no restrictive covenant. However, in June 2005, Steven discovered a copy of an employment agreement that he claimed was initialed by Blake-Ward. Steven was not sure when the agreement was signed and did not know what happened to the original. Additionally, he had not read the agreement prior to signing it.

Further, Steven claimed he found the copy in a file belonging to the real estate company that owned the building where plaintiff is located. However, in a subsequent certification, Steven stated that Blake-Ward signed the agreement on March 27, 2003, and that he did not recall that Blake-Ward had done so until he found the copy of the agreement, in August 2005. Scott did not know whether Blake-Ward initialed the agreement and did not see him sign the document.

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The agreement contained a restrictive covenant, which provided in pertinent part:

> Employee expressly agrees that ... during the term of this Agreement and any renewal thereof, and during the ... three (3) year period thereafter, s/he will not ... directly or indirectly, work for or render services for any entity which is a client of the Corporation at the time of the termination of Employee's employment with the Corporation, or who were clients of the Corporation during the one year period prior thereto....

Blake-Ward's challenge to the authenticity of his signature and the absence of the original agreement are challenges that relate to the weight to accord the testimony surrounding the document's authenticity but not its consideration for purposes of defeating summary judgment or its later admissibility at the time of trial. *See* Biunno, *Current N.J. Rules of Evidence,* comment 2 on *N.J.R.E.* 901 and 1001-1004 (2007).

We are satisfied that when viewed in the light most favorable to plaintiff, there is a genuinely disputed issue of fact as to whether Blake-Ward executed the non-competition agreement sufficient to defeat summary judgment. *Brill, supra,* 142 *N.J.* at 540, 666 A.2d 146. However, because the agreement itself contains terms that, as a matter of law, are contrary to public policy, the court did not err in granting summary judgment as to this claim.

In *Whitmyer, supra,* and *Solari Indus., Inc. v. Malady,* 55 *N.J.* 571, 576, 264 A.2d 53 (1970), the Court makes clear that a non-compete agreement is enforceable. Such agreements, "if [they] 'simply protect[ ] the legitimate interests of the employer, impose[ ] no undue hardship on the employee and [are] not injurious to the public .' " *Ingersoll-Rand Co. v. Ciavatta,* 110 *N.J.* 609, 628, 542 A.2d 879 (1988) (quoting *Whitmyer, supra,* 58 *N.J.* at 32-33, 274 A.2d 577).

The public's broad concern in fostering competition, creativity, and ingenuity, is safeguarded when courts engage in a fact sensitive analysis of the agreement to safeguard against subjecting employees to undue hardship. *Id.* at 639, 274 A.2d 577. Thus, for example, in *Cmty. Hosp. Group, Inc. v. More,* 183 *N.J.* 36, 869 A.2d 884 (2005), the Court found a two-year post-employment non-compete requirement in a restrictive covenant not per se unreasonable but remanded the matter to the trial court because it concluded that under the particular factual circumstances of the case, the thirty-mile geographic restrictive area was excessive and had to be reduced to avoid being detrimental to the public interest. The restrictive covenant at issue here, as the trial court observed, defined the scope of the services restricted and broadly prohibited defendant from directly or indirectly working with any of its clients in any capacity and anywhere. In our view, the broad brush of this language rendered the agreement contrary to public policy and, thus, unenforceable as a matter of law, irrespective of whether Ward-Blake in fact signed it.

***12** Finally, plaintiff's claim that defendants were unjustly enriched by virtue of their conduct is without sufficient merit to warrant further discussion in a written opinion. *R.* 2:11-3(e)(1)(E).

Affirmed.

N.J.Super.A.D.,2008.
Forman Industries, Inc. v. Blake-Ward
Not Reported in A.2d, 2008 WL 4191155 (N.J.Super.A.D.)

END OF DOCUMENT

APPENDIX C

C
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.
MADISON REALTY PARTNERS 7, LLC, a Delaware Limited Liability Company, individually and derivatively as a General Partner of ISA Partnership Liquidity Investors, Madison Avenue Investment Partners, LLC, a Delaware Limited Liability Company, Investment Services of America, LLC, a Delaware Limited Liability Company, and the Madison Avenue Capital Group II, LLC, a Delaware Limited Liability Company, Plaintiffs,
and
ISA PARTNERSHIP LIQUIDITY INVESTORS, a Delaware General Partnership, Nominal Plaintiff,
v.
AG ISA, LLC, a Delaware Limited Liability Company, and Angelo Gordon & Co., L.P., a Delaware Limited Partnership, Defendants.

No. CIV.A. 18094.
Submitted: Jan. 12, 2001.
Decided: April 17, 2001.

David C. McBride, Richard H. Morse and Melanie K. Sharp, Esquires, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware; Attorneys for Plaintiffs.

James F. Burnett, Esquire of Potter, Anderson & Corroon LLP, Wilmington, Delaware; and Peter N. Wang and Aimee E. Nassau, Esquires, of Friedman, Wang Bleiberg, P.C., New York, New York; Attorneys for Defendants.

MEMORANDUM OPINION
JACOBS, Vice Chancellor.

***1** A general partnership had two general partners, one responsible for managing the partnership, and the other for providing the capital funding. In March 2000, the funding partner refused to provide any further capital. The managing partner claimed that that refusal was wrongful, because the partnership agreement required 120 days advance notice before funding could be terminated, and no such notice had been given. The funding partner contended that no such notice was required, because the partnership agreement entitled the funding partner to cease making capital contributions without notice once its funding reached the $10 million level. The managing partner brought this lawsuit against the funding partner and others, asserting (*inter alia*) claims for breaches of contract and fiduciary duty. The funding partner and its co-defendant moved to dismiss the complaint for failure to state a claim upon which relief may be granted. This is the Opinion of the Court on that motion.

I. BACKGROUND FACTS

This factual background is taken from the well-pled allegations of the complaint. ISA Partnership Liquidity Investors (the "Partnership") is a Delaware general partnership formed to purchase, hold, and manage limited partnership interests and similar securities ("Investment Interests"). The Partnership's two general partners entered into a partnership agreement (the "Partnership Agreement"), setting forth the rules governing the Partnership. Madison Realty Partners 7, LLC ("Madison"), is the primary plaintiff and the managing general partner responsible for managing the Partnership, including selecting Investment Interests for the Partnership. The primary defendant is AG ISA, LLC ("AGGP"), which is the other (non-managing) general partner. AGGP, which is a subsidiary of Angelo Gordon & Co., L.P. ("Angelo Gordon"), a Delaware limited liability company, FN1 was also the exclusive provider of capital to the Partnership. Under the Partnership Agreement, AGGP was required to make such capital contributions as Madison requested. The Partnership Agreement provided, however, that AGGP could cease making capital contributions upon 120 days advance notice to Madison (the "120-Day notice provision").

FN1. Angelo Gordon is a New York based hedge fund with approximately $3 billion under management.

In connection with the formation of the Partnership, Madison caused the Partnership to enter into certain agreements with two affiliates, Investment Services of America, LLC ("ISA") and The Madison Avenue Capital Group II, LLC ("MACG II"). Those affiliates are Madison's co-plaintiffs in this lawsuit. These Agreements (the "Services Agreements") required ISA and MACG II to furnish the Partnership with personnel, services, and infrastructure that were essential both to operate, and to acquire Investment Interests for, the Partnership. As a condition of entering into the Services Agreements, ISA and MACG II required AGGP to agree to the 120-Day notice provision described above.

In September 1997, Madison Avenue Investment Partners, LLC ("MAIP"), which is a Madison affiliate, and defendant Angelo Gordon, which holds a controlling interest in AGGP, entered into an agreement (the "ISA Umbrella Agreement") in which Angelo Gordon undertook to cause AGGP to fulfill its obligations under the Partnership Agreement.FN2

FN2. MAIP is a Madison affiliate. Madison, MAIP, ISA, MACG II and the Partnership are referred to collectively as the "plaintiffs." AGGP and Angelo Gordon are collectively referred to as the "defendants."

***2** During March 2000, affiliates of the plaintiffs and the defendants met to negotiate a possible investment, unrelated to the Partnership, in a MAIP affiliate. During those negotiations, the defendants demanded that the MAIP affiliates permit them to invest on terms that were unacceptable to the MAIP affiliates, and to which the MAIP affiliates refused to accede. According to the complaint, in an effort to exert wrongful pressure on MAIP's affiliates, Angelo Gordon responded by causing AGGP to threaten that it (AGGP) would immediately cease making capital contributions to the Partnership, despite the 120-Day notice requirement. From and after that point, AGGP refused to make capital contributions to the Partnership, and Angelo Gordon failed to cause AGGP to make the required capital contributions.

Although the plaintiffs claim that the 120-Day notice provision has no exceptions, the defendants assert that the Partnership Agreement permitted them to cease providing capital funding when their total contribution reached the $10 million level, as occurred here. That latter contention gives rise to a threshold issue, which is addressed in Part III A, *infra,* of this Opinion.

II. THE PARTIES' CONTENTIONS AND THE APPLICABLE LAW

The complaint alleges eight claims. The first four are based on AGGP's refusal to make capital contributions without first having given the 120-Day notice allegedly required by the Partnership Agreement. That conduct is claimed to have violated AGGP's contractual duties under the Partnership Agreement (Count I), AGGP's fiduciary obligations to Madison (Count II), AGGP's fiduciary obligations to the Partnership (Count III), and AGGP's contractual duties to ISA and MACG II under the Services Agreements (Count IV).

The remaining four claims are asserted against Angelo Gordon. The plaintiffs claim that by failing to cause AGGP to fulfill its funding obligations under the Partnership Agreement, and/or by causing AGGP to cease contributing capital without giving the required 120 days notice, Angelo Gordon (1) breached the Umbrella Agreement (Count V), (2) aided and abetted AGGP's breach of fiduciary duty to Madison (Count VI) and to the Partnership (Count VII), and (3) tortiously interfered with the Services Agreements (Count VIII).

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The defendants respond that none of these Counts states an actionable claim. Defendants urge that because Counts I, III, IV, V, VII and VIII are claims on behalf of the Partnership, they are expressly foreclosed by the Partnership Agreement, which prohibits either partner from commencing a lawsuit on behalf of the Partnership without the other partner's permission. For that reason, defendants urge, those Counts must be dismissed.

Alternatively, the defendants argue that Counts I and V fail to state a cognizable claim for breach of contract, because neither the Partnership Agreement nor the Umbrella Agreement confers any enforceable rights upon the plaintiffs as a group. Counts II and III are also claimed to be dismissable, because they are improper attempts to seek relief based on breach of fiduciary duty theories for conduct that is specifically addressed by the Partnership Agreement and is covered by the breach of contract claims alleged in the complaint. Under Delaware law, defendants argue, fiduciary duty claims cannot proceed where the underlying conduct is addressed by parallel breach of contract claims.

***3** The defendants further argue that Count IV must be dismissed, because the defendants were not parties to the Services Agreements, and therefore could not have breached them. Moreover, the defendants urge, the claims against Angelo Gordon for aiding and abetting AGGP's breaches of fiduciary duty fail as a matter of law, because the complaint alleges no cognizable underlying claim for breach of fiduciary duty. Lastly, the defendants contend that the complaint fails to state a legally sufficient claim for tortious interference with contract.

Under Court of Chancery Rule 12(b)(6), a complaint must be dismissed if the facts alleged in the complaint, when taken as true and considered in a light most favorable to the plaintiff, fail to state a cognizable legal claim that would entitle the plaintiff to the relief sought.[FN3] All eight claims alleged in the complaint are evaluated in light of that procedural standard.

FN3. *Solomon v. Pathe Communications Corp.,* Del.Supr., 672 A.2d 35, 38-39 (1996).

In this Opinion, the issues are analyzed in the following order: first, the Court considers the threshold issue of whether a written draft of the Partnership Agreement submitted by the defendants can be considered on this motion. Second, the Court addresses the question of the plaintiffs' standing to bring this action. Finally, the Court considers each of the defendants' specific arguments for dismissal.

III. ANALYSIS

A. May the Court Consider the Partnership Agreement in Deciding This Motion?

A threshold issue that must first be decided (because it could be outcome determinative) is whether a written, unsigned draft of the Partnership Agreement, submitted by the defendants but disputed by the plaintiffs, can be considered on this Rule 12(b)(6) dismissal motion. What appears to give rise to this issue is the (apparent) fact that no fully executed original or copy of the Partnership Agreement is available.

On a motion to dismiss, documents that are incorporated by reference into the complaint will normally be considered.[FN4] The question is whether the alleged unsigned copy of the Partnership Agreement submitted by the defendants was "incorporated by reference." The defendants argue that it was, because the document they submitted is the only available written evidence of the Partnership Agreement. Moreover, defendants urge, it would be inequitable to allow the plaintiffs to plead the Partnership Agreement in their complaint as a basis for asserting claims against the defendants, while at the same time prohibiting the defendants from relying on the same document to challenge the legal sufficiency of those claims. The plaintiffs concede that the Partnership Agreement, as ex-

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ecuted, is integral to their claims, but they insist that the unsigned draft submitted by the defendants does not accurately reflect the Partnership Agreement as finally executed. Because the submitted draft does not accurately memorialize the Partnership Agreement actually agreed to by Madison and AGGP, the plaintiffs argue that it cannot be deemed "incorporated by reference" into the complaint, and therefore cannot be considered on this motion to dismiss.FN5

FN4. *In re Santa Fe Pacific Shareholder Litig.,* Del.Supr., 669 A.2d 59 (1995).

FN5. *In re Santa Fe Pacific Shareholder Litig.,* 669 A.2d at 69-70.

***4** On this issue, the plaintiffs are correct. In their complaint the plaintiffs allege certain terms of the Partnership Agreement, but they also dispute the defendants' contention that the submitted draft constitutes the definitive Partnership Agreement. Whether the defendants' draft constitutes the actual, definitive Partnership Agreement presents a fact dispute that cannot be resolved without an evidentiary hearing. But, we are not yet at that stage. Because the plaintiffs claim not to be relying on the submitted draft agreement, I must assume for purposes of this motion that the plaintiffs' pled version of the Partnership Agreement is the correct one. That is because at this procedural stage the Court is required to take the pled facts as true in deciding whether a legally valid claim is stated.FN6 Accordingly, on this motion the Court will not take cognizance of the draft Partnership Agreement submitted by the defendants.FN7

FN6. *See Solomon,* Del.Supr., 672 A.2d at 38-39.

FN7. I recognize the potential inequity in allowing the plaintiffs to rely on their alleged version of the Partnership Agreement to support their claim that the defendants breached the 120-day provision, while simultaneously disregarding what is claimed to be the only written evidence of other asserted terms of the contract upon which the defendants rely in challenging the sufficiency of that claim. As stated, however, the procedural rules that apply at the pleading stage dictate that result. If at a later stage the Court finds that the plaintiffs' position is not forthright and that the draft Partnership Agreement is, in fact, the definitive Partnership Agreement, the defendants have remedies, including the imposition of appropriate sanctions by this Court.

B. Do the Plaintiffs Have Standing To Commence This Litigation?

The defendants next argue that the plaintiffs lack standing because the Partnership Agreement prohibits one partner from bringing a lawsuit on behalf of the Partnership without the consent of all (in this case, both) partners. Because AGGP never consented to the filing of this action, the defendants urge that Counts I, III, IV, V, VII and VIII must be dismissed. That argument, however, rests on terms that are claimed to exist in the draft Partnership Agreement which, as previously held, can not be considered in deciding this motion. Because it cannot be inferred from the complaint that the "consent-of-all-partners" provision is a term of the Partnership Agreement, the defendants' standing argument predicated on that provision must fail at this stage.

C. Are the Non-Signatory Plaintiffs Third Party Beneficiaries of the Partnership and Umbrella Agreements?

It is undisputed that Madison, as a signatory to the Partnership Agreement, has standing to sue for a breach of that Agreement. Similarly, MAIP, as a signatory to the Umbrella Agreement, has standing to sue for a breach of the Umbrella Agreement. For that reason, Counts I and V, which allege that AGGP breached the Partnership and Umbrella Agreements, cannot be dismissed. Remaining in dispute, however, is whether the complaint alleges facts

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from which it can be inferred that the *non-signatory* plaintiffs have standing to enforce those agreements as intended third party beneficiaries. I conclude that it does not.

The defendants argue that the non-signatory plaintiffs are not third-party beneficiaries. Rather, because they are at most incidental beneficiaries, Counts I and V fail to state cognizable breach of contract claims by the non-signatory plaintiffs. In addition, the defendants contend that because the complaint avers that some but not all of the plaintiffs were parties to the agreements, the plaintiffs as a group are not a protected class of beneficiaries having enforceable rights under the Partnership Agreement or the Umbrella Agreement. Therefore, defendants conclude, the plaintiffs cannot claim a breach of either contract.[FN8]

FN8. The defendants claim that both contract claims must be dismissed in their entirety because in order for a claim to be adequately pled, *all* of the plaintiffs must have a right to advance the claim. The defendants cite no case law supporting this contention, and because the plaintiffs which were signatories to the relevant documents have a clear right to assert a claim against the defendants for breach thereof, the claims will not be dismissed. For that reason, the only issue that the Court need address is whether the non-signatory plaintiffs have a legally cognizable claim to occupy third-party beneficiary status.

***5** The plaintiffs respond that although the non-signatory plaintiffs are not direct parties to the Agreements, they nonetheless have enforceable rights as third party beneficiaries. In addition (plaintiffs urge), Madison's claim for breach of the Partnership Agreement and MAIP's claim for breach of the Umbrella Agreement are not dismissable on this ground, since Madison and MAIP are parties to those agreements.

As a general matter, only a party to a contract has enforceable rights under, and may sue for breach of, that contract.[FN9] To qualify as a third party beneficiary of a contract, (i) the contracting parties must have intended that the third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract.[FN10]

FN9. *Insituform of N. Am., Inc. v. Chandler,* Del. Ch., 534 A.2d 257, 270 (1987) (holding that non-signatories to a contract have no rights under the contract, and thus no standing to assert claims under the contract).

FN10. *See Guardian Constr. Co. v. Tetra Tech Richardson, Inc.,* Del.Supr., 583 A.2d 1378, 1386-87 (1990) ("[I]n order for third-party beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon a third person that was intended, but the conferring of the beneficial effect on such third-party, whether it be creditor or donee, should be a material part of the contract's purpose").

In this context, Illustration 3 to Comment b to § 302 of the *Restatement (Second) of Contracts* is helpful in understanding the difference between an intended and an incidental beneficiary:

> B promises A to pay whatever debts A may incur in a certain undertaking. A incurs in the undertaking debts to C, D and E. If the promise is ... a promise that B will pay C, D and E, they are intended beneficiaries...; if the money is to be paid to A in order that he may be provided with money to pay C, D and E, they are at most incidental beneficiaries.[FN11]

FN11. *Restatement (Second) of Contracts*

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§ 302 cmt. b, illus. 3 (1979).

That analytical framework aids the Court's assessment of the third-party beneficiary status of the non-signatory plaintiffs under the Partnership and the Umbrella Agreements, respectively.

1. *The Partnership Agreement*

With respect to the contract claims based on the Partnership Agreement, I conclude that the non-signatory plaintiffs, ISA and MACG II, have not alleged facts showing that they occupied any status other than as incidental beneficiaries of that agreement. The complaint does not allege that those entities were intended third party beneficiaries, nor can that conclusion be inferred from the facts that are pled. The Partnership Agreement was entered into to create and establish the terms for governing the Partnership, which "was organized with the limited purpose to purchase ... hold and otherwise manage and exercise all the rights of an owner of limited partnership interests and other similar equity or any debt securities ....[FN12] It may be the case that all the parties knew that the Partnership would rely on the capital calls as a source of payment of monies owed to ISA and MACG II under the Services Agreements. But, that fact, without more, does not make ISA and MACG II third party beneficiaries under the Partnership Agreement. At best, those entities were expected creditors of the Partnership, and as such, they would have no more standing to sue AGGP for breach of the Partnership Agreement than would the local utility company or the office supply store. Under Delaware law, expected creditors of a partnership are incidental beneficiaries, and are not entitled to sue for breach of the Partnership Agreement.[FN13]

FN12. Complaint, at ¶ 2.

FN13. *Guardian Constr. Co.,* 583 A.2d at 1386-87; *Restatement (Second) of Contracts* § 302 cmt. b, illus. 3 (1979). The claim that MAIP is an intended beneficiary of the Partnership Agreement also fails. The complaint does not allege that MAIP was specifically intended to receive a benefit that resulted from the Partnership, nor does it identify any such benefit. For these reasons, ISA, MACG II and MAIP are not third party beneficiaries of the Partnership Agreement.

2. *The Umbrella Agreement*

***6** The Umbrella Agreement presents the same issue, *i.e.,* were Madison, ISA and MACG II intended third party beneficiaries of Angelo Gordon's promise to cause AGGP to make capital contributions to the Partnership? I find, for the reasons previously discussed, that they were not.

The parties to the Umbrella Agreement were MAIP and Angelo Gordon. That Agreement required Angelo Gordon to cause AGGP to fulfill its obligations under the Partnership Agreement, specifically, to make the required capital contributions. Madison, as the other general partner of the Partnership, would share in the proceeds of those contributions, and ISA and MACG II would receive some of those proceeds in the form of payments under the Services Agreements. Those facts, however, do not elevate Madison, ISA and MACG II to a status other than incidental beneficiary.[FN14] Because Madison, ISA and MACG II are not intended third party beneficiaries of the Umbrella Agreement, they have no enforceable claims for breach of that contract.

FN14. *See Restatement (Second) of Contracts* § 302 cmt. b, illus. 3 (1979).

D. May the Plaintiffs Prosecute Breach of Fiduciary Duty Claims That Restate Their Claims For Breach of Contract?

The plaintiffs next claim that AGGP's failure to make capital contributions without giving the 120-Day notice required by the Partnership Agreement was a breach of the fiduciary obligation that AGGP owed to both Madison (Count II) and to the Partnership (Count III).

The defendants contend that these breach of fi-

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duciary duty claims amount to improper attempts to seek a recovery under alternative theories for AGGP's alleged breach of the Partnership Agreement. Those alternative theories, defendants say, cannot coexist with the breach of contract claims. The plaintiffs respond that the two sets of claims can coexist, because the fiduciary claims in Counts II and III are independent from the breach of contract claims. The issue presented is whether the breach of fiduciary duty claims asserted in Counts II and III can be maintained independently of the breach of contract claims alleged in Counts I and V. I conclude that they cannot.

In *Gale v. Bershad,*[FN15] this Court dismissed a breach of fiduciary duty claim in circumstances where the defendants' alleged wrongdoing was already addressed by a breach of contract claim. The *Bershad* Court held that "[t]o allow a fiduciary duty claim to coexist in parallel with [a contractual] claim, would undermine the primacy of contract law over fiduciary law in matters involving ... contractual rights and obligations."[FN16] In this case, the contract and fiduciary claims overlap completely since they are based on the same underlying conduct. Indeed, the complaint uses identical conduct as the basis for both legal claims.[FN17] As this Court has held, if the dispute "relate[s] to obligations 'expressly treated ...' by contract [, it] will be governed by contract principles."[FN18] Here, the fiduciary claims relate to obligations that are expressly treated by the Partnership Agreement and are the subject of breach of contract claims in the complaint. Accordingly, the fiduciary claims alleged in Counts II and III must be dismissed.[FN19]

FN15. Del. Ch., C.A. No. 15714, Jacobs, V.C. (Mar. 3, 1998).

FN16. *Id.*

FN17. *Compare* Complaint, at ¶ 17 (The refusal by [AGGP] to make Capital Contributions without providing the 120-Day Notice pursuant to the Partnership Agreement is a violation of the Partnership Agreement) with Complaint, at ¶ 20 (the refusal by [AGGP] to make Capital Contributions without providing the 120-Day Notice pursuant to the Partnership Agreement is a breach of the fiduciary obligations owed by [AGGP] to [Madison].

FN18. *Moore Bus. Forms, Inc. v. Cordant Holdings, Corp.,* Del. Ch ., C.A. No. 13911, Jacobs, V.C., Mem. Op. at 11-12 (Nov. 2, 1995).

FN19. The plaintiffs' claim against Angelo Gordon for aiding and abetting AGGP's breaches of fiduciary duty must also be dismissed because there is no legally sufficient underlying claim for breach of fiduciary duty against AGGP. *Moore Business Forms, Inc.,* at 12 (dismissing claim for aiding and abetting breach of fiduciary duty because "no cognizable breach of fiduciary duty is stated").

E. Have the Plaintiffs Pled Adequate Claims For Tortious Interference?

1. *Count VIII*

***7** Count VIII alleges that Angelo Gordon caused AGGP to cease making capital contributions without providing the 120-day notice in order to further Angelo Gordon's own goals and objectives. That conduct, plaintiffs claim, tortiously interfered with the Services Agreements between the Partnership and ISA and MACG. The defendants argue that those allegations do not state a legally sufficient claim for tortious interference.

To state a claim for tortious interference with contract, a plaintiff must plead facts that demonstrate the existence of: "(1) a valid contract, (2) about which defendant has knowledge, (3) an intentional act by defendant that is a significant factor in causing the breach of the [contract], (4) done without justification, and (5) which causes injury."[FN20] The defendants argue that the plaintiffs have not pled facts sufficient to demonstrate that (a) the defendants' conduct was a significant factor in causing the Partnership to breach the Services Agreements, and that (b) the defendants ceased contributing capital without justification.

FN20. *Boyer v. Wilmington Materials, Inc.,* Del. Ch., C.A. No. 12549, Allen, C. (June 27, 1997).

The plaintiffs respond that they have adequately pled each and all of the elements of tortious interference. They argue specifically that the complaint can be fairly read to show that the Partnership relied on the continued capital contributions as a source from which to pay ISA and MACG II for conducting the Partnership's day-to-day operations under the Services Agreements. Because the Partnership lost its funding without the 120-day notice, it lacked sufficient time to search for an alternate funding source. As a result, the Partnership was unable to meet its payment requirements under the Services Agreements, and ISA and MACG II lost income. Those facts, the plaintiffs urge, establish that the cessation of capital contributions was a significant factor in causing that economic loss.[FN21]

FN21. *See generally,* Complaint at ¶¶ 6, 9, 10, 13, 14, 15.

Moreover, the plaintiffs contend that they have pled facts establishing that the defendants' actions were without justification. The plaintiffs point to paragraphs 12 and 13 of the complaint, which allege that the defendants attempted to coerce MAIP's affiliates during the negotiations, and acted in retaliation for the affiliates' refusal to grant the defendants the investment terms they demanded.

I conclude that the complaint sufficiently alleges that the defendants' termination of capital contributions was a significant factor causing the Partnership to breach the Services Agreement. The complaint alleges that Angelo Gordon caused AGGP to advise Madison that it would cease making capital contributions, and that thereafter AGGP refused to make the capital contributions. The complaint further alleges that (i) AGGP was the exclusive provider of capital to the Partnership, (ii) AGGP's provision of capital and the 120-day notice provision were essential to enable the Partnership to pay for the services being rendered to it under the Services Agreements, (iii) the funding ceased, and (iv) as a result, the Partnership, ISA and MACG II lost the full benefits of the Services Agreements.

***8** The absence of “justification” for Angelo Gordon's refusal to require AGGP to continue making the capital contributions and to respect the 120-Day notice provision, is also adequately pled. The defendants' justification argument is that once AGGP had furnished $10 million of capital to the Partnership, it was legally entitled to cease making contributions, irrespective of the 120-day notice provision. This argument, however, is predicated upon the unsigned draft Partnership Agreement which the Court has found cannot be considered on this motion. If at a later stage it is determined that that provision was applicable and gave the defendants that termination right, the tortious interference claim against Angelo Gordon will ultimately fail. At this stage, however, the claim must be allowed to proceed.

Because the plaintiffs have pled legally sufficient tortious interference claims, the defendants motion to dismiss those claims is denied.

2. *Count IV*

In Count IV, the Partnership, ISA and MACG II seek money damages for AGGP's alleged breach of the Partnership Agreement. The basis of their claim is that “[t]he failure of [AGGP] to make Capital Contributions without providing the 120-Day Notice pursuant to the Partnership Agreement has caused the Partnership to be in breach of its obligation to ISA and MACG II under the Services Agreements.”[FN22] The plaintiffs characterize this claim as one for tortious interference with contract, and argue, for the reasons previously discussed, that it should not be dismissed.

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FN22. Complaint, at ¶ 26.

The defendants characterize Count IV as a claim for breach of contract, and argue that (as thus characterized) the claim must fail as a matter of law for three reasons. First, the defendants contend that the complaint does not allege that AGGP or Angelo Gordon are parties to the Services Agreements; therefore, AGGP and Angelo Gordon cannot be held liable to the Partnership, ISA or MACG II for any breach of those Agreements. Second, ISA and MACG II are not alleged to be parties to the Partnership Agreement, for which reason their claims (which in essence are claims for breach of the Partnership Agreement) must fail as a matter of law. Third, the only possible wrongdoing alleged in Count IV involves an alleged breach of the Partnership Agreement by AGGP alone, but the plaintiffs' claim on that Count is directed against all "defendants." Defendants argue that the plaintiffs cannot seek a recovery from all of the defendants where only one of them is a party to the contract allegedly breached.

I find that Count IV is fairly characterized as a claim for tortious interference with contract, essentially identical to that alleged in Count VIII. The only difference is that the Count IV claim is directed against AGGP instead of Angelo Gordon. The analysis that governs Count VIII applies equally to Count IV, for which reason the defendants' motion to dismiss Count IV will be denied.

IV. CONCLUSION

For the reasons discussed, the defendants' motion to dismiss is GRANTED as to those portions of Counts I and V that allege claims by the non-signatory plaintiffs for breach of the Partnership and Umbrella Agreements; and is also GRANTED as to the entirety of Counts II, III, VI and VII. The motion is DENIED as to the entirety of Counts IV and VIII, and as to those portions of Counts I and V that allege claims by the signatory plaintiffs. Counsel shall submit an implementing form of order.

Del.Ch.,2001.

Madison Realty Partners 7, LLC v. Ag ISA, LLC
Not Reported in A.2d, 2001 WL 406268 (Del.Ch.)

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APPENDIX D

H

United States District Court,
D. New Jersey.
PHARMACIA CORPORATION (f/k/a Monsanto Company), Plaintiff
v.
MOTOR CARRIER SERVICES CORP., CSX Intermodal, Inc., CSX Corporation, G.O.D., Inc., and Riley Leasing Corp., Defendants.

Civ. No. 04-3724 (GEB).
Dec. 7, 2006.

John McGahren, Patton Boggs, LLP, Newark, NJ, for Plaintiff.

Edward F. McTiernan, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, PC, Newark, NJ, Randy T. Pearce, Pearce, Vort & Flesig, LLC, Hackensack, NJ, for Defendants.

MEMORANDUM OPINION

BROWN, Chief Judge.

***1** This matter comes before the Court upon the Motion for Summary Judgment of Defendants Motor Carrier Services Corp. ("Motor Carrier"), CSX Intermodal, Inc. ("Intermodal"), and CSX Corporation ("CSX") (collectively "Defendants") against Plaintiff Pharmacia Corporation ("Pharmacia" or "Plaintiff"), Pharmacia's Motion for Summary Judgment against Motor Carrier, Pharmacia's Motion for Summary Judgment against Intermodal, and Pharmacia's Motion for Leave to Further Amend its Complaint. The Court has decided the motions without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons set forth below, the Court will grant Pharmacia's Motion for Leave to Amend, deny Defendants' Motion for Summary Judgment, deny Pharmacia's Motion for Summary Judgment against Motor Carrier, and grant in part and deny in part Pharmacia's Motion for Summary Judgment against Intermodal.

I. BACKGROUND

This case arises out of environmental damage incurred on a piece of property abutting the Passaic River in Kearny, New Jersey (the "Kearny Property" or "Kearny Site"). Pharmacia owned the property from 1956 to 1991 and used it for the manufacture of, *inter alia,* phosphoric acid and sodium trioplyphosphate. Am. Compl. ¶¶ 26-27.[FN1] Pharmacia's activities are known to have contributed to the environmental damage to the Kearny Property.

FN1. Pharmacia was formerly known as Monsanto Company. Am. Compl. ¶ 38.The company now known as Monsanto Company has never owned or operated the Kearny Property. *Id.* at ¶ 52. For the sake of clarity, this Opinion will refer to plaintiffs as Pharmacia.

1. Pharmacia's environmental clean-up responsibilities up to 1994.

In July 1989, Pharmacia entered into an Administrative Consent Order ("ACO") with the New Jersey Department of Environmental Protection ("NJDEP"), aimed at cleaning up some of the environmental damage sustained at the Kearny Property. Pharmacia Motion-Motor Carrier, at 4-5. Under the ACO, Pharmacia "agreed to perform interim remedial measures, to prepare a remedial investigation and feasability study, and to design and implement a remedial action alternative selected by NJDEP at the Kearny Site." Pl. R. 56 Statement ¶ 9; Def. R. 56 Counterstatement ¶ 9. Pharmacia asserts that it performed the remedial investigation and feasibility study required under the ACO. Pl. R. 56.1 Statement ¶ 12.

On August 4, 1993, Pharmacia submitted to the NJDEP a Preliminary Remedial Action Work Plan (the "Work Plan") to govern remedial action at the Kearny Site. Pl. R. 56.1 Statement ¶ 17, Def. R. 56.1 Counterstatement ¶ 17. The Work Plan mandated that Pharmacia perform eight basic tasks to allow for the removal of contaminated soils at the

Kearny Site: "(1) installation of sheet piping; (2) dewatering; (3) mobilization of equipment; (4) excavation; (5) backfilling; (6) treatment and disposal of soils and extracted water; (7) capping and monitoring; and (8) final reporting to NJDEP." Pl. R. 56.1 Statement ¶ 18, Def. R. 56.1 Counterstatement ¶ 18.

On November 11, 1994, Pharmacia submitted a Remedial Action Report to NJDEP (the "Remedial Report"), Pl. R. 56.1 Statement ¶ 21, Def. R. 56.1 Counterstatement ¶ 21, claiming to have completed soil remediation at the Kearny Site. In response, the NJDEP issued a "No Further Action" Letter for soils at the Kearny Site on December 13, 1995 ("the "Kearny NFA"). Pharmacia Motion-Motor Carrier, at 10.[FN2]

FN2. While the NJDEP issued a no further action letter to Pharmacia, it nonetheless requested, "[w]ith regard to benzene ... that Pharmacia conduct further investigation or establish a Classification Exception Area ("CEA") for benzene in the groundwater." Pl. R. 56.1 Statement ¶¶ 70-72, Def. R. 56.1 Counterstatement ¶¶ 70-72. On October 4, 2002, Pharmacia decided to establish a Classification Exception Area for benzene in the groundwater. Pharmacia Motion-Motor Carrier, at 11-12. The CEA was approved by the NJDEP. *Id.*

2. The Sale of the Kearny Property.

***2** On December 19, 1994, Pharmacia and Motor Carrier entered into an Agreement (the "Agreement") for the sale of the Kearny Property to Motor Carrier. Pl. R. 56.1 Statement ¶ 27, Def. R. 56.1 Counterstatement ¶ 27. In turn, in late 1997, an affiliate of CSX inquired about acquiring the Kearny property from Motor Carrier. Pl. R. 56.1 Statement ¶¶ 73-78; Def. R. 56.1 Counterstatement ¶¶ 73-78. Instead of purchasing the property outright, however, the affiliate of CSX entered into an agreement in December 1997 with the shareholders of Motor Carrier under which the affiliate purchased all outstanding shares of Motor Carrier. Pl. R. 56.1 Statement ¶ 84; Def. R. 56.1 Counterstatement ¶ 84. In January 1998, the CSX affiliate assigned its rights under the stock purchase agreement to Intermodal. Pl. R. 56.1 Statement ¶ 89; Def. R. 56.1 Counterstatement ¶ 89.

3. Clean-up responsibilities after 1994.

a. The NJDEP Directive.

On September 19, 2003, NJDEP issued a directive entitled "Directive No. 10-Natural Resource Injury Assessment and Interim Compensation Restoration of Natural Resources Injuries" (the "Directive"). Pharmacia Motion-Motor Carrier, at 14. Pharmacia and Motor Carrier were among the sixty-seven parties targeted by the Directive. *Id.*

The Directive alleged that the Kearny Site was among the "Hazardous Discharge Sites" that had contaminated the Lower Passaic River. Pl. R. 56.1 Statement ¶ 125; Def. R. 56.1 Counterstatement ¶ 125. According to the Directive, the NJDEP "ha[d] determined that hazardous substances were discharged at the [Kearny Site,] that those hazardous substances [we]re emanating and/or ha[d] emanated into the Lower Passaic River, [and] that [Pharmacia] and Motor Carrier [were] persons in any way responsible, pursuant to the Spill Compensation and Control Act, for th[ose] hazardous substances." Pl. R. 56.1 Statement ¶ 126; Def. R. 56.1 Counterstatement ¶ 126. The Directive compelled Pharmacia, Motor Carrier and others to "conduct an assessment of natural resources that ha[d] been injured by discharges of hazardous substances at sites in the Lower Passaic River watershed," and threatened them with suit for damages if they "fail[ed] to arrange for the clean up and removal of the discharges in the Lower Passaic watershed by implementing an assessment of natural resource injuries." Pl. R. 56.1 Statement ¶ 127, Def. R. 56.1 Counterstatement ¶ 127.

b. The USEPA investigation.

On September 15, 2003, Pharmacia received a letter from the United States Environmental Protection Agency ("USEPA") captioned "Diamond Alkali Superfund Site Notice of Potential Liability for Response Actions in the Lower Passaic River, New Jersey." Pharmacia Motion-Motor Carrier, at 12. The letter informed Pharmacia that USEPA was investigating environmental damage to the Passaic River, and that it had come to the conclusion that Pharmacia's activities on the Kearny Property had contributed to that damage. Certification of E. McTiernan ("McTiernan Cert."), at Ex. S. The letter further encouraged Pharmacia to cooperate with USEPA in its effort to remedy the environmental damage to the Passaic River and share in the costs of the procedure. *Id.*

***3** On March 10, 2004, USEPA issued a Final Draft Administrative Order on Consent in *In re Lower Passaic River Study Area Portion of the Diamond Alkali Superfund Site* (CERCLA Docket No. 02-3004-2001) (the "USEPA Order"). Pharmacia Motion-Motor Carrier, at 12; Certification of J. McGahren ("McGahren Cert."), Ex. 30. The USEPA Order became effective on June 22, 2004. Pharmacia Motion-Motor Carrier, at 13. While Pharmacia was not one of the original Settling Parties, Pharmacia signed Amendment No. 1 on June 29, 2005 to become a settling party. *Id.,* at 13-14.

4. Procedural history

Seeking contribution from Defendants for its liabilities in connection with the NJDEP and USEPA investigations, Pharmacia filed its first Complaint against Defendants in connection with the Kearny Property on August 5, 2004, then filed an Amended Complaint on April 11, 2004 (the "Amended Complaint"). On October 6, 2006, Pharmacia filed a Motion for Leave to Further Amend the Complaint (the "Motion to Further Amend"). On October 23, 2006 Defendants filed a Motion for Summary Judgment against Pharmacia, while Pharmacia filed a Motion for Summary Judgment against Intermodal ("Pharmacia Motion-Intermodal"), and a Motion for Summary Judgment against Motor Carrier ("Pharmacia Motion-Motor Carrier").

II. DISCUSSION

A. STANDARDS

1. Summary Judgment.

A party seeking summary judgment must "show 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." FED.R.CIV.P. 56(c); *see also* *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Hersh v. Allen Prod. Co.,* 789 F.2d 230, 232 (3d Cir.1986). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986) (noting that no issue for trial exists unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict in its favor). In deciding whether triable issues of fact exist, the court must view the underlying facts and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U .S. 574, 587 (1986); *Pa. Coal Ass'n v. Babbitt,* 63 F.3d 231, 236 (3d Cir.1995); *Hancock Indus. v. Schaeffer,* 811 F.2d 225, 231 (3d Cir.1987).

1. Leave to File Amended Complaint.

Federal Rule of Civil Procedure 15(a) provides that:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of

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the amended pleading, whichever period may be the longer, unless the court otherwise orders.

***4** FED. R. CIV. P. 15(a). "Although the Rule states that leave to amend should be "freely given," a district court has discretion to deny a request to amend if it is apparent from the record that (1) the moving party has demonstrated undue delay, bad faith or dilatory motives, (2) the amendment would be futile, or (3) the amendment would prejudice the other party." *Rhymer v. Philip Morris, Inc.,* 164 F. App'x 268, 268-69 (3d Cir.2006) (quotations omitted).

B. APPLICATION

1. Pharmacia's Motion for Leave to Further Amend the Complaint .

Pharmacia argues that it should be granted the right to further amend its Amended Complaint so that it can retract its claim for contribution under § 107(a)(4)(B) of the CERCLA statute, 42 U.S.C. § 9607(a)(4)(B), and replace it with a claim for contribution under section 113(f)(3)(B) of the statute. This Court will grant Pharmacia leave to so amend its Complaint.

In its initial Complaint, Pharmacia sought contribution from Defendants under section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1). That section provides, in part, that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 107(a)." 42 U.S.C. § 9613(f)(1). On December 30, 2004 however, Pharmacia moved to amend its initial Complaint, on the grounds that the Supreme Court's decision in *Cooper Indus., Inc. v. Aviall Serv., Inc.,* 543 U.S. 157 (2004) had established that Section 113(f)(1) of CERCLA did not provide a private party who had not been sued under Section 107(a) with a statutory cause of action for contribution. First Motion to Amend at 2.

Its motion to amend having been granted by the Court, Pharmacia replaced its Section 113(f)(1) claim for contribution with a claim under Section 107(a)(4)(B) of CERCLA, 42 U.S.C. § 9607(a)(4)(B). That section provides that "any covered person" will be "liable for ... any ... necessary costs of response incurred by any other person consistent with the national contingency plan." *Id.* Pharmacia alleged that the section implied a right of contribution among jointly liable parties. Am. Compl. ¶¶ 86-96.

On October 6, 2006, Pharmacia moved once again before this Court to amend its operative complaint, arguing that the Third Circuit's decision in *E.I. duPont de Nemours & Co. v. United States,* 460 F .3d 515 (3d Cir.2006)-refusing to recognize an implied right of contribution under Section 107(a)(4)(B) of CERCLA-forced Pharmacia to abandon its claim for contribution under section 113(f)(1) and bring instead a "nearly-identical contribution claim pursuant to Section 113(f)(3)(B) [of CERCLA, 42 U.S.C. § 9613(f)(3)(B)]." Motion to Further Amend, at 4. That section provides, in part, that:

> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party to [such] a settlement ...
>
> ***5** 42 U.S.C. § 9613(f)(3)(B).

In response, Defendants argue that Plaintiff's motion for leave to file a Second Amended Complaint should be denied because allowing Plaintiff to do so now would "unduly delay" proceedings. In particular, Defendants allege that Plaintiff knew of its right to seek contribution under § 113(f)(3)(B) as of June 29, 2005 (when Plaintiff signed a final settlement agreement with USEPA), and that its failure to put forward that claim until now is nothing more than an improper delaying tactic. Def. Opp'n Br., at 6. The Court, however, concludes that the filing of a Second Amended Complaint would not unduly delay this case and would not prejudice

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Defendants.

"The question of undue delay, as well as the question of bad faith, requires that we focus on the plaintiff's motives for not amending [its] complaint to assert [its] claim earlier." *Lindquist v. Buckingham Twp.,* 106 F. App'x 768, 775 (3d Cir.2004), *cert. denied* 543 U.S. 1121 (U.S. Jan. 24, 2005) (No. 04-681), *quoting* *Adams v. Gould, Inc.,* 739 F.2d 858, 868 (3d Cir .1984), *cert. denied* 496 U.S. 1122 (U.S. Jan. 7, 1985) (No. 84-384). While this Court notes Defendants' argument that Plaintiff could have advanced this new ground for contribution earlier, it does not find the delay to have been motivated by any desire to unduly delay this action.

Indeed, Plaintiff is unlikely to have been motivated by a desire to unduly delay these proceedings, given that it announced its intention to file a claim for contribution under § 113(f)(3)(B) as early as December 30, 2004. Noting then in its motion to amend the Complaint "that it was in the process of settling a portion of its potential CERCLA liability with the EPA," Pharmacia declared that "it intended to further amend its Complaint to add a claim for contribution under Section 113(f)(3)(B) of CERCLA when the settlement became binding and Pharmacia's Section 113(f)(3)(B) claim was perfected." Motion to Further Amend, at 2-3.[FN3]

FN3. It is also worth noting that Judge Falk had ordered that any motion to amend the complaint be brought by October 16, 2006. *See* December 12, 2005 Order. The underlying motion was filed 10 days before that deadline. Defendants cannot claim to have been blind-sided by Plaintiff's Motion to Further Amend.

Defendants also fail to show that they would be unduly prejudiced if the Court were to grant Plaintiff's motion. As Defendants have been aware since the initial Complaint was filed that Plaintiff intended to put forth a claim for contribution, the particular statutory clause under which Plaintiff planned to do so would have little impact on the type of discovery performed by Defendants to counter the claim. *Id.,* at 6; *see also* *Dole v. Arco Chemical Co.,* 921 F.2d 484, 487-88 (3d Cir.1990) (holding that party's attempt to amend to "refine theory of liability upon which liability might be based" was not reflective of undue delay, particularly since there were "legitimate questions as to which regulations govern[ed] in [that] unique factual situation" and since the "proposed amendment implicate[d] few, if any, new facts."). This lack of prejudice suffered by Defendants is decisive. *See* *Lorenz v. CSX Corp.,* 1 F.3d 1406, 1414 (3d Cir.1993) (holding that the prejudice suffered by non-moving party "is the touchstone for the denial of an amendment."), *quoting* *Cornell & Co. v. Occupational Safety & Health Review Comm'n,* 573 F .2d 820, 823 (3d Cir.1978).

***6** For the foregoing reasons, this Court will grant Pharmacia's request to further amend its complaint under Fed.R.Civ.P. 15(a).

2. Defendants' Motion for Summary Judgment on the issue of Laches and Equitable Estoppel.

Defendants move for summary judgment on the grounds that Pharmacia is precluded under the doctrines of equitable estoppel and laches from asserting its contractual claim. The Court will deny Defendants' motion for the following reasons.

a. Equitable Estoppel.

Under New Jersey state law, a party claiming the benefit of the estoppel must show:

> that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action. Further, the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment.

A.P. Dev. Corp. v. Band, 113 N.J. 485, 496-97 (1988), *quoting* *Miller v. Miller,* 97 N.J. 154, 163 (1984); *see also* *O'Malley v. Dept. of Energy,* 109 N.J. 309, 317 (1987) ("The essential elements of equitable estoppel are a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment."), *citing Horsemen's Benevolent & Protective Ass'n v. Atlantic City Racing Ass'n,* 98 N.J. 445 (1985).

Defendants contend that Pharmacia is estopped from requesting indemnification under the Agreement for damages incurred as a result of the USEPA and NJDEP investigations, on the grounds that Pharmacia waived its contractual rights when it allegedly (1) "concealed the USEPA's claims for more than eight years;" (2) "affirmatively assured Motor Carrier and Intermodal that there had been no violations of the 1994 Agreement;" (3) "induced Intermodal to acquire the capital stock of Motor Carrier;" (4) "induced Motor Carrier to cause Intermodal to become an "Affiliate" within the meaning of Article 5 of the 1994 Agreement, and" (5) "sought to have USEPA take direct action against Motor Carrier." Def. MSJ Br. at 10-11.

In particular, Defendants argue that Pharmacia had been aware of USEPA's claims against them since April 26, 1996 at the latest, when "USEPA notified Pharmacia of its potential liability for response actions in the Passaic River." Def. MSJ Br., at 11.[FN4] Defendants claim that they were not notified of USEPA's inquiries at the time they were made, that Pharmacia failed to disclose the USEPA investigation even when Intermodal acquired Motor Carrier, and that not once in the regular correspondence between Pharmacia and Motor Carrier regarding environmental issues was the topic of USEPA's investigation of the impact of activities at the Kearny Site may have had on the Passaic River addressed. Def. MSJ Br. at 11-13.

FN4. Defendants insist that Pharmacia may even be deemed to have known of USEPA's claims from an earlier date, as Pharmacia allegedly received a Request for Information letter from USEPA on January 3, 1995 stating that USEPA was "investigating the presence of hazardous substances in the sediments of the Passaic River." *See* McTiernan Cert. Ex. L; Def. MSJ Br. at 11-12.

Defendants submit to the Court that they suffered great prejudice as a consequence of Plaintiff's alleged failure to timely notify them of the aforementioned potential liabilities. Indeed, Defendants contend that the late disclosure of USEPA's investigation of the Kearny property's impact on the Passaic River deprived Motor Carrier of the right to take part in the investigation and be heard on the issues at the heart of the problem. Instead, they claim, Pharmacia monopolized contacts with the USEPA in an effort to exonerate Pharmacia and place all liability at Motor Carrier's door. *Id.,* at 13. In addition, Defendants argue that Plaintiffs' failure to bring USEPA's investigation to the attention of any of the Defendants induced Intermodal to acquire the stock of Motor Carrier, rather than buy or lease the Kearny Property. *Id.,* at 13-14. In effect, Defendants argue, Intermodal agreed to become an affiliate of Motor Carrier under Article 5.3 of the 1994 Agreement on the basis of incomplete information, and is now exposed to potential liability as a result of its decision to acquire Motor Carrier. *Id.,* at 14. Defendants therefore claim that they relied on Pharmacia's silence with respect to USEPA's investigation, and suffered prejudice as a result of that reliance.

***7** Pharmacia, on the other hand, contests Defendants' allegation that Pharmacia's indemnification rights under Section 2.5 of the Agreement arose in 1995 or 1996. Pharmacia explains instead that USEPA's early correspondence was nothing more than a request for information, and that Pharmacia only incurred liability for damage to the Passaic River as a result of the USEPA's March 2004 Order. Pl. Opp'n Br., at 21. In addition, Pharmacia argues that USEPA's investigation of the Kearny Property was never concealed from Defendants, as the correspondence between USEPA and Pharmacia was made available to Intermodal as early as

November 1997. *See* McGahren Exhibit 21, at 3 (letter from Dr. Robert Gan of Eder Assoc. to Marshall Williams of CSX referencing, *inter alia,* the February 1995 and December 1995 Requests for Information-Diamond Alkali Superfund Site Unit).

In light of this evidence, this Court finds that there are genuine issues of material fact as to whether Pharmacia failed to disclose the USEPA investigation, whether Intermodal or Motor Carrier were induced into any course of action as a result of that failure to disclose, and whether they suffered any prejudice as a result of that inducement. The Court must therefore deny Defendants' Motion for Summary Judgment as to the doctrine of equitable estoppel.

b. Laches

New Jersey courts have interpreted the doctrine of laches to apply when plaintiff "delay[s] for a length of time which, unexplained and unexcused, is unreasonable under the circumstances and has been prejudicial to the other party." *Mancini v. Twp. of Teaneck,* 179 N.J. 425, 437 (2004), *quoting Nw. Covenant Med. Ctr. v. Fishman,* 167 N.J. 123, 140 (2001).

As explained above, Pharmacia has offered evidence raising issues of fact as to whether it delayed disclosure of USEPA's investigation, whether any such delay was unexplained, and whether Defendants suffered any prejudice as a result. Accordingly, this Court will deny Defendants Motion for Summary Judgment as to its defense of laches.

3. Defendants' Motion for Summary Judgment on Pharmacia's Breach of Contract claim.

Defendants claim that they are entitled to summary judgment that they have no contractual obligation to indemnify Pharmacia for work performed at the request of USEPA and NJDEP, on the grounds that (i) Pharmacia failed to provide adequate notice under the Agreement and (ii) that the Agreement allegedly excludes the governmental requests at issue here from its indemnification obligation. The Court will deny Defendants' motion on this issue.

a. The Notice Requirement

Defendants argue that Article 9.12 of the Agreement relieves them of any indemnification obligation they may have had towards Pharmacia. Def. MSJ Br. at 18. That provision states as follows:

9.12 *Advance Notice of Actions.* Neither party shall take any action or make any communication which could reasonably be expected to have a materially adverse effect on the resolution or outcome of any matter for which the other party may be liable under Article 2 or Section 9.6 without providing at least five (5) business days advance notice to the other party. Any material breach of this obligation shall relieve the party to whom such notice was not provided of liabilities and indemnification under Article 2 or Section 9.6 with respect to such matter to the extent that such non-notified party has been prejudiced by the lack of timely and adequate notice. This notification requirement shall not apply to communications which are part of or which relate to a judicial or administrative proceeding in which the parties are litigating claims against each other.

***8** McGahren Cert. Ex. 10, § 9.12. Defendants claim that they never received notice of material communications between USEPA, NJDEP and Pharmacia, and suffered prejudice as a result of this lack of notice.

First, Defendants argue that the correspondence between USEPA and Pharmacia in 1995 and 1996 regarding the environmental impact of activities at the Kearny Property on the Passaic River, the April 1996 and September 2003 USEPA special notice letters, and the NJDEP September 2003 Directive, constitute exactly the type of "communication which could reasonably be expected to have a materially adverse effect on the resolution or outcome of any matter for which the other party may be liable" referenced in Article 9.12. Def. MSJ Br., at

19-20. Defendants therefore contend that they should have been given notice of such communications at least five days before Pharmacia responded to them. Instead, they argue, Pharmacia only gave Defendants notice of the communications in 2004.

Second, Defendants claim that the alleged failure to provide them with notice of said communications caused them prejudice. Indeed, Defendants contend that they were denied the right to defend their position before USEPA and the NJDEP. They claim, moreover, that Intermodal was induced into buying Motor Carrier on the basis of incomplete information, and that, as a consequence, Intermodal now finds itself potentially liable for environmental damage to the Passaic River.

Pharmacia, on the other hand, reiterates its claim that all correspondence between USEPA, NJDEP and Pharmacia was in the possession of Defendants, and disputes Defendants' allegations of prejudice. Indeed, Pharmacia argues that Defendants have failed to show that the agencies at issue took any action that might have had a materially adverse effect on Pharmacia or Motor Carrier during the eight years during which Defendants claim they should have received notice. Pharmacia Opp'n Br., at 17. In fact, Pharmacia argues that no prejudice was suffered as a result of the alleged lack of notice because “prior to 2004, Pharmacia did not incur any costs of Cleanup for which it now seeks indemnification.” *Id.,* at 18. Finally, Pharmacia contends that it answered all USEPA and NJDEP questions truthfully and completely, and that Defendants were therefore not prejudiced by any failure to include Defendants in discussions with the agencies. *Id.*

Viewing all the foregoing evidence in the light most favorable to non-movant, this Court finds that there remain genuine issues of material fact as to whether Pharmacia violated its obligations under section 9.12 of the Agreement. Indeed, there remain genuine issues of material fact as to whether Defendants received adequate notice of Pharmacia's communications with the agencies, and whether Defendants suffered any prejudice as a result of the alleged failure to give notice. The Court will therefore deny Defendants' Motion for Summary Judgment on this issue.

b. The Scope of the Indemnification Obligation Under Article 2 of the Agreement.

***9** Defendants argue that they are entitled to summary judgment that any indemnification obligations they may have under Article 2 of the Agreement do not extend to liabilities incurred in connection with damage to the Passaic River. This Court disagrees.

The Agreement at issue here must be interpreted under the law of the state of New Jersey.[FN5] Under New Jersey law, “fundamental canons of contract construction require that we examine the plain language of the contract and the parties' intent, as evidenced by the contract's purpose and surrounding circumstances.” *Highland Lakes Country Club & Community Ass'n v. Franzino,* 186 N.J. 99, 115 (2006), *quoting State Troopers Fraternal Ass'n v. New Jersey,* 149 N.J. 38, 47 (1997). “[W]hen the terms of a contract are clear and unambiguous, there is no room for construction and the court must enforce those terms as written.” *Watson v. City of East Orange,* 175 N.J. 442, 447 (2003), *citing Kampf v. Franklin Life Ins. Co,* 33 N.J. 36, 43 (1960).

FN5. Section 13.10 of the Agreement provides, in part, that “[t]his Agreement, and the rights and obligations of the parties hereunder, shall be construed in accordance with, and governed by, the law of the State of New Jersey, without giving effect to the conflict of law principles thereof.” McGahren Cert., Ex. 10, § 13.10.

Defendants argue that the cost of assessing and remedying damage to the Passaic River is unambiguously excluded under the Agreement from the category of costs for which Motor Carrier must indemnify Pharmacia. Def. MSJ Br., at 23. In particular, Defendants argue that the Agreement sets geographical, temporal and qualitative limitations on

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Pharmacia's indemnification obligations, all of which exonerate them from the duty to indemnify Pharmacia for those costs. FN6

FN6. Section 2.2 of the Agreement provides, in part, that:

> [i]f Motor Carrier after the Effective Time is required to treat, remove, and/or dispose of an Unknown ISRA/Spill Act Hazardous Material or PCB's as part of a Government Mandated ISRA/Spill Act Clean-up, Monsanto will pay the Incremental Cost of such treatment, removal and/or disposal together with any Incremental Cost of investigation, analysis or storage of that portion of the Unknown ISRA/Spill Act Hazardous Material undisclosed to or unknown by Motor Carrier required to be remediated which was in excess of the upper concentration limits for non-reisdential use under ISRA and the Spill Act at the Effective Time for such Unknown ISRA/Spill Act Hazardous Material, and/or that portion of the PCB's which Motor Carrier proves was present in the soil or groundwater at the Plant as of the Effective Time required to be remediated solley as a result of a Change in Clean-up Standards.

> McGahren Cert., Ex. 10, § 2.2.

Defendants' indemnification obligations under the Agreement are set out in Section 2.5(b) of the Agreement, which states, in part:

Purchaser Indemnification. Purchaser and its respective successors in title or interest and assigns will be liable for and will indemnify, save and hold harmless [Pharmacia], its Affiliates, their predecessors in title or interest, successors and assigns, those for whom [Pharmacia] would be liable and DOEA of any of the foregoing from and against: ...

(b) *any costs of Clean-up of Substances,* including but not limited to, any Clean-up under federal law (including but not limited to CERCLA, RCRA, or TSCA) or any Clean-up under the laws of the State of New Jersey (including but not limited to ISRA, the Spill Act or other action or regulations promulgated by the State of New Jersey) for all Substances, including but not limited to PCB's [sic] and Unknown ISRA/Spill Act Hazardous Material and whether or not such Clean-up arises from or in connection with Substances dumped, buried, injected, deposited or disposed of by [Pharmacia], its Affiliates, their respective predecessors in title or in interest, those claiming by, through or under the foregoing and their respective DOEA (except to the extent covered under Section 2.2 of this Agreement as it pertains to the NFA Letter and performance of remedial or other action with respect to groundwater mandated by the current Work Plan and ACO or an Amendment thereto) ...

McGahren Cert., Ex. 10, § 2.5(b) (emphasis added).

***10** First, Defendants claim that the Agreement demonstrates “that the parties never intended that the term “Clean-up” would be so expansive that it could include claims by governmental agencies for *off-site action* applicable to sediments, surface water and natural resources over a 17-mile stretch of the lower Passaic River.” Def. MSJ Br. at 24 (emphasis added). Section 2.1(c) of the Agreement defines “Clean-up” as “investigatory, remedial and monitoring work mandated by the Requirements of Law or a Governmental Agency to investigate, remediate, remove, treat, clean-up, contain or prevent the escape of Substances on, within, generated by or emitted from any of the Kearny Site, the Plant or Property.” McGahren Cert. Ex. 10, § 2.1(c). As for the property at issue in the Agreement, it is defined in part as “the real property at [Pharmacia's] Kearny Site, consisting of approximately 28 acres of land known as Foot of Pennsylvania Avenue, Kearny, New Jersey.” *Id.,* § 1.2. The Defendants therefore argue that the language of the Agreement establishes indisputably that they should not be held liable under the Agreement for damage to an area remote from the Kearny Site.

Second, Defendants argue that the terms of the Agreement compel the conclusion that Motor Carrier's liability, if any, is to be limited to the “Clean-up of discharges of hazardous substances from the Kearny Site *that occurred after Motor Carrier took title.*” Def. MSJ Br., at 25 (emphasis added). Indeed, Defendants point to Article 2.3 of the Agreement, which provides that Motor Carrier's liability be limited in each case to “any Substances present at or which migrate from the Kearny Site, the Plant or the Property at any time *after the Effective Time[,* December 19, 1994,] including but not limited to Substances ... dumped, buried, injected, deposited or disposed of by [Pharmacia], its Affiliates, [and] their respective predecessors in title.” McGahren Cert., Ex. 10, § 2.3 (emphasis added). Defendants conclude that since “the USEPA and NJDEP claims at issue here relate to discharges which occurred long prior to 1994, Motor Carrier need not indemnify Pharmacia.” Def. MSJ Br., at 26.

Finally, Defendants argue that the types of clean-up activities covered by the indemnification clause do not include the clean-up of “sediments, surface water or natural resources”. *Id.* Defendants claim that such types of clean-up are never mentioned in the Agreement, and were never discussed in the negotiations leading up to the Agreement. *Id.,* at 12-13. In fact, they argue, liability for those types of clean-up is instead specifically addressed in Article 9.6 of the Agreement, which provides that Pharmacia “will remain responsible for [damage] caused or occurring prior to the Effective Time [December 19, 1994] and arising out of Monsanto's ownership, operation, maintenance or use of the Property.” McGahren Cert., Ex. 10, Section 9.6. Defendants conclude that “[t]he contractual provision [above] unambiguously excludes the sort of claims now advanced by USEPA and NJDEP from the scope of the term “Clean-up costs.” “ Def. MSJ Br. at 28.

***11** In response, Pharmacia argues that Section 2.1(c) expressly covers substances “emitted from” the Kearny Site, and concludes that Defendants' argument that clean-up indemnification obligations are limited to on-site clean-up is simply invalid. Pharmacia Opp'n Br., at 11-12. Moreover, Pharmacia retorts that the alleged temporal limitations on Defendants' clean-up liability under the Agreement are unsupported by the text of the Agreement. *Id.,* at 13. Pharmacia emphasizes in particular the fact that neither the definition of “Clean-up” in Section 2.1(c) of the Agreement nor the provision addressing the indemnification obligations of Motor Carrier (Section 2.5) provide for any such temporal limitation.

In addition, Pharmacia draws the Court's attention to the language of Section 9.6(b) of the Agreement, which “explicitly excludes from Pharmacia's indemnification obligations all matters covered by Article 2,” *i.e.,* all indemnification for remediation responsibilities under the Agreement. *Id.* Pharmacia contends that Section 9.6 cannot therefore cover liability for the type of damage at issue in this case.

Finally, Pharmacia argues that N.J.S.A. 58:10-23.11b of the Spill Act defines “Clean-up and removal costs” as costs incurred mitigating “damage to the public health, safety, or welfare, including, but not limited to, public and private property, shorelines, beaches, *surface waters, water columns* and bottom sediments, soils and other affected property, including wildlife and *other natural resources* ...” N.J.S.A. 58:10-23.11b (emphasis added), and that since the Agreement provides that Section 2.5 would apply to any costs of cleanup under the Spill Act, these costs should be allocated to Motor Carrier. *Id.,* at 8.

In light of the foregoing evidence, and viewing all evidence in the light most favorable to nonmovant, this Court finds that there remain genuine issues of material fact as to whether the liabilities incurred in connection with the Passaic River clean-up are excluded from Defendants' indemnification obligations under the Agreement. The Court will therefore deny Defendants' Motion for Summary Judgment on the issue.

4. Pharmacia's Motion for Summary Judgment on Whether Motor Carrier has breached its obligation to indemnify Pharmacia for costs related to the EPA order and the NJDEP Directive.

Pharmacia claims that is entitled to summary judgment that Motor Carrier has breached its contractual obligation to to indemnify, save, and hold harmless Pharmacia for its costs and liabilities under the USEPA Order and the NJDEP Directive. Pharmacia Motion-Motor Carrier, at 18, 25. The Court disagrees.

The Court notes first that Pharmacia's argument is premised on the assumption that it has met all of its own obligations under the Agreement. As stated above, there remained genuine issues of material fact as to whether Pharmacia had complied with the notice requirements of the Agreement. Accordingly, there remain genuine issues of material fact as to whether Motor Carrier breached the Agreement, as no breach can be deemed to have occurred if Pharmacia had previously failed to comply with a material provision of the Agreement. *See Goldman S. Brunswick Partners v. Stern,* 265 N.J.Super. 489, 494 (N.J.Super.Ct.App.Div.1993) (material breach of contract by one party allows non-breaching party to "treat the contract as terminated and to refuse to render continued performance ."), *quoting Ross Sys. v. Linden Dari-Delite, Inc.,* 35 N.J. 329, 341 (1961) .

***12** Moreover, even if the Court had found that Pharmacia had met all of its obligations under the Agreement, we would still deny Pharmacia's motion for summary judgment that Motor Carrier failed to meet its indemnification obligations under the Agreement. Plaintiff argues-applying the New Jersey rules of contract interpretation outlined above-that "it was the unambiguous intent of the parties that Motor Carrier would indemnify Pharmacia for all CERCLA-related costs arising at the Kearny Site." Pharmacia Motion-Motor Carrier, at 20. In addition, Pharmacia claims that under the Agreement, "Clean-up" is defined as:

(1) investigatory, remedial and monitoring work; (2) mandated by the Requirements of Law or a Governmental Agency; (3) to investigate, remediate, remove, treat, clean-up, contain or prevent the escape of; (4) Substances on, within, generated by or emitted from the Kearny Site.

Id., at 21 (quotations omitted), *quoting* McGahren Ex. 10, § 2.1(c). According to Pharmacia, Motor Carrier's obligation to indemnify Pharmacia for the CERCLA Section 107(a) response costs therefore "depends only on whether the work for which the [US]EPA seeks reimbursement and funding constitutes a "Clean-up" as defined in the Kearny Site Agreement." Pharmacia Motion-Motor Carrier, at 21. Pharmacia concludes that since the work it performed at the request of USEPA undisputably constitutes Clean-up costs under the Agreement, it is entitled to summary judgment that Motor Carrier has breached the Agreement by failing to indemnify Pharmacia for those costs. *Id.,* at 23.

Defendants, on the other hand, argue that the term "Clean-up" as used in the Agreement is ambiguous, and that there remain genuine issues of material fact whether that term encompasses the liabilities incurred by Pharmacia in connection with the USEPA and NJDEP investigations. As a threshold matter, Defendants argue that the Agreement is not clear as to whether the costs at issue in this case would be "Clean-up" costs under Article 2.5 of the Agreement, or whether they would constitute "Incremental Costs" under Article 2.2.[6] Motor Carrier Opp'n Br., at 22.

Second, and as discussed at length above, Defendants argue that the Agreement sets geographical, temporal and qualitative limitations on Pharmacia's indemnification rights, as a result of which the costs incurred by Pharmacia in connection with the NJDEP and USEPA investigations must be read to lie beyond the scope of the Agreement's indemnification provision. Def. MSJ Br., at 24-27. In essence, Defendants argue (i) that the Agreement only covered indemnification relating to the Kearny Site itself, not the abutting Passaic River, (ii) that the Agreement only contemplated indemnification for the clean-up of discharges that occurred after December 19, 1994, when the property was conveyed to Motor Carrier, and (iii) that the Agreement does not provide for indemnification for the clean-up of water resources. *Id.*

***13** In light of the conflicting evidence presented by the parties, and viewing all evidence in the light most favorable to non-movant, this Court will deny Pharmacia's motion for summary judgment that Motor Carrier breached its alleged obligation under the Agreement to indemnify Pharmacia for work performed in connection with the NJDEP and EPA investigations.[FN7]

FN7. It necessarily follows that Plaintiff's request for summary judgment that it is entitled to reverter of the interest in the Kearny property as a result of Defendants' breach of the Agreement is premature.

5. The Parties' Motion for Summary Judgment on Motor Carrier's obligation to indemnify Pharmacia under the Spill Act.

Pharmacia moves for summary judgment that Motor Carrier is liable in contribution under the Spill Act, on the grounds that Pharmacia "has incurred and will incur costs of cleanup relating to a discharge for which Motor Carrier is "in any way responsible" " under the Act. Pl. MSJ Motor Carrier Br. at 34. Conversely, Motor Carrier moves for summary judgment that there are no grounds on which to grant Pharmacia's Spill Act contribution claim.

Section 58:10-23.11f a(2)(a) of the Spill Act, cited by both Plaintiff and Defendants, provides, in part, that:

Whenever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons *in any way responsible* for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance.

N.J.S.A. § 58:10-23.11f a(2)(a) (emphasis added). "Discharge" is defined under the Spill act as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State." N.J.S.A. § 58:10-23.11b.

A stricter rule, however, applies in the case at bar. Entities such as Motor Carrier who acquired, after September 14, 1993, property "on which there has been a discharge prior to the [entity's] acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be *strictly liable,* jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred." *Interfaith Cmty. Org. v. Honeywell Int'l, Inc ., 215 F.Supp.2d 482, 495 (D.N.J.2002)* (emphasis added), *quoting* N.J.S.A. § 58:10-23.11g(c)(3).[FN8] In essence, "property owners are strictly liable under this provision unless an innocent purchaser defense is applicable." *Interfaith Cmty.,* at 495. In addition to lack of knowledge, such an innocent purchaser must demonstrate that it was not, in any way, responsible for the discharge, and must show that it informed the NJDEP as soon as evidence of the discharge was discovered.[FN9]

FN8. That section provides, in full:

In addition to the persons liable pursuant to this subsection, any person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c. 141. Nothing in this paragraph shall be construed to alter liability of any person who acquired real property prior to September 14, 1993.

N.J.S.A. § 58:10-23.11g(c)(3).

FN9. The "innocent purchaser" defense is set out in greater detail in N.J.S.A. § 58:10-23.11g (d)(2), which states, in part, that:

(2) A person, including an owner or operator of a major facility, who owns real property acquired on or after September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that subparagraphs (a) through (d) apply, or if applicable, subparagraphs (a) through

(e) apply:

(a) the person acquired the real property after the discharge of that hazardous substance at the real property;

(b) (i) at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property ...

(c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to this section;

(d) the person gave notice of the discharge to the department upon actual discovery of that discharge.

To establish that a person had no reason to know that any hazardous substance had been discharged for the purposes of this paragraph (2), the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property....

Nothing in this paragraph (2) shall be construed to alter liability of any person who acquired real property prior to September 14, 1993 ...

N.J.S.A. § 58:10-23.11g(d)(2).

Pharmacia claims that "discharges" occurred during its ownership of the Kearny Site, that Motor Carrier knew of such discharges, and that it nonetheless bought the property in December 1994. Pharmacia Motion-Motor Carrier, at 34-35. Motor Carrier responds to Pharmacia's allegations by citing to inapposite law, ignoring the strict liability clause of the Spill Act. Motor Carrier Opp'n Br., at 30-32. This Court is nonetheless inclined to deny Pharmacia's motion for summary judgment.

***14** There appears to be no genuine issue of material fact that Motor Carrier was aware, at the time it purchased the Kearny Site, that hazardous substances may have been discharged *on the property* during Pharmacia's tenure. Summary judgment might therefore have been properly granted had Pharmacia sought indemnification for costs relating to the clean-up of the Kearny site itself. No evidence is offered to the Court, however, that Motor Carrier was aware of the discharge of hazardous substances *into the Passaic River-i.e.,* off-site. In fact, as explained above, Motor Carrier has consistently maintained that environmental concerns relating to zones outside of the Kearny Site itself were never brought up or taken into consideration by the parties in the run-up to the sale of the property. Def. MSJ Br., at 24. In addition, Motor Carrier strenuously denies being "in any way responsible" for any discharge on the Kearny Property or its surroundings.

Finally, while there is no evidence that the Motor Carrier immediately contacted the NJDEP upon discovery of the impact of Pharmacia's discharges on the Passaic River, the Court finds that this should not preclude Motor Carrier from trying to establish an "innocent purchaser" defense at a later time in these proceedings. Indeed, Motor Carrier alleges that it only learned of the environmental damage to the Passaic River in 2004. Since the NJDEP had obviously at that time been handling the issue for a number of years, there was no need to inform it of the discovery.

Viewing all evidence in the light most favorable to non-movant, this Court finds that there is a genuine issue of material fact as to whether Motor Carrier was an "innocent purchaser" of the Kearny Property under N.J.S.A. § 58:10-23.11g(d)(2), and therefore, whether Motor Carrier can be held strictly liable for the discharge of hazardous material into the Passaic River. Accordingly, the Court will deny Pharmacia's Motion for Summary Judgment on the issue. It necessarily follows that there remains a genuine issue of material fact as to whether Motor Carrier is exempt from liability under the Spill Act. Motor Carrier's motion for summary judgment on the issue will therefore also be denied.

6. The Parties' Motions for Summary Judgment on the Issue of Veil-Piercing.

Defendants argue that if the Court were to find that "either Motor Carrier or Intermodal [was] not entitled to judgment on one or more of Pharmacia's claims, then ... neither CSX (as the parent of Intermodal) nor Intermodal (as the parent of Motor Carrier) [would] be held deviating [sic] liable for any actions of its subsidiary." Def. MSJ Br., at 39. Pharmacia, for its part, moves the Court to pierce the corporate veil and find that Intermodal is liable for Motor Carrier's liabilities and obligations. Pharmacia Motion-Intermodal, at 16. This Court finds that it would be proper in this case to pierce the veil to hold Intermodal liable for Motor Carrier's liabilities, but finds that there is a genuine issue of material fact as to whether veil-piercing is appropriate to hold CSX liable for Intermodal's liabilities.

a. Veil-Piercing Standard.

***15** The law of the State of New Jersey is premised on the understanding that a corporation is an entity separate from its stockholders. *Lyon v. Barrett,* 89 N.J. 294, 300 (1982). Under the equitable doctrine of veil piercing, however, "the protections of corporate formation are lost and the parent corporation may be found liable for the actions of the subsidiary." *Verni v. Stevens,* 387 N.J.Super. 160, 199 (N.J.Super.Ct.App.Div.2006) (quotations omitted), *quoting Interfaith Cmty.,* at 497. In that regard, "piercing the corporate veil is not technically a mechanism for imposing 'legal' liability, but for remedying the fundamental unfairness [that] will result from a failure to disregard the corporate form." *Verni,* at 199 (quotations omitted), *quoting Trs. of the Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk,* 332 F.3d 188, 193 (3d Cir.2003). "In the absence of fraud or injustice, courts generally will not pierce the corporate veil to impose liability on the corporate principals." *Lyon,* at 300, *citing Frank v. Frank's, Inc.,* 9 N.J. 218, 224 (1952). The court in *Verni* went on to explain that:

> in order to warrant piercing the corporate veil of a parent corporation, a party must establish two elements: 1) that the subsidiary was dominated by the parent corporation, and 2) that adherence to the fiction of separate corporate existence would per-

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petrate a fraud or injustice, or otherwise circumvent the law. *Ventron, supra,* 94 N.J. at 500-01, 468 A.2d 150. In determining whether the first element has been satisfied, courts consider whether "the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent." *Id.* at 501, 468 A.2d 150. *See Interfaith, supra,* 215 F.Supp.2d at 497 ("veil-piercing is proper when a subsidiary is an alter ego or instrumentality of the parent corporation"). In determining corporate dominance, courts engage in a fact-specific inquiry considering whether the subsidiary was grossly undercapitalized, the day-to-day involvement of the parent's directors, officers and personnel, and whether the subsidiary fails to observe corporate formalities, pays no dividends, is insolvent, lacks corporate records, or is merely a facade. *Bd. of Trs. v. Foodtown, Inc.,* 296 F.3d 164, 172 (3d Cir.2002) ...

Verni, 387 N.J. at 199-200.

b. Motor Carrier/Intermodal Veil

Defendants' argument is limited only to asserting that while Motor Carrier is wholly-owned by Intermodal, and while Intermodal is wholly owned by CSX, their relationship is nothing more than a "garden-variety parent-subsidiary" one. Def. MSJ Br., at 39.[FN10] Unsurprisingly, Pharmacia takes exception to this characterization, both in its objection to Defendants' Motion for Summary Judgment and in its own Motion for Summary Judgment against Intermodal.

> FN10. Intermodal argues that the doctrine of veil-piercing only comes into play upon issuance of a judgment against a subsidiary, but fails to offer any controlling authority in this jurisdiction for that proposition of law. The Court is unaware of any at this time. The main case cited by Intermodal, *Casini v. Graunstein,* 307 B.R. 800, 811 (Bankr.D.N.J.2004) is inapposite. Indeed, while the court in that case held that "[b]efore invoking the doctrine [of veil-piercing,] a plaintiff must first establish an independent basis to hold the corporation liable," *id,* it went on to declare that "[h]aving established corporate liability for a tort or breach of contract, if the corporate defendant has insufficient assets to satisfy a *prospective* judgment, the plaintiff may then seek to pierce the veil." *Id.* at 811-12 (emphasis added). The Court does not interpret this language to mean that the basis for the judgment must be settled by judgment (summary or otherwise) before the doctrine of veil-piercing can be addressed.

Pharmacia points out first that "Motor Carrier is indisputably undercapitalized." Pharmacia Motion-Intermodal, at 18. Indeed, Defendants do not contest that Motor Carrier has no revenues, and has not had a balance sheet nor issued financial reports since 1998. Pl. R. 56.1 Statement ¶¶ 104-05, Def. R. 56.1 Counterstatement ¶¶ 104-05. Pharmacia concludes that Motor Carrier cannot demonstrate that it has the funds to cover any potential liabilities that may arise as a result of these proceedings. Pharmacia SMJ Intermodal, at 18.

***16** In addition, it is beyond contention that Motor Carrier has no employees, and exists solely as a holding company for the Kearny Property. Pl. R. 56.1 Statement ¶¶ 103, 106, Def. R. 56.1 Counterstatement ¶¶ 103, 106. Finally, Defendants do not dispute that "[s]ince the closing in January 1998, neither the shareholders, officers nor directors of Motor Carrier have held a meeting as set forth in the company's by-laws." Pl. R. 56.1 Statement ¶ 101, Def. R. 56.1 Counterstatement ¶ 101.

For the foregoing reasons, this Court finds that there is no genuine issue of material fact that piercing the veil between Intermodal and Motor Carrier is appropriate here under *Verni.* There is no genuine issue of material fact that the parent (Intermodal) dominates its wholly-owned subsidiary (Motor Carrier), and that given Motor Carrier's inability to satisfy a potential adverse judgment, adherence to the fiction of a separation between Intermodal and Motor Carrier would perpetrate an injustice. The Court will therefore deny Defendants' Motion for Summary Judgment on the issue of veil-piercing, and grant Pharmacia's motion on the same issue.

c. Intermodal/CSX Veil

Defendants also argue that they are entitled to summary judgment that Intermodal and CSX are to be considered distinct entities for the purposes of establishing liability in this case.

Defendants offer little evidence to support their contention that CSX may not be held accountable for Intermodal's liabilities.[FN11] Plaintiff, on the other hand, argues that CSX has numerous subsidiaries, including Intermodal, that are "mere instrumentalities of the parent," as "CSX maintains a cash pool from which each subsidiary draws to operate its own functions." Pl. Opp'n Br., at 27. Moreover, Plaintiff insists that CSX's subsidiaries do not issue annual financial reports, but instead rely on CSX to issue reports encompassing all subsidiaries. Finally, Plaintiff claims that veil-piercing is appropriate because all of Intermodal's expenditures have to be approved by the Chairman of CSX. Pl. Opp'n Br., at 27.

> FN11. In fact, Defendants do little more than assert that:
>
> > Motor Carrier is a wholly owned subsidiary of Intermodal, and Intermodal, in turn, is a wholly owned of [sic] subsidiary of CSX.... [T]he record contains no evidence suggesting anything other than garden-variety parent-subsidiary relationships between Intermodal and Motor Carrier, and between CSX and Intermodal....
> >
> > The undisputed facts here do not permit veil-piercing under New Jersey law. Instead, they demonstrate only normal parental oversight of subsidiary corporations-no domination by the parent, no blurring between parent and subsidiary, no loss of the subsidiary's separate existence, no abuse of the corporate form by the parent to perpetrate a fraud or any sort of injustice.
>
> Def. MSJ Br. at 39-41.

Viewing all evidence in the light most favorable to non-movant, this Court finds that there remains a genuine issue of material fact as to whether piercing the corporate veil between Intermodal and CSX would be appropriate under *Verni.* Accordingly, the Court will deny Defendants' motion for summary judgment on this issue.

7. Pharmacia's Motion for Summary Judgment on Intermodal's Status as an "Affiliate" of Motor Carrier under the Agreement.

Pharmacia claims that it is entitled to summary judgment that Intermodal assumed the responsibilities of Motor Carrier under the Agreement by expressly acknowledging that it was an "Affiliate" of Motor Carrier under the Agreement. The Court will deny Pharmacia's motion on this issue.

Affiliates are defined under the Agreement as follows:

> "Affiliate" of a specified party means any other present or future person (including individuals, corporations and other legal entities) directly or indirectly controlling or controlled by or under direct or indirect common control with, such specified party. For purposes of this definition, "control" when used with respect to a specified person or party means the management and policies of such person or party directly or indirectly, whether by ownership of voting securities, by contract or otherwise; and the terms "controlling" and "controlled" have meanings correlative to the foregoing.

***17** McGahren Cert., Ex. 10, § 2.1(a). Classification as an Affiliate is significant, because under section 13.19 of the Agreement:

[i]f at the end of any calendar quarter the [net worth of Motor Carrier] shall be less than Five Million Dollars ... then the Purchaser shall promptly

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notify [Pharmacia] and, within fifteen (15) days and from time to time thereafter until [Pharmacia] has been provided with financial assurance ..., shall cause Affiliates to become Assurance Affiliates by causing them ... to become parties to this Agreement, to guaranty and/or to otherwise become liable for the obligations under the Agreement ... to the same extent as [Motor Carrier] ...

Id., § 13.19. Pharmacia alleges that Intermodal was an Affiliate of Motor Carrier under Section 2.1-as it controlled all of Motor Carrier's shares-and that when Motor Carrier allegedly failed to notify Pharmacia that its net worth had dipped below the five million dollar threshold, it became responsible for all of Motor Carrier's liabilities under the Agreement.

The Court, however, finds that Pharmacia's motion on this issue is premature. As discussed above, it remains unclear whether Pharmacia fulfilled its own obligations under the Agreement. The Court must decline to issue summary judgment on the issue of Intermodal's liability under the Agreement when the issue of Pharmacia's right to enforce any of the provisions of the Agreement is still undecided. *Goldman,* 265 N.J.Super. at 494 (N.J.Super.Ct.App.Div.1993) (material breach of contract by one party allows non-breaching party to "treat the contract as terminated and to refuse to render continued performance."), *quoting Ross,* 35 N.J. at 341. Pharmacia's motion for summary judgment on this issue is therefore denied.

III. CONCLUSION

For the foregoing reasons, the Court will grant Pharmacia's Motion for Leave to Further Amend its Complaint, deny Defendants' Motion for Summary Judgment, deny Pharmacia's Motion for Summary Judgment against Motor Carrier, and grant in part and deny in part Pharmacia's Motion for Summary Judgment against Intermodal. An appropriate form of Order accompanies this Memorandum Opinion.

D.N.J.,2006.
Pharmacia Corp. v. Motor Carrier Services Corp.

Not Reported in F.Supp.2d, 2006 WL 3533881 (D.N.J.), 64 ERC 2009

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APPENDIX E

H

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
BROWN-HILL MORGAN, LLC, a New Jersey limited liability company; and Morgan Jersey Development, LLC, a New Jersey limited liability company, Plaintiffs-Respondents/Cross-Appellants,
v.
Robert LEHRER, an individual; 350 Warren, L.P., a New Jersey limited liability partnership; and J.C. Morgan Realty, LLC, a New Jersey limited liability company, Defendants-Appellants/Cross-Respondents.
J.C. Morgan Realty, LLC, and 350 Warren, L.P., Plaintiffs-Appellants,
v.
Brown-Hill Morgan, LLC, a New Jersey limited liability company; Morgan Jersey Development, LLC, a New Jersey limited liability company; and Jeffrey M. Brown, Defendants-Respondents.

Argued March 9, 2010.
Decided Aug. 12, 2010.

West KeySummary**Corporations and Business Organizations 101 3615**

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3613 Disregarding Entity; Piercing Protective Veil
101k3615 k. Particular occasions for determining entity. Most Cited Cases
(Formerly 241Ek9 Limited Liability Companies)

In an action arising from a failed real estate development venture, the underlying reality that developer was the moving force behind a limited liability company (LLC) warranted piercing the limited liability structure to reach the developer, even though he was not a member of the LLC pierced. The members of the LLC were the developer's son and nephew, neither of whom had experience in real estate development on this scale. Developer had an abandoned warehouse that he sought to develop, and he had the initial concept to develop the warehouse into a modern, multi-use structure. He was intimately involved in all aspects of the project, and he took on the responsibility to see to the critical first step, obtaining the necessary variances and approvals from the city.

On appeal from Superior Court of New Jersey, Chancery Division, Hudson County, Nos. C-206-05 and C-211-05.

Joseph Barbiere argued the cause for appellants/cross-respondents (Cole, Schotz, Meisel, Forman & Leonard, attorneys; Mr. Barbiere and Leo V. Leyva, of counsel and on the briefs; Lauren T. Rainone, on the briefs).

Jerome F. Gallagher, Jr. argued the cause for respondents/cross-appellants (Norris, McLaughlin & Marcus, attorneys; Mr. Gallagher, of counsel and on the briefs; Haekyoung Suh, on the briefs).

Before Judges WEFING, GRALL and LeWINN.

PER CURIAM.

***1** Defendants J.C. Morgan Realty, LLC ("JC Morgan"); M. Robert Lehrer ("Lehrer"); and 350 Warren, LP ("350 Warren") appeal from a judgment entered by the trial court. Brown-Hill Morgan, LLC ("Brown-Hill"); Morgan Jersey Development, LLC ("Morgan Jersey"); and Jeffrey M. Brown ("Brown") cross-appeal from that same judgment. After reviewing the record in light of the contentions advanced on appeal, we affirm in part.

I

The dispute between the parties arises out of a failed real estate development venture in downtown

Jersey City. Defendant Lehrer, through a limited partnership, 350 Warren, in which he was the sole general partner, owned an eight-story building located at 350 Warren Street. It had been built in 1906 for use as a warehouse and had been vacant for a number of years. Lehrer hoped to redevelop the property into a mixed-use structure, with underground parking, retail shops on the ground floor and luxury apartments on the upper floors. He approached Brown to solicit his participation in the project. Brown had extensive experience in construction and construction management and had been involved in the construction of several large projects in Jersey City but had not previously been involved in developing any projects in the city. Brown was interested in the concept, and the two men ultimately agreed to form a joint venture, Morgan Jersey, to pursue the project. They did not form this joint venture directly; rather, Brown formed Brown-Hill, and Lehrer formed JC Morgan, and Brown-Hill and JC Morgan, in turn, created the joint venture Morgan Jersey. Lehrer explained to Brown that for tax reasons, he would not have a direct ownership interest in JC Morgan; instead, it would be owned by his son Eric Lehrer and his nephew Kevin Lehrer. Because this arrangement had no direct impact upon him, it was satisfactory to Brown.

The building was located in a section of the city known as the Powerhouse Arts District, an area that had been designated both as a historic preservation district and to foster a growing arts community within the city. With respect to the latter, the city had adopted a redevelopment plan for the area that required ten percent of the apartments in a development to be “work/live” units for artists. Because of the historic preservation designation, approval of the Historic Preservation Commission was required before there could be any changes to the building's façade.

For the project to be viable in the modern real estate market, Lehrer and Brown both understood that it would be necessary to replace all the windows in the building, which were significantly smaller than current buyers would accept. Since the building had an estimated one thousand windows and the walls of the building were up to twenty-eight inches thick, planning and implementing their replacement was a complex endeavor. In addition, financial viability of the project necessitated relief from the requirement for a ten percent set aside for artists. Lehrer proposed seeking an exemption from this requirement through setting aside certain of the building's retail space as gallery and studio space. Brown said that Lehrer represented to him that getting these exemptions would not be a problem in light of the relationships Lehrer had developed with the individuals in charge of that process for the city. During their discussions and in the various documents they executed, the parties referred to the needed variances and approvals as “entitlements.” We shall continue that terminology for the purposes of this opinion.

***2** The parties executed a variety of documents to give form to their agreements. On March 24, 2005, Brown-Hill and JC Morgan executed the operating agreement for Morgan Realty. Certain provisions of that operating agreement are pertinent to the issues on this appeal. Under the operating agreement, Brown-Hill was responsible for designing the project and preparing a development and construction schedule. It was also responsible for preparing the final budget, subject to the approval of JC Morgan, and securing construction financing. If, within twelve months of the signing of the operating agreement, Brown-Hill had not located construction financing that was reasonably acceptable to JC Morgan, Brown-Hill had the right to extend the financing period for another six months. If the election had not been made, JC Morgan could terminate the agreement. If it elected that extension and had not secured such financing at the end of that six-month period, JC Morgan had the right to terminate the operating agreement. In addition, with the approval of JC Morgan, Brown-Hill would hire the architect, engineer and other professionals needed to complete the project.

The operating agreement provided for Brown-Hill to make capital contributions to the project of up to $500,000 through the date when Morgan Realty closed on purchase of the building. It also provided for Brown-Hill to inform JC Morgan of its capital contributions. Further, the operating agreement capped Brown-Hill's capital contribution at $500,000 until that closing occurred or one year had passed. If one year had passed and JC Morgan determined that additional capital contributions were required, Brown-Hill was obligated to make such additional contributions as JC Morgan reasonably determined were necessary. Paragraph 3.6 of the operating agreement provided:

> Except (i) upon dissolution of the Company; or (ii) as may be expressly set forth in this Agreement, no Member shall have the right to demand or receive the return of any of its aggregate Capital Contributions or any part of its Capital Account or be entitled to receive any interest on its Capital Contributions or its outstanding Capital Account balance.

Paragraph 3.9 of the operating agreement provided in pertinent part:

> Notwithstanding anything to the contrary contained in this Agreement, if the Entitlements for the Project are not obtained on or before the date which is the six month anniversary of the date hereof (the "Outside Date"), and this Agreement is consequently terminated pursuant to this Section 3.9, then the JB Member [Brown-Hill] shall be responsible for up to $100,000.00 of Project Costs. To the extent the JB Member has paid its Capital Contribution of up to $500,000.00 and any additional Capital Contributions, the excess of its Capital Contributions over $100,000 .00 (the "Excess"), shall be reimbursed by the Lehrer Member [JC Morgan] within 120 days after this Agreement is terminated. This reimbursement shall be guaranteed by the Lehrer Member.

***3** Although Brown-Hill was responsible for preparing the final budget for the project, JC Morgan had the right to approve that final budget, including any material modifications or deviations from the preliminary budget that was attached to the operating agreement.

JC Morgan was responsible for obtaining the necessary entitlements. The operating agreement provided a six-month window for JC Morgan to obtain these entitlements. If its efforts were not successful within six months, Brown-Hill could either waive that deadline or declare the agreement terminated. In the event of such termination for failure to obtain the necessary entitlements within that time frame, Brown-Hill would be responsible for up to $100,000 of the project costs, and JC Morgan would reimburse Brown-Hill for any excess capital contributions "[n]otwithstanding anything to the contrary contained" within the operating agreement.

The preliminary budget that was attached to this operating agreement estimated total project costs of $116,305,929. Of that amount, $60 million was allocated for construction costs. Brown testified that figure was just an estimate because at the time the preliminary budget was prepared, Brown-Hill had not determined the full scope of the project and had not conducted any structural assessment of the building or its systems.

Brown also testified that Lehrer had repeatedly assured him that the inherent value of the building stood behind the provision in the operating agreement to reimburse Brown-Hill. Lehrer denied ever making such a statement, and Brown admitted that nothing within any of the documents that were executed gave him the right to impose a lien on the building to secure his claim for reimbursement.

On that same date, March 24, 2005, 350 Warren, and Morgan Jersey executed a contract of sale for the building, the terms of which incorporated the operating agreement between Brown-Hill and JC Morgan governing their joint venture. The purchase price had three elements: a fixed sum of $7.238 million, plus an additional $100 per "Net Saleable Square Foot" plus 40% of the taxable in-

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come on the sale of residential units within the building. Closing was to occur on the date construction financing was in place.

Paragraph 12.3 of that contract provided the following:

> Notwithstanding anything to the contrary, Purchaser [Morgan Jersey] agrees to pay from and after the date hereof, the costs of operating the Property, which costs include real estate taxes, insurance, water charges, sewer rents, assessments, employee salaries and utilities. Schedule 12.3 attached hereto and made a part hereof sets forth the current month's operating expenses for the Property. Seller [350 Warren] acknowledges that Purchaser is relying on Schedule 12.3 as a reasonable estimate of monthly operating expenses for the Property. If this Contract is terminated, Seller shall cause the Lehrer Member to reimburse Purchaser in accordance with the terms of the Operating Agreement. Nothing in this Paragraph 12.3 shall otherwise alter the obligations of the parties hereto. The provisions of this Paragraph 12.3 shall survive the Closing, or the sooner termination of this Contract.

***4** Additionally, Morgan Jersey executed a construction management agreement with Jeffrey M. Brown Associates, Inc. ("Associates"). This agreement provided for Associates to receive a guaranteed maximum price and set forth the procedure for setting that figure. Both Brown and Lehrer agreed in their testimony that at some point that price was increased by one percent in return for Brown's agreement to hire Lehrer's son and nephew, the nominal principals of JC Morgan, during the project to help them learn real estate development. The construction management agreement also referred to certain "preconstruction phase" work to be performed but provided no breakdown for responsibility for those tasks between Associates and Brown-Hill.

The parties needed interim financing to carry the project until construction financing was in place, and in February 2005 JDI Loans, L.L.C. ("JDI") provided a construction loan in which $11.9 million was disbursed to Morgan Jersey, at an interest rate of 10.5%. Obtaining this loan required the payment of a loan origination fee of $117,000 to JDI; Brown-Hill advanced those funds. The loan agreement provided that in December 2005, the interest rate would be the greater of prime plus five percent or 10.5%; it also provided that in the event of default, the interest rate would increase to twenty percent. The loan could be extended at the end of the one-year period upon payment of one percent of the outstanding principle and deposit of six months future interest. Of the loan proceeds of $11.9 million, $2.65 million was used to satisfy the two outstanding mortgages on the property and $7.5 million was used to buy out a third-party's development rights to the property. This latter figure was greater than originally anticipated; the reasons for this increase are not entirely clear from the record.

Following the closing of this interim loan and execution of the relevant documents, the parties set about their respective tasks. The record before us contains minutes of the various design development meetings that were held, as well as e-mails that were exchanged among the various participants in the project. These minutes and e-mails chronicle the slowly deteriorating relationship between Lehrer and Brown as various delays were experienced, both in finalizing the project's design elements and in securing the requisite entitlements from the city.

Based upon Lehrer's recommendation, Morgan Jersey retained an attorney to represent it in its efforts to obtain the needed variances and approvals from the city. As time went on, Brown became increasingly concerned that the attorney, who had done prior work for Lehrer, viewed Lehrer as his client on this project, rather than the joint venture, Morgan Jersey. The attorney informed Morgan Jersey that although the Historic Commission and the Planning Board apparently came to view the project favorably, both entities preferred to have the city revise its zoning ordinance to minimize the poten-

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tial for challenges to any approvals they might grant the project. The attorney advised withholding formal submission for approvals until this question was clarified. These discussions, involving multiple parties, had the inevitable effect of delaying the project.

***5** It was not until the end of July 2005 that a formal application was submitted to the Historic Commission for approval to enlarge the windows in the structure. The attorney was advised that the Commission might take up the application at its September meeting, but for reasons that are not clear from the record, it was not included on the Commission's September agenda; there is a reference to the application being misplaced. The developers were unwilling to proceed with replacing the windows on the basis that the application had been pending for more than forty-five days, *N.J.S.A.* 40A:12A-7(e), for fear of antagonizing city officials and jeopardizing any future applications before the Planning Board.

In addition, the project went through certain evolutions in design. The number of penthouses to be built increased and Lehrer, for instance, wished to enlarge certain aspects of the approximately 4,000 square foot penthouse unit that, under the operating agreement, would be conveyed to him. These changes, of necessity, required changes in design to the remaining elements.

While the parties waited for municipal approval and debated the various design questions, Brown-Hill did perform certain work at the site and advanced funds for expenses, including those for architectural and engineering services necessary to determine the structural integrity of the building and the soil composition of the site. The building, for instance, was built entirely with wooden beams; the condition of these beams had to be determined and whether they were capable of supporting the extra weight that would be engendered by the project. Brown-Hill provided Morgan Realty with periodic reports of the progress on these fronts and received no comments in response.

Brown-Hill also explored various possibilities for obtaining construction financing. Details of this financing, however, could not be completed until the designs were finalized and approvals were in place. Brown received, for instance, one proposal for construction financing based upon a proposed budget of approximately $176 million, including construction costs of $83 million. Brown testified that budget was merely conceptual in light of the many details which remained to be finalized and “costs that were unsubstantiated.”

Brown testified that he met with Lehrer on September 22, 2005, and that Lehrer “told me we finally had a deal with the city and that the Mayor had approved,” as did the heads of relevant departments. Lehrer gave him a sheet outlining the concessions he had to make for approval. It contained a revised description of the project with gallery/studio space in the proposed building, together with six affordable rental units for artists in a building on one of Lehrer's nearby parcels, and community parking on a lot next to the project site that Lehrer had hoped to use for a high-rise. Brown was satisfied that the project could proceed. Lehrer testified that the meeting was the first time Brown told him that he was disinclined to keep paying bills for the project because he had already exceeded his required capital contribution.

***6** The following day, September 23, 2005, Brown wrote to Lehrer to summarize their meeting. He noted that he and Lehrer had finally agreed on the atrium, floor plans, and apartment sizes, which the design team needed to finish its work. He also noted that the following day would be the outside date, and recommended “that we amend our agreement to allow for 6 additional months to obtain approvals and 6 additional months to obtain financing....”

Brown further recommended that they “proceed with the financing as we have discussed[,]” which meant not waiting any longer for the entitlements, and instead performing all work that could be done “during this interim period” in order to avoid “miss[ing] the market” and to replace “the very expensive JDI loan” with construction financing. He stated his belief that Lehrer had agreed to that approach.

Brown testified that he simply wanted Lehrer to confirm everything in writing, as Lehrer was avoiding his phone calls. Lehrer still had not indicated to him that any of the entitlements was proving difficult to secure.

On September 26, 2005, the attorney advised the parties that “certain headway” was made on the “artist issue,” and that it “may or may not be resolved over the next few days.”

On September 28, 2005, Lehrer responded to Brown's e-mail by noting that the attorney's e-mail suggested that the City “may have had a change of heart” on artist units, and that it might require them to be on-site. He disagreed with Brown about having reached agreement on conceptual floor plans and unit layouts. Most important, he rejected Brown's recommended extension. He objected that he had never seen a construction financing proposal despite Brown's representations for three or four months that he “had financing lined up.”

By the end of September 2005, with no approvals in sight and the approaching deadline for the JDI loan looming in the background, Brown, based upon his view that he had already expended significantly more upon the project than the $500,000 called for as his capital contribution, refused to advance any more funds. Lehrer took the position that this constituted a default on Brown's part, and in October 2005, he declared the contract terminated. Brown responded by filing a declaratory judgment action seeking a ruling that the operating agreement was not terminated and requesting specific performance of the contract for sale of 350 Warren Street. JC Morgan and 350 Warren responded by filing their own declaratory judgment action, seeking a declaration that the joint venture was at an end, that Brown-Hill had failed to meet its contractual obligations and thus was not entitled to reimbursement for its interim expenditures.

The trial court conducted a bench trial, divided into segments. Initially, it considered and ultimately denied Brown-Hill's request for specific performance. It concluded, however, that Brown-Hill had incurred a variety of expenses that benefited Lehrer and that it would be unjust to permit Lehrer to retain those benefits without reimbursing Brown. After further hearings, the trial court ultimately entered a final judgment in favor of Brown-Hill for $508,167 [FN1] against JC Morgan, 350 Warren, and Lehrer, individually. The judgment recites that personal liability for the judgment was imposed upon Lehrer despite the limited liability company he had utilized in the transaction. Further, the trial court imposed an equitable mortgage in favor of Brown-Hill upon the property located at 350 Warren Street to secure the judgment. Finally, it denied the requests of both parties for counsel fees. Both parties have appealed and cross-appealed from various aspects of that judgment.

FN1. The third page of the judgment refers to $508,157. We conclude this was an inadvertent typographical error.

***7** Following institution of this litigation, JDI declared a default on its loan when Brown failed to make a required tax escrow deposit and cancelled a requisite insurance policy. While the litigation was pending, Brown-Hill and Morgan Jersey filed a lis pendens against 350 Warren, in furtherance of their claim for specific performance. Under the terms of Morgan Jersey's loan agreement with JDI, this constituted a default, which triggered the default rate of interest.

In November 2005, in unrelated litigation, the city's creation of the Powerhouse Arts District was set aside, together with its attendant zoning restrictions. In light of that development, Lehrer no longer wished to proceed with this project because preservation and restoration were far more expensive than new construction; with the historic district restrictions invalidated, Lehrer hoped to erect a modern high-rise on the site.[FN2]

FN2. We were informed at oral argument that that did not take place, and the building remains in the condition it was in when the parties abandoned the project.

II

We take up first the arguments which JC Morgan, Lehrer and 350 Warren present on their appeal. They contend, in essence, that Brown-Hill was not entitled to any reimbursement for its expenses in light of its failure to meet its contractual obligations, that the amount of the reimbursement the trial court awarded Brown-Hill disregards the language of the operating agreement and that the trial court had no basis to impose personal liability upon Lehrer or to permit imposition of an equitable lien on the property at 350 Warren Street. They also contend that the trial court erred in dismissing 350 Warren's claim for malicious prosecution and in not awarding defendants reimbursement for their expenses and in denying them counsel fees.

We note the standard of review governing our consideration of the parties' arguments on appeal. An appellate court's review of a trial court's fact-finding is limited. “Trial court findings are ordinarily not disturbed unless ‘they are so wholly unsupportable as to result in a denial of justice....’ “ *Meshinsky v. Nichols Yacht Sales, Inc.,* 110 *N.J.* 464, 475, 541 A.2d 1063 (1988) (quoting *Rova Farms Resort v. Investors Ins. Co. of Am.,* 65 *N.J.* 474, 483-84, 323 A.2d 495 (1974)). Findings that “may be regarded as mixed resolutions of law and fact” receive the same deference on appeal, with review “limited to determining whether there is sufficient credible evidence in the record to support these findings[.]” *P.T. & L. Constr. Co. v. Dep't of Transp.,* 108 *N.J.* 539, 560, 531 A.2d 1330 (1987).

An appellate court's review of a contract is not circumscribed by the lower court's reading of it, however, because the interpretation of a contract “is a matter of law for the court subject to de novo review.” *Fastenberg v. Prudential Ins. Co.,* 309 *N.J.Super.* 415, 420, 707 A.2d 209 (App.Div.1998). Appellate courts decide such purely legal questions without deferring to a lower court's “ ‘interpretations of the law and the legal consequences that flow from established facts....' “ *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan,* 140 *N.J.* 366, 378, 658 A.2d 1230 (1995).

***8** That de novo review of contract interpretation is guided by certain fundamental principles. As a general rule, all writings that are part of the same transaction are interpreted together. 11 *Williston on Contracts,* § 30.25 (Lord ed.1999). Thus instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be construed together. *Nester v. O'Donnell,* 301 *N.J.Super.* 198, 210, 693 A.2d 1214 (App.Div.1997); *Anthony L. Petters Diner, Inc. v. Stellakis,* 202 *N.J.Super.* 11, 21, 493 A.2d 1261 (App.Div.1985). A writing should be interpreted as a whole and in a manner that is consistent with the dominant purpose of the contract. *Krosnowski v. Krosnowski,* 22 *N.J.* 376, 386-87, 126 A.2d 182 (1956). A court must keep in mind “the contractual scheme as whole,” *Republic Bus. Credit Corp. v. Camhe-Marcille,* 381 *N.J.Super.* 563, 569, 887 A.2d 185 (App.Div.2005) (quoting *Newark Publishers' Ass'n v. Newark Typographical Union,* 22 *N.J.* 419, 426, 126 A.2d 348 (1956)), and “the objects the parties were striving to attain.” *Celanese Ltd. v. Essex County Improvement Auth.,* 404 *N.J.Super.* 514, 528, 962 A.2d 591 (App.Div.2009). “[A] contract must be interpreted considering the surrounding circumstances and the relationships of the parties at the time [the contract] was entered into, in order to understand their intent and to give effect to the nature of the agreement as expressed by them.” *Graziano v. Grant,* 326 *N.J.Super.* 328, 342, 741 A.2d 156 (App.Div.1999).

A

The trial court posited two bases to support its conclusion that Brown-Hill was entitled to reimbursement for certain of its expenditures: that the contract did not require the approval of JC Morgan or Lehrer before Brown-Hill incurred these expenses and, additionally, that JC Morgan and Lehrer were fully aware of these expenses as they were being incurred and received no objection as its expenditures mounted. Both reasons find ample support within the record.

The operating agreement gave JC Morgan authority to approve or reject the final budget for the project; that final budget, however, could only be determined once the design elements were set and the question of approvals resolved. Because neither of those steps occurred, a final budget was never prepared and submitted to Lehrer or JC Morgan for approval. We have carefully reviewed the operating agreement in its entirety, noting particularly those sections to which defendants have pointed us; we find nothing within the operating agreement which made Brown-Hill's expenditures before that final budget subject to Lehrer's prior approval and authorization.

In a project of this size and scope, if Lehrer had wished to retain the ultimate authority to approve all expenditures, that should have been clearly stated. Such an additional step, of course, would have had the clear capacity to generate additional delays in a project that was all too burdened by them. We decline to read into the contract an implied requirement that Brown-Hill obtain approval for all these preliminary expenses; doing so would run counter to the overall purpose of the agreement. Thus, we agree with the trial court that the lack of a formal authorization from Lehrer is not a bar to Brown-Hill's claim for reimbursement.

***9** The minutes of the design development meetings, to which we referred earlier, demonstrate that Lehrer was kept fully apprised of the engagement of such professionals as the architects and engineers and reviewed and commented upon their work and, in some instances, sought revisions. Various e-mails that were exchanged and marked into evidence support the trial court's finding that Lehrer and JC Morgan were kept fully apprised of the nature of Brown-Hill's expenditures and raised no objection to any of them. The trial court, in addition, following the hearing on damages, carefully delineated in its oral opinion between those charges which provided a benefit to Lehrer, for which it considered reimbursement appropriate, and those which it did not, for which it denied reimbursement. We perceive no basis to overturn any of the trial court's findings in that regard.

Nor do we agree with defendants' assertion that Brown's failure to secure construction financing for the project defeats his claim for reimbursement. The operating agreement provided a six-month time frame for JC Morgan to obtain the needed entitlements and gave Brown-Hill the right to terminate the agreement if those entitlements were not issued within that period. It also provided Brown-Hill twelve months to secure the necessary construction financing. Brown-Hill thus had the right to terminate the agreement well in advance of the time it was called upon to produce the construction financing. We see no contractual link between the construction financing and Brown-Hill's right to reimbursement.

B

Defendants also argue that even if Brown-Hill is entitled to some reimbursement, the trial court erred when it directed that Lehrer, individually, as well as the partnership 350 Warren, share responsibility for the reimbursement. There are two aspects to their argument. Defendants initially stress that neither Lehrer individually nor 350 Warren were participants in JC Morgan or Morgan Jersey and were not parties to the operating agreement and thus could not be held liable to reimburse Brown-Hill.

Defendants cite *Nat'l Amusements, Inc. v. N.J. Tpk. Auth.,* 261 *N.J.Super.* 468, 478, 619 A.2d 262 (Law Div.1992), *aff'd,* 275 *N.J.Super.* 134, 645 A.2d 1194 (App.Div.), *certif. denied,* 138 *N.J.* 269, 649 A.2d 1288 (1994), and *Callano v. Oakwood Park Homes Corp.,* 91 *N.J.Super.* 105, 108-09, 219 A.2d 332 (App.Div.1966), as authority for their assertion that a party to a contract cannot obtain a relief from one who is not a party to the contract. In our judgment, these cases do not provide support for defendants' position in this litigation.

Nat'l Amusements, Inc., supra, 261 *N.J.Super.* at 476-78, 619 A.2d 262, was an eminent domain case, in which the owner of unimproved property claimed unjust enrichment against the Turnpike Authority for notice of the possibility of a partial taking, which ultimately did not occur. Once the owner received the notice of a possible partial taking, it developed its property in a manner smaller than it otherwise would have done. *Id.* at 472, 619 A.2d 262. When the possibility of a partial taking was finally eliminated, the owner sued the Turnpike Authority for the loss it said it incurred because of this smaller development. *Id.* at 470, 472, 619 A.2d 262 . We rejected this claim because the Turnpike Authority had not received a benefit, and because the legal remedy of inverse condemnation would have been adequate in the event of a taking. *Id.* at 478, 619 A.2d 262.

***10** In *Callano, supra,* 91 *N.J.Super.* at 107, 219 A.2d 332, the decedent had contracted with a developer for construction of a new house. In a separate transaction, he ordered shrubbery from a nursery, which delivered and planted it. *Ibid.* The decedent died before paying the nursery, and his estate and the developer agreed to cancel his contract of sale. *Ibid.* This court reversed the grant of the nursery's quasi-contract claim against the developer, ruling that the nursery had an adequate remedy against the decedent's estate. *Id.* at 109-10. *Callano* thus, rather than supporting defendants' position, recognized the legitimacy on appropriate facts of pursuing the real party in interest that retained the unpaid benefit.

Defendants' second contention with respect to this issue is that, in any event, Lehrer, individually, and 350 Warren received no benefit, and that the theory of unjust enrichment is thus inapplicable. They point to the subsequent invalidation of the zoning requirements for the historic district, which had the practical effect of rendering unnecessary certain of the work performed by Brown-Hill. Defendants provide no authority for the proposition that the viability of Brown-Hill's reimbursement claim should be measured in light of this subsequent, unrelated and unanticipated development.

Contract damages are "designed 'to put the injured [party] in as good a position as he would have had if performance had been rendered as promised.' " *In re Liquidation of Integrity Ins. Co.,* 147 *N.J.* 128, 136, 685 A.2d 1286 (1996) (quoting *Donovan v. Bachstadt,* 91 *N.J.* 434, 444, 453 A.2d 160 (1982) (citation omitted)). Recoverable damages are the amount that "will put that party in the same position it would have been in if the breaching party had performed the contract in accordance with its terms, no better position and no worse." *Magnet Resources, Inc. v. Summit MRI, Inc.,* 318 *N.J.Super.* 275, 293, 723 A.2d 976 (App.Div.1998). To accept defendants' position in this regard is, in our judgment, inherently in conflict with that settled principle.

Certain of the work for which the trial court directed reimbursement, such as the environmental audit and the soil testing, retained value for Lehrer regardless of this subsequent development. Other work, such as exploring the various design alternatives, may have provided value to Lehrer for increasing his understanding of the developing market for new residential units in the area. We find no abuse of discretion in the trial court's conclusion that Lehrer received a benefit as a consequence of Brown-Hill's development work. Finally, as a matter of policy, we can see no justification for relieving Lehrer of this obligation because of the intervening actions of an unrelated third party.

Defendants contend that the theory of unjust enrichment is inapplicable to 350 Warren because the parties' agreement provided that in the event of the termination of the operating agreement, all permits, approvals and work product would be assigned to the partnership. They argue that 350 Warren cannot be considered to be unjustly enriched if it received what it was contractually entitled to.

That provision is found in the contract of sale between 350 Warren and Morgan Jersey. It is conditioned, moreover, on the purchaser, Morgan Jersey, defaulting on the contract to purchase. That is not what occurred, however. The joint venture, the trial court correctly found, was lawfully terminated when Brown-Hill exercised its right not to proceed further when the needed entitlements had not been obtained within the six-month window. There was thus no default on the part of the purchaser, Morgan Jersey, to trigger this clause.

C

***11** Defendants also contend the trial court erred when it employed the doctrine of piercing the corporate veil to impose personal liability upon Lehrer, individually. JC Morgan was a limited liability company and thus subject to *N.J.S.A.* 42:2B-1 to -70. *N.J.S.A.* 42:2B-23 provides:

> Except as otherwise provided by this act, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member, manager, employee or agent of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company, or for any debt, obligation or liability of any other member, manager, employee or agent of the limited liability company, by reason of being a member, or acting as a manager, employee or agent of the limited liability company.

Defendants note that their research has not uncovered a reported case in New Jersey which has utilized the doctrine of piercing the corporate veil, developed under the principles of corporate law, to limited liability companies. We can perceive no reason in logic or policy why the principle should not be fully applicable in the context of a limited liability company, and defendants have proffered none.

"[P]iercing the corporate veil is not technically a mechanism for imposing legal liability, but for remedying the fundamental unfairness that will result from a failure to disregard the corporate form." *Verni ex rel. Burstein v. Stevens,* 387 *N.J.Super.* 160, 199, 903 A.2d 475 (App.Div.2006) (quotations omitted), *certif. denied,* 189 *N.J.* 429 (2007). Defendants' arguments against employing the remedy of piercing the corporate veil in this matter can be divided into two general contentions: first, the doctrine is inappropriate in this matter because M. Robert Lehrer was not a member of JC Morgan, and it was the veil of that entity which the trial court pierced, and secondly, that the threshold elements were not established to warrant piercing in any event.

As to the first, defendants are technically correct; the members of JC Morgan were Lehrer's son and nephew, Eric Lehrer and Kevin Lehrer. The assertion, however, disregards the underlying reality. Lehrer was the moving force in JC Morgan; he, through 350 Warren had the property to be developed, and he had the initial concept to develop this abandoned warehouse into a modern, multi-use structure. He was intimately involved in all aspects of the project, and he took on the responsibility to see to the critical first step, obtaining the necessary entitlements. His son and nephew had no experience in real estate development, at least nothing on this scale. He assured Brown that he was making the two young men the nominal members of JC Morgan for reasons of his own tax planning and to secure the greatest return for himself. Lehrer was entitled to structure the transaction in a manner to maximize his own return, but he cannot, in a court of equity, be permitted to walk away from the reality of the transaction. "[E]quity [regards] substance[,] rather than form." *Assocs. Home Equity Servs. Inc. v. Troup,* 343 *N.J.Super.* 254, 276, 778 A.2d 529 (App.Div.2001); *Fortugno v. Hudson Manure Co.,* 51 *N.J.Super.* 482, 500-01, 144 A.2d 207 (App.Div.1958); *Ardito v. Bd. of Trs., Our Lady of Fatima Chapel,* 281 *N.J.Super.* 459, 468, 658 A.2d 327 (Ch.Div.1995).

***12** We also reject defendants' second argument against the trial court's piercing of the limited liability structure. New Jersey courts will pierce the corporate veil when necessary "to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate a fraud, to accomplish a crime, or otherwise to evade the law." *Tung v. Briant Park Homes, Inc.,* 287 *N.J.Super.* 232, 239-40, 670 A.2d 1092 (App.Div.1996). A corporate subsidiary's veil may be pierced "on a finding that the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent [,]" and that the piercing is necessary to avoid an injustice. *State, Dep't of Envtl. Prot. v. Ventron Corp. .,* 94 *N.J.* 473, 501, 468 A.2d 150 (1983).

A party seeking to pierce the corporate veil bears the burden of establishing that the corporate form should be disregarded. *Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc.,* 195 *N.J.* 457, 472, 950 A.2d 868 (2008). A court will look to various factors, including "whether the subsidiary was grossly undercapitalized, the day-to-day involvement of the parent's directors, officers and personnel, and whether the subsidiary fails to observe corporate formalities, pays no dividends, is insolvent, lacks corporate records, or is merely a facade." *Verni, supra,* 387 *N.J.Super.* at 200, 903 A.2d 475. The inquiry is fact-specific. *Ibid.*

Here, the entire history of this joint venture demonstrates that for all practical purposes, Lehrer was the sole principal working on behalf of JC Morgan. The reality is that JC Morgan had no underlying substance; it was capitalized with $100. Absent a piercing of the corporate veil, Brown-Hill lacked an adequate remedy at law. The trial court correctly recognized that it was necessary to pierce the corporate veil to prevent an injustice to Brown-Hill.

D

Defendants next contend that the trial court erred in awarding reimbursement to Brown-Hill because Brown-Hill acted in bad faith and had unclean hands. They base this position on Brown-Hill's admitted failure to notify JC Morgan and Lehrer that its budget projections showed a significant increase in the project's cost. We agree with the trial court that this is an insufficient basis to deny recompense to Brown-Hill.

During the course of its several opinions, the trial court commented at various junctures that neither Lehrer nor Brown acted with the candor one would expect from a partner. Lehrer did not keep Brown fully advised with respect to the difficulties and delays in securing the entitlements, and Brown did not share with Lehrer the figures he had developed internally with respect to potential cost. He did not, he said, because they were not real figures at that juncture; there was no way to develop realistic estimates until the entitlements and design questions were finally settled. Defendants counter that assertion by contending that if Brown had advised them of the escalating projections, they would have halted the project early on, and thus Brown-Hill would not have incurred all the expenses that it did.

***13** The trial court did not find one party more at fault than the other and viewed both as having unreasonable expectations: Lehrer, from his experience and background, should have understood that cost estimates were only guesses during the preliminary stages, and Brown, from his experience and background, should have understood that no one could guarantee either that the entitlements that were critical to the project going forward would be issued or when they would be issued.

The relationship of joint venturers, like that of partners, is "one of trust and confidence," requiring the highest standard of good faith; one joint venturer may not take advantage of the other. *Muscarelle v. Castano,* 302 *N.J.Super.* 276, 283, 695 A.2d 330 (App.Div.1997); *Silverstein v. Last,* 156 *N.J.Super.* 145, 152, 383 A.2d 718 (App.Div.1978).

"The doctrine of unclean hands embraces the principle that a court should not grant equitable re-

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lief to a party who is a wrongdoer with respect to the subject matter of the suit." *Pellitteri v. Pellitteri,* 266 *N.J.Super.* 56, 65, 628 A.2d 784 (App.Div.1993). The decision whether it is appropriate to invoke this principle, and thus deny relief, requires a careful consideration of the totality of the circumstances. *Ibid.* The decision whether it is appropriate to invoke the doctrine of unclean hands rests within the trial court's sound discretion and its decision in that regard is reviewed to determine whether there was an abuse of that discretion. *Ibid.* We can find no abuse of the trial court's discretion in this regard.

E

Defendants also contend that even if Brown-Hill were entitled to some reimbursement, the amount could not, under the language of the operating agreement, exceed $400,000. They point to the provision in the operating agreement limiting Brown-Hill's allowable capital contribution to $500,000 and combine that with the provision that in the event of termination, the first $100,000 of capital contribution would not be recoverable.

We reject this reading, as did the trial court. As we have already noted, the operating agreement did not require prior approval by defendants of an expenditure as a condition on reimbursement. Courts should read a contract "as a whole in a fair and common sense manner." *Hardy ex rel. Dowdell v. Abdul-Matin,* 198 *N.J.* 95, 103, 965 A.2d 1165 (2009). "Individual clauses and particular words [within a contract] must be considered in connection with the rest of the agreement, and all parts of the writing and every word of it, will, if possible, be given effect." *AXA Assurance, Inc. v. Chase Manhattan Bank,* 339 *N.J.Super.* 22, 26, 770 A.2d 1211 (App.Div.2001). In construing a contract, "[l]iteralism must give way to context." *Borough of Princeton v. Bd. of Chosen Freeholders of Mercer County Improvement Auth.,* 333 *N.J.Super.* 310, 325, 755 A.2d 637 (App.Div.2000), *aff'd and remanded,* 169 *N.J.* 135, 777 A.2d 19 (2001). Further, specific clauses will, as a rule, control more general terms. *Isko v. Engelhard Corp.,* 367 *F.Supp.*2d 702, 710 (D.N.J.2005).

***14** In the event the joint venture failed because Brown-Hill was unwilling to proceed further with the entitlements issue which was unresolved on the outside date, the operating agreement called for JC Morgan to reimburse Brown-Hill for all but its first $100,000 in contributions. It did so by explicitly defining the remainder of the first $500,000 "and any additional Capital Contributions" as the excess that was to be reimbursed.

Furthermore, while the operating agreement generally limited Brown-Hill's capital contribution to $500,000 before closing on the purchase of 350 Warren Street, the termination provision specifically acknowledged that Brown-Hill might have made further contributions. It explicitly stated that all contributions beyond $100,000, including "additional Capital Contributions" beyond $500,000 would be reimbursed "[n]otwithstanding anything to the contrary contained in this Agreement...." This more specific provision took precedence over the more general language upon which defendants rely.

F

Defendants also contend that the trial court erred when it imposed an equitable mortgage on the property located at 350 Warren Street to secure the judgment it had granted Brown-Hill. They point to the testimony of Jeffrey Brown in which he admitted that there was no written agreement pledging this property as security for his expenditures. They overlook, however, that he also testified that Lehrer continually assured him that the property stood behind the project.

"An equitable lien is 'a right of special nature in a fund and constitutes a charge or encumbrance upon the fund.' " *VRG Corp. v. GKN Realty Corp.,* 135 *N.J.* 539, 546, 641 A.2d 519 (1994) (quoting *In re Hoffman,* 63 *N.J.* 69, 77, 304 A.2d 721 (1973)). The concept of an equitable lien rests upon the equitable maxim that equity regards as done that

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which ought to be done. *VRG, supra,* 135 *N.J.* at 546, 641 A.2d 519. Contrary to defendants' argument, there need not be an express agreement to warrant imposition of an equitable lien; an equitable lien is an appropriate device to avoid unjust enrichment. *Id.* at 548, 641 A.2d 519. There was no abuse of discretion on the part of the trial court.

G

When this litigation commenced, Brown-Hill, as we have noted, filed a lis pendens against 350 Warren Street. Defendants included a claim for malicious prosecution based upon that filing, contending that plaintiffs used the lis pendens "in a bad faith and malicious attempt to coerce [defendants] into acquiescing" to their demands.

Malicious prosecution is the institution of a lawsuit to seek a remedy without "reasonable or probable cause" to support it. *Ash v. Cohn,* 119 *N.J.L.* 54, 58, 194 A. 174 (E. & A.1937). The party claiming malicious prosecution must also establish the existence of a "[s]pecial grievance," which "consists of interference with one's liberty or property." *Penwag Prop. Co. v. Landau,* 76 *N .J.* 595, 598, 388 A.2d 1265 (1978). Malicious prosecution is not a favored cause of action. *Id.* at 597-98, 388 A.2d 1265 (citing *Lind v. Schmid,* 67 *N.J.* 225 262 (1975)); *Baglini v. Lauletta,* 338 *N.J.Super.* 282, 299, 768 A.2d 825 (App.Div.), *certif. denied,* 169 *N.J.* 607, *appeal dismissed,* 169 *N.J.* 608, 782 A.2d 425 (2001). An essential element of the tort of malicious prosecution is actual malice. *Vickey v. Nessler,* 230 *N.J.Super.* 141, 150, 553 A.2d 34 (App.Div.), *certif. denied,* 117 *N.J.* 74, 563 A.2d 836 (1989). The trial court correctly concluded that there was a failure of proof with respect to this element; dismissal of the claim was clearly correct.

H

***15** Defendants also asserted their own claim for reimbursement from Brown-Hill for expenses they incurred. The trial court denied recovery, and defendants contend that was error. We disagree.

Defendants sought reimbursement for two categories of expenses: clean-up and related charges incurred by 350 Warren of approximately $46,000 and utility charges totaling approximately $43,000. As to the first, the clean-up work was of direct benefit to 350 Warren and was not an ordinary operating cost properly chargeable to the joint venture. As to the second, defendants supported their claim by presentation of certain checks and receipts, but not the invoices showing when the charges were incurred. The trial court properly disallowed both items.

III

Defendants' final claim of error is that the trial court improperly denied their request for counsel fees. They base this assertion on that section of the operating agreement which provided for counsel fees to the prevailing party in an action brought to enforce the agreement or seek recovery for a breach. Defendants argue that since they prevailed on their assertion that the operating agreement terminated by its own terms, and successfully defeated the claim for specific performance, they were entitled to counsel fees.

In reality, both parties prevailed in part and were unsuccessful in part. In such a context, the trial court correctly perceived that the fairest result was to deny counsel fees to both parties.

IV

We turn now to plaintiffs' cross-appeal, in which their first contention is that the trial court, in calculating the amount to be reimbursed to Brown-Hill, incorrectly disallowed its $500,000 capital contribution. It points to paragraph 3.9 of the operating agreement which provided that if the agreement terminated as a result of Lehrer not getting the necessary entitlements within the six-month window, "[t]o the extent [Brown-Hill] has paid its Capital Contribution of up to $500,000.00 and any additional Capital Contributions, the excess of its Capital Contributions over $100,000 .00 (the 'Excess'), shall be reimbursed by [Lehrer]...."

Read literally, this language would support plaintiffs' position. As we noted earlier, however, literalism must give way to context. *Princeton, supra,* 333 *N.J.Super.* at 325, 755 A.2d 637. "There is no surer way to misread any document than to read it literally[.]" *Guiseppi v. Walling,* 144 *F.*2d 608, 624 (2d Cir.1944) (Hand, J., concurring), *aff'd sub nom. Gemsco, Inc. v. Walling,* 324 *U.S.* 244, 65 *S.Ct.* 605, 89 *L. Ed.* 921 (1945). A writing must be given a reasonable construction, in accordance with justice and common sense. *GNOC, Corp. v. Director, Div. of Taxation,* 328 *N.J.Super.* 467, 477, 746 A.2d 466 (App.Div.2000) (quotations omitted), *aff'd as modified on other grounds,* 167 *N.J.* 62, 768 A.2d 1051 (2001).

We reject the construction put forth by plaintiffs; it is, in our judgment, unreasonable. Adopting that position would have had the effect of limiting Brown's overall risk to $100,000, no matter the nature of the expenses Brown-Hill incurred. Such a position would provide little or no motivation from Brown-Hill to monitor and limit its expenditures. At various points in the trial court's opinion, it referred to the colloquialism the parties had used throughout the proceedings, about "having skin in the game." If Brown-Hill could recover everything above $100,000 even if the project did not go forward due to no fault on the part of defendants, it would have had very little "skin in the game."

***16** In our opinion, the most reasonable interpretation of this language is that Brown-Hill, if it advanced more than $500,000, and the project terminated for failure to get the entitlements within that six-month period, could seek reimbursement for its advances in excess of $500,000. We thus affirm the determination of the trial court in this regard.

Plaintiffs' final argument on their cross-appeal is that the trial court erred when it denied their application for counsel fees. We reject this argument for the same reasons we rejected defendants' argument in this regard.

V

The judgment under review is affirmed, on both defendants' appeal and plaintiffs' cross-appeal.

N.J.Super.A.D.,2010.
Brown-Hill Morgan, LLC v. Lehrer
Not Reported in A.2d, 2010 WL 3184340 (N.J.Super.A.D.)

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) and CLH HOLDINGS, Defendants. v. 3M COMPANY, *et al.*, Third-Party Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY DOCKET NO. ESX-L9868-05 (PASR) <u>Civil Action</u> CERTIFICATION OF SERVICE

I, Michael Gordon, do hereby certify as follows:

1. True and correct copies of Plaintiffs' Notice of Motion for Partial Summary Judgment Against Defendant Maxus Energy Corporation, Brief in Support thereof, Certification of Counsel, Statement of Undisputed Material Facts, and Proposed form of Order were filed with the Clerk of the Court, and Judge Sebastian P. Lombardi, Essex County Courthouse, 50 West Market Street, Newark, New Jersey, 07102, and served electronically on all parties by posting on https://cvg.ctsummation.com on February 3, 2012 in accordance with the Court's Case Management Order.

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 willingly false, I am subject to punishment.

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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, Plaintiffs, v. OCCIDENTAL CHEMICAL CORPORATION, TIERRA SOLUTIONS, INC., MAXUS ENERGY CORPORATION, MAXUS INTERNATIONAL ENERGY COMPANY, REPSOL YPF, S.A., YPF, S.A., YPF HOLDINGS, INC., YPF INTERNATIONAL S.A. (f/k/a YPF INTERNATIONAL LTD.) and CLH HOLDINGS, Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - ESSEX COUNTY DOCKET NO. ESX-L9868-05 (PASR) <u>Civil Action</u> ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST MAXUS ENERGY CORPORATION
MAXUS ENERGY CORPORATION AND TIERRA SOLUTIONS, INC., Third-Party Plaintiffs, v. 3M COMPANY, et al., Third-Party Defendants.	:	

This matter having come before the Court on the motion of Marc-Philip Ferzan, Acting Attorney General; and Jackson Gilmour and Dobbs, P.C., and Gordon & Gordon, P.C., Special Counsel to the Acting Attorney General; attorneys for Plaintiffs, the New Jersey Department of Environmental Protection, the Commissioner of the New Jersey Department of Environmental Protection, and Administrator of the New Jersey Spill Compensation Fund ("Plaintiffs"); and the Court, having reviewed the papers submitted by the parties, and having heard oral argument thereon, and for other good cause shown, is of the opinion, for the reasons expressed on the record, that Plaintiffs' motion should be granted;

IT IS therefore, on this ___ day of _________, 2012,

ORDERED that Plaintiffs' motion for partial summary judgment on Count I of Plaintiffs' Third Amended Complaint against Defendant Maxus Energy Corporation is hereby GRANTED; that Maxus Energy Corporation is strictly, jointly and severally liable under the Spill Compensation and Control Act for all past cleanup and removal costs incurred by Plaintiffs associated with the discharges of hazardous substances at and from the Lister Plant property, commonly known to be located at 80 Lister Avenue in Newark, New Jersey, into the Passaic River, from 1946 through 1969; IT IS FURTHER,

ORDERED that a declaratory judgment is hereby entered against Defendant Maxus Energy Corporation, finding it strictly, jointly and severally liable under the Spill Compensation and Control Act for all future cleanup and removal costs incurred by Plaintiffs associated with the discharges of hazardous substances at and from the Lister Plant property, commonly known to be located at 80 Lister Avenue in Newark, New Jersey, into the Passaic River from 1946 through 1969; and IT IS FURTHER, ORDERED that counsel for Plaintiffs shall serve a copy of this Order on all counsel of record within seven (7) days of the date of entry of this Order by posting on the CT Summation electronic platform.

____
HON. SEBASTIAN P. LOMBARDI, J.S.C.

___ Opposed

___ Unopposed