EXHIBIT

12

SHEILA CIEMNIECKI, Plaintiff, v. PARKER McCAY P.A., et al., Defendants.

Civil No. 09-6450 (RBK/KMW)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2010 U.S. Dist. LEXIS 55661

June 7, 2010, Decided
June 7, 2010, Filed

NOTICE: NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Motion granted by, Claim dismissed by *Ciemniecki v. Parker McCay P.A., 2010 U.S. Dist. LEXIS 121077 (D.N.J., Nov. 15, 2010)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee sued defendants, including her employer, a manager, police officers, and a newspaper, for claims including defamation, false light invasion of privacy, negligent and intentional infliction of emotional distress, false imprisonment, and prima facie tort. The employer, the manager, and the newspaper moved to dismiss.

OVERVIEW: The employee claimed that the manager falsely reported to police that the employee activated the fire alarm at the employer's office, which led to her arrest for raising a false public alarm. The newspaper published an article about the incident. The court held that the complaint did not have to satisfy the New Jersey pleading rule requiring a defamation claim to set forth the allegedly defamatory words themselves; the notice-pleading requirements of *Fed. R. Civ. P. 8* applied. The complaint sufficiently alleged a defamation claim against the manager and the employer. The police report was not subject to an absolute privilege under New Jersey law, and the allegations were sufficient to support a finding that the qualified privilege did not apply or had been abused. The allegedly false accusation of a crime was susceptible of defamatory meaning. The actual malice standard did not apply because the employee was not a public figure. The prima facie tort claims against the employer, the manager, and the newspaper failed, as did the defamation and false light claims against the newspaper. The newspaper article, taken as a whole, did not relay information alleged to be false.

OUTCOME: The employer and the manager's motion to dismiss was granted as to the prima facie tort claim and was otherwise denied. The newspaper's motion to dismiss was granted.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
[HN1] Under *Fed. R. Civ. P. 12(b)(6)*, a court may dismiss an action for failure to state a claim upon which relief can be granted. With a motion to dismiss, courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. In other words, a complaint survives a motion to dismiss if it contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. In making this determination, a court must engage in a two part analysis. First, the court must separate factual allegations from legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Second, the court must determine whether the factual allegations are sufficient to show that the plaintiff has a plausible claim for relief. Determining plausibility is a context-specific task that requires the court to draw on its judicial experience

and common sense. A complaint cannot survive where a court can only infer that a claim is merely possible rather than plausible.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
[HN2] A federal court sitting in diversity applies the Federal Rules of Civil Procedure, provided the rule in question is valid and on-point. *Fed. R. Civ. P. 8* articulates the federal pleading standard. Federal pleading standards--not state pleading standards--govern the sufficiency of the complaint. As state substantive law will govern, it is necessary to look to state law to determine the general substance that a particular pleading should contain.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine
Civil Procedure > Pleading & Practice > Pleadings > General Overview
[HN3] The federal pleading standards apply to state law claims asserted in federal court.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
[HN4] Federal notice-pleading requires a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. The Iqbal pleading regime arguably increases the required specificity by insisting that the complaint contain enough factual matter to render the claim for relief plausible as opposed to merely possible.

Torts > Intentional Torts > Defamation > Elements > General Overview
[HN5] Under New Jersey law, defamation consists of: (1) a defamatory statement; (2) concerning the plaintiff; (3) which was false; (4) that was communicated to someone other than the plaintiff; (5) with fault at least amounting to negligence; and (6) damages.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Torts > Intentional Torts > Defamation > Procedure
[HN6] According to *Fed. R. Civ. P. 8*, a defamation pleading does not need to cite precise defamatory statements; it must only provide sufficient notice to the other party of the allegations made against him.

Torts > Intentional Torts > Defamation > Defenses > Privileges > Absolute Privileges
Torts > Intentional Torts > Defamation > Defenses > Privileges > Qualified Privileges
[HN7] New Jersey has explicitly declined to absolutely immunize against a defamation claim statements made to a police officer for the purpose of bringing a criminal to justice. Such communications are only qualifiedly privileged because they occur antecedent to the initiation of the judicial process.

Torts > Intentional Torts > Defamation > Defenses > Privileges > Qualified Privileges
[HN8] Statements made to authorities for the prevention and detection of crime are subject to a qualified privilege.

Torts > Intentional Torts > Defamation > Defenses > Privileges > Qualified Privileges
[HN9] A statement charging a criminal violation, made to a law-enforcement official, is qualifiedly privileged. The New Jersey Supreme Court has explained the privilege as follows: A communication made bona fide upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable; the fundamental test is the bona fides of the communication, and it is not privileged when the person making it has full knowledge of its untruthfulness.

Torts > Intentional Torts > Defamation > Defenses > Privileges > Qualified Privileges
[HN10] A communication to a law enforcement officer is generally held to be qualifiedly privileged if it is made in good faith for the purpose of helping to bring a criminal to justice. The privilege is abused where (1) the publisher knows the statement is false or the publisher acts in reckless disregard of its truth or falsity; (2) the publication serves a purpose contrary to the interests of the qualified privilege; or (3) the statement is excessively published. A qualified privilege is overcome on a showing of actual malice.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Torts > Intentional Torts > Defamation > Elements > General Overview

Torts > Intentional Torts > Defamation > Procedure
[HN11] As a threshold legal matter in a defamation case, the court must determine whether a defendant's alleged statement is reasonably susceptible of defamatory meaning. This inquiry should be guided by the fair and natural meaning which will be given to the relevant language by reasonable persons of ordinary intelligence as well as the context in which the language occurs. If the statement is susceptible of only one meaning and that meaning is defamatory, the statement is libelous as a matter of law. On the other hand, if the statement is susceptible of only one meaning and that meaning is non-defamatory, the statement cannot be slanderous. In cases where the statement is capable of both defamatory and non-defamatory meanings, the question of whether the content is defamatory properly rests with the trier of fact.

Torts > Intentional Torts > Defamation > Defamation Per Se
Torts > Intentional Torts > Defamation > Elements > General Overview
[HN12] Generally speaking, defamatory words are those that subject a person to ridicule or contempt, or that clearly sound to the disreputation of an individual. To determine whether a statement is defamatory, a court should consider (1) the content, (2) the verifiability, and (3) the context of the challenged statement. Certain kinds of statements, however, denote such defamatory meaning that they are considered defamatory as a matter of law. The false attribution of criminality is a prime example of such a statement. Certain statements are defamatory per se, including statements that the subject of the statement committed a crime.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview
[HN13] Raising a false fire alarm to the police is a crime in New Jersey.

Torts > Intentional Torts > Defamation > Defamation Per Se
[HN14] In a defamation case where criminal allegations are concerned, a court needs to examine a statement in context to determine whether it conveys the impression that a plaintiff is being accused of a crime.

Torts > Intentional Torts > Defamation > Defamation Per Se
Torts > Intentional Torts > Defamation > Elements > Slander
[HN15] Two distinct concepts in defamation law are "defamation per se" and "slander per se." The former term refers to a statement whose defamatory meaning is so clear on its face that the court is not required to submit the issue to the jury. By way of contrast, the latter term refers to four categories of slander which are considered so clearly damaging to reputation that a plaintiff may establish a cause of action without presenting any evidence of actual damage to reputation.

Torts > Intentional Torts > Defamation > Defamation Per Se
Torts > Intentional Torts > Defamation > Elements > General Overview
Torts > Intentional Torts > Defamation > Elements > Slander
[HN16] A complaint does not state a slander claim absent factual allegations rising to the level of slander per se or setting forth special damages. On the other hand, a complaint that alleges facts supporting the proposition that the relevant communication tended to bring the plaintiff into disrepute sufficiently alleges defamatory meaning, regardless of whether the statement is regarded as per se defamatory.

Torts > Intentional Torts > Defamation > Elements > Slander
[HN17] One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be (a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude. This restatement of the law is clearly disjunctive, excusing proof of special damages if the imputation of criminal conduct involves moral turpitude or is punishable by imprisonment in state or federal prison.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview
Criminal Law & Procedure > Sentencing > Ranges
[HN18] *N.J. Stat. Ann. § 2C:33-3(a)* is a crime of the third degree, which is punishable in New Jersey with up to five years in prison. *N.J. Stat. Ann. § 2C:43-6(a)(3).*

Torts > Intentional Torts > Defamation > Public Figures > Actual Malice
[HN19] The actual malice standard, when applicable, requires a defamation plaintiff to prove that the allegedly defamatory statement was made with with knowledge

that it was false or with reckless disregard of whether it was false or not. In New Jersey, the actual malice standard will apply when the alleged defamatory statement concerns a public figure or a public official or involves a matter of public concern.

Torts > Intentional Torts > Defamation > Public Figures > General Overview
Torts > Intentional Torts > Defamation > Public Figures > Actual Malice
Torts > Intentional Torts > Defamation > Public Figures > Limited Purpose Public Figures
[HN20] A person is a public figure for all purposes in a defamation case when she has achieved pervasive fame or notoriety. An otherwise private person can become a limited purpose public figure if she voluntarily interjects herself or is drawn into a particular public controversy. When a private person with sufficient experience, understanding and knowledge enters into a personal transaction or conducts his personal affairs in a manner that one in his position would reasonably expect implicates a legitimate public interest with an attendant risk of publicity, defamatory speech that focuses upon that public interest will not be actionable unless it has been published with actual malice.

Torts > Intentional Torts > Defamation > Public Figures > General Overview
Torts > Intentional Torts > Defamation > Public Figures > Actual Malice
[HN21] For the actual malice standard to apply, a defamation plaintiff must have been a public figure prior to the publication of the particular defamatory speech.

Torts > Intentional Torts > Defamation > Public Figures > General Overview
[HN22] Those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Defamation > Public Questions
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom
Torts > Intentional Torts > Defamation > Defenses > Privileges > Constitutional Privileges
Torts > Intentional Torts > Defamation > Public Figures > Actual Malice
[HN23] New Jersey provides greater protection to speech involving matters of public concern than required by the *First Amendment*. The actual malice standard is implicated as a matter of course where a media or media-related defendant publishes a news story regarding public health and safety, a highly regulated industry, or allegations of criminal or consumer fraud, or a substantial regulatory violation. In cases of non-media speech, the rule is less categorical, requiring the court to consider the content, form, and context of the speech.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Defamation > Public Questions
[HN24] For purposes of a defamation claim, mere newsworthiness is not sufficient to create a public controversy.

Torts > Intentional Torts > Invasion of Privacy > False Light Privacy > Elements
[HN25] To state a claim for the tort of false light, a plaintiff must allege (1) placement in a false light that would be highly offensive to a reasonable person; and that (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. The publicized material in a false-light claim must constitute a major misrepresentation of the plaintiff's character, history, activities, or beliefs. Hypersensitive persons are not specially protected as the material publicized must be something that would be objectionable to the ordinary person under the circumstances.

Torts > Intentional Torts > Prima Facie Tort > Elements
[HN26] A prima facie tort claim in New Jersey is designed to provide a cause of action for intentional, willful and malicious harms that fall within the gaps of the law. The prima facie tort should not be invoked when essential elements of an established and relevant cause of action are missing. Moreover, the availability of the prima facie tort doctrine is limited exclusively to those instances of intentional and culpable conduct unjustified under the circumstances that, as a threshold matter, do not fall within a traditional tort cause of action.

Torts > Intentional Torts > Defamation > Defenses > Truth
Torts > Intentional Torts > Defamation > Elements > General Overview
[HN27] A defamation plaintiff must show that an allegedly defamatory communication was false. To determine the meaning of a given article, a court must evaluate the

language in question according to the fair and natural meaning which would be given it by reasonable persons of ordinary intelligence. In assessing the language, the district court must view the publication as a whole and consider particularly the context in which the statement was made. This includes reviewing headlines in conjunction with the body of the article.

Torts > Intentional Torts > Invasion of Privacy > False Light Privacy > Elements
[HN28] To state a claim for the tort of false light, a plaintiff must allege that the defendant placed the plaintiff in a light that was false, knowing or recklessly disregarding its falsity.

Torts > Intentional Torts > Prima Facie Tort > Elements
[HN29] The prima facie tort should not be invoked when essential elements of an established and relevant cause of action are missing.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court
[HN30] Normally, a district court is compelled to grant leave to amend a complaint that it has dismissed for failure to state a claim. The rule is not absolute; however, as leave to amend is inappropriate where it would cause undue delay, the amendment was motivated by bad faith or dilatory motive, the amendment would cause prejudice, or the amendment would be futile.

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JUDGES: ROBERT B. KUGLER, United States District Judge.

OPINION BY: ROBERT B. KUGLER

OPINION

KUGLER, United [*2] States District Judge:

This matter comes before the Court upon the motion of Defendants Parker McCay P.A. and Raymond DiSanto (collectively, the "Parker McCay Defendants") to dismiss the Complaint of Plaintiff Sheila Ciemniecki ("Plaintiff" or "Ms. Ciemniecki"), as well as upon the motion of Defendant the Goodson Holding Company (sued *sub nom* The Central Record, Inc.) (the "Central Record") to dismiss the Complaint **--** both for failure to state claims upon which relief can be granted pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. The Complaint consists of fourteen counts sounding in both common-law and constitutional tort. For the reasons expressed below, the Court will deny in part and grant in part the Parker McCay Defendants' motion to dismiss, and grant the Central Record's motion to dismiss.

I. BACKGROUND [1]

1 The facts in this section are drawn from the allegations in Plaintiff's Complaint.

This action arises out of a false fire alarm that was raised at the Marlton, New Jersey law office of Defendant Parker McCay and that firm's alleged attempt to pin responsibility for the wrongdoing onto a longtime employee, who had recently fallen into disfavor with her superiors.

For over [*3] nine years, Ms. Ciemniecki worked as a law librarian at Parker McCay and received positive feedback and reviews. In January of 2009, she received a meager raise and complained about it to Parker McCay's Human Resources Manager. Subsequently, Ms. Ciemniecki was assigned to report to the Office Services Manager and was told that she would no longer be allowed to work a flexible schedule. In late May of 2009, Ms. Ciemniecki began experiencing problems with her supervisor. Her supervisor reported her to Parker McCay's Human Resources Director for working the wrong hours and docked her pay for taking an allegedly unauthorized business lunch. Apparently, Ms. Ciemniecki's supervisor did not first attempt to informally resolve these issues with Ms. Ciemniecki before reporting her. As a consequence, an argument between the two ensued, and Ms. Ciemniecki's supervisor will no longer interact with her.

On June 2, 2009, someone activated the fire alarm at Parker McCay's Marlton, New Jersey office. The day was a busy one at Parker McCay, during which several meetings were held. One of these meetings involved out-of-state individuals who apparently had been disruptive in the office and given the office [*4] staff some difficulty. At the time the alarm was activated, Ms. Ciemniecki had just finished speaking with an attorney on the fourth floor and was in the hallway on her way back to the library located on the third floor. Ms. Ciemniecki returned to the library, grabbed her purse, and evacuated the building with her colleagues.

The following day began as usual for Ms. Ciemniecki. However, at three o'clock in the afternoon, Parker McCay's Chief Financial Officer, Ray DiSanto, stopped into the law library and asked her to accompany him down the hall to a conference room. Inside, Ms. Ciemniecki was greeted by Parker McCay's Director of Human Resources and two Evesham Township Police Officers, Patrolmen David Niji and Sean McGinley, and asked to sit down. Patrolman Niji asked Ms. Ciemniecki if she pulled the fire alarm, and Ms. Ciemniecki denied the accusation. At this point, she was told that there was a surveillance video showing her pulling the fire alarm. Ms. Ciemniecki asked to review the video, but her request was denied. Patrolman Niji read Ms. Ciemniecki her *Miranda* rights, handcuffed her, and placed her under arrest for raising a false public alarm in violation of *N.J. Stat. Ann. § 2A:33-3*. [*5] Ms. Ciemniecki asked Mr. DiSanto if she would be able to get her job back upon exoneration. Mr. DiSanto replied that he saw the video and there was no doubt in his mind that it was Ms. Ciemniecki who pulled the alarm. Ms. Ciemniecki was then led out of her workplace past her colleagues flanked by police.

At the station house, Ms. Ciemniecki underwent ordinary booking procedures, including fingerprinting and picturetaking. Patrolman McGinley filed a criminal complaint with the Burlington County Prosecutor's Office for a violation of *N.J. Stat. Ann. § 2C:33-3(a)*. After having spent approximately three hours in custody at the station, Ms. Ciemniecki was released. Ms. Ciemniecki hired a lawyer to represent her against the charges.

Ms. Ciemniecki has since obtained a copy of the police report pertaining to the fire alarm incident at Parker McCay. Apparently, it indicates that Mr. DiSanto contacted the Evesham Police Department the day after the false alarm to tell them that he had additional information to relay about the false alarm. Specifically, Mr. DiSanto told police that he had video footage showing a woman, later identified as Ms. Ciemniecki, pulling the alarm. According to the police [*6] report, Patrolman Niji viewed the surveillance tape and stated that he observed Ms. Ciemniecki activate the alarm.

On June 11, 2009 a regional newspaper known as The Central Record published an article about the incident in a section entitled "On the Record" stating:

> **Woman arrested for making false alarm**
>
> **EVESHAM --** A Haddonfield woman faces charges after pulling a fire alarm at a township office building. Sheila Ciemniecki, 51, of Rhoads Avenue was charged with making a false public alarm. On June 2, at 11:33 am township police and fire departments responded to 3 Greentree Centre for a report of an activated fire alarm and discovered that it had been false.
>
> The alarm activation caused the building's evacuation and a temporary interruption of the business there.
>
> Police did not give a reason as to to why Ciemniecki pulled the fire alarm. She was later released to await a hearing in municipal court.

(Complaint at 8.) After reading the article, several of Ms. Ciemniecki's friends and a former colleague asked her if there was something wrong with her.

On July 21, 2009, the Burlington County Prosecutor's Office sent a letter to Ms. Ciemniecki's criminal defense attorney which stated that based [*7] upon their review of the video they were "clearly satisfied that dismissal of all charges is the appropriate course of action."

(Complaint P 55.) On July 28, 2009, the Burlington County Prosecutor issued an administrative dismissal of the charge against Ms. Ciemniecki.

On December 23, 2009, Plaintiff filed a Complaint against the Parker McCay Defendants, Defendants Evesham Township, Evesham Township Police Department, Patrolman David Niji and Patrolman Sean McGinley (collectively, the "Evesham Defendants"), and the Central Record. The Complaint consists of fourteen counts. Counts I, II, III, IV, V, VI, and XIV allege intentional and negligent defamation (slander), invasion of privacy (false light), negligent and intentional infliction of emotional distress, false imprisonment, and prima facie tort against the Parker McCay Defendants. Counts VII, VIII, IX, and XIV allege negligent and intentional defamation (libel), invasion of privacy (false light), and prima facie tort against the Central Record. Counts X, XI, XII, XIII, and XIV allege the deprivation of rights afforded by the New Jersey and Federal Constitutions and prima facie tort against the Evesham Defendants. [2]

2 The Evesham Defendants [*8] have asserted crossclaims for contribution and indemnification against the Parker McCay Defendants, which the Parker McCay Defendants have moved to dismiss. The Parker McCay Defendants' motion to dismiss the Evesham Defendants' crossclaims is without the scope of this Opinion.

On February 25, 2010, the Parker McCay Defendants filed a motion to dismiss the Complaint for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. Plaintiff filed a brief in opposition to the Parker McCay motion on April 5, 2010, to which the Parker McCay Defendants replied on April 12, 2010. On March 1, 2010, the Central Record filed its own motion to dismiss for failure to state a claim. Plaintiff filed a brief in opposition on April 5, 2010, to which the Central Record replied on April 12, 2010. Accordingly, the motions are now ripe for consideration.

II. STANDARD

[HN1] Under *Federal Rule of Civil Procedure 12(b)(6)*, a court may dismiss an action for failure to state a claim upon which relief can be granted. With a motion to dismiss, "'courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable [*9] reading of the complaint, the plaintiff may be entitled to relief.'" *Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009)* (quoting *Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008)*). In other words, a complaint survives a motion to dismiss if it contains sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).*

In making this determination, a court must engage in a two part analysis. *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*; *Fowler, 578 F.3d at 210-11*. First, the court must separate factual allegations from legal conclusions. *Iqbal, 129 S. Ct. at 1949*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Second, the court must determine whether the factual allegations are sufficient to show that the plaintiff has a "plausible claim for relief." *Id. at 1950*. Determining plausibility is a "context-specific task" that requires the court to "draw on its judicial experience and common sense." *Id.* A complaint cannot survive where a court can only infer that a claim is merely possible rather [*10] than plausible. *See id.*

III. DISCUSSION

A. The Parker McCay Defendants' Motion to Dismiss

The Parker McCay Defendants move to dismiss all counts alleged against them in the Complaint. In what appears to be an overlong brief dressed in a regulation brief's clothing, *see L. Civ. R. 7.2(b), (d)* (establishing page limits as well as acceptable typeface, font size, and spacing conventions), the Parker McCay Defendants make an array of arguments in support of dismissal. Most of these arguments suffer from an overly-cramped reading of the Complaint's allegations. Thus, the Court will deny the Parker McCay Defendants' motion to dismiss with respect to Counts I, II, III, IV, V, and VI, and will grant it with respect to Count XIV.

1. Counts I & II: Defamation (Slander)

The Parker McCay Defendants argue that dismissal is appropriate because the defamation claims are not plead with sufficient specificity; (2) an absolute privilege attaches to the allegedly defamatory statement; (3) a qualified privilege attaches to the allegedly defamatory statement; (4) the alleged statement is not defamatory; and (5) the Complaint does not allege actual malice. For the reasons discussed below, the Court rejects these [*11] arguments.

i. Lack of Specificity

The Parker McCay Defendants argue that Plaintiff has failed to satisfy the "fundamental rule" of defamation pleading by failing to set forward the allegedly defamatory words themselves. These Defendants insist that New Jersey pleading rules require heightened specificity in the context of defamation actions and take the position that these procedural rules govern Plaintiff's pleadings in federal court. These Defendants also argue that federal courts disfavor defamation actions because such actions raise the specter of expressive curtailment. By way of contrast, Plaintiff argues that she need only plead her defamation action in conformity the familiar notice-pleading approach embodied in *Federal Rule of Civil Procedure 8*.

[HN2] A federal court sitting in diversity applies the Federal Rules of Civil Procedure, provided the rule in question is valid and on-point. *See Hanna v. Plumer, 380 U.S. 460, 473, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)*; *Mansmann v. Tuman, 970 F. Supp. 389, 393 (E.D. Pa. 1997)* (citing *Hanna, 380 U.S. at 473*). *See generally*, Erwin Chemerinksy, *Federal Jurisdiction* § 5.3 (5th ed. 2007). *Rule 8* is on-point here because it articulates the federal pleading standard, and Defendants [*12] do not contend that it embodies an invalid exercise of power under the Rules Enabling Act. Thus, federal pleading standards -- not New Jersey pleading standards -- govern the sufficiency of the Complaint. [3] *See Turk v. Salisbury Behavioral Health, Inc., No. 09-6181, 2010 U.S. Dist. LEXIS 41640, 2010 WL 1718268, at *4 (E.D. Pa. Apr. 27, 2010)* ([HN3] "The federal pleading standards apply to state law claims asserted in federal court."); *James v. Morgan, 50 V.I. 764, 2008 WL 5211408, at *3 (D.V.I. 2008)*; *Palladino ex rel United States v. VNA of S. N.J., Inc., 68 F. Supp. 2d 455, 475 (D.N.J. 1999)*; *Joyce v. Alti Am., Inc., No. 00-5420, 2001 U.S. Dist. LEXIS 17432, 2001 WL 1251489, at * 2 (E.D. Pa. 2001). See generally*, 5 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice & Procedure*, § 1245 (3d ed. 2009) ("[I]t appears that adherence to a state's strict pleading requirements no longer is necessary. *Hanna* makes it clear that *Rule 8(a)* should be followed.").

> 3 Of course, as New Jersey substantive law will govern, it is necessary to look to New Jersey law to determine "the general substance that a particular pleading should contain." *See Palladino ex rel United States v. VNA of S. N.J., Inc., 68 F. Supp. 2d 455, 475 (D.N.J. 1999).*

The [*13] cases cited by the Parker McCay Defendants do not dictate a contrary result. In *Badrinauth v. Metlife Corp.*, for example, a plaintiff asserted a defamation claim, alleging that the defendants posted a photograph of him "with an admonition disparaging [his] character." *No. 04-2552, 2006 U.S. Dist. LEXIS 4790, 2006 WL 288098, at *6 (D.N.J. Feb. 6, 2006)* (internal quotation marks omitted). The defendants argued that New Jersey law required the complaint to specify the defamatory words used. *Id.* (citing *Darakjian v. Hanna, 366 N.J. Super. 238, 840 A.2d 959 (N.J. Super. Ct. App. Div. 2004)*). The district court dismissed the defamation claim for failure to "meet the pleading requirements for a claim of defamation under New Jersey law." *Id.* The court did not engage in an overt vertical choice of law analysis. Instead, citing to the Third Circuit's decision in *In re Alpharma Sec. Litig., 372 F.3d 137, 147 (3d Cir. 2004)*, the court simply stated that the legal sufficiency of a complaint is "based on whether it satisfies the relevant pleading requirements." *Id.*

In *In re Alpharma Inc. Sec. Litig.*, the relevant pleading requirements for the plaintiff's *Rule 10b-5* claim were those specially outlined by the Private Securities Litigation Reform [*14] Act, *15 U.S.C. § 78u-4, et seq.* (which of course is a federal statute) and *Federal Rule of Civil Procedure 9(b)*. Thus, *In re Alpharma Inc. Sec. Litig*, does not purport to articulate a rule that state pleading requirements govern diversity cases filed in federal court. To the extent that *Badrinauth* cited *In re Alpharma Inc. Sec. Litig.* for this proposition, the Court declines the Parker McCay Defendants' invitation to follow it. To the extent that *Badrinauth* simply concluded that the complaint's reference to an "admonition disparaging Plaintiff's character" was too vague to put the defendants on notice of the defamation claim against them, the Court simply observes that, for reasons explained below, the instant case is readily distinguishable.

[HN4] Federal notice-pleading requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. The *Iqbal* pleading regime arguably increases the required specificity by insisting that the complaint contain enough factual matter to render the claim for relief plausible as opposed to merely possible. *See Fowler, 578 F.3d at 210*. [HN5] Under New Jersey law, defamation consists of: (1) a defamatory statement; [*15] (2) concerning the plaintiff; (3) which was false; (4) that was communicated to someone other than the plaintiff; (5) with fault at least amounting to negligence; and (6) damages. *Cristelli v. Filomena II, Inc., No. 99-2862, 1999 U.S. Dist. LEXIS 18761, 1999 WL 1081290, at *2 (D.N.J. Dec. 1, 1999)* (citing *Monroe v. Host Marriot Servs. Corp., 999 F. Supp. 599, 603 (D.N.J. 1998)*); *DeAngelis v. Hill, 180 N.J. 1, 847 A.2d 1261, 1267-68 (N.J. 2004)* (citing *Restatement (Second) of Torts, § 558*)).

In various verbal formulations, the Complaint alleges that Mr. DiSanto (and thus Parker McCay) defamed Ms. Ciemniecki by falsely accusing her of pulling the fire alarm -- which in New Jersey is a crime -- to Patrolmen Niji and McGinley. The Complaint affirmatively asserts that Ms. Ciemniecki did not pull the fire alarm and suggests that Mr. DiSanto misrepresented this fact to police in response to the drama Ms. Ciemniecki had apparently been causing at the firm.

The Complaint does not allege the precise words alleged to be defamatory. In some cases, this lack of specificity might be problematic. In this case, however, it is not. Despite their protestations to the contrary, the Parker McCay Defendants are on notice of what Ms. Ciemniecki [*16] believes Mr. DiSanto said about her to the police (that she committed the crime of falsely pulling a fire alarm), and why she believes Mr. DiSanto bears fault for allegedly having made it (because Mr. DiSanto either lied to the police to frame Ms. Ciemniecki or purposefully ignored the videotape evidence exonerating her for a similar reason). Such allegations are, quite consistent with *Iqbal*, sufficient to state a defamation claim under *Rule 8(a)*, regardless of whether New Jersey would apply a more heightened standard to Plaintiff's pleading were the action prosecuted in New Jersey state court. [4] *See Filomena II, Inc., 1999 U.S. Dist. LEXIS 18761, 1999 WL 1081290, at *3* ([HN6] "According to *Rule 8*, a defamation pleading does not need to cite precise defamatory statements, it must only provide sufficient notice to the other party of the allegations made against him.").

4 The Court takes no position on the outcome of the instant motion under state pleading standards.

ii. Absolute Privilege

The Parker McCay Defendants claim an absolute privilege to relay information to the police preliminary to a proposed criminal prosecution. This argument begins with the *Second Restatement of Torts § 587*, which provides:

> A party to a private [*17] litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

Restatement (Second) of Torts § 587 (1977). Although *§ 587* does not purport to speak to statements made by non-party, private persons, official comments to the Second Restatement arguably interpret *§ 587* broadly enough to afford absolute immunity to Mr. DiSanto's alleged statement to police. For example, comment b provides, in pertinent part, that absolute immunity:

> [A]pplies to communications made by a client to his attorney with respect to proposed litigation *as well as to information given and informal complaints made to a prosecuting attorney or other proper officer preliminary to a proposed criminal prosecution* whether or not the information is followed by a formal complaint or affidavit.

Restatement (Second) of Torts § 587 cmt. b. (emphasis added).

The Parker McCay Defendants argue that New Jersey courts have endorsed [*18] the approach to absolute privilege taken by the Second Restatement in related contexts. As these Defendants correctly observe, New Jersey affords absolute immunity against defamation claims arising out of the filing of criminal complaints. *See Pitts v. Newark Bd. of Educ., 337 N.J. Super. 331, 766 A.2d 1206, 1209 (N.J. Super. Ct. App. Div. 2001)*; *Piper v. Scher, 221 N.J. Super. 54, 533 A.2d 974, 976 (N.J. Super. Ct. App. Div. 1987)* (citing *Lone v. Brown, 199 N.J. Super. 420, 489 A.2d 1192 (N.J. Super. Ct. App. Div. 1985))*. This absolute immunity is conferred to protect the public's strong interest in freedom of access to the courts. *See Pitts, 766 A.2d at 1209*. New Jersey also affords absolute immunity to statements made by a private investigator hired by an attorney to investigate a plaintiff's claim during the course of pretrial discovery. *See Hawkins v. Harris, 141 N.J. 207, 661 A.2d 284, 292 (N.J. 1995)*. This absolute immunity is similarly conferred to afford parties an unqualified opportunity to explore the truth of a matter without fear of recrimination. *Id. at 290*.

The Parker McCay Defendants further observe that a number of states have adopted absolute immunity for reports made by citizens to the police. *See, e.g., Ledvina v. Cerasani, 213 Ariz. 569, 146 P.3d 70, 75 (Ariz. App. Ct. Div. 2 2006)* [*19] (citing *Gen. Elec. Co. v. Sargent, 916 F.2d 1119, 1125-27 (6th Cir. 1990)*; *Borg v. Boas, 231 F.2d 788, 794-95 (9th Cir. 1956)*; *Cutts v. Am. United Life Ins., Co., 505 So.2d 1211, 1215 (Ala. 1987)*; *Starnes v. Int'l Harvester Co., 184 Ill. App. 3d 199, 539 N.E. 2d 1372, 1374-75, 132 Ill. Dec. 566 (Ill. App. Ct. 1989)*; *Flynn v. Boglarsky, 164 Mich. 513, 129 N.W. 674, 676 (Mich. 1911)*; *Hall v. Pizza Hut, 153 Mich. App. 609, 396 N.W. 2d 809, 813 (Mich. App. Ct. 1986)*; *McGranahan v. Dahar, 119 N.H. 758, 408 A.2d 121, 128 (N.H. 1979)*; *White v. Basnett, 1985 OK CIV APP 10, 700 P.2d 666, 668 (Okla. App. Ct. 1985)*; *Hott v. Yarbrough, 112 Tex. 179, 245 S.W. 676, 677 (Tex. Com. App. 1922))*. Although this appears to be the minority position, *see Fridovich v. Fridovich, 598 So.2d 65, 67 (Fla. 1992)* (collecting cases); *Caldor v. Bowden, 330 Md. 632, 625 A.2d 959, 969 (Md. 1993)* (collecting cases), it is not without some persuasive force.

For example, in *Ledvina*, a division of the Arizona Appellate Court adopted absolute immunity for both formal and informal reports made by individuals to police by focusing on the need to encourage unhindered communications to law enforcement authorities to facilitate the investigation and prosecution of crime. *146 P.3d at 74*. The court preferred absolute over qualified immunity out of a fear that otherwise [*20] the possibility of retaliatory defamation actions would "discourage free and unfettered reporting." *Id.* In the court's view, relaying information on a potential crime to police is the first step in a judicial proceeding; therefore, absolute immunity for such communications fits nicely into the framework of the Second Restatement. *Id.* Although the court was cognizant that the rule of absolute immunity could on occasion protect individuals who intentionally make a false report, the court believed that the public policy of Arizona called for striking the balance in favor of protecting whistle-blowers. *Id. at 75*. The court was satisfied that there existed adequate safeguards against intentionally false accusations in the form of criminal penalties for false reporting and/or tort actions for abuse of process or malicious prosecution. *Id. at 76*.

The problem with the Parker McCay Defendants' argument is that [HN7] New Jersey has explicitly declined to absolutely immunize statements made to a police officer for the purpose of bringing a criminal to justice. In *Dijkstra v. Westerlink*, a plaintiff brought a defamation action against a defendant who falsely reported to police that the plaintiff had [*21] attempted to shoot him. *168 N.J. Super. 128, 401 A.2d 1118, 1120 (N.J. Super. Ct. App. Div. 1979), certif. denied, 81 N.J. 329, 407 A.2d 1203*. The trial judge granted the defendants' motion to dismiss the defamation claim on grounds of absolute immunity. *Id. at 1120*. The Appellate Division disagreed and held that such communications were only qualifiedly privileged by reasoning that they occurred antecedent to the initiation of the judicial process. *Id. at 1120*. In the court's view, none of the judicial safeguards against malicious reporting -- notice and a hearing, the comprehensive control of a trial judge, and the "availability of retarding influences such as false swearing and perjury prosecutions" -- were present at such a preliminary stage. *Id. at 1121*.

New Jersey courts -- including the New Jersey Supreme Court -- continue to cite *Dijkstra* for the proposition that [HN8] "statements [made] to authorities for the prevention and detection of crime" are subject to a *qualified* privilege. *E.g., Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 516 A.2d 220 (N.J. 1986)*; *Geyer v. Faiella, 279 N.J. Super. 386, 652 A.2d 1245, 1247 (N.J. Super. Ct. App. Div. 1995)*. Moreover, as recently as 2008, the New Jersey Supreme Court has stated that: "Examples of qualified [*22] privileges are when people "make statements to authorities for the prevention and detection of crime." *See Senna v. Florimont, 196 N.J. 469, 958 A.2d 427, 435 (N.J. 2008)*. In this case, then, there can be no argument that absolute immunity is not available to the Parker McCay Defendants. Mr. DiSanto called the police, invited them to the building, and gave them information regarding the previous day's crime. Later, the patrolmen, not Mr. DiSanto, filed a criminal complaint. Thus, any statements Mr. DiSanto may have made to the police regarding Ms. Ciemniecki's alleged criminal activity were not made during the course of a judicial proceeding and were not subject to an absolute privilege under New Jersey law.

iii. Qualified Privilege

Alternatively, the Parker McCay Defendants argue that Plaintiff's claims are barred by a qualified privilege. As noted, [HN9] "a statement charging a criminal violation, made to a law-enforcement official, is qualifiedly privileged." *Williams v. Bell Telephone Labs., Inc., 132 N.J. 109, 623 A.2d 234, 239 (N.J. 1993)*. The New Jersey Supreme Court has explained the privilege as follows:

> A communication "made *bona fide* upon any subject-matter in which the party communicating has an interest or [*23] in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable"; the "fundamental test is the *bona fides* of the communication," and it is not privileged when the person making it has "full knowledge of its untruthfulness."

Id. at 240 (quoting *Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 149 A.2d 193 (1959))*. In other words, [HN10] "a communication to a law enforcement officer is generally held to be qualifiedly privileged if it is made in good faith for the purpose of helping to bring a criminal to justice." *Dijkstra, 401 A.2d at 1121* (citing *50 Am. Jur. 2d, Libel & Slander, § 214* at 726 (1970)). The privilege is abused where "(1) the publisher knows the statement is false or the publisher acts in reckless disregard of its truth or falsity; (2) the publication serves a purpose contrary to the interests of the qualified privilege; or (3) the statement is excessively published." *Williams, 623 A.2d at 240*; *see Erickson v. Marsh & McLennan Co., Inc., 117 N.J. 539, 569 A.2d 793, 805 (N.J. 1990)* ("A [*24] qualified privilege . . . is overcome on a showing of actual malice.").

The Complaint alleges that Ms. Ciemniecki did not pull the fire alarm, (Complaint P 34), and that at the time the alarm was raised Ms. Ciemniecki was on the fourth floor of the building, (*id.* PP 22, 23). The Complaint further alleges that Mr. DiSanto nonetheless told the police that Ms. Ciemniecki was seen on a videotape pulling the fire alarm. (*E.g., id.* P 52.) The Complaint also alleges Ms. Ciemniecki's belief that Mr. DiSanto made this allegedly false statement to the police "because of an animosity against her" stemming from the previous week's "falling-out" between Ms. Ciemniecki and her supervisor. (*Id.* P 58.) If believed, these allegations are sufficient to support a finding that the qualified privilege does not apply (because Mr. DiSanto did not accuse Ms. Ciemniecki in good-faith and with the purpose of helping solve crime) or that the privilege has been abused (because Mr. DiSanto knew the accusation to be false or acted in reckless disregard of the fact that Ms. Ciemniecki did not pull the alarm). The Parker McCay Defendants' position that Mr. DiSanto actually believed the accusations he allegedly made [*25] to the patrolmen is a factual issue for another day.

iv. Defamatory Nature of Statements

The Parker McCay Defendants argue that Mr. Disanto's alleged statement to the police was not defamatory as a matter of law.

[HN11] As a threshold legal matter, the Court must determine whether Mr. DiSanto's alleged statement is reasonably susceptible of defamatory meaning. *See Romaine v. Kallinger, 109 N.J. 282, 537 A.2d 284, 296 (N.J. 1988).* This inquiry should be guided by "'the fair and natural meaning which will be given [to the relevant language] by reasonable persons of ordinary intelligence'" as well as the context in which the language occurs. *Id.* (quoting *Herrmann v. Newark Morning Ledger Co., 48 N.J. Super. 420, 138 A.2d 61 (N.J. Super. Ct. App. Div. 1958), aff'd on rehearing, 49 N.J. Super. 551, 140 A.2d 529 (N.J. Super. Ct. App. Div. 1958)*; *Karnell v. Campbell, 206 N.J. Super. 81, 501 A.2d 1029 (N.J. Super. Ct. App. Div. 1985)).* If the statement is susceptible of only one meaning and that meaning is defamatory, the statement is libelous as a matter of law. *Id.* On the other hand, if the statement is susceptible of only one meaning and that meaning is non-defamatory, the statement cannot be slanderous. *Id.* In cases where the statement is capable of both defamatory and [*26] non-defamatory meanings, the question of whether the content is defamatory properly rests with the trier of fact. *Id.*

[HN12] Generally speaking, defamatory words are those "that subject a person to ridicule or contempt, or that clearly sound to the disreputation of an individual." *Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 969 A.2d 1097, 1114 (N.J. 2009)* (quoting *DeAngelis v. Hill, 180 N.J. 1, 847 A.2d 1261 (N.J. 2004)).* To determine whether a statement is defamatory, a court should consider "(1) the content, (2) the verifiability, and (3) the context of the challenged statement." *Id.* (quoting *DeAngelis, 847 A.2d at 1261*) (internal quotation marks omitted). Certain kinds of statements, however, "denote such defamatory meaning that they are considered defamatory as a matter of law." *Romaine, 537 A.2d at 291*. The "false attribution of criminality" is a prime example of such a statement. *Id.; see Dijkstra, 401 A.2d at 1120* ("The words sued upon charged the commission of a crime. Therefore they were defamatory and libelous Per se."); *Hill v. Evening News Co., 314 N.J. Super. 545, 715 A.2d 999, 1002 (N.J. Super. Ct. App. Div. 1998)* (citing *Devries v. McNeil Consumer Prods. Co., 250 N.J. Super. 159, 593 A.2d 819 (N.J. Super. Ct. App. Div. 1991))* ("[C]ertain [*27] statements are defamatory *per se,* including statements that the subject of the statement committed a crime.").

As repeatedly noted, the Complaint in this case alleges that Mr. DiSanto accused Ms. Ciemniecki of [HN13] raising a false fire alarm to the police, which is a crime in New Jersey. The Court is confident that a fact-finder could determine that accusing an innocent woman, who had never before pulled a fire alarm or been arrested for any crime, of raising a false fire alarm in an office building during a very busy working day that caused the building to be evacuated is a statement that tends to lower Ms. Ciemniecki's estimation in the community and subject her to disrepute. As a consequence, the Complaint alleges a statement that is susceptible of defamatory meaning. It also appears that, in light of the foregoing authority, Mr. DiSanto's alleged statement is defamatory as a matter of law, but for the purposes of denying the instant motion it is enough that a fact-finder could interpret Mr. DiSanto's alleged statement as being defamatory.

The Parker McCay Defendants argue that Mr. DiSanto's alleged statement to police was not susceptible of defamatory meaning, but this argument results [*28] from an overly cramped reading of the Complaint. The Parker McCay Defendants appear to believe that, at most, Mr. DiSanto told the police that he had further information regarding a crime, and that a woman, *later identified,* as Sheila Ciemniecki was seen activating the fire alarm. In other words, the Parker McCay Defendants appear to interpret Mr. DiSanto's statements as stopping short of a full-blown accusation. On a motion to dismiss, however, the Parker McCay Defendants' interpretation of Mr. DiSanto's statements does not control. As noted, Ms. Ciemniecki was not privy to the conversation between Mr. DiSanto and the police officers. As a consequence, she does not know the exact words that were communicated. Nonetheless, the Complaint clearly reveals Ms. Ciemniecki's belief that Mr. DiSanto told the police officers that Ms. Ciemniecki pulled the fire alarm. If true, this statement is reasonably interpreted as conveying the meaning that Ms. Ciemniecki committed the crime of raising a false alarm. *See Karnell v. Campbell, 206 N.J. Super. 81, 501 A.2d 1029, 1033 (N.J. Super. Ct. App. Div. 1985)* (citing *Kotlikoff v. The Community News, 89 N.J. 62, 444 A.2d 1086, 1090 (N.J. 1982)* ([HN14] "Where criminal allegations are concerned, [*29] a court needs to examine a statement in context to determine whether it conveys the impression that a plaintiff is being accused of a crime.").

The Parker McCay Defendants also submit a somewhat confusing argument that can be best summarized as follows. Mr. DiSanto's alleged accusation may have imputed to Plaintiff the violation of *N.J. Stat. Ann. § 2C-33-3(a)*; New Jersey cases and statutes give no indication that this crime should be regarded as *malum in se* (in other words, as involving an act of moral turpitude); therefore Mr. DiSanto's alleged accusation does not constitute "defamation per se"; and therefore the Complaint does not state an actionable defamation claim.

As an initial matter, this argument appears to confuse [HN15] two distinct concepts in defamation law, namely "defamation per se" and "slander per se." The former term refers to a statement "whose defamatory meaning is so clear on its face that the court is not required to submit the issue to the jury." *Biondi v. Nassimos, 300 N.J. Super. 148, 692 A.2d 103, 105 n.2 (N.J. Super. Ct. App. Div. 1997)* (citing *Lawrence v. Bauer Publ'g & Printing, 89 N.J. 451, 446 A.2d 469 (N.J. 1982))*. By way of contrast, the latter term refers to "four categories of slander which [*30] are considered so clearly damaging to reputation that a plaintiff may establish a cause of action without presenting any evidence of actual damage to reputation." *Id.* (citing *Ward v. Zelikovsky, 136 N.J. 516, 643 A.2d 972 (N.J. 1994))*.

The Parker McCay Defendants do not argue that Plaintiff has failed to plead special damages; rather, these Defendants simply argue that Mr. DiSanto's alleged accusation is not defamatory as a matter of law. [5] The distinction can be critical; [HN16] a complaint does not state a slander claim absent factual allegations rising to the level of slander per se or setting-forth special damages. *See Biondi, 692 A.2d at 105-06*. On the other hand, a complaint that alleges facts supporting the proposition that the relevant communication tended to bring the plaintiff into disrepute sufficiently alleges defamatory meaning, regardless of whether the statement is regarded as per se defamatory. Thus, in light of the Court's conclusion that Mr. DiSanto's alleged statement is reasonably susceptible of defamatory meaning, the Parker McCay Defendants' argument that the alleged statement is not defamatory per se is beside the point.

> 5 The Parker McCay Defendants captioned their argument as "Plaintiff [*31] Does Not Present Any Statement That Is Reasonably Susceptible of Defamatory Meaning." (Defs.'s Br. at 13.)

Even if the Court were to read the Parker McCay Defendants' brief as arguing that Mr. DiSanto's alleged statement was not slanderous per se (which it does not), their argument would still fail. *Section 571* of the Second Restatement provides, in pertinent part:

> [HN17] One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be (a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude.

Restatement (Second) of Torts, § 571. This section has been cited favorably by New Jersey Courts. *See Salzano v. North Jersey Media Group Inc., 993 A.2d 778, 201 N.J. 500, 2010 N.J. LEXIS 396, 2010 WL 1856222, at *22 (N.J. May 11, 2010)*; *Biondi, 692 A.2d at 107*; *Pitts, 766 A.2d at 1210*.

Mr. DiSanto's alleged statement seems to fall squarely into the first prong of *Section 571*. Moreover, this restatement of the law is clearly disjunctive, excusing proof of special damages if the imputation [*32] of criminal conduct involves moral turpitude *or* is punishable by imprisonment in state or federal prison. [HN18] *N.J. Stat. Ann. 2C:33-3(a)* is a crime of the third degree, which is punishable in New Jersey with up to five years in prison. *N.J. Stat. Ann. § 2C:43-6(a)(3)*; *State v. Reed, 183 N.J. Super. 184, 443 A.2d 744, 748 (N.J. Super. Ct. App. Div. 1982)*. Thus, it appears as though Mr. DiSanto's alleged statement is properly regarded as slanderous per se. As a consequence, proof of special damages is not required. [6]

> 6 The Court takes no position on whether the Complaint alleges facts supporting special damages.

In a last-ditch effort to evade *Section 571*'s disjunctive, the Parker McCay Defendants argue that New Jersey requires *both* prongs to be satisfied before a statement can be considered slander per se and that the crime of raising a false public alarm does not involve moral turpitude.

The only New Jersey authority offered for the proposition that the rule articulated in *Section 571* is conjunctive in New Jersey is *Ludlum v. McCuen, 17 N.J.L. 12 (1839).* In *Ludlum,* a plaintiff-Postmaster brought a defamation action alleging that the defendant had falsely accused him of breaking open his letters. *17 N.J.L. 12, Id. at *2.* The New [*33] Jersey Supreme Court held that this allegation, without more, could not be reasonably interpreted as imputing the violation of any criminal law. *17 N.J.L. 12, Id. at *3.* As the court observed, the Postmaster was authorized by the law as it existed at the time to open letters in certain circumstances. *Id.* Thus, the bare statement that the Postmaster opened an individual's letters did not import any crime. *Id.*

In what appears to be dictum, the court then proceeded to express its opinion on whether the words, if read as an accusation that the Postmaster had violated his official duty, would be slanderous and actionable. *17 N.J.L. 12, Id. at *4.* The brief discussion that ensued could be read for the proposition that words imputing a violation of a law not *malum in se* are not actionable by way of slander without proof of special damages. *See id.* ("Nevertheless, in relation to private persons, I think no words are actionable, however penal the act may be with which they charge the plaintiff, unless they impute to him, an act which is *malum in se,* and not merely *malum prohibitum.*").

For a variety of reasons (most of which should be self-evident), the Court is not convinced that *Ludlum* articulates the current state of [*34] the law in New Jersey or otherwise adds much to the analysis. The law of defamation has undergone substantial changes in the over one hundred and fifty years since the opinion was drafted. During that period, New Jersey courts have cited to it less than a dozen times. [7] Much more recent New Jersey authority indicates that the disjunctive Second Restatement approach is presently the law in New Jersey. *See, e.g., Biondi, 692 A.2d at 107* (citing *Restatement (Second) of Torts § 571* (1977). In any event, the Court cannot dismiss the defamation claim on the basis that the alleged communication lacks a defamatory meaning.

7 In a few cases, it is cited for historical propositions. *See, e.g., Maressa v. N.J. Monthly, 89 N.J. 176, 445 A.2d 376, 392 (N.J. 1982).* Other cases cite to it to address the issue of innuendo. *See, e.g., Kotok Bldg. v. Charvine Co., 183 N.J. Super. 101, 443 A.2d 260, 261 (N.J. Super. Ct. L. Div. 1981).* Apparently, only two cases cite to it to address the question of whether statements attributing criminality must accuse crimes of moral turpitude. *Compare Moore v. Miers, 78 N.J.L. 201, 73 A. 32, 32 (N.J. 1909)* ("There is nothing slanderous in this, for there is no charge of criminality or moral turpitude, and it is not [*35] pretended that the words are slanderous per se on any other of the recognized grounds.") (emphasis added), *with Sipp v. Coleman, 179 F. 997 (D.N.J. 1910)* ("There is much confusion in the older cases concerning whether accusing another of an indictable offense is slanderous per se, regardless of the nature of the crime; but it may be considered settled that *only* where the crime charged involves moral turpitude may the oral accusation be said to be slanderous per se . . . . The changes, however, are upward, and must continue upwards until the standards of the Christ shall be universally accepted.").

v. Fault

The Parker McCay Defendants argue that the Complaint does not sufficiently allege fault. According to these Defendants, the actual malice standard applies because (1) Ms. Ciemniecki became a limited purpose public figure by virtue of holding a press-conference to publicize the filing of the instant Complaint; and (2) the false activation of a fire alarm involves a matter of public concern. Predictably, the Parker McCay Defendants do not read the Complaint as alleging facts sufficient to support a claim of actual malice. On the other hand, Plaintiff argues that a negligence standard [*36] is applicable because she is a private figure and the allegedly defamatory statements do not relate to matters of public concern. In the alternative, Plaintiff argues that the Complaint does, in fact, allege that the Parker McCay Defendants acted with actual malice.

[HN19] The actual malice standard, when applicable, requires a defamation plaintiff to prove that the allegedly defamatory statement was made with "with knowledge that it was false or with reckless disregard of whether it was false or not." *See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).* In New Jersey, "[t]he actual malice standard will apply when the alleged defamatory statement concerns a public figure or a public official or involves a matter of public concern." *Senna, 958 A.2d at 443.*(citing *Curtis Publ'g Co. v. Butts, 388 U.S. 130, 163-65, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967)* (Warren, C.J., concurring); *New York Times, 376 U.S. at 279-80*; *Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, 655 A.2d 417 (N.J. 1995)).*

[HN20] A person is a public figure for all purposes when she has achieved "'pervasive fame or notoriety.'" *Senna, 958 A.2d at 436 n.9* (quoting *Gertz v. Robert Welch, Inc., 418 U.S. 323, 351, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)).* An otherwise private person can become

[*37] a limited purpose public figure if she "voluntarily interjects [herself] or is drawn into a particular public controversy." *Id.* (citation omitted). The New Jersey Supreme Court has explained that:

> [W]hen a private person with sufficient experience, understanding and knowledge enters into a personal transaction or conducts his personal affairs in a manner that one in his position would reasonably expect implicates a legitimate public interest with an attendant risk of publicity, defamatory speech that focuses upon that public interest will not be actionable unless it has been published with actual malice.

Sisler v. Gannett Co., 104 N.J. 256, 516 A.2d 1083 (N.J. 1986).

In this case, the Complaint does not allege that Ms. Ciemniecki has attained pervasive fame or notoriety. In fact, the Complaint paints the picture of a rather private individual -- a longtime law-abiding, law librarian at a private law firm -- that is not consistent with all-purpose public figure. The question then becomes whether the Complaint reveals facts sufficient to confer on Ms. Ciemniecki limited purpose public figure status. According to the Complaint, Ms. Ciemniecki did not pull the fire alarm or engage in any other activity [*38] that would constitute voluntary interjection prior to the alleged defamation. The fact that she later held a press-conference to publicize the filing of the instant litigation does not render her a limited purpose public figure retroactively. *See Silvester v. Am. Broadcasting Co., 839 F.2d 1491, 1496 (11th Cir. 1988)* ([HN21] plaintiff must have been a public figure *prior* to the publication of the particular defamatory speech). Moreover, as the Complaint tells it, Ms. Ciemniecki was wholly sucked into the limelight of this situation by the Parker McCay and Evesham Defendants for actions Ms. Ciemniecki categorically denies ever having taken. *See Hutchinson v. Proxmire, 443 U.S. 111, 134, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979)* ([HN22] "[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."). As a consequence, the Court cannot find, for the purposes of this motion, that Ms. Ciemniecki was a limited purpose public figure.

Even if Ms. Ciemniecki is not a public figure, the Parker McCay Defendants argue that she should be held to the actual malice standard by virtue of the notion that raising a fire alarm implicates important matters of public concern. [HN23] New Jersey [*39] provides greater protection to speech involving matters of public concern than required by the *First Amendment*. *Senna, 958 A.2d at 436.* The actual malice standard is implicated as a matter of course where a media or media-related defendant publishes a news story regarding "public health and safety, a highly regulated industry, or allegations of criminal or consumer fraud, or a substantial regulatory violation." *Id. at 443-44.* In cases of non-media speech, the rule is less categorical, requiring the court to "consider the content, form, and context of the speech." *Id. at 444.*

The Complaint does not contain sufficient facts for this Court to conclude at this time that the false fire alarm at the business location of the Parker McCay Defendants rose to the level of a matter of public concern vis-a-vis the non-media Parker McCay Defendants. Obviously, sounding a false fire alarm is no trivial matter. Nonetheless, the Complaint does not allege facts that would place this particular false fire alarm squarely in the realm of a substantial public concern. According to the Complaint, the false alarm was an isolated event, did not result in serious physical injury, and was confined to one particular [*40] office building on one particular day. *See Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 167, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979)* ([HN24] mere newsworthiness is not sufficient to create a public controversy). Therefore, the Court is reticent to decide, upon a motion to dismiss, that the speech in question was a matter of public concern sufficient to implicate the actual malice standard.

Moreover, even if the actual malice standard were applicable, the Court is of the opinion that the Complaint alleges it sufficiently. The Complaint alleges that "The Parker McCay Defendants published false and defamatory statements . . . with knowledge of their falsity and/or with reckless disregard as to their truth or falsity." (Complaint P 71.) Read in the context of Ms. Ciemniecki's denial of having pulled the alarm, this statement clearly expresses the belief that Mr. DiSanto must have known his accusation was false because the video could not have shown Ms. Ciemniecki doing something she did not do. In light of the foregoing, the Court will not dismiss Counts I and II.

2. Count III: Invasion of Privacy (False Light)

The Parker McCay Defendants ask the Court to dismiss Count III because (1) the absolute and qualified privileges [*41] governing defamation apply; (2) it is not plead with sufficient particularity; (3) invasion of privacy requires the publication of private facts; and (4) Mr. DiSanto's statement did not place Ms. Ciemniecki in a false light because the statement is not highly offensive.

As an initial matter, the Court notes that it need not address in any detail the Parker McCay Defendants' first three arguments. The Court has already determined that neither an absolute nor qualified privilege shields the Parker McCay Defendants from Plaintiff's defamation claims at this time. Moreover, the Court has also already concluded that Mr. DiSanto's statement, upon which Count III is based, is plead with sufficient particularity under *Rule 8*. Finally, as Plaintiff makes clear in her opposition brief, the Complaint does not bring a claim for invasion of privacy by way of unreasonable publication of private facts; rather, the only invasion of privacy tort asserted in the Complaint is that of false light.

[HN25] To state a claim for the tort of false light, a plaintiff must allege (1) placement in a false light that would be highly offensive to a reasonable person; and that (2) "the actor had knowledge of or acted in [*42] reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Leang, 969 A.2d at 1116*. "The publicized material in a false-light claim must constitute a 'major misrepresentation of [plaintiff's] character, history, activities, or beliefs.'" *Romaine, 537 A.2d at 295* (citation omitted). Hypersensitive persons are not specially protected as "the material publicized 'must be something that would be objectionable to the ordinary person under the circumstances.'" *Id.* (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts*, § 117, at 864 (5th ed. 1984)).

In this case, the accusation that Ms. Ciemniecki falsely pulled a fire alarm at a professional office building stands out in sharp contrast against the picture of Ms. Ciemniecki painted in the Complaint as a law-abiding librarian. Due in large part to the serious consequences that can ensue when unwitting persons are led to believe that they are operating in the context of an emergency situation, raising a false alarm is generally regarded as a rather despicable act. That the imputation of such activity to ordinary persons is highly offensive can be inferred [*43] from the stigma children learn to attach to acts of "crying wolf." *See The Boy Who Cried Wolf*, http://en.wikipedia.org/wiki/The_Boy_Who_Cried_Wolf (last visited June 6, 2010). As a result, the Court cannot hold as a matter of law that the statement Mr. DiSanto allegedly made to police was not highly offensive. Accordingly, the Court will not dismiss Count III.

3. Counts IV & V: Infliction of Emotional Distress

The Parker McCay Defendants argue that Counts IV and V should be dismissed because they believe the Complaint fails to state a claim for defamation. *See G.D. v. Kenny, 411 N.J. Super. 176, 984 A.2d 921 (N.J. Super. Ct. App. Div. 2009)* ("It would obviously be intolerably anomalous and illogical for conduct that is held not to constitute actionable defamation nevertheless to be relied on to sustain a different cause of action based solely on the consequences of that alleged defamation."). Because the Court has declined the Parker McCay Defendants' invitation to dismiss the defamation claims, the Court must similarly decline to dismiss Counts IV and V on this basis.

4. Count VI and XIV: False Imprisonment and Prima Facie Tort

The Parker McCay Defendants argue that Count VI should be dismissed because they [*44] do not believe there is any basis to conclude that the Plaintiff was in the conference room against her will and that there was legal authority for the questioning. The Complaint clearly alleges that Ms. Ciemniecki was not free to leave the conference room and that the police had no basis for arresting her because she did not pull the fire alarm and therefore could not have been caught on camera pulling the fire alarm. The Complaint further alleges that the Parker McCay Defendants falsely accused Plaintiff of having pulled the fire alarm to retaliate against her. Accordingly, the Court declines to dismiss Plaintiff's false imprisonment claim.

The Parker Mccay Defendants also argue that Count XIV should be dismissed because there are other common law claims for which Plaintiff can recover. [HN26] A prima facie tort claim in New Jersey is designed to provide a cause of action for "intentional, willful and malicious harms" that fall within the gaps of the law. *Dixon v. CEC Ent., Inc., 2008 N.J. Super. Unpub. LEXIS 2875, 2008 WL 2986422, at *9 (N.J. Super. Ct. App. Div. Aug. 6, 2008)* (per curiam) (quoting *Taylor v. Metzger, 152 N.J. 490, 706 A.2d 685, 701 (N.J. 1998)*). The prima facie tort should not be invoked "when essential elements of an [*45] established and relevant cause of action are missing." *Taylor, 706 A.2d at 701* (citing *Yeitrakis v. Schering-Plough corp., 804 F. Supp. 238, 250-51 (D.N.M. 1992))*. Moreover, "the availability of the prima facie tort doctrine is limited exclusively to those instances of intentional and culpable conduct unjustified under the circumstances that, as a threshold matter, do not fall within a traditional tort cause of action." *Dixon, 2008 N.J. Super. Unpub. LEXIS 2875, 2008 WL 2986422, at *10* (citation omitted).

As this Opinion makes clear, the Complaint states a claim for a number of established torts. Moreover, there is no willful conduct alleged in the Complaint that is not encompassed by these traditional actions. As a consequence, the Court will grant the Parker McCay Defendants' motion to dismiss Count XIV.

B. The Central Record's Motion to Dismiss

The Central Record asks the Court to dismiss those counts in the Complaint alleged against it. The Complaint reproduced the text of the article in full, (*see* Complaint P 47), and therefore is properly before the Court at this stage.

The Central Record argues that the Court should dismiss Plaintiff's libel claims because (1) the Complaint has pled only conclusory allegations of [*46] malice and negligence; (2) the actual malice standard applies and Plaintiff cannot meet this burden; (3) the Fair Comment Privilege applies; and (4) the article is not defamatory. Because the Court does not believe that the Central Record article, taken as a whole, relays information alleged to be false, the Court will grant the Central Record's motion to dismiss on this basis and will not consider the Central Record's remaining arguments.

As noted, [HN27] a defamation plaintiff show that the allegedly defamatory communication was false. *DeAngelis, 847 A.2d at 1267*. To determine the meaning of a given article, the court must "evaluate the language in question 'according to the fair and natural meaning which would be given it by reasonable persons of ordinary intelligence.'" *Molin v. The Trentonian, 297 N.J. Super. 153, 687 A.2d 1022, 1023 (N.J. Super. Ct. App. Div. 1997)* (quoting *Herrmann, 138 A.2d at 61*). "In assessing the language, [the district court] must view the publication as a whole and consider particularly the context in which the statement was made." *Id.* (citing *Romaine, 537 A.2d at 284*). This includes reviewing headlines in conjunction with the body of the article. *Id. at 1024*.

In *Molin*, a man was arrested [*47] for stalking a woman, and a New Jersey daily newspaper known as the Trentonian published an article several days later under the headline: "STALKER'S ARREST ENDS YEAR OF TERROR." *Id. at 1023*. The article reported "the circumstances under which the arrest took place, where it occurred, and what the [man] had done in order to prompt being arrested." *Id. at 1024*. The article further reported that the man was being held on bail for a violation of a recently enacted anti-stalking law. *Id.* The article referred to the man as the "alleged stalker" throughout and included a picture of the man with a caption reading "CHARGED." *Id.* The man subsequently brought a defamation suit against the Trentonian on the theory that the article falsely accused him of being a stalker when he had not been convicted of the crime. *Id. at 1023*.

The motion judge granted summary judgment, holding that the plaintiff was unable to prove that the statements in the article were false. [8] *Id.* On appeal, the plaintiff argued that the headline accused him, as a factual matter, of being a stalker; whereas, at the time, he was only an alleged stalker. *Id.* The Appellate Division affirmed the grant of summary judgment. *Id. at 1022*. [*48] The court reasoned that although the headline "states that the *stalker* has been arrested" the rest of the article precluded the possibility that "a reasonable person could interpret that plaintiff has been anything but arrested and charged for stalking." *Id. at 1024* (emphasis added).

> 8 The motion judge also held that the arrest -- one of the first under the anti-stalking statute -- was a matter of legitimate public interest to which the fair comment privilege attached and that the plaintiff could not show actual malice. *Molin v. The Trentonian, 297 N.J. Super. 153, 687 A.2d 1022, 1023 (N.J. Super. Ct. App. Div. 1997)*.

In this case, there are two sentences, which, if viewed in isolation, could perhaps lead to the conclusion that the article was accusing Plaintiff of actually having pulled the alarm. The first sentence of the article states: "A Haddonfield woman faces charges after pulling a fire alarm at a township office building." (Complaint P 47.) The second to last sentence of the article states: "Police did not give a reason as to why Ciemniecki pulled the fire alarm." (*Id.*) Taken in context of the article as a whole, however, these statements cannot be reasonably read to imply that the Central Record [*49] was asserting that Ms. Ciemniecki actually pulled the fire alarm. The six-sentence article appeared in a section of the newspaper entitled "On the Record"; it did not purport to be a work of independent investigative journalism. The article, such as it is, focuses on the arrest of Ms Ciemniecki, and its headline -- "Woman arrested for making false alarm" -- colloquially reflects this scope.

In fact, the first allegedly offending sentence itself makes clear that Ms. Ciemniecki was only "facing charges." The article concluded by indicating that Ms. Ciemniecki was awaiting a hearing in municipal court, thus laying to rest any residual doubt in the reader's mind that Ms. Ciemniecki may have been convicted for the charged offense. With these observations in mind, the only reasonable reading of this article is that Ms. Ciemniecki was arrested for the crime of making a false public alarm and that Ms. Ciemniecki was released and awaited a hearing on the offense for which she was arrested. Ms. Ciemniecki agrees that she was arrested for and charged with the crime of making a false public alarm and that she was released pending a hearing. Thus, the Complaint does not allege a viable defamation [*50] claim against the Central Record.

As Plaintiff observes, it would have been preferable for the Central Record to report that Ms. Ciemniecki faced charges after *allegedly* pulling a fire alarm and to query as to why Ms. Ciemniecki *allegedly* pulled the fire alarm. In fact, a case could be made that this article is a fine example of sloppy journalism. However, the mere fact that the article could have been written more clearly does not, under the particular facts of this case, support the reasonable conclusion that this article conveyed the message that Ms. Ciemniecki actually pulled the fire alarm. It does not convey such a message to a reasonable reader. It conveys the message that she was arrested for pulling a fire alarm. The Complaint admits that she was so arrested. Thus, the Court will grant the Central Record's motion to dismiss Counts VII and VIII.

As noted, [HN28] to state a claim for the tort of false light, a plaintiff must allege that the defendant placed the plaintiff in a light that was false, knowing or recklessly disregarding its falsity. *See Leang, 969 A.2d at 1116*. Based on the Court's conclusion that the Central Record article is not susceptible to being read as conveying false [*51] information, the Court must also dismiss the false light claim. Moreover, the Court will also dismiss Plaintiff's claim of prima facie tort for failure to state a claim. As noted,[HN29] the prima facie tort should not be invoked "when essential elements of an established and relevant cause of action are missing." *Taylor, 706 A.2d at 701*. In this case, the essential element of falsity is missing from Plaintiff's traditional defamation and invasion of privacy claims.

[HN30] Normally, a district court is compelled to grant leave to amend a complaint that it has dismissed for failure to state a claim. *See Carmen v. Metrocities Mortg., No. 08-2729, 2010 U.S. Dist. LEXIS 7984, 2010 WL 421115, at *7 (D.N.J. Feb. 1, 2010)* (citing *Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000))*. The rule is not absolute; however, as leave to amend is inappropriate where it would cause undue delay, the amendment was motivated by bad faith or dilatory motive, the amendment would cause prejudice, or the amendment would be futile. *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997)*. In this case, the article was reproduced fully in the Complaint, and the Court has decided that it cannot be reasonably read as asserting that [*52] Ms. Ciemniecki actually committed the crime charged. Accordingly, the Court will not grant leave to amend as doing so would be futile.

IV. CONCLUSION

For the foregoing reasons, the Court will deny the Parker McCay Defendants' motion to dismiss as to Counts I, II, III, IV, V, and VI. The Court will grant the Parker McCay Defendants' motion to dismiss as to Count XIV. The Court will grant the Central Record's motion to dismiss Counts VII, VIII, IX, and XIV. An appropriate Order shall enter.

Dated: 6-7-2010

/s/ Robert B. Kugler

ROBERT B. KUGLER

United States District Judge

GRACO, INC., et al., Plaintiffs, v. PMC GLOBAL, INC., et al., Defendants.

Civil Action No. 08-1304 (FLW)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2009 U.S. Dist. LEXIS 26845*; *73 Fed. R. Serv. 3d (Callaghan) 52

March 31, 2009, Decided
March 31, 2009, Filed

NOTICE: NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part *Graco, Inc. v. PMC Global, Inc., 2011 U.S. Dist. LEXIS 14717 (D.N.J., Feb. 14, 2011)*

COUNSEL: [*1] For GRACO INC., a Minnesota Corporation, GRACO MINNESOTA INC., a Minnesota Corporation, Plaintiffs: KAREN A. CONFOY, LEAD ATTORNEY, ERICA SUSAN HELMS, MARSHALL D. BILDER, STERNS & WEINROTH, PC, TRENTON, NJ.

For PMC GLOBAL, INC., a Delaware Corporation, PMC EUROPE INVESTMENTS, S.L., a Spanish Limited Liability Company, PMC, INC., a Delaware Corporation, DENIS S. COMMETTE, a New Jersey Resident, GAMA MACHINERY USA, INC., a Delaware Corporation, Defendants: BRIAN M. ENGLISH, LEAD ATTORNEY, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ; JAMES S. RICHTER, LEAD ATTORNEY, WINSTON & STRAWN, LLP, NEWARK, NJ.

For GARRAF MAQUINARIA S.A., a Spanish Corporation, Defendant: STEVEN MARK KAPLAN, LEAD ATTORNEY, KAPLAN & LEVENSON LLP, NEW YORK, NY.

For DENIS S. COMMETTE, a New Jersey Resident, GAMA MACHINERY USA, INC., a Delaware Corporation, Counter Claimants: BRIAN M. ENGLISH, LEAD ATTORNEY, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ.

For GRACO INC., a Minnesota Corporation, GRACO MINNESOTA INC., a Minnesota Corporation, Counter Defendants: KAREN A. CONFOY, LEAD ATTORNEY, STERNS & WEINROTH, PC, TRENTON, NJ.

JUDGES: The Honorable Freda L. Wolfson, United States District Judge.

OPINION BY: Freda L. Wolfson

OPINION

WOLFSON, [*2] ***United States District Judge:***

Presently before the Court is a motion by Defendants PMC Global, Inc. (" PMC Global"), PMC Inc. ("PMC"), PMC Europe Investments ("PMC Europe"), S.L., Denis S. Commette ("Commette"), and Gama Machinery USA, Inc. ("Gama") (collectively "PMC Defendants"), to dismiss Plaintiffs', Graco Inc. and Graco Minnesota Inc. (collectively "Plaintiffs" or "Graco"), Complaint pursuant to *Fed. R. Civ. P. 19* and *12(b)(6)*. Defendant Garraf Maquinaria S.A. ("Garraf") joins in that Motion and asserts additional reasons to dismiss Plaintiffs' Complaint. Finally, Graco filed a motion to dismiss or, in the alternative, stay the counterclaims of Defendants

Commette and Gama.

This case has its genesis in Graco's purchase of Gusmer Corporation and Gusmer Europe S.L. (collectively "Gusmer"), from Defendants PMC Global and PMC Europe for $ 65 million. Thereafter, former Gusmer (then Graco) employees ceased working for Graco, and started working for Gama and Garraf, which compete in the same in-plant polyurethane processing equipment ("IPPE") industry. Graco claims that Gama is owned by PMC, a subsidiary of PMC Global and Garraf is owned, at least in part, by PMC Europe, and that, these [*3] Defendants, acting individually or in concert, are, *inter alia*, breaching their contractual duties of the sale by promoting a new competitor company, Gama. Graco sues Defendants to recoup what it argues is the full benefit of the contracts and damages arising from the loss of value of the Gusmer trade name, technology, customer relationships, and goodwill, resulting from Defendants having hired former Gusmer and Graco employees, using Graco trade secrets, and misleading customers as to the identities of the companies. Defendants argue that there is no agency relationship between their companies, that they are entitled to compete in the IPPE industry because Plaintiffs did not contract for a non-compete agreement, the former employees are not using trade secrets, but rather knowledge and skill they developed throughout their careers, and neither Defendant companies nor their employees are misleading customers. Defendants Gama and Commette have also filed counterclaims against Graco for antitrust and tort violations. This Court has jurisdiction over this action pursuant to *28 U.S.C. §§ 1331*, *1332*, *1367* and *1338*.

For the reasons that follow, Defendants' Motions are granted in part and [*4] denied in part, and Plaintiffs' Motion is granted in part and denied in part. Specifically, the Court grants Defendants' requests to dismiss Count Three of Plaintiffs' Complaint without prejudice and Graco's Motion to dismiss Counts One and Two of Commette and Gama's Counterclaims without prejudice, and grants Defendants' requests to dismiss Count Nine of the Complaint. The Court denies Defendants' requests to dismiss Count Six and Graco is directed to re-plead its Lanham Act claims under *15 U.S.C. § 1125(a)(1)* within ten (10) days. Further, the Court denies the parties' Motions with respect to all remaining claims.

I. Background and Procedural History

Since PMC Defendants and Garraf move to dismiss Plaintiffs' claims pursuant to *Fed. R. Civ. P. 12(b)(6)*, the following version of events assumes Plaintiffs' allegations to be true. Similarly, Defendants Gama and Commette's allegations will be taken as true on their counterclaims. The Court will only recount facts that are relevant for the purposes of deciding these Motions.

The Parties

Graco Inc., a Minnesota corporation, manufactures and distributes industrial equipment, including fluid-handling systems and components that move, measure, [*5] control, dispense, and apply fluids and viscous materials used in vehicle lubrication and commercial and industrial settings. Compl. P 1. Graco Minnesota Inc. ("Graco Minnesota"), also a Minnesota corporation, is a wholly-owned subsidiary of Graco, Inc. *Id.* P 2.

PMC Global, a Delaware corporation, has its principal place of business in California. *Id.* P 3. PMC Global's founder and Chief Executive Officer is Philip E. Kamins ("Philip Kamins"), its President is Mr. Kamins's son Gary E. Kamins ("Gary Kamins"), and its Executive Vice President is T.C. Cheong ("Cheong"). *Id.* PMC Europe, a Spanish corporation, is an affiliate of PMC Global. *Id.* P 4. Philip Kamins is the President of PMC Europe, and Gary Kamins and Cheong sit on PMC Europe's Board of Directors. *Id.* Philip Kamins is an executive of PMC, which is incorporated in Delaware and has its principal place of business is in California. *Id.* P 5. PMC is allegedly a subsidiary of PMC Global. *Id.*

Gama, incorporated in Delaware on July 12, 2007, has its principal place of business in New Jersey. *Id.* P 6. Gama allegedly has acted as an agent for, an instrumentality of, or in active concert and participation with Defendants PMC Global, PMC [*6] Europe, PMC, and Garraf. *Id.* Gary Kamins is Gama's President. *Id.* Gama allegedly does business as Gama-Europe and Garraf. *Id.* Gama is owned by PMC Global's subsidiary, PMC. *See* Commette & Gama Disclosure Statement. According to PMC Defendants, Gama was created by Commette, a former employee of Gusmer (later Graco), in October 2006 and incorporated in July 2007. PMC Dfs. Mot. at 2; Compl. P 6.

Garraf, incorporated in Spain in August 2007, is an affiliate of Gama; PMC Europe has an ownership or financial interest in Gama. Compl. P 7. Garraf allegedly "acted as an agent for, an instrumentality of, or in active concert and participation with" PMC Global, PMC Europe, PMC, and Gama. *Id.* Garraf manufactures and sells spare parts for Gusmer products, as well as spray and pour equipment for the applications of polyurethane foam and polyurea. *Id.* P 54.

Commette, a New Jersey citizen, was formerly employed by Graco's subsidiary, Gusmer, and worked for Graco under an employment and consulting agreement. *Id.* P 8. Thereafter, Commette commenced work with Gama and Garraf. *Id.* Charles Royo ("Royo") is alleged to have also signed an employment contract while working as a Gusmer and Graco employee. *Id.* P 26. [*7] After Royo's employment with Gusmer ended, he too was retained by Gama and Garraf as an employee or consultant. *Id.* P 58. [1]

1 According to PMC Defendants, Royo co-founded Garraf.. PMC Dfs. Mot. at 2. Garraf disputes this allegation. *See* Garraf Reply at 6 n. 1.

Sale of Gusmer

PMC Global, through its wholly-owned subsidiary, Gusmer Machinery Group, Inc. ("GMG"), owned Gusmer. *Id.* P 19. PMC Europe owned Gusmer Europe, S.L. ("Gusmer Europe"), an affiliate of Gusmer. *Id.* P 20. Gusmer Corporation and Gusmer Europe (collectively "Gusmer") were two businesses involved in the manufacturing and sale of polyurethane and polyurea handling equipment. *Id.* P 21.

In 2004, PMC Global and its affiliate entities, GMG and PMC Europe ("affiliate entities"), offered Gusmer for sale. *Id.* P 24. "Gusmer was at the time the world's leading designer and manufacturer of specialized two-component dispensing equipment systems." Counterclaim P 10. In June 2004, the investment bank Greif & Co., representing PMC Global and its affiliate entities, provided a Confidential Memorandum to Graco that highlighted Gusmer's "Key Investments Considerations," which included information about Gusmer's revenue model, superior customer [*8] service, experienced management team, and strong relationships with customers. Compl. P 24. Gusmer Corporation had employment contracts with certain key employees that prohibited the employees from disclosing its trade secrets and confidential business information, and Commette allegedly signed such a contract on September 2, 2003. *Id.* P 25. Similarly, Gusmer Europe had employment contracts with certain key employees, which prohibited them from competing with Gusmer Europe or disclosing its trade secrets and confidential business information. *Id.* P 26. Royo allegedly signed an employment contract with Gusmer Europe on September 1, 2004. *Id.*

On February 4, 2005, Graco acquired Gusmer Corporation from PMC Global, pursuant to a Stock Purchase Agreement ("Agreement 1"), for $ 45 million in cash; Graco also acquired Gusmer Europe from PMC Global's subsidiary, PMC Europe, pursuant to a Stock Purchase Agreement ("Agreement 2"), for $ 20 million in cash. Compl. PP 28-29, Exs. A & B; Dfs. Disclosure Statement. In Agreement 1, PMC Global "absolutely and unconditionally" guaranteed all of PMC Europe's obligations to Graco in Agreement 2, including the "timely observance and performance of covenants [*9] and agreements of such parties herein and therein" ("PMC Guaranty"). Compl. P 30, Ex. A, 10.20. Both Agreements allegedly contained a provision in which New Jersey law would apply. *Id.* PP 31-32, Exs. A & B, 10.13. [2] Pursuant to the Agreements, Graco allegedly "acquired all of Gusmer's tangible assets and all of its intangible assets, including without limitation: (a) all of the Gusmer's trade names, trademarks and copyrights identified in Section 4.14 of the Disclosure Schedules attached to and incorporated in Agreements 1 and 2 ('the Disclosure Schedules'); (b) all of the Gusmer patents, patent rights, and trade secrets identified in Section 4.15 of the Disclosure Schedules; (c) the employment agreements and confidentiality agreements identified in Section 4.15 and 4.19 of the Disclosure Statements; and (d) the goodwill of Gusmer." *Id.* P 33.

2 For the purposes of this Motion, Garraf does not dispute the application of federal and New Jersey law. *See* Garraf Mot. at 2 n. 1.

PMC Global and PMC Europe allegedly warranted that they had taken precautions to preserve Gusmer trade secrets, that Gusmer's proprietary rights "are valid and enforceable," and that Gusmer obtained confidentiality [*10] agreements from all persons who had access to material proprietary rights, including any trade secrets. *Id.* PP 35-36, Exs. A & B, 4.16A. Allegedly, PMC Global and its affiliates represented in their Disclosure Schedule 4.15 that all but two Gusmer employees (neither of whom is at issue here) had signed agreements to comply with company policies regarding these trade secrets. Compl. P 37. Royo had signed a Confidentiality Agreement, and pursuant to Article 4.19 of both Agreements, Graco allegedly acquired certain employment contracts, Royo's included. *Id.* PP 38-39. The assets at the heart of the transaction included Gusmer's goodwill, customer and distributor relationships, trade names and trademarks, and intellectual property. *Id.* PP 33-41. According to Graco, the parties assigned a sum certain to specific assets, including (1) $ 6,500,000 to customer relationships, (2) $ 2,740,000 to trademarks and trade names, and (3) $ 6,130,000 to proprietary technology and engineering drawings. *Id.* P 41. PMC Global and PMC Europe allegedly warranted that "no customers, distributors, sales representatives or vendors intend to cease doing business with [Gusmer] or materially alter the amount of [*11] the business that they are presently doing with [Gusmer]," *Id.* P 40, Exs. A & B, and Gusmer's trade names and trademarks were "valid and in full force and effect." *Id.* Exs. A & B, 4.14.

Post-Acquisition of Gusmer

Following Graco's acquisition of Gusmer in February 2005, many of Gusmer's former employees began working for Graco, including Commette and Royo. Compl. P 43. Commette and Royo became important members of Graco's management team and thus allegedly participated in and received confidential communications relating to Graco's confidential strategy, planning meetings and conversations, which were designed to transform and integrate Gusmer operations into Graco's existing business. *Id.* Commette and Royo also allegedly had access to highly sensitive, confidential, non-public, proprietary information belonging to Graco and its subsidiaries, including information regarding customers, prospective customers, business relations with customers, sales reports, strategic plans, marketing plans, product information and designs, pricing information, customer discounts and rebates, profit margins, financial reports and data, sales programs, and product engineering and design plans ("Graco Trade [*12] Secrets and Confidential Business Information"). *Id.* P 44. Graco "exerted considerable effort and expended significant money" to develop this information -- all of which gave Graco "an opportunity to obtain an advantage over competitors who do not know or use [it]." *Id.* P 45. This information was allegedly not well known outside of or even within Graco's businesses and Graco took steps to guard its trade secrets and confidential business information by requiring employees like Commette to confirm their confidentiality obligations by signing non-disclosure agreements. *Id.* PP 46-47. Commette allegedly signed a Non-Disclosure Agreement with Graco on May 16, 2006. *Id.* P 47. His employment and/or consulting relationships with Graco and Gusmer Corporation ended on October 20, 2006. *Id.* P 49. Royo allegedly stopped working with Graco's subsidiary, Gusmer Europe, on February 9, 2006. *Id.* P 48. Royo allegedly signed an agreement not to compete with Gusmer Europe until February 9, 2008. *Id.* P 72.

Gama and Garraf Enter the Marketplace

After Commette's employment with Graco and Gusmer ended, Commette allegedly headed up Gama, the principal distributor for equipment and spare parts manufactured by [*13] Garraf. Compl. PP 53-54, 60. PMC Global, PMC Europe, and PMC allegedly have ownership, financial and/or business relationships with Gama and Garraf. *Id.* PP 55-56. Graco alleges that PMC Global, PMC Europe, PMC, Gama, and Garraf all knew or should have known that Commette has contractual and common-law obligations to maintain the confidentiality of the Graco Trade Secrets and Confidential Business Information, but that Defendants, through their agent, Commette, are misusing the Graco Trade Secrets and Confidential Business Information to solicit and obtain customers, some of whom were Gusmer's customers. *Id.* PP 64, 82. The same claims are made against Defendants with regard to Garraf's employment of Royo. *Id.* PP 65, 72-74. Graco, however, does not sue Royo directly in this action, and does not contend that the Court has jurisdiction over Royo, a foreign citizen.

Gama and Garraf allegedly manufacture spare parts for Gusmer products, which requires highly specialized knowledge relating to Gusmer's products' engineering and design. *Id.* P 75. Graco alleges that Gama and Garraf are using the Graco Trade Secrets and Confidential Business Information to market and sell these spare parts, and [*14] are directly soliciting the trade of current Graco customers, some of whom were doing business with Gusmer at the time Graco acquired Gusmer from PMC Global and its affiliates. *Id.* PP 59, 61-62, 65-71, 75, 80-83. Graco also alleges that Defendants are attempting to recapture former Gusmer business by representing that Gama and its products are the "successors" to Gusmer and the "real Gusmer," and claiming a false affiliation with the Gusmer brand, goodwill, and legacy, which belongs to Graco. *Id.* PP 84-85.

Plaintiffs' Claims

On March 14, 2008, Plaintiffs filed their Complaint. On July 24, 2008, Plaintiffs filed an Amended Complaint ("Complaint") alleging: (1) PMC Global and PMC Europe breached their contractual and related duties; (2) Commette breached his non-disclosure agreement; (3) Commette breached his duty of loyalty; (4) Defendants PMC Global, PMC Europe, PMC, Gama, and Garraf engaged in tortious inference with a prospective economic advantage and with a contract, namely Commette's alleged non-disclosure agreement; (5) PMC Global, PMC Europe, PMC, Gama and Garraf misappropriated trade secrets and misused confidential business information; (6) Defendants directly made or acted [*15] in concert with those making directly false or misleading statements that are likely to cause confusion as to the affiliation of Gusmer with Gama and Garraf in violation Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)(1)*; (7) Defendants directly made, or acted in concert with those making, false or misleading statements that are likely to cause confusion as to the affiliation of Gusmer with Gama and Garraf in violation the New Jersey Fair Trade Act, *N.J.S.A. § 56:4-1*; (8) Defendants engaged in unfair competition; and (9) Defendants have been unjustly enriched from their breach of their contractual and legal obligations to Graco. *Id.* at 19-26.

Plaintiffs seek, *inter alia*, damages, an injunction, return of documents and records and forensic examination of Defendants' computers, an accounting to determine profits and damages caused by unlawful conduct, exemplary and punitive damages, costs and disbursements for this action, attorneys fees pursuant to the Agreements and the Lanham Act, treble damages, and prejudgment and post-judgment interest. *Id.* at 26-29.

On June 30, 2008, PMC Defendants filed a motion to dismiss Plaintiffs' Complaint pursuant to *Fed. R. Civ. P. 19* and *12(b)(6)*. [*16] On July 25, 2008, Defendant Garraf filed a motion to dismiss Plaintiffs' Complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*, joining in with PMC Defendants' Motion and supplementing it.

Counterclaims

On June 30, 2008, Defendants Commette and Gama ("Counterclaimants") filed an Answer and Counterclaims against Plaintiffs. The Counterclaimants allege that Graco, founded in 1926, is the "world leader" in fluid handling systems and components for use in vehicle lubrication and commercial and industrial settings. Counterclaim P 8; Ex. 1. In December 2004, Graco allegedly acquired Liquid Control Corporation and its subsidiary Decker Industries, a leader in lubricants and lubricant dispensing equipment. Counterclaim P 9. At the time Graco acquired Gusmer Corporation, in February 2005, Gusmer was allegedly the world's leading designer and manufacturer of specialized two-component dispensing equipment systems. *Id.* P 10. In December 2007, Graco allegedly acquired Glas-Craft, an internationally-recognized manufacturer of mixing, metering, and proportioning equipment for dispensing coating, foam, and composite materials. *Id.* P 11. Counterclaimants allege that Plaintiff, through its acquisition of these [*17] companies, has built a monopoly position in the IPPE market. *Id.* P 12. Counterclaimants allege that although there is a distinct market for IPPE materials and equipment, with substantial technical barriers to entry, Graco has a nearly 100% market share, with annual revenues of approximately $ 100 million per year, and no significant competitors in the IPPE space. *Id.* PP 12-14. Counterclaimants allege that Graco's conduct has had a substantial effect upon interstate trade and commerce. *Id.* P 14.

Garraf, the only other company operating within the IPPE area, asked Gama, in 2007, to assist with the distribution of Garraf's products in the United States. *Id.* PP 15-16, 18. Thereafter, Gama hired Commette, who had not received a severance package from Graco nor had he agreed that he would stay out of the IPPE market. *Id.* P 17. In October 2007, Graco allegedly sent a letter ("Letter") to all IPPE distributors carrying Graco products, which Counterclaimants claim are all IPPE product distributors nationwide, announcing a pre-emptive unilateral refusal by Graco to deal with any distributor that considers carrying Garraf products as well as its own. *Id.* P 20. Graco allegedly intended this Letter [*18] to deter distributors from carrying Garraf products or from doing business with Gama or Garraf. *Id.* P 21. Counterclaimants allege that since the Letter was sent, even though Garraf allegedly has a high quality product line, it has been nearly impossible for Garraf to identify distributors for its products, and existing Gama customers have stopped buying from it. *Id.* P 22. Counterclaimants aver that distributors said that they would have carried or continued to carry Garraf products but for Graco's refusal to deal with any distributor carrying competing products. *Id.* P 23. Counterclaimants allege that this Letter has directly affected Garraf's ability to distribute its products in the United States because "no IPPE distributor could risk losing the ability to sell Graco products unless the distributor intended to exit the market altogether." *Id.* P 24.

Counterclaimants further allege that Graco has engaged in other false and predatory communications intended to block Garraf products from being distributed in the United States and to destroy Gama's business, including statements questioning the viability of Gama's continued existence and the quality of Gama's product line, specifically [*19] that "Gama's products are based on 'old' or outmodeled Gusmer technology." *Id.* PP 26-27. In June 2008, Graco allegedly told current Gama customers and individuals within the trade that it was going to close Gama down by the end of 2008, and, as a result, if customers buy anything from Gama, they would be "stuck with it." *Id.* PP 29-31. A Graco manager allegedly contacted at least one distributor that sold both Graco and Gama products demanding that the distributor elect between the two lines, claiming that Graco does not permit its current distributors to also sell Gama's line of products; as a result, at least one distributor has dropped Gama's products. *Id.* PP 32-33. Thus, Counterclaimants allege that Graco has abused its monopoly position in the IPPE market by, *inter alia,* sending this Letter, which allegedly constitutes an illegal unilateral refusal to deal because it was sent to Graco's prospective and current customers, "including customers who were, at the time, carrying both Graco and Garraf products." *Id.* P 36. Commette and Gama allege that Graco is preventing them from competing in the IPPE market, and that consumers will be forced to pay monopoly prices because Graco is preventing [*20] competitors from entering the IPPE marketplace. *Id.* PP 39-40.

Commette and Gama claim that Plaintiffs (1) violated *§ 2* of the Sherman Act, *15 U.S.C. § 2*; (2) attempted and conspired to monopolize the market place; (3) engaged in tortious interference with Commette's livelihood and Gama's business; and (4) violated the New Jersey Fair Trade Act, *N.J.S.A. § 56:4-1*; (5) engaged in unfair competition; and (6) committed trade libel and disparagement. *Id.* at 53-56. Commette and Gama seek, *inter alia,* an injunction from the anticompetitive behavior and antitrust law violations, and damages, including treble actual damages under *§ 4* of the Clayton Act, *15 U.S.C. § 15*. *Id.* at 57.

On August 19, 2008, Plaintiffs filed a Motion to Dismiss the Counterclaims on the grounds that Commette and Gama do not have standing and have not adequately plead their antitrust counterclaims under *§ 2* of the Sherman Act, *15 U.S.C. § 2*. In addition, Plaintiffs move to dismiss all of the remaining state law claims pursuant to *Rule 12(b)(6)*. In the alternative, Plaintiffs move to bifurcate and stay the Counterclaim.

II. Standard of Review

When reviewing a motion to dismiss on the pleadings, courts "accept all factual allegations [*21] as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008)* (citation and quotations omitted). Recently, in *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Supreme Court clarified the 12(b)(6) standard. Specifically, the Court "retired" the language contained in *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id. at 1968* (quoting *Conley, 355 U.S. at 45-46*). Instead, the factual allegations set forth in a complaint "must be enough to raise a right to relief above the speculative level." *Id. at 1965*. As the Third Circuit has stated, "[t]he Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: 'stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element. This 'does not impose a probability [*22] requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." *Phillips, 515 F.3d at 234* (quoting *Twombly, 127 S.Ct. at 1965*).

III. Discussion

A. Defendants' Motion to Dismiss Plaintiffs' Claims

1. Rule 19 Analysis

As a preliminary matter, PMC Defendants argue that Plaintiffs' Complaint must be dismissed in its entirety, pursuant to *Fed. R. Civ. P. 19*, for failure to join Royo as a party. PMC Defendants claim Royo is necessary and indispensable, because "[e]ach cause of action focuses on Mr. Royo's alleged misappropriation and sharing of trade secrets in active concert with other defendants" and "Royo is named directly in 20 separate paragraphs and referenced indirectly throughout the Complaint." PMC. Dfs. Br. at 3. Royo, a Spanish citizen, is not subject to personal jurisdiction in New Jersey.

Fed. R. Civ. P. 19 involves a two-step process to determine when joinder of a particular party is compulsory. *See Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 404 (3d Cir. 1993)*. First, a court must "determine whether a party should be joined if 'feasible' under *Rule 19(a)*." [*23] *Id.* If the party should be joined, but joinder is not feasible because it would destroy diversity, or the court lacks personal jurisdiction over the absentee, then the court must "determine whether the absent party is 'indispensable' under *Rule 19(b)*." *Id.* If the party is "indispensable," the action cannot proceed. *Id.; see also Wilson v. Canada Life Assurance Co., No. 08-1258, 2009 U.S. Dist. LEXIS 16714, at *7 (E.D. Pa. Mar. 3, 2009)*.

The Court must first determine whether Royo, a former Gusmer and Graco employee and current Garraf employee is a "necessary" party who must be joined under *Rule 19(a)*, if joinder is feasible. [3] *Rule 19(a)* provides that:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial [*24] risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). Under *Rule 19(a)*, the Court determines whether its can provide complete relief to the parties to the action in the absence of the party not joined. *Fed. R. Civ. P. 19(a)(1)*. "Under *Rule 19(a)(1)*, the Court must consider whether--in the absence of an un-joined party--complete relief can be granted to the persons already parties to the lawsuit. The effect that a decision may have on an absent party is immaterial." *Huber v. Taylor, 532 F.3d 237, 248 (3d Cir. 2008)*.

> 3 *Rule 19* no longer uses the word "necessary," but rather refers to parties who should be joined if feasible. *See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 116 n. 12, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)* ("Where the new version (of the Rule) emphasizes the pragmatic consideration of the effects of the alternatives of proceeding or dismissing, the older version tended to emphasize classification of parties as 'necessary' or 'indispensable.'"); *Janney, 11 F.3d at 404 n. 4* ("The term necessary in referring to a *Rule 19(a)* analysis harks back to an earlier version of *Rule 19*. It survives in case law at the price of [*25] some confusion."). The parties, however, discuss Royo's joinder in this action in terms of whether he is "necessary" and "indispensable."

PMC Defendants argue that complete relief cannot be afforded because Royo, who is not a party to this action, could continue to use Graco's trade secrets by "simply seek[ing] another distributor or import his products into the United States directly." PMC Dfs. Mot. at 5. In addition, PMC Defendants argue that the requested injunction will not stop the continued use of alleged trade secrets by Royo. *Id.* at 3-6 (relying largely on *Synygy, Inc. v. ZS Associates, Inc., No. 07-3536, 2008 U.S. Dist. LEXIS 33285, 2008 WL 1820936, at *2 (E.D. Pa. Apr. 23, 2008), appeal docketed*, No. 08-2355 (3d Cir. May 22, 2008), and *Torrington C. v. Yost, 139 F.R.D. 91 (D.S.C. 1991))*. Plaintiffs, however, argue that their current claim is not that Royo is *personally* manufacturing or distributing any products, but that Garraf and Gama are engaging in such activity. Pl. Opp. at 48. Thus, whether Graco can get relief against Royo if he ever personally engages in future conduct that would give rise to a new and independent claim is not at issue here. *Cf. Huber, 532 F.3d at 251* (holding that concern about [*26] possible issue preclusion in a potential future lawsuit against joint tortfeasor was "too speculative"). Moreover, because Royo is not a party, the "complete relief" inquiry must focus exclusively on those who are parties to the action. *Id. at 248*.

Plaintiffs argue that they can obtain complete relief against the current parties because only one of their nine claims is for misappropriation of trade secrets and most claims focus on Defendants' alleged violations of their obligations to Plaintiffs, such as breach of contract and misrepresentation, and do not depend on Royo's actions. Pl. Opp. at 49. Graco further claims that Royo's future conduct is irrelevant to whether complete relief may be afforded based on Defendants' use of its trade secrets because, if Graco wins, then it can be granted an injunction and damages against Royo's employer, Garraf, and other Defendants, thereby enjoining these Defendants' employees, including Royo, from further divulging and exploiting Graco's trade secrets. *See* Pl. Opp. at 49; *Huber, 532 F.3d at 248*. Because Plaintiffs can get complete relief for their claims against the named Defendants in this action, Royo is not a necessary party under *Rule 19(a)(1)(A)*. [*27] *Cf. Rosenzweig v. Brunswick Corp., No. 08-807, 2008 U.S. Dist. LEXIS 63655, 2008 WL 3895485, at *6 (Aug. 20, 2008)* (finding that the absent party -- a party to the disputed contract -- was necessary, and ultimately, indispensable because the court could not provide complete relief in the signatory's absence).

The Court must then consider the effect, if any, that resolution of the dispute among the named parties may have on an absent party, in this case Royo, under *Rule 19(a)(1)(B)*. *Huber, 532 F.3d at 248*. Plaintiffs assert, and Defendants do not dispute, that Defendants are liable individually and as principals under *respondeat superior* for their agents' misconduct within the course and scope of the agents' employment. Courts have determined that under a theory of *respondeat superior,* "there is no requirement that the plaintiff join as a defendant the individual upon whose act or failure to act vicarious liability is predicated. Indeed, the plaintiff has the option to sue the party vicariously liable for the conduct of an agent in one lawsuit and thereafter, pursue the agent in a separate suit. In such cases, the concept of mandatory joinder does not apply." *Marion v. Borough of Manasquan, 231 N.J. Super. 320, 327-28, 555 A.2d 699 (App. Div. 1989)*. [*28] Moreover, in their reply, Defendants do not dispute that Royo is not necessary where there is *respondeat superior* liability. Therefore, Plaintiffs argue, Royo need not be joined with regard to Plaintiffs' claims grounded in vicarious liability.

The inquiry for the Court focuses on *Rule 19(a)(1)(B)(i),* whether a decision in this case will, as a practical matter, impair or impede Royo's ability to protect his interest. Plaintiffs argue that Royo lacks sufficient interest in this litigation that would require him to be joined if feasible under *Rule 19(a)(1)(B)(i)*. Plaintiffs state that any frustration of Royo's personal business expectations based on an agreement to which his company (Garraf) is a party, is not enough to satisfy this prong of *Rule 19*. *See* Pl. Opp. at 50 (citing to *Mastercard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc., 471 F.3d 377, 387 (2d Cir. 2006)* ("It is not enough under [*Rule 19(a)(1)(B)(i)*] for a third party to have an interest, even a very strong interest, in the litigation."); *Janney Montgomery Scott, Inc., 11 F.3d at 407*). PMC Defendants argue that Royo is necessary because he maintains an interest that would not be represented in this action, and his ability [*29] to protect his interest would be impaired or impeded if he is not joined here. PMC Dfs. Mot. at 5. Specifically, PMC Defendants argue that for a finding of liability against them, the Court first will need to assess the validity and enforceability of Royo's employment agreements and then determine whether Royo is guilty of trade secret theft. PMC Dfs. Mot. at 5 (citing to *Synygy, 2008 U.S. Dist. LEXIS 63655, 2008 WL 1820936, at *2)*.

Similar to this case, where Plaintiff, in addition to this action, has separately sued Royo in Spain, in the *Synygy* case, Synygy sued a former employee's U.S.-based employer, claiming misappropriation of Synygy trade secrets, and also sued the employee in India. There, the court dismissed the action for failure to add an indispensable party citing the possibility of inconsistent or double obligations. PMC Defendants argue that Graco's claims implicate Royo and that absent Royo's participation in this case, there is a significant possibility that his acts will be construed differently in U.S. and Spanish courts and "a judgment against his U.S. distributor would brand him an 'infringer' without ever affording him his day in court." PMC Dfs. Mot. at 5-6. In addition, Defendants claim that [*30] a resolution of the Spanish case in favor of Royo could be dispositive here, eviscerating Graco's theft allegations and granting Garraf freedom to operate. Defendants also rely on *Torrington,* where the court dismissed the action in which the plaintiff sued the ex-employee and not his new company on a trade secret dispute because both were necessary parties to the resolution. *Torrington, 139 F.R.D. at 92-93*. Defendants argue that the distribution agreement between Royo's company and Gama is similar to the agreement in dispute in *Torrington;* however, in this case, Royo's company, Garraf, is a named defendant and will have the opportunity to defend the case.

In sum, PMC Defendants assert that Royo would be unable to protect his "employment with defendants in its current form and [his] interest in the resolution of the charges that [he] allegedly removed and converted trade secrets." *Home Am. Credit, Inc. v. Vermillion, No. 97-2139, 1997 U.S. Dist. LEXIS 19561, 1997 WL 793047, at *4 (E.D. Pa. Dec. 10, 1997)* (dismissing the complaint on the grounds that employees alleged to have misappropriated trade secrets are necessary parties so they may protect their interests). Similarly, in this case, Royo's conduct will be at [*31] issue because Graco's trade secret claims against Defendants are based, at least in part, on Royo's actions.

However, the Third Circuit, in *Huber,* has already determined that it is inappropriate for a court to look at privity, for issue preclusion purposes, and the collateral estoppel effect on, or of, a potential future action when making a determination of the necessity of a party that is based on the absent party's interest, under *Rule 19(a)(1)(B)(i)*. *Huber, 532 F.3d at 250-51* ("[T]he *Janney* court noted that, given the highly factual nature of a privity analysis, courts engaging in *Rule 19* analysis should not 'theorize' as to whether an absent party is in privity with a party to an action because such an analysis would be premature."). Moreover, in *Huber,* the Third Circuit emphasized that as it had already held in *Janney,* where the preclusive effect of an action on any related litigation is speculative -- as it is in the instant case -- joinder of an absent party is not compulsory under this provision of *Rule 19*. *Id.* Thus, this Court cannot speculate on the preclusive effect this litigation might have on an action in Spain. In addition, Royo's employment itself would not necessarily [*32] be jeopardized based on an outcome of this action. [4] Therefore, Royo does not have an interest that will be impaired or impeded requiring him to be joined, if feasible, in this case.

4 Royo's non-compete agreement with Graco ended on February 9, 2008. Compl. P 72. Thus, there is no current bar to his employment in the IPPE group of products. Hence, Garraf may continue to employ Royo so long as he works in a lawful manner, and does not disclose Graco trade secrets, if any.

Further, Plaintiffs argue that Defendants cannot demonstrate that any of the current parties will be subject to inconsistent obligations if Royo is not joined. *Fed. R. Civ. P. 19(a)(1)(B)(ii)*. Defendants do not argue that resolution of this action could subject them to double, inconsistent, or multiple legal obligations. Defendants, relying on *Torrington* and *Synygy*, assert that Royo could be subject to a substantial risk of inconsistent obligations given Graco's suit against Royo in Spain. PMC Dfs. Mot. at 5. However, this misconstrues *Rule 19(a)(1)(B)(ii)*, which considers the risk to the "*existing part[ies]*" of "incurring double, multiple, or otherwise inconsistent obligations because of the [absent person's] interest", [*33] not the risk to the absent party. *See also Am. Home Mortgage Corp. v. First Am. Title Ins. Co., No. 07-1257, 2007 U.S. Dist. LEXIS 83337, 2007 WL 3349320, at *7 (D.N.J. Nov. 9, 2007)* (explaining that "*Rule 19(a)(2)(ii)* [now *Rule 19(a)(1)(B)(ii)*] calls for the Court to examine whether proceeding without joining the absent parties will leave *the parties* 'subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.'"). There is no contention that any Defendants would be subject to inconsistent obligations in this case. Indeed Defendants would not. Therefore, the Court finds that Royo is not a necessary party under *Rule 19(a)*, and the Court need not conduct a *Rule 19(b)* inquiry to determine if Royo is indispensable. [5] Accordingly, the Court denies PMC Defendants' request to dismiss Plaintiffs' Complaint pursuant to *Rule 19*.

5 However, even if Royo is necessary under *Rule 19(a)*, he is not indispensable under *Rule 19(b)*. In this case, the parties agree that there is no personal jurisdiction over Spanish employee Royo, *see* Pl. Opp. at 52-54; therefore, joinder is not feasible and the Court "determine[s] whether, in equity and good conscience, the action should proceed among the existing [*34] parties or should be dismissed" pursuant to *Rule 19(b)*. *Fed. R. Civ. P. 19(b)*. The Rule lists four non-exhaustive factors that the Court should weigh, including: "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for

nonjoinder." *Fed. R. Civ. P. 19(b)*; *see Gardiner v. Virgin Islands Water & Power Authority, 145 F.3d 635, 640, 39 V.I. 519 (3d Cir. 1998)*.

With respect to the first factor, PMC Defendants claim that Royo would be prejudiced by exposure to inconsistent obligations if judgment were rendered in his absence. Plaintiffs, however, contend that resolution of "this action would not subject Royo to inconsistent obligations due to the action pending in Spain against him[because: (1)] the Spanish action deals only with Royo's obligations under his severance agreement with Graco/Gusmer and not whether his [*35] company used Graco's trade secrets or violated the rights at issue in this lawsuit[; and (2)] *Rule 19* is simply not supported by 'the real possibility that one court could find [Defendants] liable while another court was finding [the absent party] not liable in separate proceedings to which the rules of claim or issue preclusion do not apply.'" Pl. Opp. at 52-53 (quoting *General Refractories Co. v. First State Ins. Co., 500 F.3d 306, 318 (3d Cir. 2007)* (internal quotations and citations omitted)). Plaintiffs, however, do not provide the Court with a copy of the Complaint or Certification with regard to the subject matter of the Spanish action. The Court cannot rely on Plaintiffs' limited allegations in its Opposition. Therefore, the Court is unaware of what the implications are of the Spanish action.

In addition, PMC Defendants contend that Royo's and Garraf's interests may or may not align, so "there is no certainty that the interests of [Royo] will be adequately represented" if this litigation proceeds. *See Home Am. Credit, 1997 U.S. Dist. LEXIS 19561, 1997 WL 793047, at *4*. However, if a potential defendant does not wish to intervene and be a party to the suit, this fact "strongly suggest[s] that its interests [*36] will not be impeded if the suit goes forward without [him]." *Gardiner, 145 F.3d at 641*. Royo has not sought to intervene here. Accordingly, "there is little danger of prejudice to [Royo]." *Id.* Thus, the first factor weighs against indispensability.

With respect to the second and third factors, Graco asserts that it is interested in obtaining relief against the named parties, including "Royo's company" in the form of an injunction and monetary relief. Graco contends this remedy will be adequate. PMC Defendants, however, argue that an injunction against Garraf would similarly enjoin Royo, without providing him the opportunity to defend himself with regard to any disclosed trade secrets. Defendants rely on *Home Am. Credit* for support. If, however, Royo finds that he needs to "defend himself" in this action with respect to disclosing any alleged trade secrets, he may intervene. *Gardiner, 145 F.3d at 641*. Otherwise, the Court can shape the relief here, because Royo's agreement not to compete ended on February 9, 2008. Compl. P 72. Therefore, proceeding here will not affect Royo's employment on these grounds. Therefore, the second and third factors weigh against indispensability.

With respect [*37] to the fourth factor, the Plaintiff argues that when there is a lack of a practical "assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible," this consideration "counsels strongly against dismissal." *Gen. Refractories Co. v. First State Ins. Co., 500 F.3d at 306, 321 (3d Cir. 2007)* (citing *Gardiner, 145 F.3d at 642*). In this case, there are multiple parties domestic and foreign, who have contracted to apply New Jersey law, and thus, it appears that there is not another more effective, appropriate, or practical forum where better joinder would be possible. This factor weighs strongly against dismissal and against indispensability. *See Id.*

Moreover, PMC Defendants fail to put forth any persuasive arguments for a finding that Royo is indispensable. In light of Third Circuit precedent, the Court agrees that the indispensability factors pursuant to *Rule 19(b)* weigh against dismissal for failure to join an indispensable party. Accordingly, because the action can proceed in equity and good conscience, Royo is not necessary or indispensable under *Rule 19(a)* or *19(b)*, respectively, the Court denies PMC Defendants' motion to dismiss [*38] Plaintiffs' Complaint pursuant to *Rule 19*.

2. Agency Relationship: PMC as a Party & Non-Contract Claims Against Defendants PMC Global and PMC Europe

PMC Defendants move to dismiss PMC as a party in this suit because: PMC is not a party to any of the allegedly breached contracts, it is not in privity with Commette or Royo, and Plaintiffs do not allege any acts or omissions by PMC. *See* PMC Dfs. Mot. at 9; Compl. PP 28-29. PMC Defendants argue that although Graco attempts to implicate PMC by claiming Royo, Commette, Gama, or Garraf acted as PMC's agents, Graco fails to allege any facts that suggest PMC "control[led] the day-to-day time, manner, and method of executing the work" of any other Defendant. *Seltzer v. I.C. Optics, Ltd., 339 F. Supp. 2d 601, 610 (D.N.J. 2004)*. PMC Defendants contend that unless an agency relationship is established, PMC cannot be held liable for the tortious acts of any parent corporation, subsidiary, sister corporation, or person. *Id. at 609-610*.

Similarly, PMC Defendants argue that Graco has not alleged any acts or omissions directly committed by PMC Global or PMC Europe that are unrelated to the breach of contract claim, (Counts Four-Nine), nor has Graco alleged [*39] any facts suggesting an agency relationship between Royo, Commette, Gama and/or Garraf and PMC Global. *See* PMC Dfs. Mot. at 10. In its Reply, Garraf also complains that Graco has failed to allege any facts to support its conclusory allegations that Garraf is working in "active concert and participation" with the other defendants. Garraf Reply at 15. [6]

6 Garraf asserts that allegations that Garraf is an "affiliate" of Gama, that PMC Europe has an ownership or other financial interest in Garraf, or that PMC Europe is a partial owner of the real estate where Garraf's headquarters is located, insufficient to establish an agency relationship. Compl. PP 7, 57.

An agency relationship exists when one party consents to have another act on its behalf, with the principal or master controlling and directing the acts of the agent. *Seltzer, 339 F. Supp. 2d at 609*; *Sears Mortgage Corp. v. Rose, 134 N.J. 326, 634 A.2d 74 (1993)*. The Third Circuit has recognized that a "servant" and an "independent contractor" are distinct under the agency doctrine. *AT & T v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1435 (3d Cir. 1994)*. "A master-servant relationship is created if the employer assumes the right to control [*40] the time, manner, and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract. On the other hand, an independent contractor is not subject to that degree of physical control, but is only subject to the general control and direction by the principal . . . ." *Id.* (internal citations and quotations omitted). A principal is vicariously liable for the tortious acts of the servant, but is not similarly liable for those of the independent contractor. *See Id.*

"To hold a principal liable for the acts of its subsidiaries under general agency law, total domination over the subsidiary need not be proven." *Expediters Int'l of Washington, Inc. v. Direct Line Cargo Mgmt. Servs., Inc., 995 F. Supp. 468, 481-82 (D.N.J. 1998)* (citing *Phoenix Canada Oil Co. v. Texaco, Inc., 842 F.2d 1466, 1477 (3d Cir. 1988))*. However, there must be "a relationship between the corporations and the cause of action. Not only must an arrangement exist between the two corporations so that one acts on behalf of the other and within usual agency principles, but the arrangement must be relevant to the plaintiff's claim of wrongdoing." *Phoenix Canada Oil Co., 842 F.2d at 1477*. [*41] Whether there are sufficient relationships with and control over affiliates for the purposes of proving agency is a question of fact. *Expediters Int'l, 995 F. Supp. at 481-82* (denying summary judgment on misappropriation of trade secret claims where the defendant argued it should not be held liable for actions of its related company, because the court could not decide, as a matter of law, that the defendant did not act as a principal to influence or control the business practices of its affiliates, where the "self-characterized 'family of companies,' jointly participated in freight dealings and shared both stock ownership and employees").

In this case, Plaintiffs allege that Gama, Garraf, and Commette are acting as agents for, instrumentalities of, or in active concert and participation with PMC Global, PMC Europe, and PMC. Compl. PP 6, 7, *see also Id.* PP 58, 59-65, 74, 82, 85, 102. Plaintiffs allege that PMC Global, PMC Europe, and PMC are directly related or affiliated with Gama, Garraf, and Commette. *Id.* PP 3-7, 55-57. Graco has alleged facts to show that PMC Global, PMC Europe, and PMC dominate the activities of their subsidiaries or affiliate companies, Garraf and Gama. *See, e.g.,* [*42] *Id.* PP 3-7 (detailing overlapping officers and financial interests and alleging that Gama and Garraf are instrumentalities of PMC Global, PMC Europe, and

PMC); *Id.* PP 55-57 (explaining that PMC Europe is the owner of the real estate where Garraf is located and that PMC Global or PMC own the real estate where Gama is located). Plaintiffs argue that "reasonable inferences lead to the conclusion that PMC Global's use of its subsidiaries and affiliates is integral to its scheme to inappropriately take back what it has sold." Pl. Opp. at 43. On a motion pursuant to Rule 12(b)(6), the Court must accept the allegations in Plaintiffs' Complaint as true. Throughout their Complaint, Plaintiffs describe a scheme in which these related corporate defendants allegedly worked closely with one another to accomplish a common goal of promoting a new business called "Gama." Plaintiffs argue that Gama represents a contraction of the first two letter of Garraf Maquinaria, which manufactures Gama products in Spain. *Id.* at 41. Because the determination of whether there is a sufficient relationship with or control over affiliates for the purposes of proving agency is a question of fact, the Court must deny [*43] Defendants' request to dismiss PMC as a Defendant and the non-contractual claims, Counts Four-Nine, against PMC Global and PMC Europe. *See Expediters Int'l, 995 F. Supp. at 481-82*. Moreover, it would be inappropriate for the Court to make a finding regarding the agency relationship, or lack there of, with respect to any of the defendants on this motion based on Plaintiffs' allegations.

In their Opposition, Plaintiffs further claim that they have sufficiently alleged a scheme in which PMC Global, PMC Europe, and PMC may also be liable under the doctrine of alter ego and civil conspiracy, in addition to agency principles. *See* Pl. Opp. at 42. Plaintiffs, however, did not plead theories of alter ego or conspiracy in their Complaint. Thus, they are not bases for liability in this case and the Court need not address them further.

3. Count One: Breach of Contract and Related Duties Against PMC Global and PMC Europe

Defendants move to dismiss Plaintiffs' claims that Defendants PMC Global and PMC Europe breached their contractual obligations and related duties on the grounds that Defendants' alleged acts did not violate the PMC Guaranty or covenants of the Stock Purchase Agreements ("SPAs"). PMC [*44] Defendants argue that Graco's claims are based on SPAs that are fully integrated and their "terms relate to the transfers of assets; real property leases; intercompany accounts; employee benefit plans; access to records; domain name; transition services in China; and management agreements." PMC Dfs. Mot. at 11. Defendants assert that the SPAs do not mention anything about the right of PMC Global or PMC Europe to re-enter the IPPE business. Therefore, Defendants posit that even if Graco's allegations that PMC Global or PMC Europe solicited customers, retained former Gusmer employees, and used trade secrets and other proprietary information, Compl. P 88, were true, nothing in the SPAs prevent such behavior. Instead, Defendants argue that Graco is unable to identify how the PMC Guaranty or covenants of the SPAs were allegedly breached.

Plaintiffs complain that Defendants launched Gama, with the explicit objective of recapturing Gusmer's brand identity and trade, which Graco had purchased from PMC Global and PMC Europe for $ 65 million. In so doing, Plaintiffs contend that PMC Global and PMC Europe failed to perform material obligations required under the contracts, and thus, they breached [*45] the SPAs. Specifically, Plaintiffs also argue that Defendants breached New Jersey's implicit contractual obligation of good faith and fair dealing.

To state a claim for breach of contract, the plaintiff must allege (1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations. *Frederico v. Home Depot, 507 F.3d 188, 203 (3d Cir. 2007)*. Furthermore, "every contract imposes on each party the duty of good faith and fair dealing in its performance and its enforcement." *Pickett v. Lloyd's & Peerless Ins. Agency, Inc., 131 N.J. 457, 467, 621 A.2d 445 (1993)*. This implicit duty requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420, 690 A.2d 575 (1997)* (internal citations and quotations omitted). A defendant who acts with improper purpose or ill motive may be found liable for breaching the implied covenant if the breach upsets the plaintiff's reasonable expectations under the agreement. *See Intarome Fragrance & Flavor Corp. v. Zarkades, No. 07-873, 2008 U.S. Dist. LEXIS 97631, 2008 WL 5109501, at *6 (D.N.J. Dec. 2, 2008)* [*46] (citing *DiCarlo v. St. Mary Hosp., 530 F.3d 255, 267 (3d Cir. 2008))*. The defendant need not violate an express term of a contract to be held liable for a breach of the covenant of good faith and fair dealing. *See DiCarlo, 530 F.3d at 267*.

In this claim, Plaintiffs allege that Defendants PMC Global and PMC Europe continued to use Gusmer's assets that should have been transferred to Graco, such as Gusmer's customer relationships, goodwill, trade names, trade secrets, and key employment agreements, which Defendants allegedly now use to promote Gama. Compl. PP 8, 33-41, 47, 64-65, 75, 77, 79, 80-85, 88. Defendants do not contest the validity of the underlying contract. Rather, PMC Defendants argue that the Sale Agreements are silent as to the right of PMC Global and PMC Europe's to re-enter the IPPE business. Graco responds that Defendants create a straw man that the Court should reject because, simply put, Defendants cannot use assets for Gama that they previously sold to Graco. Plaintiffs contend that Defendants' conduct violates their implied contractual duties as sellers by soliciting former Gusmer distributors and customers, and deceiving customers by asserting an affiliation with [*47] Gusmer. Plaintiffs rely on *Reardon Laundry Co. v. Reardon, 97 N.J. Eq. 356, 357-58, 2 N.J. Misc. 550, 128 A. 482 (E. & A. 1925)* and *Hilton v. Hilton, 89 N.J. Eq. 182, 186-87, 104 A. 375 (E. & A. 1918)* for the proposition that New Jersey has long prohibited the seller of a business from soliciting the trade of previous customers.

Defendants counter that these cases actually reject overly broad and unreasonably implied restrictions on competition; *Hilton* and *Reardon* only addressed a seller's duty not to solicit former customers when the goodwill of a business is sold. PMC Defendants argue that a seller has no non-compete obligation unless the buyer bargained for one and that Graco did not bargain for one here. PMC Dfs. Reply 1-2. [7] Defendants claim that PMC Global and PMC Europe, the "sellers" in the Graco-Gusmer acquisition, are not soliciting former Gusmer customers, but rather the seller about which Graco complains is Gama. Defendants contend that Gama is a distinct legal entity that had nothing to do with the Graco-Gusmer acquisition. Nonetheless, Plaintiffs assert that Gama is an agent for or works in active concert and participation with PMC Global, PMC Europe, and PMC. *See* Part III.A.2., *supra.* Whether Gama was or is working [*48] as an agent for PMC Global and PMC Europe or independently from them is a question of fact, which the Court will not address on a motion to dismiss. *See Id.*

7 Defendants also argue that any attempt to restrain Commette should be summarily rejected because a "former employee cannot be enjoined from using his or her experience in the industry as a basis for earning a living." *Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 643, 691 A.2d 876 (App. Div. 1997)*. This argument, however, is irrelevant to Count One of Plaintiff's Complaint.

First, Plaintiff alleges a breach of contract because Defendants, individually or through their agents, are re-entering the IPPE business. Defendants correctly argue that even if they were engaged in such behavior, Plaintiffs did not contract for a non-compete agreement and the SPAs are fully integrated. *See* Ex. A, 10.7 & Ex. B, 10.7 ("10.7 Entire Agreement. This Agreement, including the Disclosure Schedule and Exhibits hereto, contains the sole, only, and entire agreement of the parties hereto relating to the subject matter hereof and correctly sets forth the rights, duties, and obligations of each to the other of this date. Any prior agreements, promises, [*49] negotiations, practices, or representations not expressly set forth in this Agreement are of no force or effect."). [8] Therefore, Plaintiffs cannot allege a breach of contract claim based solely on Defendants' alleged re-entering of the IPPE market.

8 When a plaintiff's claims are based upon documents that are expressly relied upon or integral to the complaint, the court may consider such documents on a motion to dismiss. *See Adamson v. Ortho-McNeil Pharm., Inc., 463 F. Supp. 2d 496, 500 (D.N.J. 2006)* (citing *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997))*.

Second, Plaintiffs allege that Defendants breached their Guaranty by soliciting customers, retaining former Gusmer employees, and using trade secrets and other proprietary information. Defendants argue that even if these contentions were true, this does not violate their SPAs. The Court agrees. The representations in the SPAs in that regard were made by Defendants PMC Global and PMC Europe at the time the contract was signed. *See, e.g.,* Ex. A 4.14-4.16A, 4.18-4.20. Plaintiffs do not allege or even argue that at the time Defendants PMC Global and PMC Europe entered into the Agreements with Plaintiffs, that [*50] Defendants knew of any customers that intended to cease doing business with Gusmer, that any employees intended to leave Gusmer, that the Gusmer name would have in any way been devalued, or that Defendants intended to compete with Graco. Therefore, Plaintiffs cannot allege a breach of contract claim based on the PMC Guaranty.

Third, Plaintiffs' breach of contract claim is based on whether Plaintiffs contracted with Defendants for the sale of Gusmer's "goodwill." Specifically, Plaintiffs argue Defendants failed to transfer Gusmer's goodwill because Defendants are riding on the coattails of the Gusmer name. However, the SPAs are silent as to goodwill. The Supreme Court has defined goodwill as "the expectancy of continued patronage." *Newark v. Morning Ledger Co. v. United States, 507 U.S. 546, 555, 113 S. Ct. 1670, 123 L. Ed. 2d 288 (1993)* (citations omitted). In addition, the Supreme Court of New Jersey has stated that goodwill consists of:

> . . . the right to continue the business at the same place in which it has been established and where its reputation has been made, carrying with it the probability that old customers will continue to resort to the old place for the purpose of making their purchases, notwithstanding the [*51] change in the name under which the business has been carried on, so long as the service remains satisfactory and the standard of the goods sold is maintained . . .

Dugan v. Dugan, 92 N.J. 423, 430, 457 A.2d 1 (1983). Recently, in *Gettinger v. Magnetic Services, Inc., No. 07-3015, 2008 U.S. Dist. LEXIS 80055, 2008 WL 4559758, at *2-3 (D.N.J. Oct. 8, 2008)*, another court in this District found that summary judgment was inappropriate because there was a genuine issue of material fact as to whether goodwill existed or had value where the agreement was silent on the issue. In *Gettinger*, the court held that whether or not goodwill existed was fact specific, and based on the pleadings, a reasonable jury could find that the purchaser, who provided the same services as the seller, at the same location, to the same customer, had an expectation of continued patronage from that customer. *See Id.* (relying on the stated elements of the *Dugan* court). Thus, the court determined that goodwill could exist even where a contract is silent on the issue.

Similarly, in the instant case, Graco has pled that it purchased the goodwill of Gusmer in its Agreements with PMC Global and PMC Europe. Compl. P 33. PMC Defendants, however, argue that goodwill [*52] was not part of the fully integrated contract and thus Plaintiffs are unable to make out a breach of contract claim here. However, the Agreements include provisions that no customers, distributors, sales representatives or venders intend to cease doing business with Gusmer, that all of the Gusmer's trade names, trademarks and copyrights are in full force and effect with no pending or threatened lawsuits, that all of the Gusmer patents, patent rights, and trade secrets are protected and that employees have signed agreements and confidentiality agreements and that none intend to leave. Complaint P 33; Exs. A & B, Disclosure Schedules 4.14-4.15, 4.18-4.20. Taking Plaintiffs' allegations as true, Plaintiffs allege the expectancy of continued patronage with Gusmer customers and thus, state a claim for breach of contract based on goodwill here. [9]

> 9 PMC Defendants' arguments that goodwill was not part of the contract is a defense that will not be entertained by the Court on a motion to dismiss.

The only remaining issue with respect to this count is whether the manner in which Defendants competed can constitute a violation by PMC Global and PMC Europe of their implied duties of good faith and [*53] fair dealing. Plaintiffs argue that "it is reasonable to infer that one who buys a business for $ 65 million (including its protected trade secrets, a product line, a distribution network, a customer base, and the right to control a well-known brand) would reasonably expect the seller not to devalue the acquisition (by utilizing trade secrets in order to launch a competitive business that features a knock-off product line with a claimed affiliation to the sold company's brand and by targeting the sold company's customer base)." Pl. Opp. at 17-18. Plaintiffs plead that "the Sale Agreements expressly transferred to Graco the following assets of that company, among others: (1) Gusmer's customer relationships; (2) Gusmer's employment agreements; and (3) Gusmer's intellectual property and proprietary information." Compl. PP 33-41. Graco alleges that Defendants are now soliciting Gusmer's customers, *see Id.* PP 80-83; employing persons bound by non-disclosure agreements, *see Id.* PP 8, 47, 64; and using Gusmer's intellectual property and proprietary information to produce and distribute competing products. *See Id.* PP 75, 77, 79, 82.

Plaintiffs argue that they have adequately pled a claim for [*54] violating the implied contractual obligation of good faith and fair dealing because PMC Global and PMC Europe deny Graco the value of its purchase, by "keep[ing] for [themselves] the essential thing [they] sold, and also keep the price [they] got for it . . ." *Levitt Corp. v. Levitt, 593 F.2d 463, 468 (2d Cir. 1979)*. While the duty of good faith and fair dealing cannot alter the clear terms of an agreement, *see DiCarlo, 530 F.3d at 267*, defendants who act with improper purpose or ill motive may be found liable for breaching the implied covenant if the breach upsets the plaintiff's reasonable expectations under the agreement. *See Intarome, 2008 U.S. Dist. LEXIS 97631, 2008 WL 5109501, at *6*. Mere competition alone, however, cannot constitute improper purpose or ill motive.

In this case, Plaintiffs plead that Defendants Gama and Garraf are "marketing their products to customers in a manner that is intended to lead customers to believe that Defendants Gama and Garraf are the successors to Gusmer or that they are the real Gusmer." Compl. P 84. In addition, Plaintiffs allege that Commette, as an agent for and in concert with other Defendants, is erroneously "informing customers that Plaintiff Graco did not purchase [*55] Gusmer Europe." *Id.* P 85. Thus, Plaintiffs' allegations of Defendants' breach of good faith and fair dealing stems from Defendants' alleged trading off on the Gusmer name and product affiliation, which sufficiently constitutes improper purpose or ill motive for purposes of this motion. Therefore, Plaintiffs have stated a claim for breach of implied duty of good faith and fair dealing on this basis. Accordingly, the Court denies PMC Defendants' request to dismiss this claim.

4. Count Two: Breach of Non-Disclosure Agreement

PMC Defendants argue that because Plaintiffs failed to allege facts sufficient to establish an enforceable employment contract, Plaintiffs' allegations that Defendant Commette breached his non-disclosure agreement should be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)*. PMC Defendants argue that Graco cannot allege that Graco had a non-disclosure agreement with Commette based on a provision in an employee handbook in this case. Graco, however, contends that its claim is not based on a provision in an employee handbook. Rather, Plaintiffs allege that Commette breached a written "Non-Disclosure Agreement" that he entered into with Graco, dated May 16, 2006. Compl. PP [*56] 47, 95.

To state a claim for breach of contract, the plaintiff must allege (1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations. *Frederico v. Home Depot, 507 F.3d 188, 203 (3d Cir. 2007)*. Graco, here, alleges: (1) it had a valid, existing contract with Commette, *see* Compl. P 47; (2) Commette breached his obligations under that contract by disclosing Graco's and Gusmer's confidential information to Gama, *see Id.* P 82; and (3) that Graco had been damaged as a result of Commette's defective performance. *See Id.* P 96. Commette allegedly signed an agreement on May 16, 2006 that prohibits him from using or disclosing "Confidential Information of Graco Inc., Gusmer Corp., their subsidiaries or others to whom members of Graco/Gusmer owe an obligation of confidentiality, to any person not authorized to receive such Confidential Information" either "during [his] employment with Graco/Gusmer or after such employment is terminated." *Id.* P 47.

PMC Defendants do not argue that Plaintiffs fail to state a claim based on this Non-Disclosure Agreement. Rather, they complain that [*57] they did not receive fair notice of this claim because Graco did not attach a copy of the agreement to its Complaint or Opposition. Citing *Adamson v. Ortho-McNeil Pharm., Inc., 463 F. Supp. 2d 496, 500 (D.N.J. 2006)*, PMC Defendants argue that the Court need not credit Plaintiffs' conclusory allegations and bald assertions about this alleged contract, which Plaintiffs failed to attach. [10] PMC Defendants inappropriately cite to *Adamson.* In that case, this Court found that if documents relied on in the complaint are attached, the Court may review them. Indeed, this Court did not require the plaintiff to attach proofs for all its allegations, which Defendants contend is necessary here. Graco correctly argues that it was not required to attach the Non-Disclosure Agreement to its Complaint. Pl. Opp. at 19 n. 5 (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig., 975 F. Supp. 584, 596 (D.N.J. 1996)* ("failure to attach specific documents to which the complaint refers, or to quote from them verbatim, [was not] fatal to their claims")). Plaintiffs have alleged sufficient facts to raise a reasonable expectation that discovery will reveal evidence of the nondisclosure agreement. *See* [*58] *Phillips, 515 F.3d at 234* (citing *Twombly, 127 S.Ct. at 1965*). Accordingly, the Court denies Defendants' request to dismiss this claim. [11]

10 Defendants also claim that the Court is not "constrained to accept the allegations of the

complaint in respect of the construction of the Agreement." *Int. Audiotext Network, Inc. v. AT&T Co., 62 F.3d 69, 72 (2d Cir. 1995)*. Plaintiffs correctly argue, however, that *Int. Audiotext Network* holds only that a court has the ability to review a document mentioned in -- but not attached to -- the complaint, without converting the motion to dismiss into a summary judgment action. *Id.*

11 Because the Court does not dismiss this claim, PMC Defendants request a more definite statement pursuant to *Rule 12(e)*. PMC Defendants claim that the documents Plaintiffs expressly rely on are integral to their claims, and without these documents, Plaintiffs' allegations are too vague and ambiguous for Commette and other PMC Defendants to respond. Defendants request that Plaintiffs clearly state which contracts are valid or in effect, which contracts have been superseded or void, and which contracts it is seeking to enforce because in their Complaint, Plaintiffs allege that [*59] there were contracts with Commette and Royo from 2003 and 2004, and a subsequent contract with Commette in 2006. PMC Dfs. Mot. at 9; Compl. PP 26, 47. In their Opposition, Plaintiffs make clear that their claim against Commette for breach of his nondisclosure agreement is based on the May 16, 2006 Non-Disclosure Agreement. *See* Pl. Opp. at 18.

The Court denies PMC Defendants' request at this time because these records can be provided in discovery. "It is not the function of *12(e)* to provide greater particularization of information alleged in the complaint or which presents a proper subject for discovery. The basis for granting such a motion is unintelligibility, not lack of detail." *MK Strategies, LLC v. Ann Taylor Stores Corp., 567 F. Supp. 2d 729, 737 (D.N.J. 2008)* (internal citations and quotations omitted). In this case, Graco sufficiently alleges a claim of breach of a non-disclosure agreement and its allegations are not so vague, ambiguous or unintelligible that PMC Defendants cannot respond in good faith. Accordingly, Defendants' request pursuant to *Rule 12(e)* is denied.

5. Count Three: Duty of Loyalty Claim

Defendants move to dismiss Plaintiffs' duty of loyalty claim against Commette [*60] pursuant to *Rule 12(b)(6)* on the ground that Graco failed to allege any misconduct by Commette during his employment. PMC Defendants point out that according to Graco's own allegations, Commette, a former Graco employee, began doing business with Gama "after [his] employment and consulting relationships with [Plaintiffs] ended." Compl. PP 50, 53. Defendants claim that all of Commette and Royo's alleged misconduct and breach of duty of loyalty occurred after they were fired by Graco and such post-employment conduct cannot support Graco's claim.

The duty of loyalty owed by "an employee to an employer consists of certain very basic and common sense obligations. An employee must not *while employed* act contrary to the employer's interest." *Lamorte Burns & Co., Inc. v. Walters, 167 N.J. 285, 302, 770 A.2d 1158 (2001)* (citations omitted) (emphasis added). Specifically, during the period of employment, an employee has a duty not to compete with his employer. *Id.* (citations omitted). "[A]n employer may prove a *prima facie* case of an employee's breach of the duty of loyalty not only by showing that the employee directly competed with the employer while employed, but also by showing that the employee while employed [*61] assisted the employer's competitor." *Id.* (citations omitted). In addition, an employee who takes legally protected information from his employer to seek a competitive advantage upon resignation also breaches his duty of loyalty. *Id. at 304*. However, "later competition with a current employer may eventually prove harmful to the former employer. That sort of harm is not actionable; it is called free enterprise." *Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 645, 691 A.2d 876 (App. Div. 1997)* (internal quotations and citations omitted).

Graco contends that it sufficiently alleges that Commette breached his duty of loyalty based on its allegations that Commette had an undisclosed arrangement with PMC Global regarding the disposition of unsold inventory "that was contrary to Graco's interests during the time he was employed by, and providing consulting services to Plaintiff Graco . . .". Compl. P 99. Plaintiffs, however, do not allege in their Complaint that Commette had this undisclosed arrangement with PMC Global *while he was employed* with Graco. [12] In addition, Plaintiffs do not dispute Defendants' assertions that Graco fired Commette nor does Graco accuse Commette of taking legally [*62] protected information from Graco while an employee of Graco for the purpose of seeking a competitive advantage upon resignation or even in anticipation of his termination by Graco. *See Lamorte Burns, 167 N.J. at 304*.

12 Graco asserts that after Commette's employment with it ended in March 2007, Commette visited Gusmer's Lakewood, New Jersey facility and asked a Graco employee about the status of the inventory of Gusmer's "Mighty Mite" products, which Graco had acquired from PMC Global. *Id.* P 50. PMC Global and Graco allegedly had an agreement in which PMC Global was to reimburse Graco for any inventory not sold in three years. *Id.* P 51. Commette allegedly told a Graco employee that he was interested in the status of this inventory because PMC Global owed him compensation for it. *Id.* P 52. Graco asserts that any agreement by Commette to sell the Mighty-Mite inventory was 'contrary to the interests of Graco.'" Pl. Opp. at 20-21 (quoting Compl. P 99). Plaintiffs do not allege that Commette actually had an agreement with anyone during his employment with Graco nor that he intended to purchase this inventory while he was employed. Rather its allegations that Commette was acting as a speculator [*63] for this inventory in March 2007 was well after he stopped working for Graco on October 20, 2006.

Graco also argues that Commette gained access to trade secret information while employed at Graco that he "inevitably has or will have to disclose." Compl. PP 44, 63-64. This allegation alone, however, is not actionable and insufficient to establish a *prima facie* claim of an employer's breach of duty of loyalty, since Plaintiffs have not alleged that Commette took such protected information for the purposes of seeking a competitive edge upon his leaving Graco's employ. *See Lamorte Burns, 167 N.J. at 303*; *Subcarrier, 299 N.J. Super. at 645*. Because Plaintiffs have failed to allege sufficient facts that Commette breached his duty of loyalty because either he directly competed with his employer or he assisted the employer's competitor *while employed* by Graco or that he took trade secrets from Graco in order to seek a competitive advantage upon his separation from Graco, the Court grants Defendants' Motion to dismiss with respect to this claim without prejudice.

6. Count Four: Tortious Interference

Defendants argue that Graco has failed to state a claim based on tortious interference with a prospective [*64] economic advantage [13] because Graco does not allege that Defendants interfered with any of Graco's customers, solicited any of its current customers, or that Graco suffered a loss. PMC Dfs. Mot. at 13-14.

13 Graco argues that PMC Defendants do not dispute its tortious interference with contract claim, specifically, Commette's alleged non-disclosure agreement, and therefore it should be deemed admitted. Pl. Opp. at 21 n. 6. Thereafter, however, in their Reply, PMC Defendants clearly dispute the sufficiency of the allegations for this claim. They do not request dismissal of this claim on its own. Rather they dispute that Graco sufficiently pled the existence of the underlying agreement with which they allegedly interfered. PMC Dfs. Reply at 8 n. 3.

On the other hand, Garraf outrightly disputes that Plaintiffs have sufficiently pled a claim for tortious interference with a contract. Garraf Mot. at 7-8. However, Garraf contends that Plaintiffs do not address why this claim should be dismissed with respect to Garraf. *See* Garraf Reply at 8 n. 3. The Court will address the sufficiency of Plaintiffs' tortious interference claims, with respect to both a contractual relationship and prospective [*65] economic advantage, as to all Defendants.

New Jersey recognizes tortious interference with a prospective economic advantage as separate and distinct from tortious interference with an existing contract. *Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 751-52, 563 A.2d 31 (1989)*. To prevail on a claim for tortious interference with a prospective economic advantage, a plaintiff must demonstrate (1) that it had a reasonable expectation of an economic advantage; (2) that was lost as a direct result of Defendants' malicious interference; and (3) that it suffered losses thereby. *See Pinnacle Choice, Inc. v. Silverstein, No. 07-1379, 2007 U.S. Dist. LEXIS 55291, 2007 WL 2212861, at *3 (D.N.J. July 31, 2007)* (citing *Lamorte Burns, 167 N.J. at 305-06*). "When a business targets its competitor's customers, it exercises a valid business judgment and that alone does not constitute tortious interference with prospective economic advantage." *Foxtons, Inc. v. Cirri Germain Realty, 2008 N.J. Super. Unpub. LEXIS 189, 2008 WL 465653, at *7 (App. Div. 2008)* (internal quotations and citations omitted). A plaintiff must set forth facts surrounding Defendants' intentional conduct that goes beyond healthy competition. *Id.* Interference must be done intentionally and [*66] with malice, such that the harm was inflicted intentionally and without justification or excuse. *Id.*

Plaintiffs allege that Graco had a "reasonable expectation of economic advantage derived from the tangible and intangible assets of the Gusmer businesses that [they] purchased from Defendant PMC and its Affiliated Entities", Compl. P 108, including their customer relationships, intellectual property, proprietary technology, trademarks, and trade names. *Id.* P 41. Graco alleges that "Defendants' conduct, practices, and activities have intentionally and unjustifiably interfered with the reasonable expectation of advantage [Graco] derived from the[se] tangible and intangible assets . . . ." *Id.* P 109. Graco further alleges that it would have received the benefit of these assets if Defendants had not engaged in the conduct described throughout the Complaint, *Id.* P 110, and that it suffered injuries as a result. *Id.* P 111.

Defendants do not dispute that Plaintiffs had a reasonable expectation of economic advantage. Garraf, however, unpersuasively argues that the allegations of interference with a prospective economic advantage are only against Commette and Royo, and not Garraf, *see* Garraf Mot. [*67] at 7, and thus, this claim against them should be dismissed. Taking the allegations as a whole, Plaintiffs do allege that Garraf, either individually or acting in concert with PMC Defendants, intentionally interfered with its reasonable expectation of advantage. *See, e.g.,* Compl. P 109. PMC Defendants, citing to *Foxtons,* dispute that Plaintiffs sufficiently allege that Defendants intentionally interfered with or solicited any of Graco's current customers. Rather, PMC Defendants argue that Graco's allegation that they solicited business from customers in the trade is insufficient to plead the intentional or malice element of the claim. *Foxtons, 2008 N.J. Super. Unpub. LEXIS 189, 2008 WL 465653, at *7*. However, because Plaintiffs' claim that Defendants solicited Graco customers by casting doubt on the origin of Graco-Gusmer products, Compl. PP 84-85, Plaintiffs allege sufficient facts surrounding Defendants' conduct that demonstrate intentional interference with an economic advantage. *See Foxtons, 2008 N.J. Super. Unpub. LEXIS 189, 2008 WL 465653, at *7*.

In addition, Plaintiffs assert that they "need not allege specific lost business opportunities in support of [their] tortious interference claim." *D&D Assocs. Inc. v. Bd. of Ed. Of N. Plainfield, No. 03-1026, 2007 U.S. Dist. LEXIS 93867, 2007 WL 4554208, at *22 n. 15 (D.N.J. Dec. 21, 2007)* [*68] (citing *Floorgraphics, Inc. v. News Am. Marketing In-Store Servs., Inc., No. 04-3500, 2006 U.S. Dist. LEXIS 70834, 2006 WL 2836268, at *6 (D.N.J. Sept. 29, 2006))*. Rather, Plaintiffs claim that they "adequately alleged that [the unlawful conduct] caused consumers, distributors and other customers to stop purchasing its products." *Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1279 (10th Cir. 2000)* (citing *Cook v. Winfrey, 141 F.3d 322, 327-28 (7th Cir. 1998))*. Plaintiffs claim that their general factual allegations regarding causation, which state the injury resulting from Defendant's conduct, are sufficient pursuant to *Rule 8*, and Defendants seek to impose a heightened pleading standard that is not required here. Pl. Opp. at 23. [14] Moreover, they argue that they have adequately alleged Defendants' efforts to divert business from Graco to "Gama" by interfering with Graco's then-existing customers or distributors. Compl. PP 67, 69.

14 The Court notes that the Third Circuit has rejected a heightened evidentiary requirement for tortious interference claims, and it follows that there would be no heightened pleading standard for such claims. *See Fineman, 980 F.2d at 186-87*.

Plaintiffs argue that they have sufficiently [*69] pled that Defendants' misconduct has interfered with specific prospective economic opportunities, *see Id.* PP 108-110, including the opportunity to sell replacement parts or new equipment to former Gusmer (now Graco) customers whose trade had been solicited and obtained by Defendants. *Id.* PP 65, 80-82. Plaintiffs state that they would have realized their reasonable expectation of economic benefit absent Defendant's conduct, and argue that they are not further required to identify and allege lost sales or damages more specifically. Pl. Opp. at 24. Defendants maintain that Plaintiff has not alleged any actual losses, as required for a tortious interference claim. *See Matrix Essentials, Inc. v. Cosmetic Gallery, Inc., 870 F. Supp. 1237, 1249 (D.N.J. 1994)*. Defendants assert that Graco has not alleged that any of its current customers stopped doing business with it or that there were any lost sales as a consequence of Gama's alleged misconduct. However, even in *Matrix,* the case cited by Defendants, the court noted that Plaintiffs must allege that the injury caused damages to plead a claim for tortious interference; Plaintiffs need not specify what the actual damages were at this stage of [*70] litigation. *Id.* While Plaintiffs will have to prove damages to succeed on this claim, they have sufficiently alleged that Defendants' actions injured them, causing damages here. Therefore, Graco has sufficiently plead the elements of a claim of tortious interference with a prospective economic advantage, including that it had reasonable expectation of economic benefit that was lost as a direct result of Defendants' malicious interference and damages.

Plaintiffs also allege that Defendants engaged in tortious interference with a contract, specifically, Commette's Non-Disclosure Agreement. Compl. PP 102-104. To sufficiently pled a claim of tortious interference with a contract, Plaintiffs must allege the same elements as a claim for tortious interference with a prospective business advantage plus the additional element of a contract. *Med Alert Ambulance, Inc. v. Atlantic Health System, Inc., 2007 U.S. Dist. LEXIS 57083, 2007 WL 2297335, at *14 (D.N.J. 2007)*. A tortious interference with contract claim cannot be directed at a person or entity that is a party to the contract. *See Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159, 173 (3d Cir. 2001)*.

PMC Defendants argue, taking as true all factual allegations in [*71] Plaintiffs' Complaint, Graco has failed to allege tortious interference with a contract. Rather, they argue that "Graco asserts only that Gama and Commette solicited business from customers 'in the trade' who previously had done business with Gusmer three years earlier, 'at the time Plaintiff Graco acquired Gusmer.'" PMC Reply at 8; Pl. Opp. at 23. Plaintiffs, however, do allege that Defendants PMC Global, PMC Europe, PMC, Gama, and Garraf are intentionally and unjustifiably interfering with Commette's non-disclosure agreement. Compl. P 102. The Court has already determined that Plaintiffs have sufficiently pled a non-disclosure agreement existed. *See* Part III.A.4., *supra*. Because the Court has determined herein that Plaintiffs adequately pled a claim for tortious interference with a prospective economic advantage and the additional element of Commette's non-disclosure agreement, Plaintiffs have sufficiently pled a tortious interference with a contract claim. Accordingly, Defendants' request to dismiss Plaintiffs' tortious interference claims are denied.

7. Count Five: Misappropriation of Trade Secrets & Misuse of Confidential Business Information

Pursuant to *Rule 12(b)(6)*, Defendants [*72] move to dismiss Plaintiffs' trade secret claims because Graco has not alleged the existence of actual trade secrets or that Defendants used such secrets to Graco's detriment. PMC Dfs. Mot. at 12-13; Garraf Mot. at 2-3.

"A trade secret claim in the federal courts is governed not by federal common law but by state law." *Rohm & Haas Co. v. Adco Chem. Co., 689 F.2d 424, 429 (3d Cir. 1982)*. "To prevail in New Jersey upon a claim for misappropriation of a trade secret, a trade secret owner must establish that: (1) a trade secret exists; (2) the information comprising the trade secret was communicated in confidence by plaintiff to the employee; (3) the secret information was disclosed by that employee and in breach of that confidence; (4) the secret information was acquired by a competitor with knowledge of the employee's breach of confidence; (5) the secret information was used by the competitor to the detriment of plaintiff; and (6) the plaintiff took precautions to maintain the secrecy of the trade secret." *Rycoline Prods., Inc. v. Walsh, 334 N.J. Super. 62, 71, 756 A.2d 1047 (App. Div. 2000)* (citing *Rohm, 689 F.2d at 429-30*; *Stone v. Goss, 65 N.J. Eq. 756, 759-60, 55 A. 736 (E. & A. 1903))*.

Significantly, information [*73] need not rise to the level of a trade secret to be protected. *See Lamorte Burns, 167 N.J. at 299*. Rather, the Supreme Court of New Jersey has held that, to be legally protected, the information may even be otherwise publicly available because it is the relationship of the parties at the time of disclosure and the intended use of the information that controls whether there has been a misuse of confidential business information. *See Id. at 299-301* ("specific information provided to defendants by their employer, in the course of employment, and for the sole purpose of servicing plaintiff's customers, is legally protectable as confidential and proprietary information").

Plaintiffs allege that when selling Gusmer, Defendants PMC Global and PMC Europe expressly transferred Gusmer trade secrets and confidential business information to Graco and represented to Graco that they had taken steps to protect these trade secrets, Compl. PP 34-36, including requiring employees to sign confidentiality agreements. *Id.* PP 37-39. The parties allegedly allocated over $ 4 million to the transfer of

Gusmer "proprietary technology." *Id.* P 41. After the sale, former Gusmer employees, including Commette, joined [*74] Graco and had access to Graco's own trade secrets, and confidential business and technical information. *Id.* PP 43-44. Plaintiffs allege that Gama and Garraf have improperly accessed and are now using the Graco and/or Gusmer trade secrets and confidential business information to to manufacture, market and sell spare parts for Gusmer equipment and new equipment to solicit former Gusmer customers and others. *Id.* PP 58-62, 65-71, 75-79. Thus, Plaintiffs argue, they have sufficiently stated cognizable claims for misappropriation of trade secrets and misuse of confidential business information.

Garraf argues that "Graco fails to allege any facts supporting their claim that any trade secrets were ever taken, used or disclosed by Garraf." Garraf Reply at 6. [15] Rather Garraf states that Graco's allegations are conclusory and nonsensical. Moreover, Garraf complains that Graco fails to allege that "any defendant actually took any corporate material or data," and that Plaintiffs' allegation that Defendants had access to and then used Graco Trade Secrets and Confidential Business Information to manufacture spare parts for Gusmer's products is insufficient. The Court disagrees. [16]

15 Garraf disputes [*75] Graco's assertion that Royo, former Gusmer employee, co-founded Gama. Further Garraf asserts the PMC Defendants' statement to that effect in their brief, PMC Dfs. Mot. at 2, is inaccurate and is not binding on it. *See* Garraf Reply at 2 n. 1.

Garraf also contends that Graco's claim that Royo and Commette's attendance at trade shows was improper does not support Graco's claims against them. Garraf Reply at 6 n. 2; Compl. PP 61-62, 66-71.

16 Citing *Sun Dial Corp. v. Rideout, 25 N.J. Super. 591, 598, 96 A.2d 788 (N.J. Super. Ch. 1953), rev'd, 29 N.J. Super. 361, 365, 102 A.2d 90 (App. Div. 1954), aff'd, 16 N.J. 252, 108 A.2d 442 (1954)*, Garraf argues that the "knowledge and skill which is obtained through experience is not a trade secret, that sound public policy favors employees bettering themselves, and that employees may carry away and use the skill acquired during the course of an employment either in business for themselves or in the service of other employers." Plaintiffs, however, contend that its "desire to protect its trade secrets and confidential information is not an attempt to hold its former employees 'hostage' because they are 'cursed' with the skill and knowledge of being competent at their chosen profession." Pl. [*76] Opp. at 28 (quoting Garraf Mot. at 6). Rather, Graco's claims against Commette (and other employees working for Defendants) are based on more than disclosure of "mere skill and knowledge of the trade generally, but technical and business trade secrets imparted to them in confidence," which Defendants are obliged to honor. Pl. Opp. at 28-29 (citing *Sun Dial Corp., 16 N.J. at 260-61*). Because these arguments go beyond sufficiency of the pleadings and are not appropriately addressed on a motion to dismiss, the Court will not consider them here.

Garraf contends that Plaintiffs rely on the "inevitable disclosure" theory because Garraf was "founded by a group of former Gusmer employees (none of whom are Royo), most of whom have over 20 years of experience in the industry and were dismissed by Graco shortly after the acquisition," and that Graco does not allege any facts to show why these people could not make and sell products using their own and public information. Garraf Mot. at 6. But "[u]nder the inevitable disclosure doctrine, a former employer is entitled to enjoin even *anticipated* employment or other business activity that would result in inevitable disclosure in order to protect the [*77] former employer's confidential and proprietary information from disclosure." *Orthovita, Inc. v. Erbe, No. 07-2395, 2008 U.S. Dist. LEXIS 11088, 2008 WL 423446, at *10 (E.D. Pa. Feb. 14, 2008)* (emphasis in original). Graco argues that it has gone further and is not bringing this action to prevent a "mere plan," but to enjoin Defendants' previous actions and actual disclosures evidenced by "Defendants' ongoing solicitation of its customers and the marketing, production and sale of spare parts for its products," including the use of Graco's pricing information. Pl. Opp. at 29-30. [17]

17 Plaintiffs contend that despite Garraf's suggestion that a preliminary injunction may not be available to Plaintiffs because they did not move for such relief at the outset of the case, *see* Garraf Mot. at 3, this should not be addressed at this time because it is not currently moving for

that relief. *See* Pl. Opp. at 29-30. The Court agrees and will not address this issue at this time.

Further, Garraf discusses the relief available when relying on the inevitable disclosure doctrine. *See* Garraf Reply at 7. In this case, Graco does not assert or plead reliance on a theory of inevitable discovery to satisfy its pleading requirement, *see* Pl. [*78] Opp. at 29, and thus, such a discussion is unnecessary.

First, PMC Defendants argue that any alleged use of Graco's trade secrets by incorporating features claimed in one of Graco's patent applications are matters of public record, and thus, defeat Graco's claim to trade secrets. *See On-Line Techs., Inc. v. Bodenseewerk Perkin-Elmer GmbH, 386 F.3d 1133, 1141 (Fed. Cir. 2004)* ("information that is disclosed in a patent or contained in published materials reasonably accessible to competitors does not qualify for protection (as a trade secret)") (internal quotation marks and citations omitted); Compl. PP 75-79. Second, PMC Defendants argue that the two-year-old customer and distributor information that had been publicly disclosed by Graco cannot be considered secret. PMC Dfs. Mot. at 13. Third, PMC Defendants argue that Commette's use of his own knowledge with his new employer, Gama, is not a misappropriation of trade secrets because "[t]o catalogue the employee's own knowledge of his employer's [costs and profit margins] . . . as a 'trade secret' or 'confidential information' and thus perpetually enjoin the employee from thereafter honestly soliciting business . . . [is] an unreasonable restraint [*79] on trade unsupported by any dominant social or economic justification." *Abalene Exterminating Co. v. Egles,* 36 Backes 1, 3 (N.J. Ch. 1945). Therefore, PMC Defendants assert that "Graco has not alleged any other misuse of any other trade secret." PMC Dfs. Reply at 7.

Graco, however, asserts that its trade secret claims are based on the "confidential, nonpublic, propriety information regarding customers, sales reports, strategic marketing plans, product information and designs, pricing information, customer discounts and rebates, profit margins, financial reports and data, sales programs, and product engineering and design plans." Pl. Opp. at 17; Compl. P 44. [18] Garraf argues that Plaintiffs' "litany is wholly insufficient under *Twombly* and *Phillips* to provide fair notice to Garraf of what the purported trade secrets it is accused of misappropriating are." Garraf Reply at 4. However, other courts in this circuit have previously found that a "plaintiff alleging misappropriation of trade secrets need not plead the details of its trade secrets in a publicly filed complaint, inasmuch as such disclosure would destroy the essential 'secrecy' of the claimed trade secret." *Orthovita, 2008 U.S. Dist. LEXIS 11088, 2008 WL 423446, at *9.* [*80] Because Plaintiffs have met the "minimal standard" required for pleading misappropriation of trade secrets and misuse of confidential business information here, the Court denies Defendants' request to dismiss these claims. *See Oswell v. Morgan Stanley Dean Witter & Co., Inc., No. 06-5814, 2007 U.S. Dist. LEXIS 44315, 2007 WL 1756-027, at *7 (D.N.J. June 18, 2007)* (stating that the defendant will have the opportunity to argue that "no genuine issue of material fact exists regarding whether the information was publicly known or readily available and therefore not protectible as a trade secret" at the summary judgment phase, *Id.* n. 7). [19]

18 Graco states that despite Defendants' allegations, it does not claim that the price of steel, *see* Garraf Mot. at 5, the pending patent on the Hybrid Heater, *see Id.* at 3-4; PMC Dfs. Mot. at 12, or customer information posted on the Internet, *see* PMC Dfs. Mot. at 13, are trade secrets or the bases of Plaintiffs' trade secret claim. Pl. Opp. at 27.

19 Moreover, at least one court in this District has held that "[i]n appropriate circumstances, information on pricing, discounts and other relevant customer data may enable an agent to take unfair advantage of its principal and therefore [*81] constitute protectible trade secrets." *See Apollo Techs. Corp. v. Centrosphere Indus. Corp., 805 F. Supp. 1157, 1204 (D.N.J. 1992)* (internal citations omitted). In addition, in *Global Transp. Logistics, Inc. v. Dov Transp.,* the court denied summary judgment where the facts were "hotly controverted" and the plaintiff claimed that its "pricing, customer preferences, customer contacts, profit margin, vendors and 'methods of operation' [we]re proprietary and confidential." No. BER-C-79-05, 2005 WL 1017602, at *1-5 (N.J. Super. Ct. Apr. 5, 2005).

8. Counts Six-Eight: Violations of the Lanham Act, the New Jersey Fair Trade Act, and New Jersey's Prohibition Against Unfair Competition

In its Opposition, Graco appears to argue that in Count Six of its Complaint it sufficiently alleges two claims against Defendants under the Lanham Act, specifically false advertising under *15 U.S.C. § 1125(a)(1)(B)* and false designations of origin under *15 U.S.C. § 1125(a)(1)(A)*. [20] Plaintiffs assert that Defendants' conduct violates the Lanham Act's prohibition of unfair competition by way of false advertisements, false designation of origin, and misleading representations or descriptions of fact in an effort [*82] to unlawfully capitalize on Gusmer's reputation for which Plaintiffs paid millions of dollars for exclusive ownership and control. Further, Plaintiffs argue that they have sufficiently plead that Defendants' misrepresentations and other unfair acts violate the New Jersey Fair Trade Act and amount to unfair competition in Counts Seven and Eight, respectively.

> 20 Problematically, Plaintiffs do not clearly allege pursuant to which provisions of the Lanham Act they are suing citing generally to *15 U.S.C. § 1125(a)(1)*. *See* Compl. PP 118-123. The Court looks to its Opposition for clarity, but relies on Plaintiffs' Complaint to determine the sufficiency of Graco's allegations.

Defendants move to dismiss all three of these counts on the grounds that Plaintiffs have failed to allege sufficient facts to support any of these claims. PMC Defendants argue Graco's pleading with respect to these three Counts, which PMC Defendants group together as Graco's "unfair competition claims," is insufficient because Graco fails to allege that Defendants used Graco's marks or otherwise suggested an affiliation sufficient to create a likelihood of consumer confusion. PMC Dfs. Mot. at 14-15. Garraf contends that [*83] an intermediate standard of pleading is required for Plaintiffs' Lanham Act claims and Plaintiffs' "unidentified statements" are inadequate to meet the requisite specificity. [21] Garraf Reply at 11-13.

> 21 Garraf states that it does not analyze Plaintiffs' claims under the New Jersey Fair Trade Act and common law unfair competition separately because under New Jersey law the pleading requirements for these claims are the same as the analysis for unfair competition under the Lanham Act. *See* Garraf Mot. at 8 n. 3 (citing *Primepoint, L.L.C. v. PrimePay, Inc., 545 F. Supp. 2d 426, 431-32 (D.N.J. 2008))*.

a. False Advertising Claims

To state a claim for false advertising under *§ 1125(a)(1)(B)*, a plaintiff must allege that: (1) the defendant made false or misleading statements about the nature, characteristics, qualities, geographic origins of his or another's goods, services, or commercial activities in commercial advertising or promotion; (2) there is actual deception or a tendency to deceive a substantial portion of the intended audience; (3) the deception is material in that it is likely to influence purchasing decisions; (4) the advertised goods traveled in interstate commerce; and (5) there [*84] is a likelihood of injury to the plaintiff. *15 U.S.C. § 1125(a)(1)(B)*; *United States Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 922-23 (3d Cir. 1990)*.

Garraf argues that the Court should apply an "intermediate" standard of pleading for Plaintiffs' Lanham Act claims because they require more specificity than the traditional notice pleading under *Rule 8*. *See Fed. R. Civ. P. 8(a)*; Garraf Reply at 11-13. Some district courts in the Third Circuit have recognized that pleading false advertising under the Lanham Act requires an intermediate pleading standard, which strikes a balance "between application and outright rejection of *Rule 9(b)*." *See Wellness Publ'g v. Barefoot, No. 02-3773, 2008 U.S. Dist. LEXIS 1514, 2008 WL 108889, at *15 (D.N.J. Jan. 8, 2008)* (quoting *EVCO Tech. & Dev. Co., LLC v. Buck Knives, Inc., No. 05-6198, 2006 U.S. Dist. LEXIS 68549, 2006 WL 2773421, at *15 (E.D. Pa. Sept. 22, 2006))*; *see also Trans USA Products, Inc. v. Howard Berger Co., No. 07-5924, 2008 U.S. Dist. LEXIS 25370, 2008 WL 852324, at *5 (D.N.J. Mar. 28, 2008)*. In *Max Daetwyler Corp. v. Input Graphics, Inc., 608 F. Supp. 1549 (E.D. Pa. 1985)*, where this intermediate approach was first applied, the court required more particularity than traditional notice pleading [*85] under *Rule 8*, but something less than the specificity required under *Rule 9*, because the claim involved the making of false statements even though it was not a "pure 'fraud' claim." *Max Daetwyler, 608 F. Supp. at 1556*. "In litigation in which one party is charged with making false statements, it is important that the party charged be provided with sufficiently detailed allegations regarding the nature of the alleged falsehoods to allow him to make a proper defense." *Id.* The Court finds that this intermediate standard should be applied in this case, where Plaintiffs charge Defendants with making false statements about Defendants' products; Plaintiffs meet this requirement.

Plaintiffs argue that they have sufficiently plead a claim under *Rule 8(a)* [22] that Gama and Garraf are making false or misleading representations when marketing their products to customers because they are "marketing their products to customers in a manner that is intended to lead customers to believe that Defendants Gama and Garraf are the successors to Gusmer or that they are the real Gusmer." Compl. P 84. Plaintiffs allege that Commette, as an agent for and in concert with other Defendants, is erroneously "informing [*86] customers that Plaintiff Graco did not purchase Gusmer Europe." *Id.* P 85. [23] Plaintiffs allege that these statements are "likely [or intended] to cause confusion or mistake or to deceive" and "have influenced and [are] likely to continue to influence customers' purchasing decisions." *Id.* PP 84-86, 119-120. Further, Plaintiffs allege that the products have traveled in interstate commerce, *Id.* P 121, and that there is a likelihood of injury to the Gusmer goodwill that it purchased and damages from the name's dilution. *Id.* PP 33, 41, 122.

22 Plaintiffs argue that the Honorable Joel A. Pisano, U.S.D.J., in *Wellness* and *Trans USA* incorrectly required an intermediate standard for allegations of false statements under the Lanham Act and, for support, cites to district court cases outside of the Third Circuit. Pl. Opp. 36-38. Plaintiffs also contend that Garraf cites to "unreported decisions [that] are at odds with contemporaneous published opinions [from district courts in other circuits] that categorically reject the suggestion that Lanham Act claims must contain more detail than would be required by *Fed. R. Civ. P. 8(a)*." Pl. Opp. at 36-37. This distinction, however, is irrelevant. None of [*87] these decisions, cited by Plaintiffs or Defendants, are binding on this Court. Thus, in conducting its own analysis, the Court finds the decisions in the district courts within the Third Circuit, which are post-Twombly, are persuasive, and the Court applies an intermediate pleading standard here.

23 Plaintiffs argue that a liberal interpretation of the "commercial advertising or promotion" requirement applies under *Rule 12(b)(6)*, and therefore, their pleadings regarding Defendants' concerted, intentional, and false marketing communications is sufficient "advertising." Pl. Opp. at 32-33 & n. 9 (citing to cases which found that even a single promotional statement suffices as an advertisement for purposes of the Lanham Act). The crux of Defendants' argument, however, is not that Plaintiffs have insufficiently plead an advertisement, but that Plaintiffs fail to sufficiently allege that any false or misleading statements were ever made by Defendants. And even if there were such statements, there are no allegations that they caused deception or had a tendency to deceive. *See, e.g.,* Garraf Reply at 13.

Taking Plaintiffs' allegations as a whole, they do identify Defendants' allegedly false statements [*88] with enough specificity to satisfy even the intermediate pleading requirement. Compl. PP 84-85. Similarly, even though Garraf argues that Plaintiffs only allege that the statements were "intended" to deceive, not that the supposed misstatements actually caused any deception or there was a tendency to deceive, the Court disagrees. *See Id.* PP 84-86, 119-120. Rather, Plaintiffs identify the allegedly false and misleading statements Defendants made and plead that customers were deceived. However, the Court will grant Graco leave to amend its Complaint to state clearly which provisions of the Lanham Act Defendants allegedly violated. *See* n. 20, *supra.* Accordingly, the Court denies Defendants' motion to dismiss with respect to Plaintiffs' false advertising claim.

b. Claims of False Designations of Origin

Plaintiffs also claim that Defendants' marketing statements amount to false and misleading designations of origin and affiliation and false descriptions of fact under the Lanham Act. *15 U.S.C. § 1125(a)(1)(A)*. PMC Defendants move to dismiss these claims, pursuant to *Rule 12(b)(6)*, for the same reasons they move to dismiss Plaintiffs' false advertising claims. Garraf argues that these claims [*89] are based on the same unidentified statements as Plaintiffs' claims of false advertising and Plaintiffs' allegations here merely recite the language of the elements in the statute, which are "wholly insufficient to provide Garraf with sufficiently detailed allegations regarding the nature of the alleged falsehoods to allow it to make a proper defense." Garraf Reply at 13-14.

To prevail on such a claim, a plaintiff must prove that: (1) the defendant uses a false designation of origin, false or misleading description of fact, or false or misleading representation; (2) such improper use occurs in interstate commerce in connection with goods and services; (3) such improper use is likely to cause confusion, mistake, or deception as to origin, sponsorship, or approval of defendant's goods or services by another person; and (4) that plaintiff has been or is likely to be damaged. *15 U.S.C. § 1125(a)(1)(A)*.

In arguing that it has adequately alleged that Defendants misrepresented the origin of Gama's products to consumers and created the likelihood that consumers will be confused about the origin of Gama's products, Graco cites to the same statements it offers to support its false advertising [*90] claim. *See* Part III.A.8.a., *supra.* Plaintiffs allege that Defendants' misleading statements also constitute false or misleading statements of fact made in conjunction with efforts to sell Garraf and Gama's products in interstate commerce. Compl. P 121. Plaintiffs argue that a false designation of origin claim is properly stated where a competitor seeks to "instill the impression that its line is the same as, or a continuation of the [Plaintiffs'] line." *777388 Ontario Ltd. v. Lencore Acoustics Corp., 105 F. Supp. 2d 56, 63 (E.D.N.Y. 2000)*. Finally, Plaintiffs contend that they have suffered damages because they are losing control of "the Gusmer name" and the associated goodwill that they purchased. *Id.* PP 33, 41, 122.

Thus, much like Plaintiffs' false advertising claim, Plaintiffs set forth adequate facts to show a reasonable expectation that discovery will reveal evidence that Graco uses a false designation of origin, false or misleading description of fact, or false or misleading representation. Although Gama's allegations that Graco made false or misleading statements of fact are adequately plead, the specific provisions of the Lanham Act upon which Plaintiffs are suing are not and [*91] the Court directs Graco to amend its Complaint with respect to this allegation. *See* n. 20, *supra.* Accordingly, the Court denies Defendants' Motions to dismiss Plaintiffs' claims of false designations of origin.

c. Claims under the New Jersey Fair Trade Act and New Jersey's Prohibition on Unfair Competition

Plaintiffs allege that Defendants' violated the New Jersey Fair Trade Act and New Jersey common law of unfair competition. *See N.J.S.A. § 56:4-1*; *Ryan v. Carmona Bolen Home for Funerals, 341 N.J. Super. 87, 92, 775 A.2d 92 (App. Div. 2001)*. Graco argues that it has adequately plead these claims because it alleges that Defendants breached their duties of good faith and fair dealing, *see* Compl. PP 87-93, and engaged in false advertising and false designation of product origin. *Id.* PP 118-123.

PMC Defendants argue that their alleged actions do not amount to unfair competition and thus Plaintiffs do not sufficiently plead these claims. PMC Defendants argue that Royo's alleged use of "a product comparison sheet that focused exclusively on head-to-head comparisons between Plaintiff Graco's and Defendants Gama and Garraf's products," Compl. P 69, suggests no more than ordinary comparative advertising, [*92] which is not unfair competition. PMC Dfs. Mot. at 15. PMC Defendants also argue that Plaintiffs fail to allege any confusion, actual or likely. PMC Reply at 9. They argue that even if Commette told "customers that Plaintiff Graco did not purchase Gusmer Europe," Compl. P 85, it would "not have the reasonable likelihood of confusing sophisticated consumers concerning the 'affiliation, connection, and/or association of Gusmer with Defendants Gama and Garraf' or 'the origin, sponsorship, and/or approval of Defendants Gama and Garraf's products.' Compl. PP 119, 120, 125[-26]." PMC Dfs. Mot. at 15.

New Jersey's prohibition against unfair competition provides relief for a breach of the duty of good faith and fair dealing and violations of the Lanham Act. "A *prima facie* case of unfair competition . . . requires evidence of bad faith or malicious conduct." *Wellness, 2008 U.S. Dist. LEXIS 1514, 2008 WL 108889, at *20*. In *Versa Prods. Co., Inc. v. Bifold Co. (Mfg.) Ltd., 50 F.3d 189, 207 (3d Cir. 1995)*, the Third Circuit found that unfair competition exists where there is an effort to "deceive consumers as to the origin of one's goods and thereby trade off the good will of a prior producer." The test of unfair competition [*93] under New Jersey law is identical to the test for unfair competition under *§ 1125* of the Lanham Act. *See AT&T Co., 42 F.3d at 1433*. Therefore, because the Court already determined that Plaintiffs' claims, as alleged, are adequately plead for the purpose of this motion, the Court need not conduct a separate analysis here. *See* Part III.A.8.a. & b., *supra.* Accordingly, the Court denies Defendants' motion to dismiss these claims.

9. Count Nine: Unjust Enrichment

Defendants move to dismiss Plaintiffs' claim for unjust enrichment. PMC Defendants contend that Plaintiffs fail to state a claim because (1) unjust enrichment is not an independent tort and is only "quantum recovery for breach of a quasi-contact properly pled under New Jersey law" and (2) Plaintiffs do not allege any quasi-contract nor that Defendants have been unjustly enriched or received any illegitimate benefit. PMC Dfs. Mot. at 15-16. Garraf argues that Plaintiffs' claim for unjust enrichment is inadequately plead because Graco fails to allege "(i) any direct relationship between it and Garraf or (ii) that [Graco] conferred any benefit to, or reasonably expected any remuneration from Garraf." Garraf Mot. at 11. Plaintiffs allege [*94] that "Defendants have been unjustly enriched by reason of their foregoing breach of their contractual and legal obligations to Plaintiff Graco." Compl. P 134.

As a preliminary matter, this Court has previously held that an unjust enrichment claim may be sustained independently as an alternative theory of recovery. *Torres-Hernandez v. CVT Prepaid Solutions, Inc., No. 08-1057, 2008 U.S. Dist. LEXIS 105413, 2008 WL 5381227, at *9 (D.N.J. Dec. 17, 2008)* (citing *In re K-Dur Antitrust Litigation, 338 F. Supp. 2d 517, 544 (D.N.J. 2004)* (finding defendant's motion to dismiss plaintiff's unjust enrichment claim as premature even where other remedies at law were available to plaintiff); *United States v. Kensington Hosp., 760 F. Supp. 1120, 1135 (E.D. Pa. 1991)* (allowing plaintiff to assert an unjust enrichment claim as an alternative theory of recovery when plaintiff had asserted a cognizable contract claim in the same complaint)). An unjust enrichment claim requires plaintiff to allege "(1) at plaintiff's expense (2) defendant received benefit (3) under circumstances that would make it unjust for defendant to retain benefit without paying for it." *In re K-Dur Antitrust Litigation, 338 F. Supp. 2d at 544* (quoting *Restatement of Restitution 1* [*95] (1937)). Further, "[t]he unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." *VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554, 641 A.2d 519 (1994)*. While New Jersey law does not recognize unjust enrichment as an independent *tort* cause of action, it does sound in quasi-contract. *Cafaro v. HMC, No. 07-2793, 2008 U.S. Dist. LEXIS 71724, 2008 WL 4224801, at *12 (D.N.J. Sept. 8, 2008)* (finding that the plaintiffs' unjust enrichment claim should be dismissed because the allegations sounded in tort and not in quasi-contract). Thus, where Plaintiffs' unjust enrichment claim is based on a quasi-contractual or implied contractual relationship with the expectation of remuneration, the Court must determine whether the claim is adequately plead.

The doctrine of unjust enrichment is "typically invoked . . . when [the] plaintiff seeks to recover from [the] defendant for a benefit conferred under an unconsummated or void contract." *Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc., 171 F.3d 912, 936 (3d Cir. 1999)* (internal [*96] citations omitted). In such an instance, the law implies a quasi-contract and requires that the defendant compensate the plaintiff in quantum meruit for the value of the benefit conferred. *See Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 998 (3d Cir. 1987)*. "To establish unjust enrichment, a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust . . . . [and the plaintiff] expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." *VRG Corp., 135 N.J. at 554* (internal citations omitted).

Garraf argues that Graco fails to allege any direct relationship between the parties or that Garraf conferred any benefit to, or reasonably expected any remuneration from Garraf. Graco does not argue that it adequately plead these two elements. Rather, it says "[i]t would be inappropriate, or premature at best, to resolve this unjust enrichment claim against Garraf before Graco has had the benefit of discovery to fully understand and prove the relationship between Garraf, which manufactures [*97] and markets 'Gama' products, and its co-defendants." Pl. Opp. at 40 n. 11. By Graco's own admission, it fails to adequately plead this claim.

More fundamentally, however, Graco does not allege recovery for a benefit conferred under an unconsummated or void contract. Instead, Graco alleges Defendants, acting in active concert with one another, have been unjustly enriched as a result of their violations of the obligations they owe to Graco, after PMC Global and PMC Europe sold Gusmer and its intangible assets to Graco for $ 65 million. Compl. PP 28-29, 33, 134. Graco further alleges that Defendants are now interfering with the previously sold assets by soliciting Gusmer's customers, retaining employees bound by non-disclosure and non-competition agreements with Gusmer, using Gusmer's intellectual property and proprietary information, while retaining the full $ 65 million purchase price, and thus, causing damage to Graco. *Id.*

PP 7, 88, 135. The entire thrust of Graco's allegations is that Defendants, working in concert, are retaining or seeking to recapture the intangible assets that comprised a substantial portion of Gusmer's value. There is, therefore, no basis for applying a quasi-contractual [*98] remedy and Plaintiffs' claims for unjust enrichment cannot stand. Accordingly, the Court grants Defendants' request to dismiss Graco's unjust enrichment claim.

B. Plaintiffs' Motion to Dismiss Defendants Gama and Commette's Counterclaims

1. Antitrust Counterclaims

Defendants Gama and Commette (collectively Gama or "Counterclaimants") [24] plead violations of *Section 2* of the Sherman Act for monopolization (Count 1) or attempted monopolization (Count 2), based on allegations of "unlawful acquisition and maintenance of monopoly power in the [in-plant polyurethane processing equipment and materials ("IPPE")] market," through Graco's purported "unilateral[] refus[al] to deal with distributors that carry products from competing manufacturers." Counterclaim PP 42, 44. [25]

24 As both parties refer to Commette and Gama as Gama on this motion, the Court does the same.

25 Counterclaimants also allege conspiracy to monopolize the IPPE market, however, the Supreme Court has clearly held that under the Sherman Act, *15 U.S.C. § 1*, a parent company and its wholly owned subsidiary are incapable of conspiring with each other. *See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 776-77, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. In *Copperweld,* [*99] the Court determined that "[a] parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." *Id. at 771*. As the parent and subsidiary always have a "unity of purpose or a common design," *Id.*, the Court held that a parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act. *Id. at 777*. Similarly, Counterclaimants fail to state a claim of conspiracy because Graco Inc. and its wholly-owned subsidiary Graco Minnesota cannot conspire with each other because they too have a unity of purpose or a common design. *See Id.*

Gama, however, argues that it did adequately plead a conspiracy claim under the Sherman Act because Graco's boycott conspiracy implicates both Graco and its top-tier American distributors who effectively became coerced coconspirators against Gama. *Otto, 388 F.2d at 797*. However, I find that Gama's allegations that "Graco and Graco Minnesota and/or others . . . conspired to monopolize the IPPE market" are too vague under *Twombly*. Counterclaim [*100] P 50. Because counterclaimants fail to allege with specificity that any other conspirator was involved, the Court dismisses Gama's claims of conspiracy to violate antitrust laws. Moreover, Gama lacks standing to bring its antitrust claims. *See* Part III.B.1., *infra.*

Graco moves to dismiss Gama's antitrust claims on the grounds that Counterclaimants do not have antitrust standing because Gama is only a distributor and not a participant, *i.e.* a competitor or consumer, in the market. Thus, Graco argues, since Gama does not directly compete against Graco in the relevant market, it cannot suffer injury of the type the antitrust laws were designed to prevent. [26] Graco also argues that Gama is neither an efficient nor proper enforcer of the antitrust laws.

26 Graco argues that as an agent of Gama, Commette's injury and standing are necessarily derivative of Gama's. Thus, if Gama lacks antitrust standing, then Commette also lacks standing. *See Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1378 (7th Cir. 1987)* (denying a corporate officer of the plaintiff company challenging anticompetitive conduct standing); *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 710-711 (11th Cir. 1984)*. [*101] Gama does not dispute this.

Gama alleges that "Graco has a nearly 100% market share and no significant competitors" in the "distinct market for plural component pump and spray and in-plant polyurethane processing equipment market ('IPPE') materials and equipment, with substantial technical barriers to entry". Counterclaim PP 12-13. Gama's counterclaims refer only to "IPPE;" however, according to Gama, IPPE encompasses the "plural component pump and stay and in-plant polyurethane processing equipment market in which Gama and Graco compete." Gama Opp.

at 1 n. 2. Gama claims that it intends to amend its counterclaims to more clearly describe the pump and spray industry, but this change will be explanatory and not substantive. *See Id.* Gama, however, has not plead this definition at this time. The Court must consider Gama's allegations as plead. *Id.* Graco argues that due to this admission, Gama concedes that its pleading of market definition is insufficient, but asserts that even if Gama amended its Counterclaims, Gama would not have standing.

Gama alleges that Garraf, located in Spain, is the only company that makes competing products and that as Garraf's sole manufacturer's representative [*102] and exclusive distributor in the United States, Gama is the only link in commerce between Garraf and the American market. Counterclaim PP 15-16, 18; Gama Opp. at 1. According to Gama, Graco threatened all of its IPPE product distributors with the loss of the right to sell Graco products if those distributors were also to sell competing products distributed by Gama. Further, those distributors are the only realistic conduit for Gama to sell Garraf products in the United States, and Graco's threats have proved successful in cutting off Gama's sales, as distributors are refusing to carry Gama's Garraf product line. Counterclaim PP 20, 24.

"Because of the infinite variety of claims that arise under the antitrust statutes, [the Supreme Court] has refused to fashion a black-letter rule for determining standing in every case." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 922 (3d Cir. 1999)* (quoting *Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964 (3d Cir. 1983))*. When assessing a Plaintiff's standing to bring antitrust claims, "[t]he [Supreme] Court has emphasized that lower courts should avoid applying bright-line rules and instead should [*103] analyze the circumstance of each case, focusing on certain key factors." *Id. at 922*. In *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 545, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, the Supreme Court articulated a five-factor balancing test for antitrust standing. The Third Circuit has expressed these factors as follows:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 320 (3d Cir. 2007).

Gama analyzes these five factors, arguing that it does meet the standing requirements. Graco contends that only a narrow class of persons and injuries have antitrust standing [*104] and *Associated General Contractors* requires more than a but-for theory of harm. First, Graco argues that its alleged monopolization of IPPE manufacturing does not directly harm Gama because Gama does not manufacture such products or buy Graco's products. Gama, however, asserts that there is a causal connection between the antitrust violation, the harm to Gama, and Graco's intent because Graco sought to prevent "all IPPE product distributors nationwide" from purchasing Garraf products from Gama and that these IPPE distributors are "the only realistic conduit for Garraf products in the United States." Counterclaim PP 20, 24. In addition, Gama alleges that Graco sent a Letter to all IPPE distributors nationwide that unilaterally threatened Graco's refusal to deal, which had its intended effect because "existing Gama customers have stopped buying." *Id.* P 22. According to Gama, distributors "would have carried or continued to carry Garraf products but for Graco's refusal to deal with any distributor carrying competing products." *Id.* P 23. Thus, there appears to be a causal connection between Graco's intent to harm competition by sending its Letter and Gama's injury from the loss of sales [*105] and potential sales.

In its Motion, Graco focuses heavily on the second factor, which deals with the concept of antitrust injury. "If the injury is not of the requisite type, even though the would-be plaintiff may have suffered an injury as a result of conduct that violated the antitrust laws, he or she has no standing to bring a private action under the antitrust laws to recover for it." *Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 181 (3d Cir. 1997)*. "Antitrust injury is a necessary but not insufficient condition of antitrust standing." *Id. at 182* (citation omitted). "Even a plaintiff who can show antitrust injury may lack antitrust standing, because the remaining . . . factors may weigh against allowing him or her to sue under the antitrust laws." *Id.*

Graco argues that Gama is not a competing manufacturer in the alleged market and therefore cannot suffer an antitrust injury. Pl. Mot. at 9-13. In *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405 (3d Cir. 1997)*, the Third Circuit explained that plaintiffs "must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from [*106] that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *113 F.3d at 413* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. Further, in *Schuylkill*, the court stated:

> The antitrust laws are intended to preserve competition for the benefit of consumers in the market in which competition occurs . . . . The requirement that the alleged injury be related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors . . . . A plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust injury.

Id. at 415 (quoting *Vinci v. Waste Management, Inc., 80 F.3d 1372, 1376 (9th Cir. 1996))*. An antitrust injury reflects an activity's anti-competitive effect on the competitive market. *Casper v. SMG, No. 00-3465, 2006 U.S. Dist. LEXIS 79267, 2006 WL 3111132, at *4 (D.N.J. Oct. 31, 2006)*. "The [*107] requirement that the alleged injury be related to anti-competitive behavior requires . . . that the injured party be a participant in the same market as the alleged malefactors." *Schuylkill Energy Resources, 113 F.3d at 415*.

In order for a reasonable factfinder to determine if Gama competed in the market in which trade was allegedly restrained -- the alleged antitrust injury -- the answer depends on how that market is defined. *Barton, 118 F.3d at 182*. In *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997)*, the Third Circuit discussed the definition and boundaries of the relevant market in antitrust actions. It wrote:

> Plaintiffs have the burden of defining the relevant market. The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted [*108] in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Queen City Pizza, 124 F.3d at 436 (internal citations and quotations omitted). Further, the court stated:

> Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively. . . . When assessing reasonable interchangeability, (f)actors to be considered include price, use, and qualities. Reasonable interchangeability is also indicated by cross-elasticity of demand between the product itself and substitutes for it. As we explained in *Tunis Brothers Co., Inc. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991)*, products in a relevant market are characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market.

Id. at 437-38 (internal citations and quotations omitted).

Gama contends that the relevant product market is a "distinct market for IPPE materials and equipment."

Counterclaim PP 1, 7. "Graco denies that [*109] 'the IPPE space,' Counterclaim P 12, defines a relevant product market under antitrust law." Pl. Mot. at 10 n. 7. Graco asserts that Gama's claims should be dismissed because it has failed to identify any product in the alleged market and its interchangeability with other products. *Id.* It is unclear what exactly defines the IPPE market "materials and equipment" or the "pump and spray industry." As pled, Gama does not define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand nor does it allege a proposed relevant market, as pled, that clearly encompasses all interchangeable substitute products. *See Queen City Pizza, 124 F.3d at 437-38*. Despite granting all factual inferences in Gama's favor, the relevant market is legally insufficient, and Gama cannot demonstrate that its alleged injury is of the type for which the antitrust laws were intended to provide redress. *See Barton, 118 F.3d at 182*. Thus, the Court dismisses Gama's antitrust claims. *See Id.* (citing numerous cases that dismissed the plaintiff's antitrust claims for failure to sufficiently plead a relevant market). [27]

> 27 With regard to Gama's alleged antitrust [*110] injury, depending on how Gama defines the relevant market, Gama may be able to demonstrate that it, at least at times, directly competes with Graco, as Graco admits that sometimes it acts as a distributor selling to end-users. In addition, Gama may be able to show that it forges the link between Garraf and the top-tier American distributors and competes directly with Graco, which sells its products directly to the same distributors, and thus Gama's harm is inextricably intertwined with Graco's alleged refusal to deal and its forced group boycott. *See Carpet Group Int'l v. Oriental Rug Importers Ass'n Inc., 227 F.3d 62, 77 (3d Cir. 2000)*. Even if, however, Gama adequately defines the relevant market and demonstrates Gama's alleged injury is of the type for which the antitrust laws were intended to provide redress, balancing the five factors in *Associated General Contractors,* Gama will have to demonstrate that it has standing with regard to the factors of directness of the injury, the existence of more direct victims, and, most troubling, the potential for duplicative recovery or complex apportionment of damages.

Because Gama fails to sufficiently define the relevant market and thus lacks [*111] standing, the Court need not address the individual arguments the parties raise with regard to the sufficiency of Graco's pleading regarding its monopolization and attempted monopolization claims. Accordingly, the Court grants Graco's request to dismiss Gama's antitrust claims without prejudice.

2. Gama' State Law Claims

a. Tortious Interference with Business Advantage

The Court has already determined that to state claim for tortious interference with prospective economic advantage, a plaintiff must establish (1) that it had a reasonable expectation of an economic advantage; (2) that was lost as a direct result of Defendants' malicious interference; and (3) that it suffered losses thereby. *See* Part III.A.6., *supra.* Graco argues that Gama fails to allege that it had a reasonable expectation of business advantage or that Graco acted intentionally and with malice. Graco also contends that because Gama is only a start-up with no established customers, it cannot plead generic expectations of business advantage. [28]

> 28 The Court notes that this argument contradicts Graco's claim that Gama has successfully entered the market as evident from "Gama's own website [that] identifies at least 12 distributors [*112] for Garraf products, acquired in Gama's one year of business." Pl. Mot. at 25 n. 12.

Gama, however, argues that it has a reasonable expectation to continue its sales of Garraf products to its existing customers and distributors, and to sell its products to other members of the trade. Counterclaim PP 22-24. Gama contends that Graco knew of Gama's business expectations when it took deliberate steps to wrongfully undermine those expectations by allegedly sending a Letter to "all IPPE distributors carrying Graco products -- which is to say, all IPPE product distributors nationwide[,] . . . announc[ing] a pre-emptive unilateral refusal by Graco to deal with any distributor . . . that considers carrying Garraf products as well." Counterclaim PP 20-21. Gama alleges that Graco knowingly made false and disparaging comments about Gama's business and products to customers in the trade and gave its customers ultimatums not to carry Gama's products. *Id.* PP 25-27, 29-33. Due to Graco's conduct, Gama's customers stopped buying products and dropped the Gama line. *Id.* PP 23, 32. Thus, Gama argues, it sufficiently pleads that "but for [Graco's] interference, there was a reasonable probability that [it] [*113] would have received the anticipated economic benefit." *Slim CD, Inc. v. Heartland Payment Sys., Inc., No. 06-2256, 2007 U.S. Dist. LEXIS 62536, 2007 WL 2459349, at *3 (D.N.J. Aug. 24, 2007)*. [29] The Court agrees. Accepting all of Gama's allegations as true, Gama alleges a reasonable expectation of an economic benefit from selling products to customers in the trade with which Graco intentionally and wrongfully interfered. *See Id., 116 N.J. at 753-51* (finding that courts easily find a reasonable expectation of economic benefit even where the sale is to the public at large).

29 Graco argues that Gama "implicitly conceded that it has failed to 'establish with reasonable certainty a prospective economic relation." Pl. Reply at 8-9. However, Gama states that it intends to amend its counterclaims with the actual dollar amount it allegedly lost due to Graco's conduct. Gama Opp. at 23 & n. 4. Because a plaintiff must only allege that the injury caused damages to state a tortious interference cause of action, and need not specify what the actual damages were at this stage of litigation, Graco's argument is unavailing. *Matrix, 870 F. Supp. at 1249*.

Graco also argues that Gama fails to allege any action constituting malice because [*114] nothing about its Letter or actions was "wrongful" and Gama fails to plead any factual allegations to support its claim that Graco "intentionally and unjustifiably interfer[ed] with Gama's business." Pl. Mot. at 29-32; Counterclaim P 53. Graco asserts that exercising control over one's own distribution network cannot constitute tortious interference. For support, Graco relies on *Frank Brunckhorst Co., L.L.C. v. Coastal Atlantic, Inc., 542 F. Supp. 2d 452 (E.D. Va. 2008)*. In that case, after the termination of its contract with Brunckhorst, Coastal alleged it had a business expectancy to sell competitive products to its former customers, but "Brunckhorst interfered with that expectancy by 'threatening' Coastal's former customers in order to prevent them from buying [a competing product line] from Coastal." *Frank Brunckhorst, 542 F. Supp. 2d at 464*. Under Virginia law, the court dismissed the claim because "[even though] perhaps unsavory, Brunckhorst tactics in threatening to withdraw supplies of Boar's Head products to those retailers who decided to purchase [the competiting] products from Coastal were within its legal rights." *Id.* The court further found that apart from Coastal's conclusory [*115] allegation the counterclaim did not allege any reference to "illegal or independently tortious" means or methods that "violate an established standard of a trade or profession, or involve unethical conduct." *Id.* Thus, Graco argues that its Letter simply informed its distributors that it preferred that they carry only Graco products because taking on an additional competitive product line may significantly reduce the best efforts of a Graco distributor to sell Graco products. Thus, Graco contends that its conduct was a justifiable method of protecting its business interests, and not "transgressive of generally accepted standards of common morality." *Lamorte Burns, 167 N.J. at 306*. Graco also asserts that Gama failed to sufficiently allege malice because Gama merely recited that Graco "acted intentionally and without justification." *Foxtons, 2008 N.J. Super. Unpub. LEXIS 189, 2008 WL 465653, at *7*. The Court disagrees.

Gama argues that sending such a Letter or literature is not simply dismissed as "a lawful method of competition" or "at most mere puffing." *Buono Sales, Inc. v. Chrysler Motors Corp., 363 F.2d 43, 49 (3d Cir. 1966)*. Rather, the Third Circuit has found that, under New Jersey law, a "defendant's carefully planned [*116] method of enticing" a plaintiff's customers away from plaintiff and to defendant constitutes tortious interference with plaintiff's business. *Id.* Similarly, Gama argues and the Court agrees that Gama has sufficiently pled a claim of tortious interference here.

Moreover, Gama contends that it sufficiently stated a claim even without the Letter because Graco does not contest that it has knowingly made false and disparaging comments about Gama's businesses and products to customers in the trade. Counterclaim PP 26, 30-31. In addition, Graco allegedly gave its customers ultimatums not to carry Gama's products. *Id.* P 32. Courts applying New Jersey law have permitted claims of such "sharp dealing", where neither the normal nor the expected course of practice is followed and a defendant strays from "the rules of the game." *Print Mart-Morristown, 116 N.J. at 757-58*. [30] Gama alleges a similar type of activity to that held actionable in *Print Mart-Morristown,* [*117] and thus, accepting all of Gama's allegations as true, Gama alleges the malice element. Accordingly, Gama has stated a claim for tortious interference with business advantage and thus the Court denies Graco's request to dismiss this claim.

30 Citing, e.g., *Harris v. Perl, 41 N.J. 455, 461, 197 A.2d 359 (1964)*; *Buono Sales, Inc. v. Chrysler Motors Corp., 363 F.2d 43, 49 (3d Cir. 1966)* (holding that under New Jersey law an automobile manufacturer could be held liable for tortious interference with prospective economic relations, where an auto maker wrote to DeSoto purchasers and recommended that buyers have their cars serviced at dealerships that did not handle DeSoto in an effort to phase out dealerships of discontinued DeSoto model), *cert. denied, 385 U.S. 971, 87 S. Ct. 510, 17 L. Ed. 2d 435 (1966)*, appeal after remand, *449 F.2d 715 (1971)*; *Somers Constr. Co. v. Bd. of Ed., 198 F. Supp. 732 (D.N.J. 1961)* (permitting a tortious interference claim where the complaint alleged that architects had maliciously advised board of education to accept a higher bid for construction of new high school).

b. Trade Libel Claim

To assert a claim of trade libel or disparagement, the plaintiff must demonstrate (1) publication, [*118] (2) with malice, such as knowingly making false statements or with reckless disregard for their falsity, (3) of false allegations concerning its property, product or business, and (4) special damages. *See Floorgraphics, Inc. v. News America Marketing in-Store Services, Inc., No. 04-3500, 2008 U.S. Dist. LEXIS 34143, 2008 WL 1901107, at *3 (D.N.J. Apr. 24, 2008)*; *Mayflower Transit, LLC v. Prince, 314 F. Supp. 2d 362, 378 (D.N.J. 2004)* (citing *Sys. Operations Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1140 (3d Cir. 1997))*.

Graco argues that Gama fails to state a claim for trade libel and product disparagement because it does not identify any publication that could be verified and proven false nor has it plead special damages. First, Graco contends that Gama fails to identify an actionable statement and specifically, the following allegations in Gama's Counterclaim are not actionable: Graco's Letter to distributors informing them of Graco's intention to review their business relationship should they add a competing product line, Counterclaim P 20; Graco's statements that Gama is selling "old" or "outmodeled" Gusmer technology, *Id.* P 26; and Graco personnel's false statements concerning Gama's continued viability [*119] and the quality of Gama's product line. *Id.* P 27. Graco argues that each of these statements either do not contain false statements or cannot be proven false. Graco further contends that Gama's allegations that Graco representatives falsely claimed to customers that Gama would cease to be in operation by the end of 2008 and that the customers would be "stuck with [Garraf products] when Graco forces Gama out of business," *Id.* PP 29-31, are merely predictions about future market conditions and not actionable statements of fact. Pl. Mot. at 37. Graco argues that these statements are merely an expression of Graco's business opinion and intentions and truth is a defense; thus, Gama fails to plead an actionable statement. [31] Second, Graco argues that Gama fails to plead special damages with particularity, as required by New Jersey law.

31 The Court notes that such defenses are inappropriate at this stage of litigation -- on a motion to dismiss when all factual allegation are accepted as true.

Gama, however, argues that it did adequately plead trade libel, and more specifically actionable statements. Gama asserts that Graco's false statements are sufficient allegations of trade libel because [*120] the statements are "publication[s] of [] matter[s] derogatory to the plaintiff's property or business, of a kind designed to prevent others from dealing with him or otherwise to interfere with plaintiff's relations with others." *Patel v. Soriano, 369 N.J. Super. 192, 246-47, 848 A.2d 803 (App. Div. 2004)*. Much like the parties here dispute every claim and allegation, the parties also argue about one another's reliance on specific case law relating to trade libel and defamation claims and whether Gama's allegations constitute actionable statements under trade libel. Specifically, Gama argues that Graco relies on cases that focus on defamation rather than trade libel. *See* Gama Opp. at 26. On the other hand, Graco argues that Gama never actually contends that it pleads actionable statements of fact, but rather only disputes the law. Pl. Reply at 10. Although there are some significant differences between trade libel and defamation claims, "[m]any statements effectuate both harms." *Patel, 369 N.J. Super. at 247*. "[O]ne may disparage plaintiff's business by reflecting upon its character, the manner in which it is conducted, or its popularity or danger, and not affect any property." *Id. at 248* (internal [*121] citations omitted). Further, in a disparagement action, the plaintiff must show "proof of publication of material derogatory to the quality of a plaintiff's business, or to his business in general, of a kind calculated to prevent others from dealing with him, or otherwise to interfere adversely with his relations with others." *Id.*

In the instant case, Gama alleges that Graco knowingly made false statements to the public and members of the trade about Gama's business and product lines, including statements about its business, products, product offerings, technology, operations, and business plans. Counterclaim PP 25-27, 29-33. Thus, Gama alleges that Graco made false statements derogatory to Gama's property or business, of a kind designed to prevent others from dealing with Gama or otherwise to interfere with Grama's relations with others. *See Patel, 369 N.J. Super. at 246-47*. Accordingly, Gama has properly plead a claim for trade libel.

A trade libel or disparagement claim also requires that a prevailing plaintiff prove special damages by establishing pecuniary loss that has been realized or liquidated, such as lost sales, or the loss of prospective contracts with customers. *See Patel, 369 N.J. Super. at 248* [*122] (noting that traditionally a plaintiff was required to identify particular business interests who have refrained from dealing with him, or explain the impossibility of doing so, but where requiring such identification is unreasonable, proof of lost profits resulting from breach of contract may suffice, particularly where the loss is shown with reasonable certainty and where the possibility that other factors caused the loss is satisfactorily excluded. *Id. at 248-49*). At this stage of the litigation, however, Gama adequately pleads special damages. Gama alleges that it was damaged by Graco's conduct because it lost sales to established customers, existing distributors dropped its product lines, and it was prevented from acquiring new customers that were also recipients of the Letter. Counterclaim PP 24, 32-33. While these allegations are sufficient here, to ultimately prevail on this claim, Gama must identify the businesses who stopped dealing with it, or explain why it cannot prove lost profits with reasonable certainty while excluding the other factors that could cause the loss. *See Patel, 369 N.J. Super. at 248-49*. Accordingly, the Court denies Graco's request to dismiss this claim [*123] pursuant to *Rule 12(b)(6)*.

c. New Jersey Fair Trade Act & Unfair Competition Claims

Graco contends that Gama fails to state a claim under the New Jersey Fair Trade Act, *N.J. Stat. Ann. § 56:4-1*, and for unfair competition, and thus, the Court should dismiss these claims. Courts have repeatedly held that *§ 56:4-1* is the state statutory equivalent of Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)*, and thus the same pleading standard is required. *See, e.g., SK & F, Co. v. Premo Pharm. Labs., Inc., 625 F.2d 1055, 1066 (3d Cir. 1980)*. Graco argues that Gama does not provide any facts or explanation as to how it violated the New Jersey Fair Trade Act, allege any practices that constitute false advertising or misdesignation of origin, nor plead the elements of a claim.

In addition, New Jersey and federal unfair competition claims are measured by identical standards. *See Primepoint, L.L.C. v. PrimePay, Inc., 545 F. Supp. 2d 426, 431-32 (D.N.J. 2008)* (citing *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., (" A&H V"), 237 F.3d 198, 210 (3d Cir. 2000))*. Graco argues that Gama has failed to adequately allege a claim for unfair competition or provide any explanation regarding the grounds [*124] of its claim.

Gama, however, contends that it has adequately pled these claims because Graco's conduct "falls below any standards of fair play or business fairness." Gama Opp. at 28. Gama argues that Graco has employed improper tactics to stifle competition in the IPPE industry, has monopolized the IPPE market, and has exerted its influence to exclude Gama from competing against it. For support that it has adequately pled these claims, Gama argues that it adequately pled trade libel and disparagement under *Section 43(a)* of the Lanham Act, and "Graco does not dispute that its other conduct supports the unfair competition claims." Gama Opp. at 28-29. Because Gama has pled actionable conduct under *Section 43(a)* of the Lanham Act, *see* Part III.B.2.b., *supra.*, and thus, the elements of a New Jersey Fair Trade Act or unfair competition claim, Gama has sufficiently alleged these claims. Accordingly, the Court denies Graco's request to dismiss these claims.

3. Graco's Request to Stay Claim

If the Court denies Graco's motion to dismiss Gama's counterclaims, Graco requests, in the alternative, that the Court bifurcate Gama's claims. Gama argues that Graco has made such a request to keep competition [*125] out of the domestic market as long as possible and tie Gama in round after round of trials and discovery. Courts may bifurcate trials for "convenience, to avoid prejudice, or to expedite and economize." *Fed. R. Civ. P. 42(b)*.

Moreover, bifurcation "remains the exception rather than the rule" even though "courts have generally been more willing to bifurcate patent trials than other types of cases." *Innovative Office Prods. v. SpaceCo, Inc., No. 05-4037, 2006 U.S. Dist. LEXIS 29439, 2006 WL 1340865, at *1 (E.D. Pa. May 15, 2006)* (citation omitted). In this case, however, Graco's contract and tort claims are not dispositive of Gama's remaining counterclaims and all of the claims focus on the business practices and conduct of all the parties. It is senseless to try Graco's claims first and Gama's thereafter. The Court does not see a need to bifurcate the Counterclaim. Accordingly, the Court denies Graco's request.

IV. Conclusion

For the foregoing reasons, Defendants' Motions are granted in part and denied in part, and Plaintiffs' Motion is granted in part and denied in part. Specifically, the Court grants Defendants' requests to dismiss Count Three of Plaintiffs' Complaint without prejudice and Graco's Motion [*126] to dismiss Counts One and Two of Commette and Gama's Counterclaims without prejudice, and grants Defendants' requests to dismiss Count Nine of the Complaint. The Court denies Defendants' requests to dismiss Count Six and Graco is directed to re-plead its Lanham Act claims under *15 U.S.C. § 1125(a)(1)* within ten (10) days. Further, the Court denies the parties' Motions with respect to all remaining claims.

/s/ Freda L. Wolfson

The Honorable Freda L. Wolfson

United States District Judge

Date: March 31, 2009

ORLANDO A. MUNOZ, Plaintiff-Respondent/Cross-Appellant, v. ROBERT P. PERLA, ROBERT L. STEIGER, THE HERITAGE PARTNERSHIP, FOAM TECHNOLOGY, INC., RPMS CONSULTING ENGINEERS, Defendants-Appellants/Cross-Respondents.

DOCKET NO. A-5922-08T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2011 N.J. Super. Unpub. LEXIS 3096

December 15, 2010, Submitted
December 20, 2011, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Chancery Division, General Equity Part, Middlesex County, Docket No. C-249-07.

COUNSEL: Miller, Miller & Tucker, P.A., attorneys for appellants/cross-respondents (Richard B. Tucker, Jr., of counsel and on the briefs).

Brennan Law Firm, P.C., attorneys for respondent/cross-appellant (Francis J. Brennan, III, of counsel and on the briefs; Robert F. Morris, on the briefs).

JUDGES: Before Judges R. B. Coleman, Lihotz and Harris.

OPINION

PER CURIAM

This matter involves cross-appeals from a July 6, 2009 final judgment entered by Judge Travis L. Francis following a bench trial in which he determined that defendants Robert P. Perla, Robert L. Steiger, the two active partners in a real estate partnership, and defendant Heritage Partnership (Heritage) breached their fiduciary duties to a third inactive partner, plaintiff Orlando A. Munoz. The trial judge concluded that defendants caused Heritage to charge below market rent to defendant RPMS Consulting Engineers (RPMS) and defendant Foam Technology, Inc. (Foam), entities in which Perla and Steiger had interests, and caused Heritage to pay excessive fees for alleged management services performed by those entities.

The court reformed [*2] the leases between Heritage and the related tenant entities and awarded damages in plaintiff's favor. Defendants appeal and plaintiff cross-appeals. On his cross-appeal, plaintiff contends the court erred in granting the partial summary judgment dismissal concluding his claims were untimely. We affirm the judgment of the court.

Plaintiff, Perla and Steiger are all professional engineers. They were principals of RPMS, an engineering firm they started in 1983. On July 21, 1992, they entered into a partnership agreement creating Heritage to "maintain, operate, manage, sell and/or lease" a building. Each of the partners contributed to the capital of the partnership and retained one-third ownership.

Paragraph 1.03 of the Heritage partnership agreement provides that the rights and obligations of the partners are governed by the Uniform Partnership Act, *N.J.S.A. 42:1A-1 to-56*. Other pertinent provisions of the partnership agreement include paragraph 3.03, which provides that the partnership shall continue until June 30, 2012, unless terminated as set forth in the agreement; paragraph 6.01, which states that all decisions of the partnership are by majority vote of the three partners; paragraph [*3] 6.02, which provides that each partner has the right to inspect and examine the books and accounts of the partnership operations at all reasonable times; and paragraph 6.03, which states that no partner shall do any act detrimental to the best interests of the partnership or that would make it impossible to carry on the ordinary business of the partnership.

In August 1992, Heritage paid $1,550,000 to purchase an empty three-story, 39,490-square-foot office building in Monroe Township which contains approximately 22,800 square feet of space (the Heritage building) for rent. Steiger, Perla, plaintiff and RPMS signed a guaranty of payment to cover the $1.3 million mortgage for the building. Plaintiff, Perla and Steiger collectively decided to manage the Heritage building using RPMS employees.[1] Plaintiff, Perla and Steiger agreed that RPMS would negotiate with its landlord to prematurely terminate its sublease in Princeton and relocate to the Heritage building in Monroe Township. RPMS paid $9,388.37 per month in Princeton for approximately 6,800 square feet of class A space. Initially, Steiger, Perla and plaintiff did not consider what fair market rent in the Heritage building should be; [*4] they decided that rent from RPMS should cover the expenses of the building. Steiger testified that from 1992 to 1994, there was no set rent that RPMS paid Heritage. Thus, at first, RPMS paid Heritage $15,800 per month rent.

1 Heritage had no employees and no separate office space. Indeed, Heritage has never had any employees or separate office space.

Starting in 1993, RPMS began to invoice Heritage for management services, computed as the hourly rates of RPMS's employees for services rendered with a markup to cover additional costs such as a share of health insurance and vacation time. Perla testified that RPMS's markup of thirty-five percent was rather low compared to standard business practice, and he believed there was nothing improper about it. RPMS's markup on its invoices to arms' length client accounts such as oil companies was considerably higher.

In May 1993, plaintiff, Perla and Steiger incorporated Foam, a company that provides fire protection to the oil industry, and located its principal place of business in the Heritage building. At about that time, plaintiff informed Perla and Steiger that he intended to retire in late 1993. Perla and Steiger bought plaintiff out from RPMS, [*5] but plaintiff remained a principal of Foam until December 1, 2003. He retained his interest in Heritage, but he moved to Pennsylvania and took no active part in the day-to-day activities of the real estate partnership. Plaintiff did not visit the Heritage building from 1993 to 2005, and while he knew he could look at records at any time, he did not request any information about Heritage during this time period. He did receive tax returns and K-1 forms, but did not look at them thoroughly.

On May 12, 1994, Steiger sent a letter to plaintiff, which plaintiff at first stated that he had never seen until his attorney gave it to him in 2006, but eventually he conceded that he cashed the check that was one of the referred attachments to that letter. The parties disagreed as to what was sent and whether there were later versions of the letter that included attachments, but the court ultimately found that plaintiff had received the letter and the check but not the attachments that included proposed rent calculations.

In any event, the first page of the letter states that there are seven items attached: (1) a vacation check; (2) a 401K plan quarterly report; (3) a 401K newsletter; (4) "RPMS rent [*6] calculation for your comment"; (5) "Foam rent calculation for your comment"; (6) "a brief outline of what is going on with Heritage"; and (7) "a brief outline of what is going on with Foam." In the intact iteration, two pages titled, "Rent Calculation," list the square footage of RPMS's area and state the rent is $12,900, and Foam's area, stating the rent is $1,050.

On December 21, 1994, without having received any comments from plaintiff, Steiger and Perla drew up written leases for Heritage that provided basic monthly rent of $12,900 for RPMS and $1,050 for Foam. Steiger and Perla came up with the amounts based on what they thought was reasonable for the spaces; they did not conduct a fair market analysis. The initial term of the lease for Foam ran from January 1, 1995 to December 31,

1997. Perla and Steiger agreed to a total of three leases for Foam, covering the period from January 1, 1998 to December 31, 2008. The initial term for the RPMS lease ran from January 1, 1995 to December 31, 1997, with three leases, covering the period from January 1, 1998 to December 31, 2012. Perla testified that RPMS would never have paid more than $12,900 per month and would have vacated the building [*7] if forced to pay more.

On October 28, 2005, plaintiff sought to withdraw from Heritage. He wrote to Steiger about possibly selling his share, which provoked a communication from Perla and Steiger's attorney to plaintiff's attorney offering $200,000 for plaintiff's share of Heritage. Plaintiff's rejection of that offer led to appraisals of the property, the collection of materials showing cash and liabilities and eventually to this litigation.

From 1992 to 2000, Heritage retained a real estate agent, Linda Cinelli, to rent and attempt to sell the building. Steiger, on behalf of Heritage, signed the listing agreement for sale, and when Cinelli changed companies, Steiger signed a new agreement to continue her services. On January 14, 2002, Mercer Associates submitted an offer to purchase the Heritage building for $3,600,000. The process went back and forth with offers from Mercer for the same price but with different contingencies. On June 3, 2004, Raritan Properties made an offer to purchase the property for $3,650,000. On March 7, 2005, Babu Cherukuri presented an offer with a purchase price of $3,700,000, which Steiger rejected as too low and because it required that RPMS sign a five-year [*8] lease. On March 18, 2005, Steiger wrote Cinelli stating they had taken the building off the market. Nevertheless, on June 21, 2005, Cinelli submitted an offer from Birger Brinck-Lund to buy the property for $4,250,000. That offer required that RPMS remain as a tenant and pay $22 per square foot in rent.[2]

2 Steiger and Perla did not contact plaintiff about any of the offers and all were rejected. Plaintiff testified that he would have accepted an offer because he wanted to sell the building.

Throughout its tenancy in the Heritage building, RPMS provided management services and submitted invoices for those management services to Heritage that contained little detail. Steiger and Perla both testified that nobody, including plaintiff, ever complained about their format, the amounts or the documentation until the amended complaint was filed after the complaint. Steiger claimed that the amounts charged were reasonable and not all work done for Heritage was invoiced.

In answers to interrogatories, defendants set forth reasons that RPMS and Foam paid lower rent, and a list of work items that Steiger and Perla did for Heritage. Steiger testified one reason for the lower rent was that RPMS's space [*9] on the third floor is of lower quality, it has a slanted ceiling and an extremely poor layout. Steiger also testified that RPMS paid more for its space than another tenant, GMAC, and GMAC's space was superior because it was on the first floor.

Steiger acknowledged that RPMS and Heritage did not employ rigorous controls against each other. The checkbook for Heritage was in the same fireproof safe with the checkbook for RPMS. Steiger sat at his RPMS desk to do work for Heritage and answered calls for Heritage on RPMS's phone.

In 2006, plaintiff obtained information that included copies of the leases and an appraisal to see the worth of the Heritage building. At that time, plaintiff saw that the rent had not changed since he retired and that there were renewals of the leases with RPMS and Foam made without his knowledge. Steiger admitted that he did not notify plaintiff about these renewals. Plaintiff concluded that the rent was too low and that RPMS had overcharged Heritage on invoices for performance incentives and maintenance fees. While the invoices did not have details on services charged, plaintiff noticed that there were many different payments to different people and concluded that [*10] invoice amounts should have been lowered after the building was fully occupied.

On November 14, 2007, plaintiff filed a five-count complaint, alleging: (1) breach of fiduciary duty, duty of loyalty, and duty of care by Perla and Steiger; (2) breach of the Heritage partnership agreement; (3) minority partner oppression; (4) formation of a constructive trust, an equitable lien, and unjust enrichment; and (5) conversion and/or wrongful appropriation. In their answer, defendants denied the key allegations and asserted eleven separate defenses, including laches, estoppel, waiver and the statute of limitations.

Plaintiff subsequently filed an amended complaint that added a sixth count seeking an accounting of the income, expenses, and assets of Heritage, based on claims relating to invoices for professional services charged to Heritage and defendants' attempts to sell the building. Defendants filed an amended answer, adding an additional defense.

Defendants moved for summary judgment and on November 7, 2008, Judge Francis ordered partial summary judgment entered in favor of defendants based on laches on all of plaintiff's equitable claims that accrued on or before November 13, 2001, including [*11] reformation of the leases, imposing a constructive trust, appointing an independent trustee, imposing an equitable lien, rescission of the leases, dissolution of the partnership, and production of an accounting. He also ordered that all legal claims which accrued on or before November 13, 2001, shall be subject to a *Lopez* hearing, which was conducted at the start of the trial.[3]

3 Pursuant to *Lopez v. Swyer, 62 N.J. 267, 272-74, 300 A.2d 563 (1973)*, the judge conducts a hearing to determine if the plaintiff's defenses present the right to relief from the bar of the statute of limitations under the discovery rule.

Judge Francis ruled that there was no basis for tolling the applicable six-year statute of limitations and barred plaintiff's claims related to below fair market rent that accrued before January 1, 2004, and the balance of his claims that accrued before November 14, 2001.

Peter Sockler, a tax assessor and owner of an appraisal firm, issued an appraisal report in July 2006 appraising the Heritage property at $4,300,000, and he testified as an expert for plaintiff at trial. He issued a second appraisal report dated August 14, 2008, appraising the property at $4,000,000. He also issued a report, [*12] dated September 12, 2008, estimating market rent value for the owner-occupied spaces of the Heritage building for the appraisal dates of July 30, 1994 through July 30, 2008, with market rent rates between $14.09 and $23 per square foot. In calculating the rental for RPMS, he applied a twenty percent reduction to the estimated rates, because of the dormers and unusable space on the third floor.

David Stafford, a certified public accountant issued a September 26, 2008 report, setting forth an analysis of plaintiff's damages, in which he concluded that the damages for RPMS's overcharging of expenses, RPMS's rental differential, and interest to December 31, 2008, totaled $1,575,137.97, with plaintiff due one-third of the total, or $525,045.99.

Sockler acknowledged that a hypothetical landlord's anticipated tenant expense obligations are a relevant component of a hypothetical tenant's rental rate, as are risk factors such as rent defaults (collection losses) and vacancy losses. One such expense obligation is a tenant fit-up expense, where a tenant asks a landlord to reconfigure an interior space.

Joel L. Krinksy of J.L. Krinsky & Co., defendants' expert in real estate, issued a report, dated [*13] October 13, 2008, addressing the valuation of the building, the fairness of rents charged RPMS and Foam, and the charges to Heritage. The report included statistical information on rental rates, capitalization rates, and management fees, as well as summaries of annual rent from each of Heritage's tenants, effective rents based on tenant fit-up, and an analysis of RPMS's fees. Krinsky concluded: (1) the value of the Heritage building has lowered due to prevailing market conditions, not because of the rents being paid by RPMS and Foam; (2) the rents being paid by RPMS and Foam are at market levels when all factors (including usable space, initial tenant fit-up, and ongoing tenant space improvements) are taken into consideration; and (3) the charges to Heritage for fees and services have been both fair and at market levels.

After considering the evidence presented, Judge Francis concluded that in 1992 and 1993, RPMS paid varying amounts of monthly rent to Heritage, not based on a fair market rental value analysis, but instead based on the amount of rental income Heritage needed to remain solvent. The judge found that there were "several iterations" of Steiger's May 12, 1994, letter. The [*14] iteration plaintiff received referred to rents paid by RPMS and Foam in the body of the letter but not in separate attachments. Thus, the judge concluded plaintiff did not receive notice of the rent calculations. Defendants sent plaintiff tax returns, which plaintiff only "browsed" and did not review thoroughly.

Other than plaintiff's request in 2006 for a copy of RPMS's lease agreement, at no time between January 1, 1995, and November 14, 2007, did plaintiff initiate any contact with Perla and Steiger or request any information or records from them pertaining to Heritage. During the same period, plaintiff did not seek to inspect Heritage's financial or other records personally or through any representative.

Judge Francis concluded that plaintiff, Perla, Steiger and employees of RPMS rendered free services to

Heritage between 1992 and mid-1993, and then, with plaintiff's knowledge, RPMS began invoicing Heritage for services. Based on Heritage's income tax returns and form K-1 sent to him by defendants, at all times after January 1, 1995, plaintiff had some inferable notice of the rents paid to Heritage by RPMS and Foam, as well as management and other professional services rendered by [*15] RPMS and Foam to Heritage.

Judge Francis found the Sockler report credible as to rent valuations. The judge noted that Sockler factored in a twenty percent reduction from market rent for all building spaces due to the dormers on the first and second floors, as well as limited nonusable areas and the physical condition of the building. Both Sockler and Krinsky concluded that management fees based on gross rents should be between four and six percent. The management fees, which included the incentives and administrative fees, that were assessed to Heritage were in excess of six percent. The judge ruled that anywhere between four and six percent was reasonable for management fees, clarifying that the fees should not include payment for repairs of the building.

Judge Francis stated that it was difficult to determine if the comparable properties in Krinsky's report were in buildings of the same age, location and building condition. Nevertheless, the judge found that Krinsky's statistics buttressed Sockler's conclusion that the building and property were worth about $4,000,000. The judge rejected Krinsky's opinion that the RPMS management fees were reasonable because Krinsky did not provide [*16] any industry averages or similar standards to support his conclusion.

Overall, Judge Francis concluded that Perla and Steiger had fiduciary duties as partners of Heritage imposed by law, statutory duties imposed under *N.J.S.A. 42:1A-21* and *N.J.S.A. 42:1A-24* of the Uniform Partnership Act, and contractual duties under paragraphs 1.02 and 6.03 of the partnership agreement. The Uniform Partnership Act and the partnership agreement imposed continuing affirmative duties on Perla and Steiger to keep plaintiff informed about Heritage business without demand from plaintiff. While *N.J.S.A. 42:1A-4* and *42:1A-24* allow a partnership to waive certain duties of partners, Heritage did not waive any fiduciary obligations and, in fact, embraced those duties from the Uniform Partnership Act and included them in the partnership agreement. There was no evidence that these obligations were ever altered, amended or waived.

Perla and Steiger never notified plaintiff about the 2003 renewals of the RPMS and Foam leases despite their duty to do so. Based on plaintiff's testimony, had he been informed, he would not have agreed to the terms of the leases. Given the overlapping ownership structure of Heritage, RPMS [*17] and Foam, any lost profits from Heritage would adversely affect plaintiff, while benefiting Perla and Steiger. Hence, the court ruled that, as agents for Heritage, Perla and Steiger were obligated to seek maximum value for the Heritage leased space. They failed to do so, however, and the leases failed to cover the operating expenses of RPMS's and Foam's share of the building. RPMS's rental was well below market value, and the lease understated the amount of space RPMS actually occupied.

Judge Francis found Sockler's report credible as to the fair market value for RPMS's space for 2004 through 2008. The judge looked at the different calculations of square footage and found shortfalls ranging from $6.66 to $11.19 per square foot. Even the most favorable calculations demonstrated the lease rates were significantly lower than fair market value.

The judge also concluded that Perla and Steiger were required to notify plaintiff about performance incentives and administration fees paid by Heritage to RPMS, pursuant to the Uniform Partnership Act and the terms of the partnership agreement, and they failed to do so. Even though plaintiff was aware of the assessment of fees during the period he [*18] was an active member of the partnership, and he had assessed fees himself as a member of RPMS, he was not apprised of the amount of the fees and the amounts were not reasonable. Based on Sockler's testimony and information in Krinsky's report, four to six percent of gross rents was a reasonable amount.

In spite of Steiger's and Perla's failure to communicate to plaintiff information about offers and rejections related to the sale of the Heritage building, Judge Francis found they did not breach their fiduciary duties of loyalty or the partnership agreement in that regard. More specifically, he reasoned there were no damages to Heritage or to plaintiff for the failure to accept any of the offers because the partnership agreement is for a fixed period of time and the asset can still be sold. Hence, the judge refused to order the dissolution of the partnership and the sale of the building.

He noted, in the current market, forcing a sale would not be good for the partners. However, he determined plaintiff is entitled to an accounting, which plaintiff had requested as part of the complaint.

Regarding rent that RPMS currently pays, the judge ordered a reformation of the lease to fair market [*19] rent, with the difference being paid to Heritage and distributed to the partners. Also, fees assessed to Heritage by RPMS were ordered to be reduced to not more than six percent of gross rents. Continuing forward, the judge ordered the RPMS and Foam leases reformed to provide for annual increases of 3.6 percent. Plaintiff's application for a constructive trust on the assets of the partnership was denied. The judge found no minority oppression because although plaintiff demanded to be bought out, he had made no specific demand for information regarding the leases or management fees. The judge concluded that the defenses of laches, waiver and estoppel were not applicable.

On appeal, defendants maintain that Judge Francis erred in ordering reformation of RPMS's and Foam's leases. We disagree.

First, defendants argue that plaintiff's demand to reform the leases to market rent presupposes that the contracting parties had intended and agreed that the rental rates would be fair market rates. Contrary to that supposition, defendants contend that the three partners had agreed that RPMS and Foam would occupy space in the least desirable areas of the Heritage building, and they were more concerned [*20] with the certainty of the rental income from RPMS and Foam than they were with whether the rent was at a fair market level. Defendants argue further that it is reasonable to infer that if a fair rental analysis had been done, RPMS would not have prematurely terminated its lease in Princeton where the monthly rent was $9,388.37 in order to move into the Heritage building and occupy vastly inferior rental space for $15,800 per month. That rationale may have been persuasive when all the parties had the same interests in the various entities. It lost its persuasiveness when the interests of the partners were no longer fully aligned. The question that arose then was whether Steiger and Perla breached their fiduciary duty to Heritage and to plaintiff by not obtaining their expressed consents to the terms of the lease and by allowing RPMS and Foam to benefit at Heritage's expense. The court concluded a breach had occurred.

Defendants also argue reformation is improper because there is no evidence of mistake on the part of Heritage as to the below market rental rates set forth in the leases with RPMS and Foam. In addition, defendants maintain that there is no evidence of mistake by RPMS or [*21] Foam, or the individual defendants, as to the rental rates. Thus, defendants argue that plaintiff's reformation claim cannot be sustained on the theory of mutual mistake. It bears repeating that the rental agreements between RPMS, Foam and Heritage did not create a problem while plaintiff was an equal partner in all three companies. However, once plaintiff left RPMS and Foam, Heritage was unfairly subsidizing those tenants. Judge Francis's finding that the contracting parties initially established RPMS's rental rate "not based on any fair rental value analysis, but, rather, on the amount of rental income Heritage needed in any given month to remain solvent" supports the conclusion that Steiger and Perla subsequently breached their fiduciary duties to Heritage, when they favored their interests and adversely affected the interests of Heritage and plaintiff. The judge's award of damages for underpayment of rent and reformation of the leases to provide annual rent increases starting August 1, 2008 was an appropriate exercise of discretion in the interest of justice.

Reformation of a contract is an equitable remedy, traditionally available when there exists "'either mutual mistake or unilateral [*22] mistake by one party and fraud or unconscionable conduct by the other.'" *Dugan Constr. Co. v. N.J. Tpk. Auth., 398 N.J. Super. 229, 242-43, 941 A.2d 622 (App. Div.)* (quoting *St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, 88 N.J. 571, 577, 443 A.2d 1052 (1982))*, *certif. denied*, *196 N.J. 346, 953 A.2d 764 (2008)*. Mutual mistake exists only when "'both parties were laboring under the same misapprehension as to [a] particular, essential fact.'" *Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 608, 560 A.2d 655 (1989)* (emphasis omitted) (quoting *Beachcomber Coins, Inc. v. Boskett, 166 N.J. Super. 442, 446, 400 A.2d 78 (App. Div. 1979))*. Further, "New Jersey law also requires for reformation for mutual mistake that the minds of the parties have met and reached a prior existing agreement, which the written document fails to express." *Ibid.* (citing *St. Pius X, supra, 88 N.J. at 579*). We agree with defendants that none of those requirements for mutual mistake have been met.

On the other hand, where there is no mutual mistake, reformation of a contract may be granted when the facts of the case give rise to equitable fraud. *Id. at 609*. In *Jewish Center of Sussex County v. Whale*, the Court set forth the means of distinguishing equitable fraud [*23] from legal fraud as follows:

> A misrepresentation amounting to actual legal fraud consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment. The elements of scienter, that is, knowledge of the falsity and an intention to obtain an undue advantage therefrom, are not essential if plaintiff seeks to prove that a misrepresentation constituted only equitable fraud.
>
> *[86 N.J. 619, 624-25, 432 A.2d 521 (1981)* (citations omitted).]

"[A] party claiming equitable fraud must prove the required elements by clear and convincing evidence." *Daibo v. Kirsch, 316 N.J. Super. 580, 588, 720 A.2d 994 (App. Div. 1998)*.

In a situation where there are misrepresentations and reformation is appropriate, its purpose "is to restore the parties to the *status quo ante* and prevent the party who is responsible for the misrepresentations from gaining a benefit." *Bonnco, supra, 115 N.J. at 612* (citing *Enright v. Lubow, 202 N.J. Super. 58, 72, 493 A.2d 1288 (App. Div. 1985), certif. denied, 104 N.J. 376, 517 A.2d 386 (1986))*. Here, Judge Francis did not find that there were misrepresentations when the leases were initially [*24] signed. Thus, he did not conclude that reformation of the contracts was a proper remedy for the initial contracts period. Rather, the reformation applied to the leases as extended.

Plaintiff points out that the judge awarded monetary damages as a separate remedy from reformation of future rent payments. In his oral decision, the judge states he is ordering reformation of the leases regarding updates, and he does speak of damages. However, he also directs that the leases will be reformed, and the differences between the rent paid and fair market rent will be paid to Heritage and distributed to its partners. The final judgment clearly states that the leases are reformed to provide fair market rent and that plaintiff will be paid his share of the underpayment of rent.

While Judge Francis ordered reformation of the RPMS and Foam leases for the period January 1, 2004 through July 30, 2008, and for periods thereafter to show annual rate increases, this was a remedy that resulted in damages for the difference between fair market rent and what RPMS and Foam had been paying. Our review of his ruling convinces us that he ordered these damages because defendants breached their fiduciary duty owed [*25] to Heritage and violated the Uniform Partnership Act and the partnership agreement. Defendants merely question whether reformation of the leases is a proper remedy for a violation of fiduciary duty. We are satisfied it is a proper remedy.

The New Jersey Supreme Court has described the elements of a claim for breach of fiduciary duty as follows:

> The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship. *Restatement (Second) of Torts § 874 cmt. a* (1979) . . . . The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. *Restatement (Second) of Trusts §§ 170, 174* (1959). Accordingly, the fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship. *Restatement (Second) of Torts § 874* (1979).
>
> [*McKelvey v. Pierce, 173 N.J. 26, 57, 800 A.2d 840 (2002)* (quoting *F.G. v. MacDonell, 150 N.J. 550, 563-64, 696 A.2d 697 (1997))*.]

Finding a breach [*26] of fiduciary duty, Judge Francis crafted an equitable remedy to adjust the leases to comport with prevailing law. The leases, though they may not have been mistakes when signed, later, upon plaintiff's withdrawal from RPMS and Foam, offended established standards of fairness and propriety. Circumstances changed that heightened the duty owed by Steiger and Perla. While Judge Francis did not specifically characterize the extensions of the leases without consulting plaintiff as fraud or unconscionable conduct, they may be so characterized, which would establish a basis for reformation of contract.

In arguing that defendants clearly breached their duties to Heritage and committed unconscionable conduct in negotiating the 2003 lease renewals, plaintiff relies on *Enea v. Superior Court of Monterey County, 132 Cal. App. 4th 1559, 34 Cal. Rptr. 3d 513 (Cal. Ct. App. 2005)*. In Enea, the California appellate court held that the defendants in a partnership violated their fiduciary duties to another partner by renting the partnership's office building to themselves at below fair market value. *Id. at 514*. Before the trial court, the defendants moved for summary judgment, arguing that they owed no fiduciary duty to the [*27] plaintiff to pay fair market rent. *Id. at 515*. The trial court granted the motion, ruling that there was no evidence of any agreement to collect market or maximum rents, and that absent such an agreement, or some other evidence giving rise to a duty to pay fair market rent, there can be no fiduciary duty to do so. *Id. at 515-16*. The appellate court discussed California partnership law and concluded: "'Partnership is a fiduciary relationship, and partners may not take advantages for themselves at the expense of the partnership.'" *Id. at 517* (quoting *Jones v. Wells Fargo Bank, 112 Cal. App. 4th 1527, 5 Cal. Rptr. 3d 835, 845 (Cal. Ct. App. 2003))*.

The *Enea* court explained:

> Here the facts as assumed by the parties and the trial court plainly depict defendants taking advantages for themselves from partnership property *at the expense of the partnership*. The advantage consisted of occupying partnership property at below-market rates, i.e., less than they would be required to pay to an independent landlord for equivalent premises. The cost to the partnership was the additional rent thereby rendered unavailable for collection from an independent tenant willing to pay the property's value.
>
> [*Ibid.* (emphasis added).]

The [*28] appellate court determined that the defendants violated a California provision identical to *N.J.S.A. 42:1A-24(b)(1)*, that a partner's duty of loyalty to the partnership and the other partners is "[t]o account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct . . . of the partnership business or derived from a use by the partner of partnership property . . . ." *Enea, supra, 34 Cal. Rptr. 3d at 518*. Further, it noted that the defendants violated a provision identical to *N.J.S.A. 42:1A-21(g)*, "A partner shall use or possess partnership property only on behalf of the partnership." *Ibid.*

The court also rejected the defendants' reliance on the provision identical to *N.J.S.A. 42:1A-24(d)*, "A partner does not violate a duty or obligation under this act or under the partnership agreement merely because the partner's conduct furthers the partner's own interest." *Ibid.* The court explained:

> It does not by its terms authorize the kind of conduct at issue here, which did not "merely" further defendants' own interests but did so by depriving the partnership of valuable assets, i.e., the space which would otherwise have been rented at [*29] market rates. Here, the statute entitled defendants to lease partnership property *at the same rent another tenant would have paid*. It did not empower them to occupy partnership property for their own exclusive benefit at partnership expense, in effect converting partnership assets to their own and appropriating the value it would otherwise have realized as distributable profits.
>
> [*Ibid.*]

The court also appropriately rejected the defendants' argument that they had no duty to collect market rents in the absence of a contract expressly requiring them to do so, stating that "this turns partnership law on its head." *Ibid.* The court explained that fiduciary duties are imposed by law and their breach sounds in tort, specifically called the breach of fiduciary duty. *Id. at 519*. Thus, the *Enea* court reversed the lower court's grant of summary judgment, reinstating the plaintiff's claims. *Id. at 520*.

Though *Enea* does not determine whether reformation of a lease is a remedy for breach of fiduciary duty, its fact pattern is similar to the one here, and it is instructive that these claims do fall under the Uniform Partnership Act.

As an additional argument, defendants claim that plaintiff presented [*30] no evidence of market rates for the period after July 30, 2008, so the judge erred in reforming the lease agreements prospectively and including annual 3.6 percent increases. Defendants argue such prospective rent increases are barred by *Rule 4:9-4*, as plaintiff did not file supplemental pleadings after he filed his amended complaint around August 4, 2008.

Plaintiff's amended complaint asks for reformation of the leases to provide a fair market value rental. The requested relief includes the full period of the leases, without need for a supplemental pleading. Even though the judge did not state specifically why he determined there should be a 3.6 percent annual increase in the rent after 2008, we note that in Sockler's report, the expert stated "[t]he trend [of full service rentals] is increasing over the 20 years of comparable rentals analyzed. The average annual increase is 3.64 percent, which is reasonably consistent with the market analysis section of the appraisal and the analysis of the rent roll." We are satisfied that the identification of such a trend served as a sufficient basis for the court to impose that annual incremental increase.[4]

> 4 At another point in his report, in discussing [*31] the competitive positioning of the RPMS space, Sockler found a higher annual rental rate increase, as he states: "Rental rates from 1993 to 2008 have ranged from a low of about $17.50 to a high of $30.00 over the 16 year period indicating an average annual rental rate increase of approximately 4.5 percent per year."

Defendants also contend that plaintiff's proof of reformation damages was improper and insufficient. Again, we disagree, and we return to the established principles that guide our review. An appellate court will "'not disturb the factual findings and legal conclusions of the trial judge unless . . . convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484, 323 A.2d 495 (1974)* (quoting *Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155, 188 A.2d 43 (App. Div.), certif. denied, 40 N.J. 221, 191 A.2d 61 (1963))*. This is particularly true where the credibility of expert opinion testimony is involved, because a fact finder is never bound to accept the testimony of expert witnesses, even if it is unrebutted by any other evidence. [*32] *State v. M.J.K., 369 N.J. Super. 532, 549, 849 A.2d 1105 (App. Div. 2004), appeal dismissed, 187 N.J. 74, 899 A.2d 298 (2005)*. Thus, a judge is entitled to select the expert testimony he or she finds most compelling, and weigh and judge it as any other testimony. *Waterson v. Gen. Motors Corp., 111 N.J. 238, 248, 544 A.2d 357 (1988)*; *Mandel v. UBS/Paine Webber, Inc., 373 N.J. Super. 55, 71, 860 A.2d 945 (App. Div. 2004), certif. denied, 183 N.J. 213, 214, 871 A.2d 91 (2005)*.

Defendants assert that plaintiff's alleged proof of damages in his reformation claim consisted solely of the appraisal of the market rent report and testimony from Sockler. Defendants argue that the report completely ignored both the historic and ongoing interrelationships between Heritage and RPMS and assumed that their only relationship was that of landlord and tenant, which was no different from outside tenants.

Defendants complain that Sockler's opinions of market rent assumed a competitive and open market, with the rental amount representing the normal consideration for the property leased unaffected by special fees or concessions granted by anyone associated with the transaction. They argue the assumption that Heritage dealt with RPMS at arms' length was incorrect. They point [*33] out that none of the other tenants personally guaranteed Heritage's $1,300,000 mortgage loan or provided Heritage with hundreds of hours of free services, a free reception area, conference room and office space within its rental space, free office equipment, and telephone and internet services, as RPMS had been doing for Heritage since 1992. In short, defendants maintain there was nothing "normal" about the relationship between Heritage and RPMS. Recognizing those complaints or arguments, the trial judge was nevertheless justified in reaching the conclusion he reached.

Defense counsel questioned Sockler about hypothetical concessions provided by a tenant to a landlord, and he admitted that these concessions to Heritage had not been mentioned or measured in his report. Sockler acknowledged that an arms' length landlord would appropriately consider tenant expenses, such as an incoming tenant's fit-up expense, rent defaults or collection losses, vacancy and other risk factors in determining the amount of rent to demand. In spite of these challenges to the expert's perspective, Sockler's report and opinion offered an acceptable and adequate basis for Judge Francis to consider damages owed [*34] to plaintiff for the underpayment of market level rent to Heritage. The judge was free to accept or reject defendants' argument that the market level rent figures needed to be adjusted downward due to concessions that Heritage received from RPMS and Foam. Sockler's opinion was not lacking merely because it did not embrace concessions that RPMS gave to Heritage.

The record includes invoices that appear to include charges for services that defendants now claim were given for free. In addition, Heritage paid RPMS's invoices for services rendered, which included a thirty-five percent markup for hourly service. Judge Francis considered the rent paid, the quality of the building and the space rented by RPMS and Foam, and decided to reform the contracts based on fair market value for the space. We decline to disturb Judge Francis's exercise of discretion in that regard.

Defendants argue in the alternative, that RPMS and Foam have been paying market rents. We reject that argument. Defendants do not present any authority on this issue; they merely claim that their expert testimony should have been accepted by the judge and plaintiff's rejected. They assert that unlike Sockler's hypothetical report, [*35] Krinsky's report set forth a fair market value on the actual tenancies that exist between the landlord and tenants, appropriately taking into account all actual terms and conditions. Krinsky stated that approximately one third of RPMS's space was not directly usable for the purposes intended, possibly not even for storage. Relying on industry standards, Krinsky determined a specific dollar amount for the tenant fit-up expense that Heritage would have incurred for an arms' length tenant but did not incur with RPMS and Foam, and factored that expense savings into their rental rates.

This dispute centered on the amount of usable space in RPMS's area of the building. Defendants explain that by applying Sockler's July 30, 2008, market rent calculation of $22 per square foot to 7,565 usable square feet in the RPMS space, and factoring into the rental rates the financial impact of the tenant fit-up expense saved by Heritage in connection with the RPMS and Foam tenancies, Krinsky concluded that RPMS and Foam are paying market rents.

Judge Francis obviously considered these arguments and decided what square footage figure should be used to calculate fair market rents for RPMS's and Foam's space. [*36] He then relied on Sockler's calculations to set the rents and reform the contracts. The judge was free to rely on that testimony and reject recalculating rents paid based on inferior space and services allegedly given free to Heritage.

Defendants argue that plaintiff's claims of below fair market rent are barred by the statute of limitations. We disagree.

Plaintiff alleged in his complaint that Perla and Steiger breached their fiduciary duty to him because, as Heritage partners, they entered into leases that were below fair market. Defendants contend that such claims are governed by the six-year statute of limitations in *N.J.S.A. 2A:14-1*, and that the statute begins to run when the subject cause of action accrues, which was the day on which plaintiff's right to file the action first arose. *Holmin v. TRW, Inc., 330 N.J. Super. 30, 35, 748 A.2d 1141 (App. Div. 2000), aff'd o.b., 167 N.J. 205, 770 A.2d 283 (2001)*.

Judge Francis appropriately recognized that the discovery rule provides an equitable basis to "avoid the harsh effects" that may result from "a mechanical application of [the] statute of limitations." *Szczuvelek v. Harborside Healthcare, 182 N.J. 275, 281, 865 A.2d 636 (2005)*. Under the discovery rule, a cause of action [*37] does not accrue "until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he [or she] may have a basis for an actionable claim." *Ibid.* (quoting *Lopez v. Swyer, 62 N.J. 267, 273, 300 A.2d 563 (1973))*. Nevertheless,

> [i]t is not every belated discovery that will justify an application of the rule lifting the bar of the limitations statute. The interplay of the conflicting interests of the competing parties must be considered. The decision requires more than a simple factual determination; it should be made by a judge and by a judge conscious of the

> equitable nature of the issue before him [or her].
>
> [*Ibid.* (quoting *Lopez, supra, 62 N.J. at 275*).]

Defendants assert that plaintiff's cause of action first accrued either in December 1994 when the challenged RPMS and Foam leases were entered into, or at the latest, in January 1995 when the tenants remitted the rent payments to Heritage.

Defendants rely on *Axelrod v. CBS Publications, 185 N.J. Super. 359, 369, 448 A.2d 1023 (App. Div. 1982)*, where we applied a six-year statute of limitations to bar a plaintiff's claim on the grounds that during the limitations period, the plaintiff was in possession of sufficient [*38] knowledge that he should have discovered the existence of any fraud. Defendants also rely on *Roberts v. Magnetic Metals Co., 463 F. Supp. 934, 945-46 (D.N.J. 1978)* (citations and internal quotations omitted), *rev'd on other grounds, 611 F.2d 450 (3d Cir. 1979)*, where the federal court held that the limitations period begins to run when a plaintiff "should have been aware of at least the possibility of fraud" and that the running of the limitations period "does not await the leisurely discovery of the full details or full enormity of the fraudulent scheme."

Defendants assert that plaintiff had both actual and constructive knowledge of his claims of below fair market rent, and of the injuries alleged in his complaint. They claim plaintiff had actual notice of the rents in Steiger's May 12, 1994, letter and in Heritage's tax returns and form K-1, which he received annually thereafter. He had constructive knowledge of the factual basis for the claims in Heritage's business, accounting, and financial books, which were available for his inspection as a partner in Heritage or by his attorneys, accountants or other representatives. Plaintiff admitted at trial that he made no effort to inspect [*39] Heritage's books and accounts prior to November 2007, and merely browsed income tax returns and other information sent to him by defendants.

Judge Francis allowed plaintiff's claims to go forward based on the date of the 2003 lease renewals. Plaintiff filed his complaint within the six-year period of those lease renewals. The renewals are separate acts that changed the term of the leases. Defendants admitted that they never notified plaintiff about the extensions through 2008 and 2012, and it is this fact that is sufficient to overcome the statute of limitations.

We find that there is no merit in defendants' argument that plaintiff's claims of below fair market rent on the lease renewals are barred by the statute of limitations.

We also reject defendants' contention that plaintiff's claims of below fair market rent are barred by the equitable doctrines of estoppel, waiver and laches.

Courts define equitable estoppel as:

> The effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might otherwise have existed . . ., as against another person, who has in good faith relied upon such conduct, and has been led thereby [*40] to change his position for the worse. . . .
>
> [*Cnty. of Morris v. Fauver, 153 N.J. 80, 104, 707 A.2d 958 (1998)* (quoting *Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339, 403 A.2d 880 (1979))*.]

"[A] party asserting equitable estoppel may rely upon 'conduct, inaction, representation of the actor, misrepresentation, silence or omission.'" *Ridge Chevrolet-Oldsmobile, Inc. v. Scarano, 238 N.J. Super. 149, 154, 569 A.2d 296 (App. Div. 1990)* (quoting *Fairken Assocs. v. Hutchin, 223 N.J. Super. 274, 280, 538 A.2d 465 (Law Div. 1987))*. Equitable estoppel "requires a detrimental change in position based on reasonable reliance." *Ibid.* The party's "reliance must be reasonable and justifiable" with the burden of proof on the party asserting the estoppel. *Foley Mach. Co. v. Amland Contractors, Inc., 209 N.J. Super. 70, 75, 506 A.2d 1263 (App. Div. 1986)*.

Here, defendants contend that plaintiff lulled RPMS and Foam into inaction regarding the continuation of their tenancies at the Heritage building by failing to give them any indication that at some point in time between his retirement in late 1993 and the commencement of this action in November 2007 that he had decided that the rental rates were inadequate or unfair. Defendants maintain that RPMS [*41] and Foam were not able to take appropriate steps to protect their interests, such as vacating the building and finding more suitable and less expensive space, which would have avoided all of the below fair market rent claims.

Defendants did not show that they reasonably relied on plaintiff's conduct and suffered a consequent detrimental change in position. Instead, they renewed leases that were unfair to Heritage. Moreover, plaintiff did not receive notice of the renewals. Hence, his inaction, that is, his failure to contest the rates, cannot be the basis for defendants to succeed on this claim.

A waiver is "the intentional relinquishment of a known right." *Borough of Closter v. Abram Demaree Homestead, Inc., 365 N.J. Super. 338, 354, 839 A.2d 110 (App. Div.)* (citing *W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152-53, 141 A.2d 782 (1958)), certif. denied, 179 N.J. 372, 845 A.2d 1254 (2004)*. A waiver must be accomplished by a "clear unequivocal and decisive act," and "[t]he circumstances must show clearly that while the party knew of the right, he or she abandoned the right either by design or indifference." *Ibid.* (citations and internal quotations omitted).

Here, plaintiff did not waive his right to contest the [*42] lease renewals because defendants never notified him of these renewals. Nothing in the record supports the conclusion that plaintiff waived his right to contest the renewals.

"The policy behind [laches] is the discouragement of stale claims." *Gladden v. Bd. of Trs. of Pub. Employees' Ret. Sys., 171 N.J. Super. 363, 371, 409 A.2d 294 (App. Div. 1979)*. "The burden of proof is upon the defendant to show that his adversary prejudiced him by delaying the assertion of his claim without excuse or explanation." *Enfield v. FWL, Inc., 256 N.J. Super. 502, 520, 607 A.2d 685 (Ch. Div. 1991)* (citation omitted), *aff'd o.b., 256 N.J. Super. 466, 607 A.2d 666 (App. Div.), certif. denied, 130 N.J. 9, 611 A.2d 648 (1992)*. "Even if laches should not apply, plaintiffs must be 'reasonably prompt' in asserting their claim." *Id. at 520-21*.

Defendants rely on *Mancini v. Township of Teaneck, 179 N.J. 425, 436, 846 A.2d 596 (2004)*, where the Court explained that the doctrine of laches depends on the facts and circumstances of the particular case and its application rests within the sound discretion of the trial court. An appellate court reviews a laches determination for an abuse of discretion. *Ibid.*

Laches is "an equitable defense that may be interposed in the absence of the statute [*43] of limitations." *Lavin v. Bd. of Educ. of Hackensack, 90 N.J. 145, 151, 447 A.2d 516 (1982)*. It is applicable when "'there is unexplainable and inexcusable delay in enforcing a known right whereby prejudice has resulted to the other party because of such delay.'" *Cnty. of Morris, supra, 153 N.J. at 105* (quoting *Dorchester Manor v. Borough of New Milford, 287 N.J. Super. 163, 171, 670 A.2d 600 (Law Div. 1994), aff'd o.b., 287 N.J. Super. 114, 670 A.2d 576 (App. Div. 1996))*. Relevant factors thus include "[t]he length of delay, reasons for delay, and changing conditions of either or both parties during the delay . . . ." *Lavin, supra, 90 N.J. at 152* (citation omitted).

A defense that is based on laches is similar to one premised on the expiration of a limitations period, in that both concern delay on the part of the pursuing party. *Mancini, supra, 179 N.J. at 434*. "The time constraints of laches, unlike the periods prescribed by the statute of limitations, are not fixed but are characteristically flexible." *Lavin, supra, 90 N.J. at 151*. Moreover, case law suggests that a claim that is defeated by a limitations defense, would likewise not survive a laches defense. *See id. at 153 n.10* ("Where a legal and an equitable remedy exist [*44] for the same cause of action, equity will generally follow the limitations statute . . . . Where the equitable cause of action is analogous to the one at law, laches may depend solely on the comparable statute of limitations.").

Defendants argue that because plaintiff seeks both the legal remedy of monetary damages and the equitable relief of reformation of the leases, such claims are subject under *Lavin* to both limitations and laches defenses. Defendants claim prejudice by plaintiff's delay because RPMS and Foam remained as tenants and continued to pay rent while damages were mounting.

Here, Judge Francis determined that plaintiff was due damages based on the 2003 lease renewal dates and expense charges going back to 2003. Laches is inappropriate because defendants did not notify plaintiff of the lease renewals. Further, while plaintiff could have reviewed the invoices at an earlier date, there was no prejudice to defendants because there is no indication of lost evidence or witnesses who would have testified years earlier but were no longer available. Therefore, we find that there is no merit to defendants' argument that plaintiff's claims of below fair market rent are barred by the [*45] doctrines of estoppel, waiver and laches.

Defendants maintain that plaintiff should be denied retroactive relief on his claims of below market rent. They argue that they would suffer significant prejudice if monetary damages are sustained, particularly since the damages are mechanically extrapolated back to January 1, 2004. Defendants rely on *Lavin, supra, 90 N.J. at 148-55*, without citing to any specific portion of the opinion, and state that the Court considered how a damage award should be impacted by an unreasonable delay in asserting the claim. This argument merely addresses laches, which we have already discussed in the previous issue.

Defendants claim that plaintiff's belated assertion resulted in an enormous retroactive rent increase, for which RPMS and Foam have not budgeted and not agreed to pay. Judge Francis considered the fiduciary duty that Steiger and Perla owed plaintiff and determined what fair market value should be for the rental periods at issue. While RPMS and Foam owed money to Heritage, the damages are not an unfair retroactive rent increase, but instead a calculation of money due Heritage for fair market rental of the space.

Similar to the equitable doctrines already [*46] discussed, the doctrine of unclean hands is an affirmative defense which may be applied at the judge's discretion. *Kingsdorf v. Kingsdorf, 351 N.J. Super. 144, 156, 797 A.2d 206 (App. Div. 2002)*. Its purpose is to effectuate the principle that relief should not be granted to a wrongdoer. *Ibid.*

While equity avoids rewarding a party with unclean hands, that doctrine is not invoked upon any particular finding, but rather when the totality of circumstances indicates that the claimant stands to reap a reward despite its unjust conduct. *Pellitteri v. Pellitteri, 266 N.J. Super. 56, 65, 628 A.2d 784 (App. Div. 1993)*. This means that the claimant "produced the situation and created the attendant hardship." *Heritage Bank, N.A. v. Ruh, 191 N.J. Super. 53, 72, 465 A.2d 547 (Ch. Div. 1983)*.

Here, defendants assert that plaintiff abandoned Heritage in late 1993 by withdrawing from an active role in the partnership. Defendants contend that plaintiff did not initiate any conversation with Perla and Steiger, and he did not respond to their communications. However, Judge Francis found that Steiger and Perla never told plaintiff about the lease renewals, so his inaction does not show that he produced a situation that created a hardship. Instead, [*47] the totality of the circumstances show that Steiger's and Perla's actions favored the entities in which they, but not plaintiff, had an interest. That resulted in the unfairness to Heritage. The judge did not abuse his discretion by failing to invoke the doctrine of unclean hands, and we have no cause to do differently.

On his cross-appeal, plaintiff asserts that defendants were not entitled to partial summary judgment based on laches or the statute of limitations. This argument relates to the period before November 13, 2001, where Judge Francis dismissed the claims based on laches. Plaintiff has included the November 7, 2008, order of partial summary judgment, but has not referred to a transcript from that date, or other document in the record setting forth the reasoning for the judge's decision.

It is not possible to thoroughly consider this issue because the record on appeal does not include Judge Francis's reasoning for granting partial summary judgment. *Rule 2:5-3(b)* requires that an appellant, with certain exceptions, file transcripts with this court of "the entire proceedings in the court . . . from which the appeal is taken." Plaintiff has also not complied with *Rule 2:5-3(a)*, [*48] which requires "if a verbatim record was made of the proceedings before the court . . . from which the appeal is taken, the appellant shall, no later than the time of the filing and service of the notice of appeal, serve a request for preparation of an original and copy of the transcript . . . ." We, therefore, decline to address this issue. *See Cipala v. Lincoln Tech. Inst., 179 N.J. 45, 55, 843 A.2d 1069 (2004)* (upholding the Appellate Division's refusal to address the plaintiff's claim because she failed to submit a final order or a trial transcript). *See also* Pressler and Verniero, *Current N.J. Court Rules*, comment 2 on *R. 2:5-3(b)* (2012) ("Failure to provide the complete transcript may result in dismissal of the appeal . . . .").

Plaintiff asserts that he was entitled to bring claims occurring outside the statute of limitations under the discovery rule. Plaintiff is correct that equitable principles may be applied to extend statutory periods of limitations. *See Price v. N.J. Mfrs. Ins. Co., 182 N.J. 519, 524-25, 867 A.2d 1181 (2005)* (flexible applications of procedural statutes of limitations may be based on equitable principles, such as the discovery rule or estoppel).

Plaintiff argues that he is entitled to [*49] equitable tolling because defendants failed to inform him about the below market leases and the RPMS expense fees. It was within Judge Francis's discretion whether to apply an exception to the statute of limitations in this case. "The doctrine of equitable tolling has traditionally been applied where . . . the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Price v. N.J. Mfrs. Ins. Co., 368 N.J. Super. 356, 362, 846 A.2d 617 (App. Div. 2004), aff'd, 182 N.J. 519, 867 A.2d 1181 (2005)*. This is not the situation here.

Instead, Steiger, Perla and plaintiff initially decided to create Heritage without employees and to rely on RPMS and Foam to cover Heritage's expenses. This is not a situation where the statute of limitations should have been tolled.

On his cross-appeal, plaintiff also maintains that defendants' management fees should have been further reduced. We disagree.

Plaintiff explains that RPMS's fees consisted of three charges: (1) administration fees, (2) performance incentives and (3) hourly charges. Defendants respond that the judge was only concerned with the first two categories, and the third category consisted of fees for non-management [*50] services. Defendants explain that this third grouping included hourly invoices for professional services performed by Steiger, as well as typing, design work, preparation of tenant layout drawings, office cleaning, building repairs and snow removal performed by various individuals.

Plaintiff states that the total of these fees was well above a reasonable level of management fees, however, the judge's ruling only reduced the administration fees and the performance incentives and failed to reduce the hourly charges that RPMS invoiced to Heritage.

After Judge Francis rendered his oral decision, defense counsel questioned the judge and he stated that he was only concerned with the reasonableness of RPMS's management fees, which would include administration fees and performance incentives. The judge stated that he was concerned with these management fees if they exceeded six percent of gross rents.

Judge Francis stated that the "other fees," representing hourly professional services, were reasonable and plaintiff was aware of them prior to his retirement from RPMS in late 1993. Our review of the record shows that plaintiff never presented any evidence to establish the unreasonableness of this [*51] third category of fees. Plaintiff's experts, a certified public accountant and an appraiser, found nothing unusual, extraordinary, or excessive in Heritage's operating expenses as billed by RPMS. Had plaintiff sought to recover damages for claims of overbilling, he would have had to present proof that the invoices were either for services that were unnecessary or that the hourly rates were unjustified. Plaintiff was aware from the start that Heritage had no employees and that RPMS was billing Heritage for these services.

Further, defendants correctly state that it was plaintiff's counsel who submitted the proposed form of judgment that did not contain any finding of unreasonableness of RPMS's hourly professional services fees, which confirms plaintiff's understanding of the judge's decision that these fees were not unreasonable. We defer to the trial judge's determination. *Rova Farms, supra, 65 N.J. at 483-84*.

Affirmed.

OBERWEIS DAIRY, INC., Plaintiff, v. DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, INC., Defendant.

Case No. 08 C 4345

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2009 U.S. Dist. LEXIS 18514

March 11, 2009, Decided
March 11, 2009, Filed

PRIOR HISTORY: *Oberweis Dairy, Inc. v. Democratic Cong. Campaign Comm., Inc., 2008 U.S. Dist. LEXIS 84371 (N.D. Ill., Oct. 21, 2008)*

COUNSEL: [*1] For Oberweis Dairy, Inc., Plaintiff: Jody Knight, Thomas George DiCianni, Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., Chicago, IL.

For Democratic Congressional Campaign Committee, Inc., Defendant: C. Vincent Maloney, LEAD ATTORNEY, Perkins Coie LLP, Chicago, IL; Amanda Elizabeth Adrian, Perkins Coie LLC, Chicago, IL.

JUDGES: Hon. Harry D. Leinenweber, United States District Judge.

OPINION BY: Harry D. Leinenweber

OPINION

MEMORANDUM OPINION AND ORDER

Before the Court is the Defendant's Motion to Dismiss Plaintiff's Complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the following reasons, Defendant's Motion is Granted.

I. BACKGROUND

Oberweis Dairy, Inc. (hereinafter, the "Plaintiff"), an Illinois corporation, filed suit against the Democratic Congressional Campaign Committee, Inc. (hereinafter, the "Defendant"), in the Circuit Court of Kane County, Illinois, for false light invasion of privacy over a statement Defendant allegedly transmitted, through political advertisements, that "illegal immigrants were found working at plaintiff's dairy stores." Plaintiff maintains that this statement was intended to, and did, falsely communicate that Plaintiff hired and retained illegal immigrants as [*2] employees. Before the case was removed to this Court on July 31, 2008, Defendant moved the Circuit Court to dismiss the Complaint on three grounds: (1) a corporation has no standing to sue for false light invasion of privacy, (2) the Complaint fails to identify any false statement made by Defendant, and (3) Plaintiff failed to plead requisite special damages. Because Defendant's first challenge to the Complaint is dispositive, the Court need not address Defendant's remaining challenges.

II. ANALYSIS

On a *Rule 12(b)(6)* motion to dismiss, the Court accepts all well-pleaded allegations in the Complaint as true, and views the allegations in the light most favorable to the plaintiff, drawing all reasonable inferences in the plaintiff's favor. *Bontkowski v. First Nat. Bank of Cicero, 998 F.2d 459, 461 (7th Cir., 1993)*. "A complaint must always . . . allege 'enough facts to state a claim to relief that is plausible on its face.'" *Limestone Development Corp. v. Village of Lemont, Ill., 520 F.3d 797, 803 (7th Cir., 2008)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007))*. To avoid dismissal, the "allegations must plausibly suggest that the plaintiff has a right to relief, raising [*3] that possibility above a 'speculative level.'" *E.E.O.C. v. Concentra Health Services, Inc., 496 F.3d 773, 776 (7th Cir., 2007)* (citing *Bell Atlantic, 127 S.Ct. at 1965*).

The Defendant moves to dismiss Plaintiff's false light claim on the basis that corporations lack standing to sue for false light and the Court agrees. The parties acknowledge in their briefs that Illinois law controls Plaintiff's claim and, although Defendant has not pointed to any Illinois case that expressly holds that corporations lack standing to sue for false light, neither has Plaintiff cited *any* cases holding that corporations do have standing to sue for false light.

The single case Plaintiff cites in support of its position, *Pullman Standard Car Mfg. Co. v. Local Union No. 2928 of United Steelworkers of America, 152 F.2d 493 (7th Cir., 1945)*, is a libel case recognizing that a corporation's business reputation is protected by law. But the tort of false light invasion of privacy does not protect a party's reputation; it protects an individual's personal privacy interest to be free from false publicity. *See Restatement (Second) of Torts § 652E cmt. b* (1977). Corporations do not have such a privacy interest. *See* [*4] *American States Ins. Co. v. Capital Associates of Jackson County, Inc., 392 F.3d 939 (7th Cir., 2004)*; *Restatement (Second) of Torts § 652I cmt. c* (1977).

The Illinois Supreme Court relies heavily on the Restatement for the definition and elements of a false light claim. *See Eberhardt v. Morgan Stanley Dean Witter Trust FSB, No. 00-3303, 2001 U.S. Dist. LEXIS 1090, 2001 WL 111024 (N.D.Ill., Feb. 2, 2001)*; *Lovgren v. Citizens First Nat. Bank of Princeton, 126 Ill. 2d 411, 534 N.E.2d 987, 990, 128 Ill. Dec. 542 (Ill., 1989)* (citing to *Restatement (Second) of Torts § 652E cmt. c* (1977)). The *Restatement* has long recognized that corporations do not have standing to sue for false light. *Restatement (Second) of Torts § 652I* and *cmt. c* (1977) ("A corporation . . . has no personal right of privacy. It has therefore no cause of action for any of the four forms of invasion covered by *§§ 652B to 652E*."). Several jurisdictions beyond Illinois also rely on the *Restatement's* privacy tort formulations and hold that corporations lack standing to sue for such torts. *See Felsher v. University of Evansville, 755 N.E.2d 589 (Ind., 2001)*; *Southern Air Transport, Inc. v. American Broadcasting Companies, Inc., 670 F.Supp. 38 (D.D.C., 1987)*; *Fibreboard Corp. v. Hartford Accident and Indemnity Co., 16 Cal. App. 4th 492, 20 Cal.Rptr.2d 376 (Cal.App. 1 Dist., 1993)*. [*5] Even in jurisdictions not relying on the *Restatement*, courts have found that corporations lack standing to sue for privacy torts, including false light. *See, e.g., Seidl v. Greentree Mortg. Co., 30 F.Supp.2d 1292 (D.Colo., 1998)*; *CNA Financial Corp. v. Local 743 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 515 F.Supp. 942 (N.D.Ill., 1981)* (citing California, New York, Pennsylvania and Kentucky law).

The Court finds that, because Illinois has adopted the *Restatement's* definition of a false light claim which excludes corporations from standing to assert such a claim, considerable authority from other jurisdictions has declined to recognize a corporation's false light claim, and Plaintiff has cited no authority supporting such a claim, the Supreme Court of Illinois would hold that Plaintiff has failed to state a claim under Illinois law.

CONCLUSION

For the reasons stated herein, the Defendant's Motion to Dismiss is Granted.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber

Harry D. Leinenweber, Judge

United States District Court

DATE: 3/11/2009

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AMY E. VASQUEZ, Plaintiff-Appellant, v. DAWN ADDIEGO, AUBREY FENTON, SEAN KENNEDY, MICHAEL WARNER and CHARLES LAMBIASE, Defendants-Respondents.

DOCKET NO. A-2994-08T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2010 N.J. Super. Unpub. LEXIS 890

December 15, 2009, Submitted
April 23, 2010, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Certification denied by *Vasquez v. Addiego, 203 N.J. 94, 999 A.2d 463, 2010 N.J. LEXIS 624 (N.J., July 8, 2010)*

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-7102-06.

COUNSEL: William H. Buckman, attorney for appellant.

Capehart, Scatchard, P.A., attorneys for respondents (Anthony T. Drollas, Jr., on the brief).

JUDGES: Before Judges Skillman and Simonelli.

OPINION

PER CURIAM

Plaintiff Amy E. Vasquez appeals from the January 9, 2009 Law Division order granting summary judgment to defendants and dismissing her complaint with prejudice. We affirm.

The following facts are derived from evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in a light most favorable to plaintiff. *Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995)*. Plaintiff was a Democratic candidate for Burlington County Freeholder in 2005. Defendants Dawn Addiego and Aubrey Fenton were plaintiff's opponents, and defendants Sean Kennedy, Michael Warner and Charles Lambiase were officials of the Burlington County Republican Committee.

Plaintiff claims that defendants made false and defamatory statements in television and print campaign advertisements that she did not pay property taxes in Burlington County and had a warrant issued against her for failing [*2] to pay New York State income taxes. Some of the print advertisements included a copy of a tax warrant docketed by the New York State Department of Taxation and Finance against plaintiff on February 25, 1998, for failure to pay State income taxes.

On February 8, 1999, the Department of Taxation issued a Notice to Vacate Tax Warrant and Release Lien (the Notice), which indicated that "due to an inadvertence, the warrant was prematurely issued and filed." The Notice vacated and canceled the warrant, which was attached to the Notice, released any lien against plaintiff's real or personal property, and directed the Clerk of New York to "mark the official records accordingly."

On November 4, 2005, plaintiff filed a pro se complaint [1] against Addiego, Fenton, Kennedy and "John Does," alleging that they defamed her by publishing and distributing the false statements, and by negligently, carelessly and recklessly failing to ascertain that the warrant "was a clerical error and without factual support." Plaintiff also alleged that defendants knowingly or recklessly disregarded the truth about the warrant having been vacated.

1 Plaintiff is an attorney-at-law of the State of New Jersey.

Defendants [*3] filed a *Rule 4:6-2(e)* motion to dismiss the complaint for failure to state a claim upon which relief can be granted. On February 17, 2006, Judge Colalillo granted the motion and dismissed the complaint without prejudice, finding that plaintiff, a public figure, made "bare conclusary assertions . . . that defendants knew or reasonably should have known that the statement was false with no other factual reference to lend support to the contention[,]" and failed to satisfy the "actual malice" standard to sustain a defamation claim.

Plaintiff filed a second pro se complaint on April 4, 2006, adding Warner and Lambiase as defendants, asserting more detailed allegations against each defendant, and raising a new allegation that defendants altered or negligently, carelessly and recklessly authorized the alteration of the Notice in order to falsely represent her to the public as a tax cheat who had a valid warrant issued against her for failing to pay State income taxes.

Defendants filed a *Rule 4:6-2(e)* motion to dismiss the second complaint. June 23, 2006, Judge Little granted the motion and dismissed the complaint without prejudice, finding that plaintiff failed to assert sufficient allegations [*4] of actual malice.

Plaintiff filed a third pro se complaint on October 19, 2006, asserting allegations similar to those in the second complaint and raising a new allegation that defendants received and reviewed the Notice with the attached warrant, and thus understood that plaintiff was not delinquent in paying taxes but nonetheless "published the erroneous warrant[.]" Plaintiff also alleged that defendants negligently, carelessly and recklessly disregarded that the Notice indicated that the warrant was "an error and without factual support."

Defendants filed a *Rule 4:6-2(e)* motion to dismiss the third complaint. Judge Kassel denied the motion, finding that because the Notice indicated that the warrant was attached, plaintiff had established a sufficient factual basis supporting her claim that defendants knew or recklessly disregarded the fact that the warrant had been vacated.

Thereafter, plaintiff, now represented by an attorney, sought to depose two of the defendants but they did not appear, prompting her to file a motion to suppress their answer for failure to provide discovery. Defendants filed a cross-motion for summary judgment or, alternatively, for a protective order limiting [*5] the scope of discovery. In support of the summary judgment motion, defendants submitted certifications stating that they never reviewed the advertisements or the Notice and did not publish the warrant with knowledge that it had been issued in error.

Judge Kassel denied the summary judgment motion without prejudice, finding that an issue of fact existed as to whether the Notice and warrant were attached to one another in 2005, thus providing support for the allegation that defendants acted with reckless indifference in publishing the advertisements. As to the remaining motions, the judge was initially inclined to permit defendants' depositions on this issue but decided to limit discovery "from the appropriate officials of the State of New York" as to whether the Notice and warrant were attached in 2005. The judge then concluded as follows:

> Let's see where we go after this, and then if need be, either I'll in essence handle a motion for reconsideration on the summary judgment motion or a motion to expand discovery to some of the more broader areas. All right, but that's what it is, discovery shall be limited without prejudice to either side's request to expand discovery, to the issue as [*6] to whether [the Notice] was attached to [the warrant].

Plaintiff's counsel expressed his agreement with the judge's ruling and found it appropriate. Without objection, the judge entered an order on January 30, 2008, reflecting his oral decision.

Plaintiff subsequently sought to depose defendants but they refused to appear. On April 18, 2008, plaintiff filed a motion to amend the January 30, 2008 order and to extend discovery. Judge Kassel entered an order on April 9, 2008, denying the motion to amend but extending discovery to August 9, 2008 to provide plaintiff additional time to obtain discovery from the New York officials.

On August 4, 2008, plaintiff filed a motion to expand and extend discovery. She claimed that on July 23, 2008, she went to the county clerk's office in New York and requested a copy of the Notice, and that an individual named Michael Markowitz (Markowitz) [2] informed her that the original and any copies of the warrant and Notice were destroyed in a flood. Plaintiff also claimed that Markowitz advised her that the Notice "would have been the only document available at the County Clerk's office." She submitted to the court a copy of a computer printout with a handwritten [*7] notation, purportedly written and signed by Markowitz, stating: "To Whom It May Concern, After thorough search, vacate order dated 02/08/99 is no longer in county clerk office (only document that would have been available)." [3] Judge Kassel entered an order on August 29, 2008, denying the motion.

2 Markowitz's official capacity, if any, is unknown.

3 We note that the computer printout and handwritten note are dated January 23, 2008, thus indicating that plaintiff may have had this document in her possession before July 23, 2008.

Plaintiff did not proceed with the permitted discovery. As a result, on October 3, 2008, defendants filed a summary judgment motion. At oral argument, Judge Fox asked plaintiff's counsel if plaintiff possessed any evidence that defendants knew about the Notice. Counsel responded, "Yeah. I mean, there's one procedural problem with the case Judge, and that is . . . in actuality [Judge Kassel] had originally allowed for depositions of the parties on this issue of knowledge and then the [January 30, 2008] order mistakenly reflected that we could only depose and question New York officials." Counsel conceded, however, that Judge Kassel denied plaintiff's motions to reconsider [*8] the January 30, 2008 order. The judge, therefore, refused to reconsider the discovery issue.

Following oral argument, Judge Fox found as follows:

> [O]ther than the certification of the plaintiff and the [handwritten note allegedly signed by Markowitz], plaintiff attaches no affidavits, no certification, and obviously no deposition transcripts since plaintiff chose not to depose any New York officials, as she was permitted to do.
>
> . . . [T]he notation and signature of the purported clerk in New York is not notarized and, in fact, does not even identify his alleged position in the clerk's office, or that he has any personal knowledge of his purported statement. In short, . . . plaintiff has put forth no proofs of any kind that, in fact, the defendants had knowledge of the vacating of the warrant. . . .
>
> . . . .
>
> . . . [T]he plaintiff has failed to set forth any evidence of actual malice, any evidence to contradict the sworn certification of the defendants, which would indicate that the defendants saw or were aware of the notice to vacate the warrant at any time prior to the publishing of the campaign advertising in question.

The judge entered an order on January 9, 2009, granting defendants' motion, [*9] finding that plaintiff's proofs fell "woefully short of creating an issue of fact" sufficient to defeat summary judgment. This appeal followed.

On appeal, plaintiff contends that Judge Fox erred in granting summary judgment because there exists a genuine issue of material fact as to whether defendants acted with actual malice regarding all of her defamation claims, not just those relating to the Notice and warrant. We disagree.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. *Chance v. McCann, 405 N.J. Super. 547, 563, 966 A.2d 29 (App. Div. 2009)*. Thus, we consider, as the trial judge did, "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A*

., *189 N.J. 436, 445-46, 916 A.2d 440 (2007)* (quoting *Brill, supra, 142 N.J. at 536*).

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the 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 [*10] judgment or order as a matter of law." *R. 4:46-2(c)*. If there is no genuine issue of material fact, we must then decide "whether the trial court correctly interpreted the law." *Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494, 935 A.2d 769 (App. Div. 2007), certif. denied, 195 N.J. 419, 949 A.2d 847 (2008)*.

Summary judgment practice is particularly well-suited in defamation actions involving public figures. *DeAngelis v. Hill, 180 N.J. 1, 12, 847 A.2d 1261 (2004)*. Plaintiff does not dispute that she is a public figure. False statements about public figures are not actionable unless published with "actual malice." *Lynch v. New Jersey Educ. Ass'n., 161 N.J. 152, 165, 735 A.2d 1129 (1999)* (citing *New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964))*.

> To satisfy the actual-malice standard, a plaintiff must show by clear and convincing evidence that the publisher either knew that the statement was false or published with reckless disregard for the truth. To prove publication with reckless disregard for the truth, a plaintiff must show that the publisher made the statement with a high degree of awareness of [its] probable falsity or with serious doubts as to the truth of the publication. To be actionable, the [*11] recklessness in publishing material of obviously doubtful veracity must approach the level of publishing a knowing, calculated falsehood. Negligent publishing does not satisfy the actual-malice test.
>
> [*Ibid*. (internal quotations and citations omitted).]

Despite her more than three-year effort to pursue her defamation claims against defendants, plaintiff undertook no discovery to support those claims. There is no evidence, let alone clear and convincing evidence, that defendants knew that the advertisements were false, or published them with reckless disregard for the truth, or that they made the statements with a high degree of awareness of their probable falsity or with serious doubts about their truth. Accordingly, summary judgment was properly granted.

Plaintiff's remaining contention that Judge Kassel erred by prohibiting her from deposing defendants, and by denying her motion to amend the January 30, 2008 order to expand discovery lacks sufficient merit to warrant further discussion. *R. 2:11-3(e)(1)(E)*.

Affirmed.