Ryan T. Warden (I.D. No. 044322006)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
Telephone: (973) 656-1600
Facsimile: (973) 656-1611
Email: Ryan.warden@ogletree.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANIBAL MEJIAS, DENNIS MINTER, JERRY FULLER, and JOSE PENA, on behalf of themselves and those similarly situated, Plaintiffs, v. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendants.	CIVIL ACTION NO. _____ **NOTICE OF REMOVAL UNDER THE CLASS ACTION FAIRNESS ACT**

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

PLEASE TAKE NOTICE THAT, pursuant to the Class Action Fairness Act ("CAFA"), Defendant Goya Foods, Inc. ("GFI") removes to the United States District Court for the District of New Jersey the above-captioned action originally filed as Docket No. MER-L-001401-19 in the Superior Court of New Jersey, Law Division, Mercer County (the "State-Court Action"). Removal is proper on the following grounds:

I. BACKGROUND

A. Plaintiff Anibal Mejias filed the State-Court action.

1. On July 18, 2019, Mejias filed the State-Court Action. According to the complaint, a copy of which is attached as Exhibit A, Mejias resides at 4408 North 6th Street, Philadelphia, Pennsylvania and formerly contracted with GFI to deliver its food products in South Carolina. (Compl. ¶ 4.)

2. Mejias named GFI and several individuals as Defendants. GFI manufactures and sells food products and has its principal place of business at 350 County Road, Jersey City, New Jersey. (*Id.* ¶¶ 8, 9.) The individual Defendants—for which Mejias did not provide any residency-related information—are GFI's officers. (*Id.* ¶¶ 11-19.)

3. The thrust of the original complaint was that Defendants misclassified as independent contractors Mejias and other similarly-situated delivery drivers. (*Id.* ¶ 2.) As a result of this purported misclassification, Mejias asserted the following causes of action: (i) violation of the New Jersey Wage Payment Law ("NJWPL"), N.J.S.A. 34:11-4.1, *et seq.*, for making improper deductions from drivers' wages (*e.g.*, money for truck insurance) (*id.* ¶¶ 74-78); (ii) breach of contract because such deductions are against New Jersey public policy (*id.* ¶¶ 79-82); (iii) violation of New Jersey's RICO Act ("NJRICO"), N.J.S.A. 2C:41-1, *et seq.* (*id.* ¶¶ 83-92); and (iv) unjust enrichment based on the money that Defendants allegedly withheld for returned or damaged goods that were previously delivered (*id.* ¶¶ 93-96).

4. Mejias alleged his claims on behalf of the following putative nationwide class going back six years:

> All truck drivers of Defendants who were designated as independent contractors or owner operators and from whom Defendants unlawfully withheld wages . . . by deducting costs and fees associates with drivers' leasing vehicles, for fuel and maintenance costs, insurance, trailer rentals and other equipment, administrative

> fees, returned and damages products, and other deductions not allowed by governing law.

(*Id.* ¶ 33.)

B. Defendants moved for partial dismissal and change of venue before answering.

5. On August 22, 2019, Defendants moved to (i) dismiss all claims against the individual Defendants; (ii) dismiss the NJRICO claim; (iii) dismiss the unjust enrichment claim; and (iv) transfer venue to Hudson County, New Jersey to adjudicate the remaining NJWPL and breach of contract claims against GFI. A copy of Defendants' motion is attached as Exhibit B.

6. Plaintiffs filed their opposition to Defendants' motion on September 5 and Defendants submitted their reply four days later. Copies of the opposition and reply briefs are attached as Exhibits C and D.

7. On October 7, the court denied Defendants' motion to transfer venue. On October 18, the court dismissed the unjust enrichment claim, but otherwise denied Defendants' motion to dismiss. Copies of the Court's orders are attached as Exhibits E and F.

8. On October 28, Defendants filed their answer, a copy of which is attached as Exhibit G.

C. Plaintiffs filed an amended complaint.

9. On April 8, 2020, Mejias filed a motion to amend. The court granted Mejias' request on May 8. Three days later, Plaintiffs filed the amended complaint. Copies of Mejias' motion, the court's order, and the amended complaint are attached as Exhibits H, I, and J.

10. The amended complaint again alleges that Mejias resides at 4408 North 6th Street, Philadelphia, Pennsylvania and formerly contracted with GFI to deliver its food products in South Carolina. (Am. Compl. ¶ 4.)

11. In addition to Mejias, the amended complaint includes three new named Plaintiffs: Dennis Minter, who resides in New Jersey and formerly contracted with GFI to deliver its food products in that state; Jerry Fuller, who resides in New Jersey and formerly contracted with GFI to deliver its food products in that state, Pennsylvania, Maryland, and Delaware; and Jose Pena, who resides in New Jersey and formerly contracted with GFI to deliver its food products in that state, Maryland, and Delaware. (*Id.* ¶¶ 4, 6, 8, 9.)

12. Plaintiffs name the same ten Defendants. (*Id.* ¶¶ 13, 15-23.) And, as in the original complaint, they allege that GFI has its principal place of business at 350 County Road, Jersey City, New Jersey. (*Id.* ¶ 13.)

13. The amended complaint relies on the same underlying independent-contractor misclassification theory as the original complaint, but it includes an additional claim for overtime under New Jersey law and alternative claims for improper wage deductions under the laws of the states of Pennsylvania, Maryland, and South Carolina. (*Id.* ¶¶ 1, 2.)

14. Plaintiffs assert two putative nationwide classes: (i) a wage deduction class like that alleged in the original complaint, which includes independent-contractor drivers across the U.S. between July 18, 2013, and the present; and (ii) an overtime class that includes independent-contractor drivers across the U.S. who were not paid overtime between July 18, 2017, and the present. (*Id.* ¶¶ 33, 34.)

15. In the alternative, Plaintiffs allege several putative state-specific classes:

- a New Jersey wage deduction class that includes independent-contractor drivers who performed work in that state between July 18, 2013, and the present;
- a New Jersey overtime class that includes independent-contractor drivers who performed work in that state between July 18, 2017, and the present;
- a Pennsylvania wage deduction class that includes independent-contractor drivers who performed work in that state between July 18, 2016, and the present;

- a Maryland wage deduction class that includes independent-contractor drivers who performed work in that state between July 18, 2016, and the present; and

- a South Carolina wage deduction class that includes independent-contractor drivers who performed work in that state between July 18, 2016, and the present.

(*Id.* ¶¶ 35-39.)

16. In addition to bringing the same claims for violation of the NJWPL (on behalf of the nationwide and the alternate New Jersey wage deduction classes), breach of contract (on behalf of all classes), and violation of NJRICO (on behalf of the nationwide wage deduction class) (*id.* ¶¶ 105-09, 120-32), Plaintiffs allege the following causes of action:

- violation of the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, *et seq.*, for failure to pay overtime (on behalf of the nationwide and the alternate New Jersey overtime classes) (*id.* ¶¶ 110-19);

- violation of the Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1, *et seq.*, for making improper deductions from drivers' wages (on behalf of the alternate Pennsylvania wage deduction class) (*id.* ¶¶ 133-42);

- violation of the Maryland Wage Payment and Collection Law, Md. Code Ann., Lab. & Empl. § 3-501, *et seq.*, for making improper deductions from drivers' wages (on behalf of the alternate Maryland wage deduction class) (*id.* ¶¶ 143-50); and

- violation of the South Carolina Payment of Wages Act, S.C. Code. § 41-10-10, *et seq.*, for making improper deductions from drivers' wages (on behalf of the alternate South Carolina wage deduction class) (*id.* ¶¶ 151-61).

D. The parties agreed to a stay pending mediation.

17. On March 18, 2020, the court issued an order referring the case to mediation. On May 15, the parties filed a stipulation and proposed consent order to stay the case pending mediation. The court entered the consent order on May 18. Copies of the referral order, stipulation, and consent order are attached as Exhibits K, L, and M.[1]

[1] Affidavits of service from the State-Court Action are attached as Exhibit N. Motions for admission *pro hac vice* and associated orders are attached as Exhibit O. A copy of the docket is attached as Exhibit P.

18. In preparation for mediation, the parties each submitted a mediation statement setting forth their respective positions on liability and damages. Plaintiffs submitted their statement on August 13. GFI submitted its statement on August 14. (*See* Declaration of Margaret Santen ("Santen Decl.") ¶¶ 4-6.)

19. On August 18, the parties attended mediation, but did not settle their dispute. (*Id.* ¶ 3.)

20. On September 3, the stay was lifted.

II. JURISDICTION UNDER CAFA

21. This Court has original jurisdiction over this putative class action under CAFA, codified in pertinent part at 28 U.S.C. §§ 1332(d) and 1453(b), because (1) the number of members of all proposed classes in the aggregate is at least 100, (2) the citizenship of at least one proposed class member is diverse from that of at least one Defendant, and (3) the amount in controversy exceeds $5 million, exclusive of interest and costs.

A. The putative classes consist of at least 100 members.

22. 28 U.S.C. § 1332(d)(5)(B) requires that the number of members of all proposed classes in the aggregate be at least 100.

23. Plaintiffs allege that the proposed "Nationwide Wage Deduction Class" consists of "[a]ll truck drivers of Defendants who were designated as independent contractors or owner operators and from whom Defendants unlawfully withheld wages . . . between July 18, 2013, and the present." (Am. Compl. ¶ 33.)

24. As reflected in the following table, which shows the location of the GFI warehouses that the putative class members use(d), Defendants' counsel has reviewed relevant corporate

records and determined that the putative "Nationwide Wage Deduction Class," as defined in the amended complaint, has 276 members[2]:

State of Warehouse	Number of Putative Class Members
Illinois	12
Massachusetts	44
New York	13
Texas	58
Virginia[3]	12
New Jersey	137
Total	**276**

(*See* Declaration of Marie Reed ("Reed Decl.") ¶¶ 4-6.)

25. Because this putative class consists of at least 100 proposed members, the requirement of 28 U.S.C. § 1332(d)(5)(B) is satisfied.

B. The citizenship of at least one putative class member is different from the citizenship of at least one Defendant.

26. Under 28 U.S.C. § 1332(d)(2)(A), "[t]he district courts shall have original jurisdiction of any civil action in which the matter . . . is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant[.]"

27. A corporation is a citizen of "every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business[.]" 28 U.S.C. § 1332(c)(1). GFI is a New Jersey corporation with its principal place of business at 350 County Road, Jersey City, New Jersey (constituting the location of the company's center of

[2] GFI is relying on Plaintiffs' putative class definitions only for purposes of this notice and reserves its right to challenge the definitions and class certification at the appropriate time. GFI disputes Plaintiffs' contention that there were "unlawfully withheld wages . . . and fees[.]" (Am. Compl. ¶¶ 33).

[3] Mejias used the warehouse in Virginia.

direction, control, and coordination, *i.e.*, its "nerve center"). (*See* Reed Decl. ¶ 3 & Ex. 1; Am. Compl. ¶ 13.) Thus, GFI is a citizen of New Jersey.

28. Mejias is not a citizen of New Jersey. Indeed, Plaintiffs do not allege any connection between Mejias and New Jersey. Instead, they allege that he resides in Pennsylvania and previously contracted with GFI to deliver products in South Carolina. (*See* Am. Compl. ¶ 4.)

29. Accordingly, the minimal diversity requirement of 28 U.S.C. § 1332(d)(2)(A) is satisfied because there is diversity of citizenship between Mejias and GFI.

C. The amount in controversy exceeds $5 million, exclusive of interest and costs.

30. Under 28 U.S.C. § 1332(d)(2), "[t]he district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs[.]" The claims of individual class members are aggregated when determining whether CAFA's $5 million jurisdictional threshold is met. *See* 28 U.S.C. § 1332(d)(6).

31. As discussed above, on August 13, Plaintiffs submitted a mediation statement setting forth their position on liability and damages. Plaintiffs' mediation statement calculated total potential damages well in excess of $5 million.[4] (Santen Decl. ¶ 5.)

32. This is the first time that Plaintiffs provided information that the aggregate damages sought exceed $5 million. *See, e.g.*, *Munoz v. J.C. Penney Corp.*, 2009 WL 975846, at *4 (C.D. Cal. Apr. 9, 2009) (noting that courts have "upheld the use of settlement letters in showing a sufficient amount in controversy for purposes of removal"); *Molina v. Lexmark Int'l, Inc.*, 2008 WL 4447678, at *8 (C.D. Cal. Sept. 30, 2008) ("[P]arties in Lexmark's position *frequently* rely on

[4] If necessary, GFI will provide Plaintiffs' mediation statement, including their damages analysis, to the Court for in-camera review.

information obtained during mediation to support removal of a state action to federal court.") (emphasis added); *Mitchell v. Western Union*, 2007 WL 4440885, at *1 n.2 (D.N.J. Dec. 18, 2007) ("Since Plaintiff's Complaint is open-ended with respect to the amount in controversy, the Court must perform an independent appraisal of the value of the claim, taking into account the petition for removal and other evidence, including *plaintiff's settlement demands*, to determine whether plaintiff's claims meet the amount in controversy requirement.") (emphasis added; quotation marks and citations omitted).

33. Because the potential amount in controversy exceeds $5 million, exclusive of interest and costs, 28 U.S.C. § 1332(d)(2) has been satisfied.

III. TIMELINESS OF REMOVAL

34. Defendants may remove a case to federal court "within 30 days after the receipt . . . of a copy of the initial pleading[.]" 28 U.S.C. 1446(b)(1). "[I]f the case stated by the initial pleading is not removable," Defendants may also remove a case to federal court within 30 days of receiving an "amended pleading, motion, order or *other paper* from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3) (emphasis added).

35. In either scenario, "the triggering event focuses solely upon the defendant's receipt of a litigation document" from plaintiffs "demonstrating sufficient jurisdictional facts . . . supporting removal." *Portillo v. Nat'l Freight, Inc.*, 169 F. Supp. 3d 585, 593 (D.N.J. 2016). "[T]hat is, the scope of the defendant's knowledge, at the initial pleading or otherwise, plays no role in triggering the 30-day removal clock." *Id. See also id.* at 596 ("28 U.S.C. § 1446(b) . . . imposes a time limit on such removal only where the plaintiff's initial pleading or subsequent

document sufficiently demonstrates removability.") (emphasis in original). Notably, Defendants have no "duty to investigate or supply facts outside those provided by" Plaintiffs. *Id.* at 596.

36. Neither the original complaint nor the amended complaint provided enough information to support removal. For example, neither contained a sufficient allegation of damages (or the size of the putative classes).

37. As discussed above, it was not until August 13 that Plaintiffs first provided a "paper" (*i.e.*, their mediation statement) stating that the potential amount in controversy exceeded $5 million. *See, e.g.*, *Molina*, 2008 WL 4447678, at *4 ("A document reflecting a settlement demand in excess of the jurisdictional minimum constitutes 'other paper' sufficient to provide notice that a case is removable and starts the thirty day window under § 1446(b)."") (collecting cases).

38. GFI therefore timely removed because it filed this notice within 30 days of receiving from Plaintiffs an "other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3).

39. GFI has served a copy of this notice, including exhibits, on Plaintiffs, through their counsel, and will file a copy of the notice in the State-Court Action in accordance with 28 U.S.C. § 1446(d). A copy of the notice of the notice of removal that will be filed in the State-Court Action is attached as Exhibit Q.

WHEREFORE, GFI removes the above-captioned action now pending against it in the Superior Court of New Jersey, Law Division, Mercer County to the United States District Court for the District of New Jersey.

Dated: September 4, 2020
Morristown, New Jersey

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

/s Ryan T. Warden

Ryan T. Warden
10 Madison Avenue, Ste. 400
Morristown, NJ 07960
Telephone: (973) 656-1600
Facsimile: (973) 656-1611
Email: Ryan.warden@ogletree.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2020 I caused a copy of the foregoing notice of removal with attached exhibits and declarations pursuant to Local Civil Rule 11.2 to be served upon Plaintiffs' below counsel via email, and on will on September 8, 2020, serve same via overnight mail:

David E. Cassidy
Yelena Kofman-Delgado
VLASAC SHMARUK
485B Route 1 South, Suite 120
Iselin, NJ 08830
Tel: (732) 494-3600
dcassidy@vslaws.com
ykofman@vslaws.com

Shanon J. Carson
Alexandra K. Piazza
BERGER MONTAGUE PC
1818 Market St., Suite 3600
Philadelphia, PA 19103
Telephone: (215) 875-3000
scarson@bm.net
apiazza@bm.net

Attorneys for Plaintiffs

/s Ryan T. Warden
Ryan T. Warden

44127309.1

Ryan T. Warden (I.D. No. 044322006)
Fotini Karamboulis (I.D. No. 029562013)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
Telephone: (973) 656-1600
Facsimile: (973) 656-1611
Email: Ryan.warden@ogletree.com
Fotini.karamboulis@ogletree.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANIBAL MEJIAS, DENNIS MINTER, JERRY FULLER, and JOSE PENA, on behalf of themselves and those similarly situated, Plaintiffs, v. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendants.	CIVIL ACTION NO. _____ **NOTICE OF REMOVAL UNDER THE CLASS ACTION FAIRNESS ACT**

EXHIBIT A

VLASAC & SHMARUK, LLC
David E. Cassidy, Esq.
N.J. Atty ID# 024061996
John M. Vlasac, Jr., Esq.
N.J. Atty ID# 020042000
485 B Route 1 South, Suite 120
Iselin, New Jersey 08830
(732) 494-3600
Attorneys for Plaintiffs

ANIBAL MEJIAS, on behalf of himself and those similarly situated, Plaintiff, vs. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendant(s)	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MERCER COUNTY Docket Number: MER-L- CIVIL ACTION **COMPLAINT WITH JURY DEMAND**

INDIVIDUAL AND CLASS ACTION COMPLAINT

Plaintiff, **ANIBAL MEJIAS** (hereinafter "Plaintiff"), on behalf of himself and those similarly situated, by and through the undersigned counsel, hereby complains as follows against Defendants **GOYA FOODS, INC., ("Goya"), ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1-10** (said names being fictitious, real names unknown), and **ABC COMPANIES 1-10**

(said names being fictitious, real names unknown), (hereinafter collectively referred to as "Defendants").

INTRODUCTION

1. Plaintiff brings this action to redress Defendants' violations of the New Jersey Wage Payment Law (hereinafter "NJWPL"), N.J.S.A. 34:11-4.1, et seq., the New Jersey Civil RICO Act, N.J.S.A. 2C:41-1, et seq., and the common law of New Jersey.

2. Plaintiff asserts Defendants unlawfully designated Plaintiff and those similarly situated to him as independent contractors and Defendants used that improper classification to unlawfully deduct wages from their pay. Specifically, Defendants unlawfully withheld wages from Plaintiff and those similarly situated by deducting costs and fees associated with drivers' leasing of vehicles, for fuel and maintenance costs, insurance, trailer rentals and other equipment, administrative fees, returned and damaged products, and other deductions not allowed by governing law. These wage deductions violate the New Jersey Wage Payment Law (hereinafter "NJWPL"), N.J.S.A. 34:11-4.1, et seq., the New Jersey Civil RICO Act, N.J.S.A. 2C:41-1, et seq. and the common law of New Jersey.

3. As a result of Defendants' unlawful actions, Plaintiff and those similarly situated are owed wages and other damages.

PARTIES

4. Plaintiff, Mr. ANIBAL Mejias, is an adult individual residing at 4408 North 6th Street, Philadelphia, PA 10140. Plaintiff was an employee of Defendant Goya working as a truck driver in the State of South Carolina from in or around May 2018 until on or about May 2019.

5. Plaintiff signed a form agreement labeled Independent Contractor's Service Agreement dated May 2018 (the "Agreement").

6. Defendants told Plaintiff they utilized the Agreement as a standard independent contractor agreement for truck drivers with the common policies and practices at issue in this action. The Agreement is used to misclassify employees as independent contractors when in fact they are not independent contractors in practice.

7. The Agreement purports to cover the terms and conditions of Plaintiff's employment and, upon information and belief, is the same in all material respects set forth in this Complaint as agreements executed by other misclassified truck drivers.

8. Defendant Goya is a company doing business in New Jersey and throughout the United States manufacturing and selling and delivering food products under the Goya brand name.

9. Defendant Goya has its principal place of business located at 350 County Road, in the City of Jersey City, in the State of New Jersey and has multiple facilities throughout the United States.

10. Defendant Goya is an employer of Plaintiff, as defined by the NJWPL.

11. Defendant, Robert I. Unanue is an adult individual and an officer of Defendant Goya.

12. Defendant, Francisco R. Unanue is an adult individual and an officer of Defendant Goya.

13. Defendant, Joseph Perez is an adult individual and an officer of Defendant Goya.

14. Defendant, Peter Unanue is an adult individual and an officer of Defendant Goya.

15. Defendant, David Kinkela is an adult individual and an officer of Defendant Goya.

16. Defendant, Rebecca Rodriguez is an adult individual and an officer of Defendant Goya.

17. Defendant, Carlos G. Ortiz is an adult individual and an officer of Defendant Goya.

18. Defendant, Miguel A. Lugo, Jr. is an adult individual and an officer of Defendant Goya.

19. Defendant, Conrad Colon is an adult individual and an officer of Defendant Goya.

20. Defendant John Does 1-10 (said names being fictitious, real names unknown) are all unknown employees of Goya Foods., Inc. are additional officers and owners of Defendant Goya.

21. Defendant ABC Companies 1-10 (said names being fictitious, real names unknown) are all unknown business entities associated with Defendant who employ truck drivers delivering Goya products as independent contractors or owner operators.

22. At all times relevant herein, Defendants acted by and through their agents, servants, and employees, each of whom acted at all times relevant herein in the course and scope of their employment with and for Defendants.

JURISDICTION AND VENUE

23. This Court has jurisdiction over this matter as the Agreement has a choice of law and choice of venue provision designating New Jersey law as the governing law and New Jersey as the venue for any litigation between the parties. Specifically, the Agreement states in Section 12:

(e) New Jersey Law and Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey both as to interpretation and performance,

without regard to New Jersey's conflict-of-law rules, and any dispute arising under this Agreement or relating to the relationship created by this Agreement shall be subject to the exclusive jurisdiction of the federal or state courts of New Jersey.

24. This Court has personal jurisdiction over Defendants as they conduct substantial business in New Jersey and their principal place of business is located in New Jersey.

25. Venue is proper in Mercer County under R. 4:3-2(b) as Defendants conduct substantial business throughout Mercer County and Defendant Goya's registered agent is located in Mercer County.

CLASS ACTION ALLEGATIONS

26. The foregoing paragraphs are incorporated herein as if set forth in their entirety.

27. Pursuant to Rule 4:32 of the New Jersey Rules of Civil Procedure, Plaintiff brings his claim for relief to redress Defendants' violations of the NJWPL, the NJRICO, and the common law of New Jersey on behalf of himself and those similarly situated.

28. Defendant misclassified Plaintiff and all those similarly situated as independent contractors instead of employees under the standard articulated pursuant to the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1 et seq., and New Jersey Supreme Court precedent.

29. Plaintiff seeks to represent a class of all those similarly situated who worked or work for Defendants as truck drivers and who were subject to the unlawful policies of Defendants within the past six (6) years.

30. Defendant Goya employs truck drivers throughout the United States and utilizes the independent contractor or owner operator classification regularly to satisfy its delivery needs, as further pled herein.

31. Due to Defendant Goya using this classification of truck drivers under an Agreement with a New Jersey choice of law and venue provision and the drivers being scattered across the United States, it is impracticable to bring or join individual claims. The members within the Class are scattered throughout the United States and so numerous that joinder of all members is impractical in satisfaction of New Jersey Court Rule 4:32-1(a)(1).

32. Plaintiff does not know the exact size of the class, as such information is in the exclusive control of Defendants.

33. Plaintiff seeks to certify the following classes defined as:

> All truck drivers of Defendants who were designated as independent contractors or owner operators and from whom Defendants unlawfully withheld wages from by deducting costs and fees associates with drivers' leasing vehicles, for fuel and maintenance costs, insurance, trailer rentals and other equipment, administrative fees, returned and damages products, and other deductions not allowed by governing law. To the extent revealed by discovery and investigation, there may be additional appropriate classes and/or subclasses from the above class definition which is broader and/or narrower in time or scope.

34. Excluded from the Class are Defendants' officers, directors, agents, employees and members of their immediate families; and the judicial officers to whom this case is assigned, their staff, and the members of their immediate families.

35. There are common questions of law and fact that affect the rights of every member of the Class, and the types of relief south are common to every member of the respective Class. The same conduct by Defendants has injured each respective Class Member. Common questions of law and/or fact common to the respective Classes include, but are not limited to:

a. Whether Defendants improperly classified its independent contractor truck drivers;

b. Whether Defendants unlawfully deducted wages from the Class Members through this misclassification scheme;

c. Whether Defendants breached the Agreement with Class Members by maintaining wage deduction clauses in violation of public policy under the governing law of said Agreements.

36. These questions of law and/or fact are common to the Class and predominate over any questions affecting only individual class members.

37. The claims of Plaintiff are typical of the claims of their respective Class as required by New Jersey Court Rule 4:32-1(a)(3), in that all claims are based upon the same factual and legal theories. It is the same conduct by each Defendant that has injured each member of the Class.

38. Plaintiff will fairly and adequately represent and protect the interests of the Class, as required by New Jersey Court Rule 4:32-1(a)(4). Plaintiff will fairly and adequately protect the interests of the those similarly situated because Plaintiff's interests are coincident with, and not antagonistic to, those of the Class.

39. Plaintiffs have retained counsel with substantial experience in the handling of wage and hour class actions in New Jersey. Plaintiffs and their counsel are committed to the vigorous prosecution of this action on behalf of the classes and have the financial resources to do so. Neither Plaintiff nor counsel has any interest adverse to those of the Class.

40. Plaintiff's claims are typical of the claims of the those similarly situated because Plaintiff, like all those similarly situated, were/are employees of the Defendants under common policies and practices who were, within the last six (6) years, misclassified as independent contractors and from whom Defendants unlawfully deducted wages from their pay.

41. Class certification is appropriate pursuant to New Jersey Court Rule 4:32-1(b)(1) because the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications that would establish incompatible standards of

conduct for Defendants and/or because adjudications respecting individual members of the Class would, as a practical matter, be dispositive of the interests of the other members or would risk substantially impairing or impending their ability to prosecute their interests.

42. A class action is superior to other available methods for the fair and efficient adjudication of the controversy under New Jersey Court Rule 4:32-1(b)(3).

43. Absent a class action, most members of the Class likely would find the cost of litigating their claims to be prohibitive, and will have no effective remedy at law, especially due to Defendants' use of a broad choice of law and venue provision thereby making it very difficult for individual class members to even seek redress.

44. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants and promotes consistency and efficiency of adjudication.

45. Maintenance of this action as a class action is a fair and efficient method for adjudication of this controversy. It would be impracticable and undesirable for each member of each putative class who has suffered harm to bring a separate action. In addition, the maintenance of separate actions would place a substantial and unnecessary burden on the courts and could result in inconsistent adjudications, while a single class action can determine, with judicial economy, the rights of all putative class members.

46. Class certification is also appropriate because this Court can designate particular claims or issues for class-wide treatment and may designate one or more subclasses pursuant to New Jersey Court Rule 4:32-2(d).

47. No unusual difficulties are likely to be encountered in the management of this action as a class action.

FACTUAL BACKGROUND

48. The foregoing paragraphs are incorporated herein as if set forth in their entirety.

49. Goya owns and operates approximately 14 U.S. distribution centers throughout the United States.

50. Goya ships its products to different grocery stores throughout the United States, many of them located in the State of New Jersey, for retail sale. In areas where it doesn't have a physical presence, it works with third-party distributors but otherwise it ships directly to retailers.

51. Goya employs more than 4,000 workers worldwide.

52. More than 500 Goya salespeople regularly visit stores and take orders and merchandise Goya Foods, Inc. products for retail sale throughout the United States. When a Goya salesperson visits a store, they place an order on their handheld devices, and these orders are processed overnight for next-day delivery. Sales Orders are picked, loaded, and delivered to stores on a next-day basis.

53. Goya delivers straight to its customers' stores, which range from big box retailers to neighborhood bodegas. Goya uses both traditional w-2 employees and it designates some truck driver employees as alleged independent contractors, also known as owner operators, to make its deliveries. Upon information and belief, Goya uses approximately 190 truck drivers for its delivery operations.

54. All orders are filled from inventory in distribution centers and delivered by Goya by truck driver Goya hires. The Goya truck drivers, such as the Plaintiff, are misclassified as owner operators/independent contractors but in reality are employees of Goya.

55. Truck driver delivery employees such as the Plaintiff are an integral part of Goya's business model.

56. Truck driver delivery employees are not performing activities outside Goya's normal course of business or even outside its normal place of business as goods are produced and shipped directly to customers via an integrated chain of commerce. Goods are not distributed to a third-party site for delivery but rather flow continuously form Goya to the customers.

57. Goya's truck drivers such as Plaintiff and those similarly situated make multiple direct customer stops per day, which are exclusively directed by Goya via delivery tickets, and these employees do not deliver to other customers. Goya knows this due to the volume of product and number of stops it assigns to each misclassified driver.

58. Goya's truck drivers are provided a loaded trailer each night with delivery instructions with quantities and locations and truck drivers exercise no meaningful control over their deliveries.

59. Goya provided Plaintiff and those similarly situated an XRS handheld device to plug into the trucks to track location, hours and mileage. These devices generate DOT required reports that a true independent contractor would be required to supply independent of the company provided device. Upon information and belief, these same devices were also used for traditional w-2 truck driving employees.

60. Plaintiff and those similarly situated did not utilize vehicles for other clients.

61. Goya maintained a dispatcher who directed and controlled deliveries and the truck drivers at all times and who would regularly communicate with Plaintiff and those similarly situated. Upon information and belief, the same dispatcher dispatched traditional w-2 truck drivers and the employees mis-designated as independent contractor truck drivers like Plaintiff.

62. Plaintiff and those similarly situated were even required to get pre-approval for days off via the dispatcher.

63. During Plaintiff's employment, Goya required Plaintiff to return his truck to a trucking yard each day, and his vehicle would be fueled and loaded over night for next day deliveries, with written instructions what and where to deliver.

64. Defendants attempted designation of drivers as independent contractors was a fraudulent fiction to hide the true employee status of these workers. Indeed, Defendants directed and controlled important aspects of their employment including deliveries and their schedule of work yet Defendants deducted money normally considered business expenses from the drivers' weekly paychecks ostensibly for payment for the truck leases and other costs and fees associated with deliveries of their product.

65. Defendants denied Plaintiff and those similarly situated other benefits such as paid time off, vacation pay, holiday pay and similar compensation benefits due to employees.

66. Defendants paid Plaintiff and those similarly situated "commissions," which were based upon a percentage of delivered product assigned and provided to them to deliver each day.

67. Incentive pay was also given to Plaintiff and those similarly situated so long as the total amount of returns from a given day did not exceed a certain percentage of the product actually delivered.

68. Defendants, however, required Plaintiff and those similarly situated to pay for normal business expenses and costs that Defendants should have been paying.

69. The Agreement states: "[Plaintiff[Contractor shall be responsible for paying all operating expenses and costs of operating the Equipment, including all expenses for fuel, oil, and repairs to the Equipment; . . . ."

70. The Agreement further created an unlawful "Reserve" account to secure its interests. The Agreement specifically states: "[Plaintff] Contractor authorizes Carrier to deduct ten (10%) percent of Contractor's weekly commissions due Contractor from Carrier [Defendant

Goya] under Section 3 of the Agreement (the "Reserve"). Carrier shall deposit the Reserve in an interest bearing account at such rates as Carrier, in its sole discretion, may secure from time to time for credit to Contractor. Interest shall accrue weekly and be calculated on the closing balance of the Reserve at the end of the week. From time to time, Contractor may (1) elect to discontinue further deductions at anytime provided the Reserve has a minimum balance of Four Thousand ($4,000) Dollars and (2) request the disbursement to Contractor of any excess over Four Thousand ($4,000) Dollars. Within seventy-five (75) days of the termination of the Agreement (or as soon as practicable thereafter) Carrier will pay to Contractor, after deducting all amounts due and owing Carrier under the Agreement, the balance of any monies held in the Reserve."

71. These deductions were itemized in each pay period (weekly) in the drivers' "Driver Commission Report" and the "Driver Commission Statement."

72. Defendants unlawfully deducted from Plaintiff's paycheck, each week, the following:

a. $125.00 for trailer rental;

b. $150.00 for truck insurance;

c. $23.94 for Helpers Workmen's Compensation insurance;

d. $580.73 for truck lease;

e. $250.00 for equipment;

f. Fuel costs averaging approximately $400.00 - $500.00;

g. A $2.50 for "professional fee" to administer the unlawful deductions;

h. Approximately $276.64 to maintain the "Reserve" account in case Plaintiff could not work and pay the fees Defendants required; and,

i. Rejected goods at the time of delivery or Returns and damaged goods that were previously delivered by the Plaintiff.

73. The Agreement, the general policies and practices, the commission reports and statements, and the amounts identified above are representative of the proposed Class.

FIRST COUNT
Violations of the New Jersey Wage Payment Law
(Unlawful Deductions – ALL DEFENDANTS)

74. The foregoing paragraphs are incorporated herein as if set forth in their entirety.

75. At all times relevant herein, Defendants stand/stood in an Employer/Employee relationship with the Plaintiff and those similarly situated.

76. At all times relevant herein, Defendants are/were responsible for paying wages to Plaintiff and those similarly situated.

77. Defendants violated the NJWPL by withholding wages for illegal deductions from Plaintiff's and those similarly situated.

78. As a result of Defendants' uniform policies and practices described above, Plaintiff was illegally deprived of regular wages earned, in such amounts to be determined at trial, and is entitled to recovery of such total unpaid amounts, pre and post-judgment interest, and other compensation pursuant to N.J.S.A. 34:11-4.1 et seq.

WHEREFORE, Plaintiff prays that this Court enter an Order providing that:

a) Defendants are to be prohibited from continuing to maintain their policies, practices, or customs in violation of the state laws and principles of equity;

b) Defendants are to compensate, reimburse, and make Plaintiff and those similarly situated whole for any and all pay and benefits they would have received had it not been for Defendants' illegal actions, including, but not limited to, lost past earnings. Plaintiff and those similarly situated should be accorded those benefits illegally withheld by Defendants;

c) A declaratory judgment that Defendants' wage practices alleged herein violate the New Jersey Wage Payment Law ("NJWPL"), N.J.S.A. 34:11-4.1 et seq.; An Order for injunctive relief ordering Defendants to comply with the NJWPL and end all of the illegal wage practices alleged herein;

d) An Order certifying this action as a Class Action, designating the lead Plaintiff ANIBAL MEJIAS as Class representative and the undersigned counsel as Class Counsel;

e) Judgment for damages for all unpaid regular wages to which Plaintiff and members of the Class are lawfully entitled under the NJWPL, N.J.S.A. 34:11-4.1 et seq.;

f) Incentive Award for the lead Plaintiff;

g) An Order directing Defendants to pay Plaintiff and members of the putative Class pre and post-judgment interest, reasonable attorney's fees and all costs connected with this action; and,

h) Any and all other equitable relief which this Court deems fit.

SECOND COUNT
BREACH OF CONTRACT
(Failure to Pay Wages Due - DEFENDANT GOYA FOODS)

79. The foregoing paragraphs are incorporated herein as if set forth in their entirety.

80. By misclassifying Plaintiff and those similarly situated as independent contractors and by unlawfully requiring Plaintiff and those similarly situated to pay for costs and for the returns of unwanted or damaged goods, Defendants breached the Agreement because such deductions are against New Jersey public policy and hence were unenforceable agreements deducting monies owed to Plaintiff and those similarly situated.

81. As a result, Defendants breached their contract with Plaintiff and those similarly situated by deducting wages pursuant to clauses in the Agreement that were are unenforceable a in violation of New Jersey public policy as set forth in the NJWPL.

82. Plaintiff and those similarly situated have suffered damages and the monies improperly deducted under the Agreement must be returned to Plaintiff and those similarly situated as void against public policy.

WHEREFORE, Plaintiff prays that this Court enter an Order providing that:

a) Defendants are to be prohibited from continuing to maintain their policies, practices, or customs in violation of the state laws and principles of equity;

b) Defendants are to compensate, reimburse, and make Plaintiff and those similarly situated whole for any and all pay and benefits they would have received had it not been for Defendants' illegal actions, including, but not limited to, lost past earnings. Plaintiff and those similarly situated should be accorded those benefits illegally withheld by Defendants;

c) An Order certifying this action as a Class Action, designating the lead Plaintiff ANIBAL MEJIAS as Class representative and the undersigned counsel as Class Counsel;

d) Incentive Award for the lead Plaintiff;

e) An Order directing Defendants to pay Plaintiff and members of the putative Class pre and post-judgment interest, reasonable attorney's fees and all costs connected with this action; and,

f) Any and all other equitable relief which this Court deems fit.

THIRD COUNT
NJRICO
(ALL DEFENDANTS)

83. The foregoing paragraphs are incorporated herein.

84. Defendants are a group of persons associated for the common purpose of carrying out the fraudulent scheme described in this Complaint; as a result, Defendants and their officers, agents, and employees constitute an enterprise within the meaning of RICO.

85. During all relevant times this enterprise was engaged in and its activities affected trade and commerce.

86. The enterprise had a pattern of racketeering activity consisting of the commission of continuing acts of mail and wire fraud as described in this Complaint.

87. Defendants conspired to defraud Plaintiff and those similarly situated to mislead them to believe they were independent contractors.

88. In doing so, Defendants created a contract with weekly unlawful deductions from wages as set forth, including for return of their goods, which were occurred in relation to deliveries. Defendants did this, in part, to avoid paying taxes and to avoid liability to third parties.

89. The scheme is fraudulent in nature and required weekly acts of mail fraud and theft of wages to accomplish by transferring money labeled as commission but not wages for the purpose of avoiding subsidiary taxation to the enterprise, and for the purpose of avoiding paying other emoluments of employment by the enterprise. In effectuating these predicate acts, Defendants used both the mail and wires for the purpose of executing this scheme in violation of 18 U.S.C. §§ 1341 and 1343.

90. Defendants even created an unlawful “Reserve” account to secure any monies they unlawfully required Plaintiff and those similarly situated to pay .

91. Defendants also misrepresented to Plaintiff and those similarly situated that it deducted money(s) for a lawful purpose when it withheld wages when in fact all such wages were withheld solely to benefit Defendants and not for any legal purpose.

92. Defendants used their enterprise and a weekly pattern of unlawful predicates acts to accomplish depriving Plaintiff and those similarly situated of wages owed to them in violation of the New Jersey Civil RICO Act, N.J.S.A. 2C:41-1, et seq.

WHEREFORE, Plaintiff prays that this Court enter an Order providing that:

a) Defendants are to be prohibited from continuing to maintain their policies, practices, or customs in violation of the state laws and principles of equity;

b) Defendants are to compensate, reimburse, and make Plaintiff and those similarly situated whole for any and all pay and benefits they would have received had it not been for Defendants' illegal actions, including, but not limited to, lost past earnings. Plaintiff and those similarly situated should be accorded those benefits illegally withheld by Defendants;

c) Treble and other damages as allowed for by statute;

d) An Order certifying this action as a Class Action, designating the lead Plaintiff ANIBAL MEJIAS as Class representative and the undersigned counsel as Class Counsel;

e) Incentive Award for the lead Plaintiff;

f) An Order directing Defendants to pay Plaintiff and members of the putative Class pre and post-judgment interest, reasonable attorney's fees and all costs connected with this action; and,

g) Any and all other equitable relief which this Court deems fit.

FOURTH COUNT
Unjust Enrichment
(Failure to Pay Wages Due – DEFENDANT GOYA FOODS)

93. The foregoing paragraphs are incorporated herein as if set forth in their entirety.

94. By misclassifying Plaintiff and Those similarly situated as independent contractors and by unlawfully requiring Plaintiff and those similarly situated to pay for returned or damaged goods that were previously delivered.

95. Defendants also withheld money for return or damaged goods previously delivered, which is not provided for anywhere in the Agreement, which unjustly enriched the Defendants.

96. As a result of Defendants' conduct, Plaintiff and those similarly situated have suffered damages and the improperly withhold monies should be returned.

WHEREFORE, Plaintiff prays that this Court enter an Order providing that:

a) Defendants are to be prohibited from continuing to maintain their policies, practices, or customs in violation of the state laws and principles of equity;

b) Defendants are to compensate, reimburse, and make Plaintiff and those similarly situated whole for any and all pay and benefits they would have received had it not been for Defendants' illegal actions, including, but not limited to, lost past earnings. Plaintiff and those similarly situated should be accorded those benefits illegally withheld by Defendants;

c) An Order certifying this action as a Class Action, designating the lead Plaintiff ANIBAL MEJIAS as Class representative and the undersigned counsel as Class Counsel;

d) Incentive Award for the lead Plaintiff;

e) An Order directing Defendants to pay Plaintiff and members of the putative Class pre and post-judgment interest, reasonable attorney's fees and all costs connected with this action; and,

f) Any and all other equitable relief which this Court deems fit.

JURY DEMAND

Plaintiff hereby demands trial by jury on all issues.

NOTICE OF DESIGNATION OF TRIAL COUNSEL

PLEASE TAKE NOTICE that pursuant to the Rules of the Court, John M. Vlasac, Jr., Esq. and David E. Cassidy, Esq. are hereby designated as trial counsel of the within matter.

DEMAND TO PRESERVE EVIDENCE

All Defendants are hereby directed to preserve all physical and electronic information pertaining in any way to Plaintiffs' and Those similarly situated' employment, to Plaintiffs' and Those similarly situated' cause of action and/or prayers for relief, and to any defenses to same, including, but not limited to, electronic data storage, closed circuit TV footage, digital images, computer images, cache memory, searchable data, emails, spread sheets, employment files, memos, text messages, any and all online social or work related websites, entries on social networking sites (including, but not limited to, Facebook, Twitter, MySpace, etc.), and any other information and/or data and/or things and/or documents which may be relevant to any claim or defense in this litigation.

DEMAND FOR INSURANCE DISCOVERY

Pursuant to R. 4:18, plaintiff hereby demands that the defendants, produce the following documents for inspection and copying at the office of John M. Vlasac, Jr., Esquire, Vlasac & Shmaruk, 485B Route 1 South, Iselin, New Jersey, within the time provided by R. 4:18-1(b):

1. On the date of the incident, indicate whether the defendants had a liability insurance policy and, if so, set forth the name of the insurance company, the policy number, the effective date, the policy limits and attach a copy of the declarations page.

2. On the date of the incident, indicate whether the defendants had any excess coverage including a personal liability catastrophe umbrella and, if so, set forth the name of the insurance company, the policy number, the effective date, the policy limits and attach a copy of the declarations page.

VLASAC & SHMARUK, LLC
Attorney for the Plaintiffs

_/s/ David E. Cassidy, Esq._____
DAVID E. CASSIDY, ESQ.

Dated: July 18, 2019

CERTIFICATION

I certify that the within matter is not the subject of any other pending court or arbitration proceeding.

VLASAC & SHMARUK, LLC
Attorney for the Plaintiffs

_/s/ David E. Cassidy, Esq._____
DAVID E. CASSIDY, ESQ.

Dated: July 18, 2019

CERTIFICATION PURSUANT TO R. 4:5-1

I, DAVID E. CASSIDY, hereby certify as follows:

1. I am attorney at law of the State of New Jersey and am a member of the firm and as such, I am fully familiar with same.

2. To the best of my knowledge, confirmation and belief, there is no other action pending about the subject matter of this Complaint in the Superior Court of New Jersey, Law Division, Mercer County. Additionally, other than pled herein as a Class Action, there are no other persons known to me who should be added as parties to this matter, nor are there any other actions contemplated.

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

VLASAC & SHMARUK, LLC
Attorney for the Plaintiffs

/s/ David E. Cassidy, Esq.
DAVID E. CASSIDY, ESQ.

Dated: July 18, 2019

Civil Case Information Statement

Case Details: MERCER | Civil Part Docket# L-001401-19

Case Caption: MEJIAS ANIBAL VS GOYA FOODS, INC.
Case Initiation Date: 07/18/2019
Attorney Name: JOHN MICHAEL VLASAC
Firm Name: VLASAC & SHMARUK, LLC
Address: 485B ROUTE 1 SOUTH STE 120
ISELIN NJ 08830
Phone:
Name of Party: PLAINTIFF : MEJIAS, ANIBAL
Name of Defendant's Primary Insurance Company (if known): Unknown

Case Type: EMPLOYMENT (OTHER THAN CEPA OR LAD)
Document Type: Complaint with Jury Demand
Jury Demand: YES - 6 JURORS
Hurricane Sandy related? «sandyRelated»
Is this a professional malpractice case? NO
Related cases pending: NO
If yes, list docket numbers:
Do you anticipate adding any parties (arising out of same transaction or occurrence)? YES

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? YES

If yes, is that relationship: Employer/Employee

Does the statute governing this case provide for payment of fees by the losing party? NO

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:

Do you or your client need any disability accommodations? NO
If yes, please identify the requested accommodation:

Will an interpreter be needed? NO
If yes, for what language:

Please check off each applicable category: Putative Class Action? YES **Title 59?** NO

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b)

07/18/2019
Dated

/s/ JOHN MICHAEL VLASAC
Signed

Ryan T. Warden (I.D. No. 044322006)
Fotini Karamboulis (I.D. No. 029562013)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
Telephone: (973) 656-1600
Facsimile: (973) 656-1611
Email: Ryan.warden@ogletree.com
Fotini.karamboulis@ogletree.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANIBAL MEJIAS, DENNIS MINTER, JERRY FULLER, and JOSE PENA, on behalf of themselves and those similarly situated, Plaintiffs, v. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendants.	CIVIL ACTION NO. _____ **NOTICE OF REMOVAL UNDER THE CLASS ACTION FAIRNESS ACT**

EXHIBIT B

Fotini Karamboulis, Esq. (I.D. #029562013)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
(973) 656-1600
Attorneys for Defendants

ANIBAL MEJIAS, on behalf of himself and those similarly situated, Plaintiff, v. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MERCER COUNTY DOCKET NO.: MID-L-001401-19 *Civil Action* **NOTICE OF MOTION FOR PARTIAL DISMISSAL OF PLAINTIFF'S COMPLAINT AND TO CHANGE VENUE**

TO: David E. Cassidy, Esq.
John M. Vlasac, Jr., Esq.
485 B Route 1 South, Suite 120
Iselin, New Jersey 08830
Attorneys for Plaintiff

COUNSELOR:

PLEASE TAKE NOTICE that on Friday September 13, 2019 at 9 o'clock in the forenoon or as soon thereafter as counsel may be heard, the undersigned attorneys for defendants Defendants Goya Foods, Inc., Robert I. Unanue, Francisco R. Unanue, Joseph Perez, Peter Unanue, David Kinkela, Rebecca Rodriguez, Carlos G. Ortiz, Miguel A. Lugo, Jr., and Conrad Colon will apply to the Superior Court of New Jersey, Law Division, Mercer County, at the

Courthouse in Trenton, New Jersey, for an Order: (i) dismissing Plaintiff's Complaint in its entirety as against the Individual Defendants, with prejudice; (ii) dismissing Plaintiff's New Jersey Racketeering Influenced and Corrupt Organizations Act claims against all Defendants, with prejudice; (iii) dismissing Plaintiff's unjust enrichment claim against GFI, with prejudice; (iv) transferring the venue of this action to Hudson County to adjudicate Plaintiff's remaining New Jersey Wage Payment Law and breach of contract claims against GFI; and (v) granting such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that in support of this application, Defendants shall rely on the accompanying Memorandum of Law, Certifications and proposed form of Order.

PLEASE TAKE FURTHER NOTICE that defendant requests oral argument in connection with this motion.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
Attorneys for Defendants

By _____
Fotini Karamboulis

Dated: August 22, 2019

39661137.1

Fotini Karamboulis, Esq. (I.D. #029562013)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
(973) 656-1600
Attorneys for Defendants

ANIBAL MEJIAS, on behalf of himself and those similarly situated, Plaintiff, v. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MERCER COUNTY DOCKET NO.: MID-L-001401-19 *Civil Action*

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL DISMISSAL OF PLAINTIFF'S COMPLAINT AND TO CHANGE VENUE TO HUDSON COUNTY

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Aaron Warshaw (*pro hac vice* pending)
Daniel M. Bernstein (*pro hac vice* pending)
599 Lexington Avenue, 17th Floor
New York, New York 10022

Fotini Karamboulis
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960

Attorneys for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Other Authorities

I. PRELIMINARY STATEMENT

Defendants Goya Foods, Inc. ("GFI") and Robert I. Unanue, Francisco R. Unanue, Joseph Perez, Peter Unanue, David Kinkela, Rebecca Rodriguez, Carlos G. Ortiz, Miguel A. Lugo, Jr., Conrad Colon (the "Individual Defendants," and collectively with GFI, "Defendants"), through their attorneys Ogletree, Deakins, Nash, Smoak & Stewart, P.C., respectfully submit this memorandum of law in support of their motion, pursuant to New Jersey Court Rule 4:6-2(e) and 4:3-3(a)(3) *et seq.*, requesting: (i) dismissal with prejudice of Plaintiff's Complaint against the Individual Defendants; (ii) dismissal with prejudice of Plaintiff's New Jersey RICO claims against all Defendants; (iii) dismissal with prejudice of Plaintiff's unjust enrichment claim; and (iv) to transfer venue to Hudson County to resolve Plaintiff's remaining wage payment and breach of contract claims against GFI.

From May 2018 to June 2019, Plaintiff performed independent truck driving services for GFI, and as such he was properly and legally treated as an independent contractor. In a flagrant abuse of process, and with no apparent purpose other than to badger the Individual Defendants, Plaintiff asserts a boilerplate, unsubstantiated, and baseless claim against various GFI officers alleging improper pay deductions under the New Jersey Wage Payment Law (the "WPL"), N.J.S.A. § 34:11-4.1 *et seq.* As a matter of law, Plaintiff – who was properly classified and, in fact, performed services as an independent contractor – has no basis to allege violations under provisions of a wage payment law that does not apply to independent contractors.

Plaintiff's WPL claim against the Individual Defendants is wholly premature given that he has not and cannot establish liability under the WPL against GFI, and he cannot prove any risk that GFI will renege on its salary obligations. Further, even assuming *arguendo* that Plaintiff had alleged any facts permitting application of the WPL against GFI – which Plaintiff did not do, and he cannot do – he fails to identify a *single alleged act* by any Individual Defendant to permit

extension of the WPL to impose individual liability. The absence of *any* supporting factual allegations compels that Plaintiff has named the Individual Defendants for the sole purpose of harassment, and his WPL claim against the Individual Defendants should be dismissed.

Moreover, Plaintiff's throwaway claim under the New Jersey Racketeering Influenced and Corrupt Organizations Act ("NJRICO"), N.J.S.A. § 2C:41-1 *et seq*., is similarly baseless. Plaintiff makes no effort to assert the requisite factual allegations to support a claim under NJRICO – let alone with particularity as he is required to do. Critically, Plaintiff has not alleged (and he cannot allege) any fraudulent misrepresentations or omissions of fact by any of the Individual Defendants or by GFI. Again, Plaintiff's decision to include a moribund NJRICO claim is solely to harass GFI and the Individual Defendants.

Plaintiff's claim for unjust enrichment is similarly deficient as a matter of law. The claim is entirely duplicative of his breach of contract claim, and in fact Plaintiff's Independent Contractor Service Agreement – which Plaintiff relies upon and incorporates by reference into his Complaint – controls Plaintiff's status as an independent contractor. Because Plaintiff pleads the existence of a valid contract, the Independent Contractor Service Agreement binds the parties and governs the same subject matter as Plaintiff's alleged unjust enrichment claim. For that reason, Plaintiff is barred as a matter of law from alleging unjust enrichment.

As for Plaintiff's remaining WPL claim and breach of contract claim against GFI, the proper venue is Hudson County for the convenience of parties and witnesses in the interest of justice. Plaintiff has no connection to this Mercer County venue. He resides in Pennsylvania, and he performed services for GFI in South Carolina. Further, GFI maintains its principal place of business in Hudson County, and none of the Individual Defendants reside in Mercer County. As

such, this Court should not be burdened with adjudicating a controversy that has absolutely no connection whatsoever to Mercer County.

II. BACKGROUND[1]

A. The Parties

Plaintiff resides in Philadelphia, Pennsylvania. (Compl., ¶ 4.)[2] From May 2018 to June 2019 (incorrectly identified as May 2019 in the Complaint), Plaintiff performed services for GFI as a truck driver in South Carolina. (*Id.*)

GFI is a privately-held Delaware corporation, with its principal place of business and headquarters in Jersey City, County of Hudson. *See* https://www.goya.com/en/contact-us. GFI is a leading producer and distributor of Latino food products, offering over 2,500 high-quality and affordable food products from the Caribbean, Mexico, Spain, Central and South America. The Individual Defendants serve in officer roles at GFI.

B. The Facts as Alleged by Plaintiff

Plaintiff alleges that, beginning in May 2018, he performed truck driving services for GFI in South Carolina pursuant to an Independent Contractor Service Agreement entered into by Plaintiff and GFI. (Compl., ¶¶ 4-5.) Plaintiff alleges that "Defendants unlawfully withheld wages" by deducting costs and fees from his pay. (*Id.*, ¶ 2.) Plaintiff thus asserts statutory claims under the WPL (First Count) and NJRICO (Third Count) against all Defendants, and common law claims for breach of contract (Second Count) and unjust enrichment (Fourth Count) against GFI only. (*Id.*, ¶¶ 74-96.)

---

[1] Defendants vehemently deny the allegations in the Complaint, including that they violated any applicable law, and expressly reserve and do not waive all applicable defenses. Defendants describe Plaintiff's purported allegations herein solely so that the Court may resolve the foregoing motion.

[2] Plaintiff's Complaint is enclosed herein as Exhibit A to the Certification of Fotini Karamboulis, Esq.

In support of his First Count under the WPL, Plaintiff asserts in conclusory and boilerplate fashion that "Defendants violated the NJWPL by withholding wages for illegal deductions" from Plaintiff by requiring him "to pay for normal business expenses and costs that Defendants should have been paying." (*Id.*, ¶¶ 68, 77.) Yet, Plaintiff's allegations regarding the Individual Defendants – *in their entirety* – consist of merely identifying each person as an "adult individual" and "officer of [GFI]." (*Id.*, ¶¶ 11-19.) Nowhere in his Complaint does Plaintiff identify any alleged conduct – let alone a single alleged act – by any of the Individual Defendants that gives rise to his claims.

Plaintiff's Second Count for breach of contract relies upon the Independent Contractor Service Agreement. Plaintiff asserts that GFI breached the agreement because wage deductions "are against New Jersey public policy and hence were unenforceable." (*Id.*, ¶ 80-81.)

In support of his Third Count under NJRICO, Plaintiff alleges, again in conclusory fashion, that Defendants engaged in "racketeering activity consistent with the commission of continuing acts of mail and wire fraud," "conspired to defraud Plaintiff" to mislead him to believe that he was an independent contractor, "transferr[ed] money labeled as commission" that allegedly should have been wages, and misrepresented that GFI "deducted money(s) for a lawful purpose when it withheld wages" for various expenses. (*Id.*, ¶¶ 86-91.) Yet, Plaintiff identifies no purported misrepresentations of fact by Defendants (nor can he), and identifies no specific act by any of the Individual Defendants (nor can he), which is fatal to his NJRICO claim.

Plaintiff's Fourth Count for unjust enrichment is duplicative of his Second Count for breach of contract insofar as he asserts that GFI "unlawfully required Plaintiff . . . to pay for returned or damaged goods that were previously delivered." (*Id.*, ¶ 94.) In fact, Plaintiff's unjust enrichment claim relies upon his Independent Contractor Service Agreement to assert that such

deductions were "not provided for anywhere in the Agreement." (*Id.*, ¶ 95.) To the extent that Plaintiff's Independent Contractor Service Agreement governs the same subject matter as his unjust enrichment claim, and Plaintiff has asserted a breach of contract claim, his Fourth Count is deficient as a matter of law.

C. Procedural History

On July 18, 2019, Plaintiff filed his Complaint. On July 22, 2019, Plaintiff served his Summons and Complaint upon all Defendants by personal service at GFI's principal place of business in Jersey City, New Jersey (Hudson County). Defendants file the instant motion concurrently with GFI's Answer to the Complaint. This is Defendants' first motion in this action.

III. ARGUMENT

A. Applicable Standard for Dismissal

Rule 4:6-2(e) permits dismissal of a plaintiff's complaint for failure to state a claim upon which relief can be granted. A plaintiff's "complaint may be dismissed for failure to state a claim if it fails 'to articulate a legal basis entitling plaintiff to relief." *DeBenedetto v. Denny's, Inc*., 421 N.J. Super. 312, 318 (Law Div. 2010). The motion must be evaluated in light of the legal sufficiency of the facts alleged on the face of the complaint. *Printing Mart-Morristown v. Sharp Electronics Corp*., 116 N.J. 739, 746 (1989); *Rieder v. State Dept. of Transp*., 221 N.J. Super. 547, 552 (App. Div. 1987). If the factual allegations are "palpably insufficient" to support a claim upon which relief can be granted, then dismissal is appropriate. *Frederick v. Smith*, 416 N.J. Super 594, 597 (N.J. Super. Ct. App. Div. 2010). Under this standard, partial dismissal is warranted under Rule 4:6-2(e) of Plaintiff's WPL claim against the Individual Defendants, NJRICO claim against all Defendants, and unjust enrichment claim against GFI.

B. Plaintiff's WPL Claim (Count One) Against the Individual Defendants Should Be Dismissed for Failure to State a Claim for Relief

Plaintiff's attempt to harass the Individual Defendants should not be permitted to stand. Although the WPL permits personal liability of corporate officers, N.J.S.A. § 34:11-4.1(a), such liability is only available where a plaintiff has established liability against a corporation and that corporation reneges on its salary obligations. *Mulford v. Computer Leasing, Inc.*, 334 N.J. Super. 385, 399 (Law Div. 1999). Plaintiff has not alleged, and he cannot allege, any facts to show that GFI was his "employer," that GFI is liable for purported salary obligations, or that GFI is unable to satisfy any judgment (which Defendants maintain will never come to pass). At the very least, Plaintiff's attempt to name the Individual Defendants, who have no connection to this case except for their role as corporate officers for GFI, is premature and the Individual Defendants should be dismissed from the Complaint.

Further, under the New Jersey Wage Payment Law, only an "employer" may be held liable for violations of the wage payment and deduction requirements of the WPL. N.J.S.A. §§ 34:11-4.2, 4.4, 4.10. The term "employer" may include officers and agents who "hav[e] the management of such corporation." *Id.* § 34:11-4.1; *Kaplan v. GreenPoint Global*, 2014 U.S. Dist. LEXIS 135140, *22 (D.N.J. Sept. 25, 2014).

While the WPL does not define "management" of the corporation, New Jersey courts weigh discrete factors when determining whether individuals qualify as "managers" under the state's wage and hour law, N.J.S.A. § 34:11-56a *et seq*. Specifically, New Jersey courts consider the degree to which the individual participates in:

- Interviewing job candidates;
- Selecting candidates for hire;
- Setting or adjusting employees' rates of pay;
- Setting or adjusting employees' hours of work;

- Directing the work of employees;
- Maintaining production or sales records for use in supervision or control;
- Appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status;
- Handling employee complaints and grievances;
- Disciplining employees;
- Planning the work;
- Determining the techniques to be used;
- Apportioning the work among the employees;
- Determining the type of materials, supplies, machinery, equipment or tools to be used;
- Determining the type of merchandise to be bought, stocked and sold;
- Controlling the flow and distribution of materials or merchandise and supplies;
- Providing for the safety and security of the employees or the property;
- Planning and controlling the budget; and
- Monitoring or implementing legal compliance measures.

See Hearn v. Rite Aid Corp., 2012 N.J. Super. Unpub. LEXIS 643, *9-10 (Superior Ct. App. Div., March 27, 2012).

Here, Plaintiff has not alleged a single fact establishing any of the factors above for any Individual Defendant. Nor does Plaintiff allege any meaningful interaction with any Individual Defendant to support his claims. Plaintiff instead merely recites the alleged positions held by the Individual Defendants within GFI, (Compl., ¶¶ 11-19), with no further allegations as to their purported roles in "having the management of such corporation." N.J.S.A. §§ 34:11-4.1. Absent any allegations of relevant management activities consistent with New Jersey law, Plaintiff's claims against the Individual Defendants under the WPL must be dismissed as a matter of law for failure to state a claim upon which relief can be granted.

C. Plaintiff's NJRICO Claim (Count Three) Against all Defendants Should Be Dismissed for Failure to State a Claim for Relief

Plaintiff's mere invocation of the NJRICO without any factual assertions to support such a claim, let alone any factual assertions pled with specificity as he is required to do, is deficient as a matter of law. To prove a violation of NJRICO, a plaintiff must establish:

(1) The existence of an enterprise;

(2) That the enterprise engaged in or its activities affected trade or commerce;

(3) That defendant was employed by, or associated with the enterprise;

(4) That he or she participated in the affairs of the enterprise;

(5) That he or she participated through a pattern of racketeering activity; and

(6) Injury resulting from the violation.

Shan Indus., LLC v. Tyco Int'l (US), Inc., 2005 U.S. Dist. LEXIS 37983, *46-47 (D.N.J. Sept. 9, 2005). A "pattern of racketeering activity" requires further proof that (1) the defendants engaged in at least two incidents of racketeering conduct, and (2) a showing that the incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents. *Id.* (citing N.J.S.A. § 2C:41-1(d)).

NJRICO includes among "racketeering activity" any conduct defined as racketeering activity under the federal RICO statute, 18 U.S.C. § 1961(1). N.J.S.A. § 2C:41-1(a)(2). This includes mail and wire fraud, which is the predicate racketeering activity alleged by Plaintiff in his Complaint. (Compl., ¶ 86); *Myrus Hack, LLC v. McDonald's Corp.*, 2009 U.S. Dist. LEXIS 25765, *18-19 (D.N.J. 2009).

The mail fraud and wire fraud statutes contain the same substantive elements: (1) the existence of a scheme to defraud; (2) the use of the mails (18 U.S.C. § 1341) or interstate wires

(18 U.S.C. § 1343) in furtherance of the fraudulent scheme; and (3) culpable participation by the defendants. *United States v. Pearlstein*, 576 F.2d 531, 534 (3d Cir. 1978) (mail fraud); *United States v. Alsugair*, 256 F. Supp. 2d 306, 314 (3d Cir. 2019) ("The mail and wire fraud statutes share the same relevant language, and the same legal analysis applies to both statutes"). The element of fraud requires the plaintiff to establish: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. *Myrus Hack, LLC.*, 2009 U.S. Dist. LEXIS 25765 at *18. These allegations of fraud be pled with specificity. *Lum v. Bank of Am.*, 361 F.3d 217, 223-24 (3d Cir. 2004). To do so, the plaintiff must plead with particularity "the circumstances of the alleged fraud," including the "date, place or time of the fraud, or through alternative means of injecting precision and some measure of substantiation into their allegations of fraud." *Id.* (citations omitted).

Therefore, to establish "racketeering activity" by virtue of mail and wire fraud violations for purposes of Plaintiff's NJRICO claims as asserted in the Complaint, Plaintiff would have to allege – *with specificity* – fraudulent misrepresentations or omissions of fact as part of a scheme to defraud. Plaintiff's Complaint fails to do so, and he cannot allege any facts to meet this high burden. Instead, the sole alleged "misrepresentations" identified by Plaintiff are GFI's legal classification of his payment as commissions, Plaintiff's "reserve" account, and GFI's deductions of money for lawfully stated purposes. (Compl., ¶¶ 89-91.) As a matter of law, these purported acts cannot be a predicate misrepresentation of fact for purposes of establishing fraud under NJRICO.

The law does not, and has never, extended NJRICO liability to alleged erroneous legal conclusions. In fact, doing so would create NJRICO liability for *every* alleged statutory wage payment violation. As described above, no authority supports this misapplication of the NJRICO.

On the contrary, courts have repeatedly denied claims predicated on mail or wire fraud where the allegations of a fraudulent scheme merely alleged statutory violations. *See, e.g., Danielsen v. Burnside-Ott Aviation Training Ctr.*, 746 F. Supp. 170, 176 (D.C. Cir. 1990) (no mail or wire fraud where claims were based solely on alleged labor law violations); *Choimbol v. Fairfield Resorts, Inc.*, 2006 U.S. Dist. LEXIS 68225, *28 (E.D. Va. Sept. 11, 2006) (dismissing RICO claim based on violations of FLSA; "But for the proscriptions of the FLSA, the Defendants conduct would not constitute the fraudulent scheme Plaintiffs allege. The FLSA provides direct relief for such violations."); *Kilper v. City of Arnold*, 2009 U.S. Dist. LEXIS 63471, *69-71 (E.D. Mo. July 23, 2009) (city's alleged violation of state or federal law insufficient as predicate RICO offense; "otherwise, a RICO claim would exist in any instance when a party challenged the validity of a legislative provision and the implementation of that provision."); *Sluka v. Estate of Herink*, 1996 U.S. Dist. LEXIS 20330, *13 (E.D.N.Y. Feb. 9, 1996) ("the mere failure to comply with state law" does not constitute mail or wire fraud). Plaintiff's attempted abuse of the NJRICO statute should not be permitted to stand.

Moreover, Plaintiff includes no specific "date, place or time" or other "measure of substantiation" of the alleged fraud, including *who* made any purported misrepresentations, as required under New Jersey law to satisfy the heightened pleading standard. *Lum*, 361 F.3d at 223-224; *see also Franks v. Food Ingredients Int'l, Inc.*, 2010 U.S. Dist. LEXIS 77280, *20, 2010 WL 3046416 ("Plaintiffs have failed to describe a single incident of fraud with any amount of detail or particularity. The Amended Complaint does not identify which Defendant made

which alleged fraudulent representation, when, or in what manner."); *Drobny v. JP Morgan Chase Bank*, 929 F. Supp. 2d 839, 849 (N.D. Il. 2013) (failure to allege fraud with particularity where plaintiffs "d[id] not allege when the false documents were transmitted, who mailed or wired them, or why they believe that person had an intent to defraud" and the complaint "includes nothing beyond 'loose references' to serving misleading documents by mail."). Significantly, Plaintiff does not identify a single statement or action by any individual Defendant, let alone any fraudulent conduct. Once again, this compels the conclusion that Plaintiff has asserted these claims for the sole purpose of harassing GFI and its individual officers.

For each of these reasons, Plaintiff's claims under NJRICO must be dismissed in their entirety against all Defendants for failure to state a claim.

D. Plaintiff's Unjust Enrichment Claim (Count Four) Against GFI Should Be Dismissed Because He Relies Upon His Independent Contractor Service Agreement, and the Claim Is Duplicative of His Breach of Contract Claim (Count Two)

Similar to his WPL claims against the Individual Defendants and his NJRICO claim against all Defendants, Plaintiff's unjust enrichment claim against GFI fails as a matter of law. Under New Jersey law, "[a] quasi-contract claim cannot exist when there is an enforceable agreement between parties." *MK Strategies, LLC v. Ann Taylor Stores Corp.*, 567 F. Supp. 2d 729, 733–34 (D.N.J. 2008) (citing *Callano v. Oakwood Park Homes Corp.*, 91 N.J. Super. 105, 219 (App. Div. 1966)). Where a plaintiff pleads the existence of a valid contract, "the express contract binds the parties, and the court has no grounds from which to find an implied promise concerning the same subject matter." *Bowen v. Bank of Am.*, No. 14-3531, 2015 WL 5542489, at *5 (D.N.J. Sept. 18, 2015); *see also Ribble Co,, Inc. v. Burkert Fluid Control Sys.*, No. 15-61732, 016 WL 6886869, at *5 (D.N.J. Nov. 22, 2016) (dismissing unjust enrichment claim concerning the same conduct that forms basis of breach of contract claim where plaintiff admitted and relied

upon existence of valid contract); *Saccomanno v. Honeywell*, No. BER-C-73-07, 2007 WL 5745989, at *4 (Superior Ct., Bergen Cty., June 18, 2007) (dismissing unjust enrichment claim that duplicated breach of contract claim where plaintiff admitted existence of valid and binding contract).

Plaintiff admits that his independent contractor status is governed by the Independent Contractor Service Agreement that he entered into with GFI in May 2018. (Compl., ¶¶ 5-7.) In fact, Plaintiff asserts a separate claim for breach of contract (Count Two), and he even relies upon the Independent Contractor Service Agreement as a basis for recovery under his unjust enrichment claim. (*Id*., ¶ 95) ("Defendants also withheld money for return or damaged goods previously delivered, *which is not provided for anywhere in the Agreement*, which unjustly enriched the Defendants.") (emphasis added). As such, Plaintiff's unjust enrichment claim is wholly governed by the Independent Contractor Service Agreement and is the same subject matter as his breach of contract claim. Under well-established New Jersey law, Plaintiff's Count Four for unjust enrichment should be dismissed as a matter of law because it is duplicative of his breach of contract claim and is governed by the terms of the Independent Contractor Service Agreement.

E. Venue Should Be Transferred to Hudson County for the Convenience of the Parties and the Witnesses

Pursuant to Rule 4:3-3(a)(3), Defendants request to transfer venue of this action to Hudson County to resolve Plaintiff's remaining WPL and breach of contract claims against GFI. A motion to change venue under Rule 4:3-3(a)(3) may be granted "for the convenience of parties and witnesses in the interest of justice." As the Chancery Division has explained (and the Appellate Division has affirmed):

> [V]enue requirements are not jurisdictional . . . . Rather, they are rules of practice designed to place litigation at a location

> convenient to the parties and witnesses . . . . Accordingly, an action may be transferred from one venue to another where the convenience of parties and witnesses is not served by the strict application of the venue rules.

State v. Middlesex Co. Bd. of Chosen Freeholders, 206 N.J. Super. 414, 420 (Ch. Div. 1985), (citing *Doyley v. Schroeter*, 191 N.J. Super. 120, 123-24 (Law Div. 1983)), *aff'd* 208 N.J. Super. 342 (App. Div. 1986); *see also Engel v. Gosper*, 71 N.J. Super. 573 (N.J. Super. Law Div. 1962) (transfer of venue to Ocean County proper where defendants had right to have personal injury action tried in Ocean County, the case had significant contacts with Ocean County, and for the convenience of defendants); *Diodate v. Camden Cty. Park Comm'n*, 136 N.J. Super. 324, 327-328 (App. Div. 1975) (same). The interest of justices requires a transfer where the majority of witnesses and documents are located in the transferee jurisdiction. *See, e.g., Ricoh Co., Ltd. v. Honeywell, Inc.*, 817 F. Supp. 473 (D.N.J. 1993) (interpreting federal counterpart to R. 4:3-3). This is especially so where, as here, the "central facts of a lawsuit" occur outside of the plaintiff's selected forum. *Id*. at 481.

Plaintiff is a resident of Philadelphia, Pennsylvania who performed services for GFI in South Carolina, and he has no connection whatsoever to this forum. By stark contrast, GFI and any relevant witnesses within New Jersey are located in Hudson County. Plaintiff does not allege that any of the underlying events occurred in – or that any parties or witnesses reside in – Mercer County. The records that the parties would use in support of their claims and defenses are located in Hudson County; none are located in Mercer County. In short, all of the relevant factors, such as ease of access to sources of proof (personnel files, computers, and other records) and availability of witnesses mandate transferring venue to Hudson County. This Court and its potential jury pool should not be burdened with adjudicating a controversy that has no connection whatsoever to this venue.

Moreover, while ordinarily a plaintiff's choice of forum is given deference, a plaintiff's selection of a forum other than his or her home forum is not accorded the same deference. *Mowrey v. Duriron, Co., Inc.*, 260 N.J. Super. 402, 412 (1992) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256, n. 24 (1981)). Indeed, "the presumption in favor of plaintiff's choice is only a strong one where plaintiff is a resident who has chosen his home forum." *Mandell v. Bell Atlantic Nynex Mobile,* 315 N.J. Super. 273, 281-82 (Law Div. 1997). Because Plaintiff is a resident of Philadelphia, and he has no connection to this forum, his preference to lay venue in Mercer County, inconvenient as it is, does not warrant deference.

Finally, it is clear that one of the purposes of R. 4:3-3(a)(3) is to diminish the danger of a plaintiff selecting an inconvenient forum as a means of forum shopping or vexing, harassing or oppressing a defendant. In the instant case, it would be absurd to allow an out-of-state plaintiff to bring this case in an arbitrary, more distant courthouse in Mercer County, rather than in the convenient, logical, and local forum in Hudson County. Transfer is mandated in the interest of justice for this additional reason as well.

Accordingly, Defendants respectfully request, for the convenience of parties and witnesses in the interest of justice, that the Court transfer the venue of this action to Hudson County.

IV. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court issue an order: (i) dismissing Plaintiff's Complaint in its entirety as against the Individual Defendants, with prejudice; (ii) dismissing Plaintiff's NJRICO claims against all Defendants, with prejudice; (iii) dismissing Plaintiff's unjust enrichment claim against GFI, with prejudice; (iv) transferring the venue of this action to Hudson County to adjudicate Plaintiff's remaining WPL and breach of

contract claims against GFI; and (v) granting such other and further relief as the Court deems just and proper.

Dated: August 22, 2019
Morristown, New Jersey

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By _____
Aaron Warshaw (*pro hac vice* pending)
Daniel M. Bernstein (*pro hac vice* pending)
599 Lexington Avenue, 17th Floor
New York, New York 10022

Fotini Karamboulis
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960

Attorneys for Defendants

39611069.4

Fotini Karamboulis, Esq. (I.D. #029562013)
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
(973) 656-1600
Attorneys for Defendants

ANIBAL MEJIAS, on behalf of himself and those similarly situated, Plaintiff, v. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MERCER COUNTY DOCKET NO.: MID-L-001401-19 *Civil Action* **ORDER**

TO: David E. Cassidy, Esq.
John M. Vlasac, Jr., Esq.
485 B Route 1 South, Suite 120
Iselin, New Jersey 08830
Attorneys for Plaintiff

COUNSELOR:

THIS MATTER having come before the Court, upon the application of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., attorneys for Defendants Goya Foods, Inc. ("GFI"), Robert I. Unanue, Francisco R. Unanue, Joseph Perez, Peter Unanue, David Kinkela, Rebecca Rodriguez, Carlos G. Ortiz, Miguel A. Lugo, Jr., and Conrad Colon, for an Order granting Defendants' motion for partial dismissal of Plaintiff's complaint and to change venue to Hudson County; and the Court having reviewed the papers submitted in support of the motion and those submitted in opposition

thereto, if any; and having heard the oral arguments of the parties (if any); and for good cause shown;

IT IS on this _____ day of _____ 2019,

ORDERED, that Defendants' Motion is GRANTED and JUDGMENT IS ENTERED in favor of Defendants and against Plaintiff, and thereby: (i) dismissing Plaintiff's Complaint in its entirety as against the Individual Defendants, with prejudice; (ii) dismissing Plaintiff's New Jersey Racketeering Influenced and Corrupt Organizations Act claims against all Defendants, with prejudice; (iii) dismissing Plaintiff's unjust enrichment claim against GFI, with prejudice; (iv) transferring the venue of this action to Hudson County to adjudicate Plaintiff's remaining New Jersey Wage Payment Law and breach of contract claims against GFI; and (v) granting such other and further relief as the Court deems just and proper; it is

FURTHER ORDERED that a copy of this Order shall be served on all parties within _____ days of the date of receipt of this Order.

_____
J.S.C.

Opposed ____
Unopposed ____

39662781.1

Fotini Karamboulis, Esq. (I.D. #029562013)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
(973) 656-1600
Attorneys for Defendants

ANIBAL MEJIAS, on behalf of himself and those similarly situated, Plaintiff, v. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MERCER COUNTY DOCKET NO.: MID-L-001401-19 *Civil Action* **CERTIFICATION**

I, Fotini Karamboulis, being of full age, certify and state as follows:

1. I am an attorney at law of the State of New Jersey and an Associate with the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. and counsel for Defendants GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A. LUGO, JR., and CONRAD COLON, (collectively "Defendants"). As such, I am fully familiar with the facts stated herein.

2. I submit this Certification in support of Defendants' motion for partial dismissal of Plaintiff's complaint and to change venue to Hudson County.

3. Attached as Exhibit A is a copy of Plaintiff's Complaint in this action.

4. For the reasons set forth in Defendants' memorandum of law in support of the motion, Defendants respectfully request that the Court issue an order: (i) dismissing Plaintiff's Complaint in its entirety as against the Individual Defendants, with prejudice; (ii) dismissing Plaintiff's NJRICO claims against all Defendants, with prejudice; (iii) dismissing Plaintiff's unjust enrichment claim against GFI, with prejudice; (iv) transferring the venue of this action to Hudson County to adjudicate Plaintiff's remaining WPL and breach of contract claims against GFI; and (v) granting such other and further relief as the Court deems just and proper.

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

Fotini Karamboulis, Esq.

Dated: August 22, 2019

EXHIBIT A

VLASAC & SHMARUK, LLC
David E. Cassidy, Esq.
N.J. Atty ID# 024061996
John M. Vlasac, Jr., Esq.
N.J. Atty ID# 020042000
485 B Route 1 South, Suite 120
Iselin, New Jersey 08830
(732) 494-3600
Attorneys for Plaintiffs

ANIBAL MEJIAS, on behalf of himself and those similarly situated, Plaintiff, vs. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendant(s)	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MERCER COUNTY Docket Number: MER-L- CIVIL ACTION **COMPLAINT WITH JURY DEMAND**

INDIVIDUAL AND CLASS ACTION COMPLAINT

Plaintiff, **ANIBAL MEJIAS** (hereinafter "Plaintiff"), on behalf of himself and those similarly situated, by and through the undersigned counsel, hereby complains as follows against Defendants **GOYA FOODS, INC., ("Goya"), ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1-10** (said names being fictitious, real names unknown), and **ABC COMPANIES 1-10**

(said names being fictitious, real names unknown), (hereinafter collectively referred to as "Defendants").

INTRODUCTION

1. Plaintiff brings this action to redress Defendants' violations of the New Jersey Wage Payment Law (hereinafter "NJWPL"), N.J.S.A. 34:11-4.1, et seq., the New Jersey Civil RICO Act, N.J.S.A. 2C:41-1, et seq., and the common law of New Jersey.

2. Plaintiff asserts Defendants unlawfully designated Plaintiff and those similarly situated to him as independent contractors and Defendants used that improper classification to unlawfully deduct wages from their pay. Specifically, Defendants unlawfully withheld wages from Plaintiff and those similarly situated by deducting costs and fees associated with drivers' leasing of vehicles, for fuel and maintenance costs, insurance, trailer rentals and other equipment, administrative fees, returned and damaged products, and other deductions not allowed by governing law. These wage deductions violate the New Jersey Wage Payment Law (hereinafter "NJWPL"), N.J.S.A. 34:11-4.1, et seq., the New Jersey Civil RICO Act, N.J.S.A. 2C:41-1, et seq. and the common law of New Jersey.

3. As a result of Defendants' unlawful actions, Plaintiff and those similarly situated are owed wages and other damages.

PARTIES

4. Plaintiff, Mr. ANIBAL Mejias, is an adult individual residing at 4408 North 6th Street, Philadelphia, PA 10140. Plaintiff was an employee of Defendant Goya working as a truck driver in the State of South Carolina from in or around May 2018 until on or about May 2019.

5. Plaintiff signed a form agreement labeled Independent Contractor's Service Agreement dated May 2018 (the "Agreement").

6. Defendants told Plaintiff they utilized the Agreement as a standard independent contractor agreement for truck drivers with the common policies and practices at issue in this action. The Agreement is used to misclassify employees as independent contractors when in fact they are not independent contractors in practice.

7. The Agreement purports to cover the terms and conditions of Plaintiff's employment and, upon information and belief, is the same in all material respects set forth in this Complaint as agreements executed by other misclassified truck drivers.

8. Defendant Goya is a company doing business in New Jersey and throughout the United States manufacturing and selling and delivering food products under the Goya brand name.

9. Defendant Goya has its principal place of business located at 350 County Road, in the City of Jersey City, in the State of New Jersey and has multiple facilities throughout the United States.

10. Defendant Goya is an employer of Plaintiff, as defined by the NJWPL.

11. Defendant, Robert I. Unanue is an adult individual and an officer of Defendant Goya.

12. Defendant, Francisco R. Unanue is an adult individual and an officer of Defendant Goya.

13. Defendant, Joseph Perez is an adult individual and an officer of Defendant Goya.

14. Defendant, Peter Unanue is an adult individual and an officer of Defendant Goya.

15. Defendant, David Kinkela is an adult individual and an officer of Defendant Goya.

16. Defendant, Rebecca Rodriguez is an adult individual and an officer of Defendant Goya.

17. Defendant, Carlos G. Ortiz is an adult individual and an officer of Defendant Goya.

18. Defendant, Miguel A. Lugo, Jr. is an adult individual and an officer of Defendant Goya.

19. Defendant, Conrad Colon is an adult individual and an officer of Defendant Goya.

20. Defendant John Does 1-10 (said names being fictitious, real names unknown) are all unknown employees of Goya Foods., Inc. are additional officers and owners of Defendant Goya.

21. Defendant ABC Companies 1-10 (said names being fictitious, real names unknown) are all unknown business entities associated with Defendant who employ truck drivers delivering Goya products as independent contractors or owner operators.

22. At all times relevant herein, Defendants acted by and through their agents, servants, and employees, each of whom acted at all times relevant herein in the course and scope of their employment with and for Defendants.

JURISDICTION AND VENUE

23. This Court has jurisdiction over this matter as the Agreement has a choice of law and choice of venue provision designating New Jersey law as the governing law and New Jersey as the venue for any litigation between the parties. Specifically, the Agreement states in Section 12:

(e) New Jersey Law and Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey both as to interpretation and performance,

without regard to New Jersey's conflict-of-law rules, and any dispute arising under this Agreement or relating to the relationship created by this Agreement shall be subject to the exclusive jurisdiction of the federal or state courts of New Jersey.

24. This Court has personal jurisdiction over Defendants as they conduct substantial business in New Jersey and their principal place of business is located in New Jersey.

25. Venue is proper in Mercer County under R. 4:3-2(b) as Defendants conduct substantial business throughout Mercer County and Defendant Goya's registered agent is located in Mercer County.

CLASS ACTION ALLEGATIONS

26. The foregoing paragraphs are incorporated herein as if set forth in their entirety.

27. Pursuant to Rule 4:32 of the New Jersey Rules of Civil Procedure, Plaintiff brings his claim for relief to redress Defendants' violations of the NJWPL, the NJRICO, and the common law of New Jersey on behalf of himself and those similarly situated.

28. Defendant misclassified Plaintiff and all those similarly situated as independent contractors instead of employees under the standard articulated pursuant to the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1 et seq., and New Jersey Supreme Court precedent.

29. Plaintiff seeks to represent a class of all those similarly situated who worked or work for Defendants as truck drivers and who were subject to the unlawful policies of Defendants within the past six (6) years.

30. Defendant Goya employs truck drivers throughout the United States and utilizes the independent contractor or owner operator classification regularly to satisfy its delivery needs, as further pled herein.

31. Due to Defendant Goya using this classification of truck drivers under an Agreement with a New Jersey choice of law and venue provision and the drivers being scattered across the United States, it is impracticable to bring or join individual claims. The members within the Class are scattered throughout the United States and so numerous that joinder of all members is impractical in satisfaction of New Jersey Court Rule 4:32-1(a)(1).

32. Plaintiff does not know the exact size of the class, as such information is in the exclusive control of Defendants.

33. Plaintiff seeks to certify the following classes defined as:

> All truck drivers of Defendants who were designated as independent contractors or owner operators and from whom Defendants unlawfully withheld wages from by deducting costs and fees associates with drivers' leasing vehicles, for fuel and maintenance costs, insurance, trailer rentals and other equipment, administrative fees, returned and damages products, and other deductions not allowed by governing law. To the extent revealed by discovery and investigation, there may be additional appropriate classes and/or subclasses from the above class definition which is broader and/or narrower in time or scope.

34. Excluded from the Class are Defendants' officers, directors, agents, employees and members of their immediate families; and the judicial officers to whom this case is assigned, their staff, and the members of their immediate families.

35. There are common questions of law and fact that affect the rights of every member of the Class, and the types of relief south are common to every member of the respective Class. The same conduct by Defendants has injured each respective Class Member. Common questions of law and/or fact common to the respective Classes include, but are not limited to:

a. Whether Defendants improperly classified its independent contractor truck drivers;

b. Whether Defendants unlawfully deducted wages from the Class Members through this misclassification scheme;

c. Whether Defendants breached the Agreement with Class Members by maintaining wage deduction clauses in violation of public policy under the governing law of said Agreements.

36. These questions of law and/or fact are common to the Class and predominate over any questions affecting only individual class members.

37. The claims of Plaintiff are typical of the claims of their respective Class as required by New Jersey Court Rule 4:32-1(a)(3), in that all claims are based upon the same factual and legal theories. It is the same conduct by each Defendant that has injured each member of the Class.

38. Plaintiff will fairly and adequately represent and protect the interests of the Class, as required by New Jersey Court Rule 4:32-1(a)(4). Plaintiff will fairly and adequately protect the interests of the those similarly situated because Plaintiff's interests are coincident with, and not antagonistic to, those of the Class.

39. Plaintiffs have retained counsel with substantial experience in the handling of wage and hour class actions in New Jersey. Plaintiffs and their counsel are committed to the vigorous prosecution of this action on behalf of the classes and have the financial resources to do so. Neither Plaintiff nor counsel has any interest adverse to those of the Class.

40. Plaintiff's claims are typical of the claims of the those similarly situated because Plaintiff, like all those similarly situated, were/are employees of the Defendants under common policies and practices who were, within the last six (6) years, misclassified as independent contractors and from whom Defendants unlawfully deducted wages from their pay.

41. Class certification is appropriate pursuant to New Jersey Court Rule 4:32-1(b)(1) because the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications that would establish incompatible standards of

conduct for Defendants and/or because adjudications respecting individual members of the Class would, as a practical matter, be dispositive of the interests of the other members or would risk substantially impairing or impending their ability to prosecute their interests.

42. A class action is superior to other available methods for the fair and efficient adjudication of the controversy under New Jersey Court Rule 4:32-1(b)(3).

43. Absent a class action, most members of the Class likely would find the cost of litigating their claims to be prohibitive, and will have no effective remedy at law, especially due to Defendants' use of a broad choice of law and venue provision thereby making it very difficult for individual class members to even seek redress.

44. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants and promotes consistency and efficiency of adjudication.

45. Maintenance of this action as a class action is a fair and efficient method for adjudication of this controversy. It would be impracticable and undesirable for each member of each putative class who has suffered harm to bring a separate action. In addition, the maintenance of separate actions would place a substantial and unnecessary burden on the courts and could result in inconsistent adjudications, while a single class action can determine, with judicial economy, the rights of all putative class members.

46. Class certification is also appropriate because this Court can designate particular claims or issues for class-wide treatment and may designate one or more subclasses pursuant to New Jersey Court Rule 4:32-2(d).

47. No unusual difficulties are likely to be encountered in the management of this action as a class action.

FACTUAL BACKGROUND

48. The foregoing paragraphs are incorporated herein as if set forth in their entirety.

49. Goya owns and operates approximately 14 U.S. distribution centers throughout the United States.

50. Goya ships its products to different grocery stores throughout the United States, many of them located in the State of New Jersey, for retail sale. In areas where it doesn't have a physical presence, it works with third-party distributors but otherwise it ships directly to retailers.

51. Goya employs more than 4,000 workers worldwide.

52. More than 500 Goya salespeople regularly visit stores and take orders and merchandise Goya Foods, Inc. products for retail sale throughout the United States. When a Goya salesperson visits a store, they place an order on their handheld devices, and these orders are processed overnight for next-day delivery. Sales Orders are picked, loaded, and delivered to stores on a next-day basis.

53. Goya delivers straight to its customers' stores, which range from big box retailers to neighborhood bodegas. Goya uses both traditional w-2 employees and it designates some truck driver employees as alleged independent contractors, also known as owner operators, to make its deliveries. Upon information and belief, Goya uses approximately 190 truck drivers for its delivery operations.

54. All orders are filled from inventory in distribution centers and delivered by Goya by truck driver Goya hires. The Goya truck drivers, such as the Plaintiff, are misclassified as owner operators/independent contractors but in reality are employees of Goya.

55. Truck driver delivery employees such as the Plaintiff are an integral part of Goya's business model.

56. Truck driver delivery employees are not performing activities outside Goya's normal course of business or even outside its normal place of business as goods are produced and shipped directly to customers via an integrated chain of commerce. Goods are not distributed to a third-party site for delivery but rather flow continuously form Goya to the customers.

57. Goya's truck drivers such as Plaintiff and those similarly situated make multiple direct customer stops per day, which are exclusively directed by Goya via delivery tickets, and these employees do not deliver to other customers. Goya knows this due to the volume of product and number of stops it assigns to each misclassified driver.

58. Goya's truck drivers are provided a loaded trailer each night with delivery instructions with quantities and locations and truck drivers exercise no meaningful control over their deliveries.

59. Goya provided Plaintiff and those similarly situated an XRS handheld device to plug into the trucks to track location, hours and mileage. These devices generate DOT required reports that a true independent contractor would be required to supply independent of the company provided device. Upon information and belief, these same devices were also used for traditional w-2 truck driving employees.

60. Plaintiff and those similarly situated did not utilize vehicles for other clients.

61. Goya maintained a dispatcher who directed and controlled deliveries and the truck drivers at all times and who would regularly communicate with Plaintiff and those similarly situated. Upon information and belief, the same dispatcher dispatched traditional w-2 truck drivers and the employees mis-designated as independent contractor truck drivers like Plaintiff.

62. Plaintiff and those similarly situated were even required to get pre-approval for days off via the dispatcher.

63. During Plaintiff's employment, Goya required Plaintiff to return his truck to a trucking yard each day, and his vehicle would be fueled and loaded over night for next day deliveries, with written instructions what and where to deliver.

64. Defendants attempted designation of drivers as independent contractors was a fraudulent fiction to hide the true employee status of these workers. Indeed, Defendants directed and controlled important aspects of their employment including deliveries and their schedule of work yet Defendants deducted money normally considered business expenses from the drivers' weekly paychecks ostensibly for payment for the truck leases and other costs and fees associated with deliveries of their product.

65. Defendants denied Plaintiff and those similarly situated other benefits such as paid time off, vacation pay, holiday pay and similar compensation benefits due to employees.

66. Defendants paid Plaintiff and those similarly situated "commissions," which were based upon a percentage of delivered product assigned and provided to them to deliver each day.

67. Incentive pay was also given to Plaintiff and those similarly situated so long as the total amount of returns from a given day did not exceed a certain percentage of the product actually delivered.

68. Defendants, however, required Plaintiff and those similarly situated to pay for normal business expenses and costs that Defendants should have been paying.

69. The Agreement states: "[Plaintiff[Contractor shall be responsible for paying all operating expenses and costs of operating the Equipment, including all expenses for fuel, oil, and repairs to the Equipment; . . . ."

70. The Agreement further created an unlawful "Reserve" account to secure its interests. The Agreement specifically states: "[Plaintff] Contractor authorizes Carrier to deduct ten (10%) percent of Contractor's weekly commissions due Contractor from Carrier [Defendant

Goya] under Section 3 of the Agreement (the "Reserve"). Carrier shall deposit the Reserve in an interest bearing account at such rates as Carrier, in its sole discretion, may secure from time to time for credit to Contractor. Interest shall accrue weekly and be calculated on the closing balance of the Reserve at the end of the week. From time to time, Contractor may (1) elect to discontinue further deductions at anytime provided the Reserve has a minimum balance of Four Thousand ($4,000) Dollars and (2) request the disbursement to Contractor of any excess over Four Thousand ($4,000) Dollars. Within seventy-five (75) days of the termination of the Agreement (or as soon as practicable thereafter) Carrier will pay to Contractor, after deducting all amounts due and owing Carrier under the Agreement, the balance of any monies held in the Reserve."

71. These deductions were itemized in each pay period (weekly) in the drivers' "Driver Commission Report" and the "Driver Commission Statement."

72. Defendants unlawfully deducted from Plaintiff's paycheck, each week, the following:

a. $125.00 for trailer rental;

b. $150.00 for truck insurance;

c. $23.94 for Helpers Workmen's Compensation insurance;

d. $580.73 for truck lease;

e. $250.00 for equipment;

f. Fuel costs averaging approximately $400.00 - $500.00;

g. A $2.50 for "professional fee" to administer the unlawful deductions;

h. Approximately $276.64 to maintain the "Reserve" account in case Plaintiff could not work and pay the fees Defendants required; and,

i. Rejected goods at the time of delivery or Returns and damaged goods that were previously delivered by the Plaintiff.

73. The Agreement, the general policies and practices, the commission reports and statements, and the amounts identified above are representative of the proposed Class.

FIRST COUNT
Violations of the New Jersey Wage Payment Law
(Unlawful Deductions – ALL DEFENDANTS)

74. The foregoing paragraphs are incorporated herein as if set forth in their entirety.

75. At all times relevant herein, Defendants stand/stood in an Employer/Employee relationship with the Plaintiff and those similarly situated.

76. At all times relevant herein, Defendants are/were responsible for paying wages to Plaintiff and those similarly situated.

77. Defendants violated the NJWPL by withholding wages for illegal deductions from Plaintiff's and those similarly situated.

78. As a result of Defendants' uniform policies and practices described above, Plaintiff was illegally deprived of regular wages earned, in such amounts to be determined at trial, and is entitled to recovery of such total unpaid amounts, pre and post-judgment interest, and other compensation pursuant to N.J.S.A. 34:11-4.1 et seq.

WHEREFORE, Plaintiff prays that this Court enter an Order providing that:

a) Defendants are to be prohibited from continuing to maintain their policies, practices, or customs in violation of the state laws and principles of equity;

b) Defendants are to compensate, reimburse, and make Plaintiff and those similarly situated whole for any and all pay and benefits they would have received had it not been for Defendants' illegal actions, including, but not limited to, lost past earnings. Plaintiff and those similarly situated should be accorded those benefits illegally withheld by Defendants;

c) A declaratory judgment that Defendants' wage practices alleged herein violate the New Jersey Wage Payment Law ("NJWPL"), N.J.S.A. 34:11-4.1 et seq.; An Order for injunctive relief ordering Defendants to comply with the NJWPL and end all of the illegal wage practices alleged herein;

d) An Order certifying this action as a Class Action, designating the lead Plaintiff ANIBAL MEJIAS as Class representative and the undersigned counsel as Class Counsel;

e) Judgment for damages for all unpaid regular wages to which Plaintiff and members of the Class are lawfully entitled under the NJWPL, N.J.S.A. 34:11-4.1 et seq.;

f) Incentive Award for the lead Plaintiff;

g) An Order directing Defendants to pay Plaintiff and members of the putative Class pre and post-judgment interest, reasonable attorney's fees and all costs connected with this action; and,

h) Any and all other equitable relief which this Court deems fit.

SECOND COUNT
BREACH OF CONTRACT
(Failure to Pay Wages Due - DEFENDANT GOYA FOODS)

79. The foregoing paragraphs are incorporated herein as if set forth in their entirety.

80. By misclassifying Plaintiff and those similarly situated as independent contractors and by unlawfully requiring Plaintiff and those similarly situated to pay for costs and for the returns of unwanted or damaged goods, Defendants breached the Agreement because such deductions are against New Jersey public policy and hence were unenforceable agreements deducting monies owed to Plaintiff and those similarly situated.

81. As a result, Defendants breached their contract with Plaintiff and those similarly situated by deducting wages pursuant to clauses in the Agreement that were are unenforceable a in violation of New Jersey public policy as set forth in the NJWPL.

82. Plaintiff and those similarly situated have suffered damages and the monies improperly deducted under the Agreement must be returned to Plaintiff and those similarly situated as void against public policy.

WHEREFORE, Plaintiff prays that this Court enter an Order providing that:

a) Defendants are to be prohibited from continuing to maintain their policies, practices, or customs in violation of the state laws and principles of equity;

b) Defendants are to compensate, reimburse, and make Plaintiff and those similarly situated whole for any and all pay and benefits they would have received had it not been for Defendants' illegal actions, including, but not limited to, lost past earnings. Plaintiff and those similarly situated should be accorded those benefits illegally withheld by Defendants;

c) An Order certifying this action as a Class Action, designating the lead Plaintiff ANIBAL MEJIAS as Class representative and the undersigned counsel as Class Counsel;

d) Incentive Award for the lead Plaintiff;

e) An Order directing Defendants to pay Plaintiff and members of the putative Class pre and post-judgment interest, reasonable attorney's fees and all costs connected with this action; and,

f) Any and all other equitable relief which this Court deems fit.

THIRD COUNT
NJRICO
(ALL DEFENDANTS)

83. The foregoing paragraphs are incorporated herein.

84. Defendants are a group of persons associated for the common purpose of carrying out the fraudulent scheme described in this Complaint; as a result, Defendants and their officers, agents, and employees constitute an enterprise within the meaning of RICO.

85. During all relevant times this enterprise was engaged in and its activities affected trade and commerce.

86. The enterprise had a pattern of racketeering activity consisting of the commission of continuing acts of mail and wire fraud as described in this Complaint.

87. Defendants conspired to defraud Plaintiff and those similarly situated to mislead them to believe they were independent contractors.

88. In doing so, Defendants created a contract with weekly unlawful deductions from wages as set forth, including for return of their goods, which were occurred in relation to deliveries. Defendants did this, in part, to avoid paying taxes and to avoid liability to third parties.

89. The scheme is fraudulent in nature and required weekly acts of mail fraud and theft of wages to accomplish by transferring money labeled as commission but not wages for the purpose of avoiding subsidiary taxation to the enterprise, and for the purpose of avoiding paying other emoluments of employment by the enterprise. In effectuating these predicate acts, Defendants used both the mail and wires for the purpose of executing this scheme in violation of 18 U.S.C. §§ 1341 and 1343.

90. Defendants even created an unlawful “Reserve” account to secure any monies they unlawfully required Plaintiff and those similarly situated to pay .

91. Defendants also misrepresented to Plaintiff and those similarly situated that it deducted money(s) for a lawful purpose when it withheld wages when in fact all such wages were withheld solely to benefit Defendants and not for any legal purpose.

92. Defendants used their enterprise and a weekly pattern of unlawful predicates acts to accomplish depriving Plaintiff and those similarly situated of wages owed to them in violation of the New Jersey Civil RICO Act, N.J.S.A. 2C:41-1, et seq.

WHEREFORE, Plaintiff prays that this Court enter an Order providing that:

a) Defendants are to be prohibited from continuing to maintain their policies, practices, or customs in violation of the state laws and principles of equity;

b) Defendants are to compensate, reimburse, and make Plaintiff and those similarly situated whole for any and all pay and benefits they would have received had it not been for Defendants' illegal actions, including, but not limited to, lost past earnings. Plaintiff and those similarly situated should be accorded those benefits illegally withheld by Defendants;

c) Treble and other damages as allowed for by statute;

d) An Order certifying this action as a Class Action, designating the lead Plaintiff ANIBAL MEJIAS as Class representative and the undersigned counsel as Class Counsel;

e) Incentive Award for the lead Plaintiff;

f) An Order directing Defendants to pay Plaintiff and members of the putative Class pre and post-judgment interest, reasonable attorney's fees and all costs connected with this action; and,

g) Any and all other equitable relief which this Court deems fit.

FOURTH COUNT
Unjust Enrichment
(Failure to Pay Wages Due – DEFENDANT GOYA FOODS)

93. The foregoing paragraphs are incorporated herein as if set forth in their entirety.

94. By misclassifying Plaintiff and Those similarly situated as independent contractors and by unlawfully requiring Plaintiff and those similarly situated to pay for returned or damaged goods that were previously delivered.

95. Defendants also withheld money for return or damaged goods previously delivered, which is not provided for anywhere in the Agreement, which unjustly enriched the Defendants.

96. As a result of Defendants' conduct, Plaintiff and those similarly situated have suffered damages and the improperly withhold monies should be returned.

WHEREFORE, Plaintiff prays that this Court enter an Order providing that:

a) Defendants are to be prohibited from continuing to maintain their policies, practices, or customs in violation of the state laws and principles of equity;

b) Defendants are to compensate, reimburse, and make Plaintiff and those similarly situated whole for any and all pay and benefits they would have received had it not been for Defendants' illegal actions, including, but not limited to, lost past earnings. Plaintiff and those similarly situated should be accorded those benefits illegally withheld by Defendants;

c) An Order certifying this action as a Class Action, designating the lead Plaintiff ANIBAL MEJIAS as Class representative and the undersigned counsel as Class Counsel;

d) Incentive Award for the lead Plaintiff;

e) An Order directing Defendants to pay Plaintiff and members of the putative Class pre and post-judgment interest, reasonable attorney's fees and all costs connected with this action; and,

f) Any and all other equitable relief which this Court deems fit.

JURY DEMAND

Plaintiff hereby demands trial by jury on all issues.

NOTICE OF DESIGNATION OF TRIAL COUNSEL

PLEASE TAKE NOTICE that pursuant to the Rules of the Court, John M. Vlasac, Jr., Esq. and David E. Cassidy, Esq. are hereby designated as trial counsel of the within matter.

DEMAND TO PRESERVE EVIDENCE

All Defendants are hereby directed to preserve all physical and electronic information pertaining in any way to Plaintiffs' and Those similarly situated' employment, to Plaintiffs' and Those similarly situated' cause of action and/or prayers for relief, and to any defenses to same, including, but not limited to, electronic data storage, closed circuit TV footage, digital images, computer images, cache memory, searchable data, emails, spread sheets, employment files, memos, text messages, any and all online social or work related websites, entries on social networking sites (including, but not limited to, Facebook, Twitter, MySpace, etc.), and any other information and/or data and/or things and/or documents which may be relevant to any claim or defense in this litigation.

DEMAND FOR INSURANCE DISCOVERY

Pursuant to R. 4:18, plaintiff hereby demands that the defendants, produce the following documents for inspection and copying at the office of John M. Vlasac, Jr., Esquire, Vlasac & Shmaruk, 485B Route 1 South, Iselin, New Jersey, within the time provided by R. 4:18-1(b):

1. On the date of the incident, indicate whether the defendants had a liability insurance policy and, if so, set forth the name of the insurance company, the policy number, the effective date, the policy limits and attach a copy of the declarations page.

2. On the date of the incident, indicate whether the defendants had any excess coverage including a personal liability catastrophe umbrella and, if so, set forth the name of the insurance company, the policy number, the effective date, the policy limits and attach a copy of the declarations page.

VLASAC & SHMARUK, LLC
Attorney for the Plaintiffs

_/s/ David E. Cassidy, Esq._____
DAVID E. CASSIDY, ESQ.

Dated: July 18, 2019

CERTIFICATION

I certify that the within matter is not the subject of any other pending court or arbitration proceeding.

VLASAC & SHMARUK, LLC
Attorney for the Plaintiffs

_/s/ David E. Cassidy, Esq._____
DAVID E. CASSIDY, ESQ.

Dated: July 18, 2019

CERTIFICATION PURSUANT TO R. 4:5-1

I, DAVID E. CASSIDY, hereby certify as follows:

1. I am attorney at law of the State of New Jersey and am a member of the firm and as such, I am fully familiar with same.

2. To the best of my knowledge, confirmation and belief, there is no other action pending about the subject matter of this Complaint in the Superior Court of New Jersey, Law Division, Mercer County. Additionally, other than pled herein as a Class Action, there are no other persons known to me who should be added as parties to this matter, nor are there any other actions contemplated.

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

VLASAC & SHMARUK, LLC
Attorney for the Plaintiffs

/s/ David E. Cassidy, Esq.
DAVID E. CASSIDY, ESQ.

Dated: July 18, 2019

Civil Case Information Statement

Case Details: MERCER | Civil Part Docket# L-001401-19

Case Caption: MEJIAS ANIBAL VS GOYA FOODS, INC.
Case Initiation Date: 07/18/2019
Attorney Name: JOHN MICHAEL VLASAC
Firm Name: VLASAC & SHMARUK, LLC
Address: 485B ROUTE 1 SOUTH STE 120
ISELIN NJ 08830
Phone:
Name of Party: PLAINTIFF : MEJIAS, ANIBAL
Name of Defendant's Primary Insurance Company (if known): Unknown

Case Type: EMPLOYMENT (OTHER THAN CEPA OR LAD)
Document Type: Complaint with Jury Demand
Jury Demand: YES - 6 JURORS
Hurricane Sandy related? «sandyRelated»
Is this a professional malpractice case? NO
Related cases pending: NO
If yes, list docket numbers:
Do you anticipate adding any parties (arising out of same transaction or occurrence)? YES

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? YES

If yes, is that relationship: Employer/Employee

Does the statute governing this case provide for payment of fees by the losing party? NO

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:

Do you or your client need any disability accommodations? NO
If yes, please identify the requested accommodation:

Will an interpreter be needed? NO
If yes, for what language:

Please check off each applicable category: Putative Class Action? YES **Title 59?** NO

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b)

07/18/2019
Dated

/s/ JOHN MICHAEL VLASAC
Signed

Ryan T. Warden (I.D. No. 044322006)
Fotini Karamboulis (I.D. No. 029562013)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
Telephone: (973) 656-1600
Facsimile: (973) 656-1611
Email: Ryan.warden@ogletree.com
Fotini.karamboulis@ogletree.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANIBAL MEJIAS, DENNIS MINTER, JERRY FULLER, and JOSE PENA, on behalf of themselves and those similarly situated, Plaintiffs, v. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendants.	CIVIL ACTION NO. _____ **NOTICE OF REMOVAL UNDER THE CLASS ACTION FAIRNESS ACT**

EXHIBIT C

VLASAC & SHMARUK, LLC
David E. Cassidy, Esq.
N.J. Atty ID # 024061996
John M. Vlasac, Jr., Esq.
N.J. Atty ID # 020042000
485 B Route 1 South, Suite 120
Iselin, New Jersey 08830
(732) 494-3600
Attorneys for Plaintiffs

ANIBAL MEJIAS, on behalf of himself and those similarly situated, Plaintiff(s), vs. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendant(s)	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MERCER COUNTY Docket Number: MER-L-1401-19 CIVIL ACTION

PLAINTIFF'S OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS

To: Fotini Karamboulis, Esq.
Ogletree, Deakins, Nash,
Smoak & Stewart, P.C.
10 Madison Avenue, Suite 400
Morristown, NJ 07960

Table of Contents

PRELIMINARY STATEMENT

Plaintiff, ANIBAL MEJIAS (hereinafter "Plaintiff"), on behalf of himself and those similarly situated, brings this action against Defendants, GOYA FOODS, INC., ("Goya"), ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1-10 (said names being fictitious, real names unknown), and ABC COMPANIES 1-10 (said names being fictitious, real names unknown), (collectively referred to as "Defendants"), to redress Defendants' violations of the New Jersey Wage Payment Law (hereinafter "NJWPL"), N.J.S.A. 34:11-4.1, et seq., the New Jersey Civil RICO Act, N.J.S.A. 2C:41-1, et seq., and the common law of New Jersey.

Defendants employed Plaintiff as a truck driver in the State of South Carolina from in or around May 2018 until his termination of employment on or about May 2019. Plaintiff performed work under a form agreement labeled Independent Contractor's Service Agreement dated May 2018 (the "Agreement"). Defendants told Plaintiff they utilized the Agreement as a standard independent contractor agreement for truck drivers with the common policies and practices at issue in this action. The Agreement is used to misclassify employees as independent contractors when in fact they are employees, not independent contractors, in every way. The Agreement purports to cover the terms and conditions of Plaintiff's employment and is used as an artifice to improperly classify truck drivers so Defendants can unlawfully deduct wages from their pay and not pay taxes. Specifically, Defendants unlawfully withheld wages from Plaintiff and those similarly situated by deducting costs and fees associated with drivers' leasing of vehicles, for fuel and maintenance costs, insurance, trailer rentals and other equipment, administrative fees, returned and damaged products, and other deductions not allowed by governing law. These wage

deductions violate the NJWPL, N.J.S.A. 34:11-4.1, et seq., the New Jersey Civil RICO Act, N.J.S.A. 2C:41-1, et seq., and the common law of New Jersey.

Defendants seek to dismiss the corporate officers as named Defendants, and also seek dismissal of Counts II and III of Plaintiff's Complaint as a matter of law. Defendants also ask this Court to transfer venue to Hudson County for their convenience. As shown below, Defendants cannot prevail on any of these bases. Corporate officers are personally liable for unpaid wages under N.J. Stat. § 34:11-4.1. Plaintiff has also set forth specific allegations demonstrating he is entitled to pursue his claims of under N.J.S.A. 2C:41-2(c), the New Jersey Racketeer Influenced and Corrupt Organizations Act, and for unjust enrichment. And finally, Defendants' application for change of venue is without basis and must be denied.

LEGAL ARGUMENT

I. Corporate Officers of an Employer are personally liable for unpaid wages under N.J. Stat. § 34:11-4.1.

The WPL is a "remedial statute" that is "liberally construed" . . . "to further its remedial purpose." Hargrove v. Sleepy's, LLC, 220 N.J. 289, 106 A.3d 449 (2015). The WPL holds individual officers of an employer personally liable for the failure to pay the wages of employees even if they are a "figurehead" officer or director with no direct managerial activity. See, Mulford v. Computer Leasing, Inc., 334 N.J. Super. 385, 759 A.2d 887 (1999).

The WPL defines an employer, in relevant part, as "any individual ... [or] corporation... employing any person in this State." N.J.S.A. 34:11-4.1(a). The applicable statute states: "[f]or the purposes of this Act, the officers of a corporation **and** any agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation. Id (emphasis added); see also, Teleki v. Talk Marketing Enterprises, Inc., 2012 WL 2283044 (App. Div. 2012).

A plain language reading of the definition of an employer under the WPL shows it includes three classes of culpable parties: 1) the corporate entity; 2) all officers; and 3) other agents or personnel who manage the activities of the corporation. The initial sentence of the "employer" definition includes any "i**ndividual**, partnership, association, joint stock company, trust, corporation …or successor of any of the same, employing any person in this State." (emphasis added). The statute then goes on to provide a second sentence that declares for purposes of the act, "the *officers* of a corporation **and** *any agents having the management of such corporation* shall be deemed to be the employers of the employees of the corporation." (emphasis added). This text establishes that individual corporate "officers of a corporation" are

liable for the non-payment of wages **and** so are "any agents having the management of such corporation." These are two distinct classes of liable parties in addition to the corporate entity.

The last antecedent rule of construction supports this reading. The last antecedent rule of construction is a doctrine of interpretation of a statute, by which "[r]eferential and qualifying phrases, where no contrary intention appears, refer solely to the last antecedent." J. Sutherland, Statutes and Statutory Construction, § 420 (1891) (footnote citations omitted). This modifying phrase applies only to the last antecedent phrase, absent any contrary intent. Morella v. Grand Union /New Jersey Self-Insurers Guardian Association, 391 N.J. Super. 231, 917 A.2d 826 (App. Div. 2007), citing State v. Santomauro, 261 N.J. Super. 339, 618 A.2d 917 (App. Div. 1993).

Here, the limiting language "*having the management of such corporation*" only applies to agents, not corporate officers. Defendants ask this Court to extend that limiting language without any support for such a restriction. Defendants argue corporate officer liability only exists if corporate officers engage in active managerial duties by citing to Hearn v. Rite Aid Corp., No. A-2009-10T1, 2012 WL 996603, at *1 (App. Div. 2012). Hearn has no bearing on this case. In Hearn, Plaintiff —the putative representative of a class composed of assistant managers (ASMs) employed at Rite Aid pharmacies—asserted that she and the class members were improperly denied overtime. In assessing the merits of the claim, the Appellate Division had to determine if plaintiff and the other ASMs were exempt managers or non-exempt hourly employees. The court cited to the federal regulations and the factors to make this determination but that case has absolutely nothing to do with individual liability for unlawful wage deductions. Reliance by this Court on this irrelevant and non-precedential case would be gross error.

The Mulford decision is instructive. In Mulford, an employee who failed to receive commission payments sued not only his employer, but its shareholders, directors, and officers. The court held the statute intended to impose personal liability on the officers and directors for unpaid wages. The court specifically determined under New Jersey law that there can be no figurehead directors and that all corporate directors, regardless of their actual functions, are deemed responsible for managing the business and affairs of a corporation, and, therefore, constitute employers under New Jersey's wage statute. Id. In a small acknowledgment of the corporation's primary responsibility for wages, the Mulford court concluded that the judgment against the officers and directors for more than $800,000 in unpaid commissions and interest would only be enforced to the extent the corporation failed to pay the judgment within 11 days. Id. This secondary liability holding though does not affect the personal liability that results from the plain language of the statute as the court also noted these individuals were jointly and severally liable.

In the matter at hand, the individual defendants are all officers of the corporation and therefore personally liable without regard to any other fact or factor. To suggest otherwise overlooks the plain language of the statue and Mulford. The definition of an employer includes all officers and agents or personnel who manage the activities of the corporation as there are no "figurehead directors" in New Jersey.

Defendants also cite Kaplan v. GreenPoint Global, 2014 U.S. Dist. LEXIS 135140, *22 (D.N.J. Sept. 25, 2014). In Kaplan, however, the district court specifically held "[g]enuine issues of material fact exist as to how much Greenpoint agreed to pay Kaplan for her services and whether she received the agreed upon amount. There are also genuine issues of material fact as to whether any unpaid amount constitutes "wages" under the statute. And, contrary to

Defendants' assertions, Sharma can be held personally liable under the statute. Accordingly, the Court will deny Defendants' motion for summary judgment on this claim." Kaplan at *8. That case actually supports Plaintiff's position here.

II. Plaintiff has plead sufficient facts to state a claim for relief under the New Jersey Racketeer Influenced and Corrupt Organizations Act, N.J.S.A. 2C:41-2(c), (hereinafter "RICO").

Defendants claim that the claim brought under N.J.S.A. 2C:41-2(c), the New Jersey Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO"), should be dismissed for failure to provide specificity about mail and wire fraud. This contention by Defendants, however, is incorrect. Plaintiffs have plead sufficient facts to state a claim for relief under RICO and, therefore, Plaintiffs are entitled to relief under the act.

To begin, Defendants fail to acknowledge the appropriate standard. When a motion is brought pursuant to R. 4:6-2(e), the complaint must be searched in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). Every reasonable inference is therefore accorded the plaintiff and the motion granted only in rare instances and without prejudice. Moreover, a complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by amendment of the complaint. Id. However, if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. Energy Rec. v. Dept. of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001).

Here, the Complaint filed in this matter contains many specific facts detailing the predicate acts of wire and mail fraud. The specificity is set forth in the complaint as relates to the intent of the scheme to avoid paying benefits and taxes in utilizing mail and wire fraud to send

money improperly labeled as non-wages to drivers throughout the United States. This scheme resulted in Defendants not having to pay benefits and taxes associated with wages. This is separate aside from the unlawful deduction set forth under NJWPHL. Plaintiff has adequately pled the requirement of mail and wire fraud as referenced but he weekly transmittal of weekly money improperly labeled as non-wages and the corresponding commission paperwork. The Complaint lists the type of conduct at issue and the dates (weekly).

The elements of wire fraud under 18 U.S.C. § 1343 parallel those of the mail fraud statute, but via use of an interstate telephone call or electronic communication made in furtherance of the scheme. United States v. Frey, 42 F.3d 795, 797 (3d Cir. 1994) (wire fraud is identical to mail fraud statute except that it speaks of communications transmitted by wire); see also United States v. Profit, 49 F.3d 404, 406 n. 1 (8th Cir.) (the four essential elements of the crime of wire fraud are: (1) that the defendant voluntarily and intentionally devised or participated in a scheme to defraud another out of money; (2) that the defendant did so with the intent to defraud; (3) that it was reasonably foreseeable that interstate wire communications would be used; and (4) that interstate wire communications were in fact used) (citing Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit 6.18.1341 (West 1994)), cert. denied, 115 S.Ct. 2289 (1995).

Plaintiff signed a form agreement labeled Independent Contractor's Service Agreement dated May 2018 (the "Agreement"). (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 5**). Defendants subsequently told Plaintiff they utilized the Agreement as a standard independent contractor agreement for truck drivers with the common policies and practices at issue in this action. (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 6**). The Agreement is used to misclassify employees as independent contractors when in fact they are not

independent contractors in practice. (**Id.**). The Agreement purports to cover the terms and conditions of Plaintiff's employment. (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 7**).

Defendants attempted designation of drivers as independent contractors was a fraudulent fiction to hide the true employee status of these workers. (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 64**). Indeed, Defendants directed and controlled important aspects of their employment including deliveries and their schedule of work yet Defendants deducted money normally considered business expenses from the drivers' weekly paychecks ostensibly for payment for the truck leases and other costs and fees associated with deliveries of their product. (**Id.**). This conduct was not the full extent of Defendants' dishonest and illegal conduct. Defendants denied Plaintiff and those similarly situated other benefits such as paid time off, vacation pay, holiday pay and similar compensation benefits due to employees. (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 65**). Defendants also required Plaintiff and those similarly situated to pay for normal business expenses and costs that Defendants should have been paying. (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 68**). Based on the terms set forth in the Agreement, "[Plaintiff] Contractor shall be responsible for paying all operating expenses and costs of operating the Equipment, including all expenses for fuel, oil, and repairs to the Equipment. . . . " (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 69**).

Furthermore, the Agreement also created an unlawful "Reserve" account to secure its interests. The Agreement specifically states: "[Plaintiff] Contractor authorizes Carrier to deduct ten (10%) percent of Contractor's weekly commissions due Contractor from Carrier [Defendant Goya] under Section 3 of the Agreement (the "Reserve"). Carrier shall deposit the Reserve in an

interest-bearing account at such rates as Carrier, in its sole discretion, may secure from time to time for credit to Contractor. Interest shall accrue weekly and be calculated on the closing balance of the Reserve at the end of the week. From time to time, Contractor may (1) elect to discontinue further deductions at any time provided the Reserve has a minimum balance of Four Thousand ($4,000) Dollars and (2) request the disbursement to Contractor of any excess over Four Thousand ($4,000) Dollars. Within seventy-five (75) days of the termination of the Agreement (or as soon as practicable thereafter) Carrier will pay to Contractor, after deducting all amounts due and owing Carrier under the Agreement, the balance of any monies held in the Reserve." (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 70**).

These deductions were itemized in each pay period (weekly) in the drivers' "Driver Commission Report" and the "Driver Commission Statement." (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 71**). Defendants unlawfully deducted from Plaintiff's paycheck, each week, the following:

a. $125.00 for trailer rental;

b. $150.00 for truck insurance;

c. $23.94 for Helpers Workmen's Compensation insurance;

d. $580.73 for truck lease;

e. $250.00 for equipment;

f. Fuel costs averaging approximately $400.00 - $500.00;

g. A $2.50 for "professional fee" to administer the unlawful deductions;

h. Approximately $276.64 to maintain the "Reserve" account in case Plaintiff could not work and pay the fees Defendants required; and

i. Rejected goods at the time of delivery or Returns and damaged goods that were previously delivered by the Plaintiff.

(**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 72**).

Finally, Defendants conspired to defraud Plaintiff and those similarly situated to mislead them to believe they were independent contractors. (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 87**). In doing so, Defendants created a contract with weekly unlawful deductions from wages as set forth, including for return of their goods, which were occurred in relation to deliveries. (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 88**). Defendants did this, in part, to avoid paying taxes and to avoid liability to third parties.

The scheme is fraudulent in nature and required weekly acts of mail and wire fraud by transferring money labeled as commission but not wages for the purpose of avoiding subsidiary taxation to the enterprise, and for the purpose of avoiding paying other emoluments of employment by the enterprise. (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 89**). In effectuating these predicate acts, Defendants used both the mail and wires for the purpose of executing this scheme in violation of 18 U.S.C. §§ 1341 and 1343. (**See Same**). Defendants even created an unlawful "Reserve" account to secure any monies they unlawfully required Plaintiff and those similarly situated to pay. (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 90**). Defendants also misrepresented to Plaintiff and those similarly situated that it deducted money(s) for a lawful purpose when it withheld wages when in fact all such wages were withheld solely to benefit Defendants and not for any legal purpose. (**See Defendants' Exhibit A, Plaintiff's Complaint, Paragraph 91**). In the end, the conduct of Defendants clearly overcame the requirements of RICO and, therefore, Plaintiff is entitled to recovery under the statutory construct.

Snyder v. Dietz & Watson Inc., 2013 WL 395875 (D.N.J. 2013), is directly on point to the matter at hand. In Snyder, a putative class action, plaintiff, Richard Snyder, was a former delivery driver for defendant Dietz & Watson. Plaintiff claimed Dietz & Watson, and its president and vice president, also defendants, violated RICO and the New Jersey Wage Payment Law ("NJWPL") by misrepresenting that deductions from drivers' paychecks to account for shortages were lawful and placed in an escrow account, when instead such withholdings were unlawful and used by defendants for their own benefit. Plaintiff contended that in the spring of 2000, when he was first given a permanent driving route, a Dietz & Watson employee, Louisa Bergey, told him that a certain amount of money would be deducted from his paycheck and placed in an escrow account in order to cover any shortages in the money collected from customers. Mr. Snyder claimed he was advised that once any shortages were paid to the defendants, the remaining funds would be returned to him. In February 2005, this policy was included in the collective bargaining agreement defendants entered into with the drivers' union. Subsequently, in 2007, Mr. Snyder was advised via telephone by Ms. Bergey that she would begin to prospectively deduct $75 per pay period because he did not have sufficient funds in his escrow account. This $75 deduction was marked on each of his paychecks as going to "Drivers Escro."

In Snyder, plaintiff Snyder claimed that not only were defendants' deductions unlawful, defendants: (1) knew they were unlawful; (2) knowingly misrepresented the propriety of taking the deductions; (3) never put the money in escrow and instead used the money for themselves; and (4) perpetrated this scheme on many other drivers, and these actions violated RICO and NJWPL, and such claims should be vindicated through a class action, much like the one in the matter at hand. Plaintiff went on to claim, “an allegation that an employer deprived an employee

of an economic benefit, such as wages and seniority, can constitute a crime under the mail fraud statute." Snyder, citing U.S. v. Boffa, 688 F.2d 919, 929 (3d Cir.1982). "This is because a contract between employer and employee, and not the NLRA, is the source of those benefits, and "[a]lthough they may have been obtained as a result of employees' exercise of rights guaranteed by ... the NLRA, these benefits are contractual, not statutory, in nature." Id. Like Boffa explains, a plaintiff's right to his earnings is an economic benefit conferred to him by virtue of his employment with defendants, and the scheme to defraud him of that benefit through the mail and wire can constitute predicate acts to support a RICO claim.

For all the above reasons, Plaintiff has adequately plead an NJRICO claim.

III. Plaintiff's claim for unjust enrichment and breach of contract should not be dismissed as Plaintiff has a right to litigate both claims.

Defendants further claim that Plaintiff's Unjust Enrichment Claim should be dismissed due to Plaintiff's Breach of Contract alternative theory of recovery. At this point in the litigation, however, dismissal of Plaintiff's claim is premature and Plaintiff has a right to litigate both claims and conduct discovery into those matters as asserted. R. 4:5-2 provides that: "Relief in the alternative or of several different types may be demanded."

Under New Jersey law, to state a claim for unjust enrichment, a plaintiff must allege that: (1) a defendant received a benefit from the plaintiff; (2) retention of the benefit by the defendant without payment would be unjust; (3) plaintiff expected remuneration from defendant at the time he performed or conferred a benefit on defendant; and (4) the failure of remuneration enriched the defendant beyond its contractual rights. VRG Corp. v. GKN Realty Co.,135 N.J. 539, 554, 641 A.2d 519 (1994). An unjust enrichment claim also requires a "direct relationship" between the parties or a mistake on the part of the party conferring the benefit. Premier Pork LLC v. Westin, Inc., 2008 WL 724352, at *14–15 (D.N.J. 2008). In the matter at hand, Plaintiff has set

forth each of these requirements at length and shown that an unjust enrichment claim can be sustained.

IV. Defendants' request to change Venue is without basis and must be denied.

Defendants complain that the venue should be changed, for their convenience. Such complaint is clearly not a basis for changing venue.

Under R. 4:3-2(a)(3), a Plaintiff is entitled to place venue of an action in any county where any of the parties reside at the time the action is commenced. Under subsection (b) of this Rule, a corporate party is deemed to reside in the county where its registered agent is located or in any county where it conducts business. Hence, the Corporate Defendant does in fact "reside" in Mercer County for purposes of this Rule, as its registered agent is in Mercer County. (**See Designation of Registered Agent, attached hereto as Exhibit 1**).

It has been consistently noted that the Venue Rule is mandatory. Engel v. Gosper, 71 N.J. Super. 573 (Law Div. 1962); Diodato v. Camden Cty. Park Com'n., 136 N.J. Super. 324 (App. Div. 1975). It is only in a rare case where a claim of inconvenience will be accepted as a basis for transferring venue. Weed v. Smith, 15 N.J. Super. 250 (App. Div. 1951) Plaintiff's choice of venue will ordinarily not be disturbed. Id.

Here, Defendant, Goya Foods, Inc. has a registered agent in Mercer County and was served in Mercer County. (**See Affidavit of Service, attached hereto as Exhibit 2**). Hence, the venue of this action in Mercer County complies with the mandate of this Rule.

An application to transfer venue is governed by R. 4:3-2(a), which dictates that venue may be transferred if: (1) Venue has not been laid in accordance with R. 4:3-2; (2) Substantial doubt exists that a fair and impartial trial can be achieved in the venue where the matter has been laid; (3) The convenience of the parties or in the interest of justice dictate that a transfer occur.

It is clear that none of the grounds stipulated under R. 4:3-3(a) exist. First, venue has been laid in accordance with R. 4:3-2. Second, there is no claim that a fair and impartial trial is not achievable in Mercer County. Third, defendant cannot claim that it would be inconvenient for the matter to be tried in Mercer County when Goya does business all over the state of New Jersey, including a specific location in Pedricktown, New Jersey in Salem County. (**See,** **https://www.goya.com/en/contact-us**). Fourth, Defendants overlook the convenience of the Plaintiff. While Defendants service all of New Jersey and have picked their registered agent to reside in Mercer County, along with the fact they have a facility in Salem County, they simply ignore Plaintiff's residence as a factor, which defeats their motion to transfer the action for convenience on its own. Indeed, Mercer is the best venue for this action in light of these facts.

In sum, Defendants have made no showing that the Venue Rule was violated. Thus, Defendants have not shown there is a reason to change venue. It would be improper to disturb Plaintiff's proper establishment of venue in this action. Mercer County is the proper forum for the adjudication of this matter. Defendants, and their counsel, have no basis for their application and it must, as a result, be denied.

V. Conclusion

Ultimately, it is abundantly clear that Plaintiff has laid forth sufficient evidence to prove that: (1) corporate officers are personally liable for unpaid wages under N.J. Stat. § 34:11-4.1; (2) Plaintiff can sustain a claim for relief under N.J.S.A. 2C:41-2(c), the New Jersey Racketeer Influenced and Corrupt Organizations Act; (3) Plaintiff should be afforded the opportunity to litigate and conduct discovery on both a claim for unjust enrichment and breach of contract; and (4) Defendants' application for change of venue is without basis and must be denied. Therefore,

based on the foregoing, Plaintiff respectfully requests this Honorable Court to deny Defendants' Motion for Partial Dismissal of Plaintiff's Complaint and to Change Venue to Hudson County.

Respectfully Submitted,

LAW OFFICES OF VLASAC & SHMARUK, LLC
Attorneys for Plaintiffs

By: /S/David E. Cassidy, Esq.
David E. Cassidy, Esq.

DATED: September 5, 2019

CERTIFICATION OF MAILING

I hereby certify that the within Opposition to Defendant's Notice of Motion to Dismiss was forwarded to the Motions Clerk at Mercer County Superior Courthouse, located at 175 S. Broad Street, Trenton, New Jersey via efile with a courtesy copy being forwarded lawyers service for filing; and a copy being forwarded via efile and lawyer service to counsel for the following defendants, all within the time and in the manner prescribed by the Rules of Court:

Fotini Karamboulis, Esq.
Ogletree, Deakins, Nash,
Smoak & Stewart, P.C.
10 Madison Avenue, Suite 400
Morristown, NJ 07960

Respectfully Submitted,

LAW OFFICES OF VLASAC & SHMARUK, LLC
Attorneys for Plaintiffs

By: /S/David E. Cassidy, Esq.
David E. Cassidy, Esq.

DATED: September 5, 2019

Exhibit 1

New Jersey Business Gateway
Business Entity Information and Records Service
Business Id : 0100024010

Status Report For:	GOYA FOODS, INC.
Report Date:	6/13/2019
Confirmation Number:	91641726402

IDENTIFICATION NUMBER, ENTITY TYPE AND STATUS INFORMATION

Business ID Number:	0100024010
Business Type:	FOREIGN PROFIT CORPORATION
Status:	ACTIVE
Original Filing Date:	08/16/1976
Stock Amount:	N/A
Home Jurisdiction:	DE
Status Change Date:	NOT APPLICABLE

REVOCATION/SUSPENSION INFORMATION

DOR Suspension Start Date:	N/A
DOR Suspension End Date:	N/A
Tax Suspension Start Date:	N/A
Tax Suspension End Date:	N/A

ANNUAL REPORT INFORMATION

Annual Report Month:	AUGUST
Last Annual Report Filed:	07/30/2018
Year:	2018

AGENT/SERVICE OF PROCESS (SOP) INFORMATION

Agent:	UNITED STATES CORP COMPANY
Agent/SOP Address:	PRINCETON SOUTH CORPORATE CTR STE 160, 100 CHARLES EWING BLVD,EWING,NJ,08628
Address Status:	DELIVERABLE
Main Business Address:	350 COUNTY ROAD, JERSEY CITY, NJ, 07307
Principal Business Address:	350 COUNTY ROAD,JERSEY CITY,NJ,07307

ASSOCIATED NAMES

Associated Name:	N/A
Type:	N/A

New Jersey Business Gateway
Business Entity Information and Records Service
Business Id : 0100024010

PRINCIPALS

Following are the most recently reported officers/directors (corporations), managers/members/managing members (LLCs), general partners (LPs), trustees/officers (non-profits).

Title:	PRESIDENT
Name:	UNANUE,ROBERT I
Address:	350 COUNTY ROAD, JERSEY CITY, , , US
Title:	TREASURER
Name:	UNANUE,FRANCISCO R
Address:	350 COUNTY ROAD, JERSEY CITY, , , US
Title:	VICE PRESIDENT
Name:	PEREZ,JOSEPH
Address:	350 COUNTY ROAD, JERSEY CITY, , , US
Title:	VICE PRESIDENT
Name:	UNANUE,PETER
Address:	350 COUNTY ROAD, JERSEY CITY, , , US
Title:	VICE PRESIDENT
Name:	KINKELA,DAVID
Address:	350 COUNTY ROAD, JERSEY CITY, , , US
Title:	VICE PRESIDENT
Name:	RODRIGUEZ,REBECCA
Address:	350 COUNTY ROAD, JERSEY CITY, , , US
Title:	VICE PRESIDENT
Name:	ORTIZ,CARLOS G
Address:	350 COUNTY ROAD, JERSEY CITY, , , US
Title:	VICE PRESIDENT
Name:	LUGO JR,MIGUEL A
Address:	350 COUNTY ROAD, JERSEY CITY, , , US
Title:	VICE PRESIDENT
Name:	COLON,CONRAD
Address:	350 COUNTY ROAD, JERSEY CITY, , , US

FILING HISTORY -- CORPORATIONS, LIMITED LIABILITY COMPANIES, LIMITED PARTNERSHIPS AND LIMITED LIABILITY PARTNERSHIPS

To order copies of any of the filings below, return to the service page, https://www.njportal.com/DOR/businessrecords/Default.aspx and follow the instructions for obtaining copies. Please note that trade names are filed initially with the County Clerk(s) and are not available through this service. Contact the Division for

New Jersey Business Gateway
Business Entity Information and Records Service
Business Id : 0100024010

instructions on how to order Trade Mark documents.

Charter Documents for Corporations, LLCs, LPs and LLPs

Original Filing (Certificate)Date:	1976

Changes and Amendments to the Original Certificate:

Filing Type	Year Filed
CHANGE OF REGISTERED OFFICE	1986
CHANGE OF REGISTERED OFFICE	1982
Annual Report Filing with address change	2015
Annual Report filing with officer/member change	2017
Annual Report filing with officer/member change	2015
Annual Report filing with officer/member change	2014

Note:
Copies of some of the charter documents above, particularly those filed before June 1988 and recently filed documents (filed less than 20 work days from the current date), may not be available for online download.

- For older filings, contact the Division for instructions on how to order.
- For recent filings, allow 20 work days from the estimated filing date, revisit the service center at https://www.njportal.com/DOR/businessrecords/Default.aspx periodically, search for the business again and build a current list of its filings. Repeat this procedure until the document shows on the list of documents available for download.

The Division cannot provide information on filing requests that are in process. Only officially filed documents are available for download.

Exhibit 2

ANIBAL MEJIAS, ON BEHALF OF HIMSELF AND THOSE SIMILARLY SITUATED — Plaintiff

vs.

GOYA FOODS, INC., ET AL — Defendant

Superior Court of New Jersey
Law Division
Mercer County
Docket Number: MER-L-001401-19

AFFIDAVIT OF SERVICE

(For Use by Private Service)

Cost of Service pursuant to R. 4:4-3(c)

$_____

Person to be served (Name & Address):
GOYA FOODS INC
C/O UNITED STATES CORP. CO.
PRINCETON SOUTH CORPORATE CENTER, SUITE 160, 100
CHARLES EWING BLVD
EWING, NJ 08628

Attorney:
David Cassidy, Esq.

Papers Served: Summons, Complaint, Jury Demand, Notice of Designation of Trial Counsel, Demand to Preserve Evidence, Demand for Insurance Discovery, Certification, Certification Pursuant to R. 4:5-1, CIS, Track Assignment, Lawyers Referral List

Service Data:

Served Successfully X Not Served_____ Date: 7/23/2019 Time: 11:54 am Attempts:_____

_____ Delivered a copy to him / her personally

_____ Left a copy with a competent household member over 14 years of age residing therein

X Left a copy with a person authorized to accept service, e.g. managing agent, registered agent, etc.

Name of Person Served and relationship / title:

Lisa Constant

Registered Agent/Managing Agent At RA Office

Description of Person Accepting Service:

Sex: F Age: 50 Height: 5'3" Weight: 170 Skin Color: White Hair Color: Light Brown

Comments or Remarks:

Server Data:

Subscribed and Sworn to before me on 8/1/19 2019
by the affiant who is personally known to me.

NOTARY PUBLIC

Dawn V. Engelhardt
NOTARY PUBLIC
State of New Jersey
My Commission Expires 9/13/2020

I, Sharon McCabe Villa, was at the time of service a competent adult not having a direct interest in the litigation. I declare under penalty of perjury that the foregoing is true and correct.

Signature of Process Server Date

STATUS, L.L.C.
1509 Stuyvesant Avenue
Union, NJ 07083
(908) 688-1414
Our Job Serial Number: STS-2019028738
Ref: NA

2012 WL 2283044
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Margot W. TELEKI, Plaintiff–Appellant,
v.
TALK MARKETING ENTERPRISES, INC., Defendant,
and
David J. Clark, Douglas Campbell and Brian Regan, Defendants–Respondents.

Submitted June 5, 2012.
|
Decided June 19, 2012.

On appeal from the Superior Court of New Jersey, Chancery Division, Morris County, Docket No. C–0085–11.

Attorneys and Law Firms

Peter Petrou, attorney for appellant.

Warren F. Clark, attorney for respondents.

Before Judges BAXTER and NUGENT.

Opinion

PER CURIAM.

*1 Plaintiff Margot W. Teleki appeals from an October 24, 2011 Chancery Division order that granted summary judgment to defendants David J. Clark, Douglas Campbell and Brian Regan, thereby dismissing plaintiff's complaint and absolving defendants of responsibility to pay plaintiff the salary promised her in an Employment Agreement. Plaintiff negotiated the Employment Agreement with Talk Marketing Enterprises, Inc. (TMEI), the corporation of which defendants were officers. We agree with plaintiff's contention that the judge impermissibly allowed parol evidence to alter the unambiguous terms of the Employment Agreement, thereby negating the wage payment guarantee established by *N.J.S.A.* 34:11–4.1 and 4.2. We reverse.

I.

On September 23, 2005, plaintiff sold her ailing telemarketing companies, Talk Marketing, L.L.C. and Talk Marketing, Inc., to TMEI. The principal shareholders of TMEI were defendants Clark, Campbell and Regan. The transaction was set forth in three documents, an Asset Purchase Agreement, an Assumption of Liabilities Agreement and an Employment Agreement, all dated September 23, 2005. It is the latter document that gave rise to this appeal.

The Asset Purchase and Assumption of Liabilities Agreements, when read together, provide that in return for plaintiff selling her telemarketing company to TMEI, TMEI: would assume responsibility for payment of a $200,000 demand loan issued by Wachovia Bank to plaintiff's telemarketing company; and would agree to negotiate with Wachovia "to have [plaintiff's] personal and collateral guarantees terminated" as to that $200,000 loan. In addition, the Asset Purchase and Assumption of Liabilities Agreements specified that a $400,000 loan from Wachovia to plaintiff's telemarketing corporation would remain plaintiff's sole responsibility; however, TMEI agreed to "endeavor" to pay down the principal balance of that loan, and further agreed to negotiate with Wachovia for the removal of the payment guarantees made by plaintiff.

As is evident, TMEI made no cash payment for the purchase of plaintiff's telemarketing companies. The parties did, however, adopt the Employment Agreement, under which TMEI was obligated to pay plaintiff a salary of $4166.67 twice per month, or $100,000 per year, for each of ten years.

We describe the Employment Agreement in some detail, as its provisions are critical to resolution of the issue on appeal. The Employment Agreement contained the following provisions:

- Plaintiff would serve as the Vice President of Sales for TMEI, working as an "outside sales person."
- TMEI would provide plaintiff an expense account of $275 per month to pay for plaintiff's sales expenses, including travel expenses, auto payments and mileage, gasoline and toll expenses, and telephone charges.
- TMEI would pay plaintiff "a salary of One Hundred Thousand Dollars ($100,000.00) per year, payable in equal twice-monthly installments at [TMEI's] normal pay periods ('Base Salary')."

*2 • In addition to the $100,000 annual Base Salary, TMEI would pay plaintiff commissions of five percent on any existing accounts, and fifteen percent on any accounts sourced by plaintiff.

• During plaintiff's "employment hereunder, Employee will serve in such capacity and with such duties as shall reasonably be required by the Chief Executive Officer."

• "[Plaintiff] will be entitled to receive her base salary without regard to her performance or any targets, sales goals or achievements."

• At her option, plaintiff would represent TMEI at trade shows, if requested to do so by the CEO.

• TMEI would provide plaintiff with health insurance as part of TMEI's health insurance plan.

• Plaintiff was entitled to four weeks vacation.

• If plaintiff were to die before the end of the ten-year period covered by the Employment Agreement, all of her rights under the Agreement would terminate; however, TMEI would remain obligated to pay to her estate any accrued Base Salary or commissions owing to plaintiff at the time of her death.

Notably, the Employment Agreement also included an integration clause, which provided as follows:

> Th[is] Agreement constitutes the *entire* agreement between the parties hereto on the subject matter hereof and may not be modified without the written agreement of both parties hereto.
>
> [(Emphasis added).]

Between September 23, 2005 and January 30, 2009, TMEI faithfully paid plaintiff the agreed-upon salary of $8333.33 per month. TMEI treated the payments as wages, because TMEI annually issued plaintiff a W–2. Each W–2 showed the deductions normally withheld for payment of wages, such as income taxes, social security, unemployment insurance and Medicare. Additionally, TMEI's corporate tax returns included an itemized deduction for the salary paid to plaintiff. [1]

In January 2009, the economic climate for telemarketing companies began to sour, and on January 30, 2009, TMEI notified plaintiff that it would unilaterally reduce her monthly salary from $8333.33 to $2600, a reduction of sixty-eight percent. Plaintiff responded to that salary reduction by filing a complaint and order to show cause against TMEI on June 16, 2011, seeking to compel TMEI to restore her salary to the $8333.33 specified in the Employment Agreement.

Two months later, plaintiff filed an amended complaint, asserting the same claims against TMEI that she had set forth in her original complaint but now, for the first time, asserting claims against the individual officers of the company, defendants Clark, Campbell and Regan. Plaintiff sought the sum of $68,999.95 as liquidated damages due her for the underpayment of wages through August 2011.

In a May 26, 2011 letter from defendants to plaintiff, they notified her that her "salary payments" would be discontinued, effective immediately. Defendants did, however, make a payment to plaintiff in mid-June of $2800, representing partial payment of her salary at the reduced amount specified in TMEI's January 30, 2009 correspondence, consisting of $1400 for June 15, 2011 and $1400 for June 30, 2011. TMEI has not made any payments of salary to plaintiff since June 2011. On September 1, 2011, TMEI filed for bankruptcy protection. Thereafter, plaintiff proceeded solely against the individual defendants.

*3 On October 20, 2011, the court conducted a hearing on plaintiff's order to show cause and request for a preliminary injunction to compel the individual defendants to pay plaintiff the salary of $8333.33 specified in the Employment Agreement. At that hearing, defendants asserted that during the negotiations leading to the acquisition of plaintiff's telemarketing business, defendants had made it clear—and plaintiff had agreed—that defendants would incur no personal liability under the Employment Agreement. Defendants also argued that despite its title of "Employment Agreement," and despite the language requiring TMEI to pay to plaintiff "[d]uring her employment ... a *salary* of One Hundred Thousand Dollars ($100,000.00) per year," the so-called Employment Agreement was, in reality, a mechanism for the deferred purchase of plaintiff's telemarketing company (emphasis added).

Defendants maintained that, as a result, the provisions of *N.J.S.A.* 34:11–4.1 and 4.2—which impose individual liability on corporate officers for payment of wages—were inapplicable. In particular, defendants maintained that because the purchase by TMEI of the corporate assets of

plaintiff's telemarketing company was structured in a way that avoided any lump-sum payment at the time of closing, the parties had instead agreed to pay the capital costs of acquisition over a ten-year period through a document they entitled an "Employment Agreement."

Defendants argued that plaintiff knew, at the time the Employment Agreement was signed, that defendants would have no "personal liability for anything in the transaction." They pointed to defendant Clark's certification, in which he stated:

> I cannot emphasize strongly enough how adamant all three individually named Defendants were in the negotiations, regarding the asset purchase of [plaintiff's] distressed business, that neither myself, Douglas Campbell nor Brian Regan would be personally responsible for any obligations [to] [plaintiff]. In the Asset Purchase Agreement, the Buyer, Talk Marketing Enterprises, Inc. assumed various liabilities, including payment of the $200,000.00 demand loan from Wachovia Bank for which [plaintiff] was personally responsible. I further attach ... a document entitled "Assumption of Liabilities" pursuant to which Defendant Talk Marketing Enterprises, Inc., as buyer, assumed various liabilities of Talk Marketing, LLC and Talk Marketing, Inc. as seller. *It was well understood by all parties to the transaction that the individual members of Talk Marketing Enterprises, Inc., myself, Douglas Campbell and Brian Regan, were not accepting personal responsibility for anything in the transaction, and [plaintiff] and her attorney at the time agreed that there would be no personal responsibility of any of the buyers who were buying through a corporation.*
>
> [(Emphasis added).]

Plaintiff opposed defendants' attempt to avoid responsibility for payment of the salary promised her under the Employment Agreement. She argued that the obligation of corporate officers, such as defendants, to ensure the payment of wages is statutory, arising under the New Jersey Wage Payment Law, N.J.S.A. 34:11–4.1 and 4.2. She maintained that the New Jersey Wage Payment Law obligates persons who assume authority over corporate operations to pay salary and wages to corporate employees when the corporation defaults on its obligation to do so.

***4** The judge ruled in favor of defendants. She reasoned that plaintiff should not be permitted to obtain the benefit of the Wage Payment Law when she was not asked to perform any services for TMEI after January 2009. The judge also held that in the absence of a negotiated personal guarantee by the individual defendants to pay plaintiff a salary, plaintiff was not entitled to the protection of the New Jersey Wage Payment Law, and was not entitled to the payment of salary by the individual defendants.

In reaching that conclusion, the judge looked beyond the express provisions of the Employment Agreement to conclude that the agreement reached by the parties was something other than what it expressly purported to be, namely, an agreement for the payment of wages. The judge held that the Employment Agreement was, in actuality, an Asset Purchase Agreement under which the individual defendants had no personal liability. The judge stated:

> I don't care if it says wages. If they are not wages, then they are not subject to this [A]ct. This [A]ct specifically applies to wages. And it is designed to protect people ... who have worked on a time, task, piece or commission basis [who] haven't been paid.... But a buy out agreement which is essentially what this agreement was is not subject to the [W]age [A]ct because they are not wages.
>
> ....
>
> And when we look at the [E]mployment [A]greement, it is a nearly ineluctable conclusion that that [E]mployment [A]greement was the result of the purchase of her shares of stock—of her assets.
>
> ....
>
> The company is still liable on the [E]mployment [A]greement. But the individuals are not liable and they are not liable under N.J.S.A. 34:11–4.1 ad sec [sic]. And ... [there is a] distinction between the personal liability imposed by ... the wage statute ... and personal liability for a buy out of assets.
>
> ....
>
> There is an assumption of liability agreement, an asset purchase agreement [,][and] an employment agreement. I really couldn't find anything that would impose personal liability here.

Because the judge's ruling was based upon an interpretation of the statute that effectively disposed of the entire matter, the parties consented to treat the judge's ruling as a motion for summary judgment, thereby creating a final order for

purposes of appeal. The judge signed a confirming order on October 24, 2011.

On appeal, plaintiff maintains that the dismissal of her complaint constitutes reversible error of law because the Employment Agreement, when read in conjunction with N.J.S.A. 34:11–4.1 and 4.2, imposed personal liability on the individual defendants for the payment of wages. She maintains that she did, in fact, provide services to TMEI for more than three years pursuant to the Employment Agreement, for which she was paid a salary of $8333.33 per month; and TMEI, as well as the individual defendants, its corporate officers, treated the $8333.33 as wages by providing plaintiff with a W–2 and making the normal salary deductions for social security, Medicare and unemployment insurance. Finally, she asserts that the judge impermissibly ignored the integration clause in the Employment Agreement, which forbids reference to any external understandings or agreements.

II.

***5** When reviewing an order granting summary judgment, we employ the same standard as that governing the trial court. *Henry v. N.J. Dep't of Human Servs.*, 204 N.J. 320, 330 (2010). Where the granting or denial of summary judgment depends upon statutory construction and interpretation, our review of the judge's rulings on issues of law is de novo. *City of Atlantic City v. Trupos*, 201 N.J. 447, 463 (2010).

In relevant part, the New Jersey Wage Payment Law provides that every employer is obliged:

> [to] pay the *full amount* of wages due to his employees at least twice during each calendar month[.]
>
> [N.J.S.A. 34:11–4.2 (emphasis added).]

The term "wages" is defined as follows:

> "Wages" means the direct monetary compensation for labor or services rendered by an employee, where the amount is determined on a time, task, piece, or commission basis excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto.
>
> [N.J.S.A. 34:11–4.1(c).]

The Wage Payment Law defines an employer, in relevant part, as "any individual ... [or] corporation ... employing any person in this State." N.J.S.A. 34:11–4.1(a). The statute further provides that for purposes of the obligation to pay wages, the officers of a corporation who are responsible for its management, are to be treated as the "employers of the employees of the corporation." The applicable statute states:

> For the purposes of this [A]ct, the officers of a corporation and any agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation.
>
> [*Ibid.*]

We recently reaffirmed the obligation of corporate officers for payment of employee wages when the corporation itself defaults on its payment obligations. *DeRosa v. Accredited Home Lenders, Inc.*, 420 N.J.Super. 438, 464 (App.Div.2011). *See also Mulford v. Computer Leasing, Inc.*, 334 N.J.Super. 385, 399 (Law Div.1999) (observing that under the Wage Payment Law, liability of directors and officers is secondary to the corporation's liability, so that the personal liability of corporate officers comes into play only in instances where the corporation reneges on its salary obligations). Moreover, because " 'employees are the obvious special beneficiaries of the [Wage Payment Law],' " the statute should be read to create " 'a private right of action in court against employers ... to protect and enforce [employees'] rights thereunder.' " *Winslow v. Corporate Express, Inc.*, 364 N.J.Super. 128, 137–38 (App.Div.2003) (quoting *Mulford, supra*, 334 N.J.Super. at 394).

The question presented by this appeal is whether any provision in the applicable statutes relieves defendants, as the corporate officers, of the responsibility to ensure the payment of wages in the circumstances presented here, where the corporation has defaulted on its obligation to pay wages. In urging us to affirm the order under review, the individual defendants assert that after the early part of 2008, plaintiff no longer "showed up for work." Such an argument ignores two facts. First, as we have already noted, the September 23, 2005 Employment Agreement expressly provided that during plaintiff's employment, she would "serve in such capacity" and would perform "such duties as shall reasonably be required [of her] by the Chief Executive Officer." The Employment Agreement also specifies that plaintiff would be "entitled to receive her base salary without regard to her performance for any targets, sales goals or achievements." For that reason, it is clear that if the CEO chose not to ask

plaintiff to perform any assignments, which is the case, the Employment Agreement nonetheless entitled her to be paid.

*6 Second, there is no dispute that the Employment Agreement negotiated by the parties did not expressly provide for a waiver of the statutory protection enjoyed by plaintiff as an employee of TMEI. *See* Alamo Rent A Car, Inc. v. Galarza, 306 N.J.Super. 384, 390 (App.Div.1997) (holding that a waiver of a statutory right must be knowing and voluntary).

Moreover, the terms of the Employment Agreement are instructive, as the document contains numerous provisions reinforcing the nature of the Agreement as an employment relationship for which plaintiff was to receive wages. As we have already noted, the Agreement: created specific responsibilities for plaintiff, designating her as the Vice President of Sales; specified the salary she would earn and the duration of her employment; enrolled her in TMEI's company health insurance plan; granted her four weeks of paid vacation; gave her an expense account of $275 per month for her work as "an outside sales person"; entitled her to represent TMEI at trade shows if requested to do so by TMEI's CEO; and guaranteed her the right to earn commissions ranging from five percent to fifteen percent.

Nothing in the language of the Employment Agreement suggests that it is anything other than what it purports to be, namely, a contract of employment under which plaintiff was entitled to a salary of $100,000 per year for a ten-year period. Indeed, the individual defendants do not dispute those terms. Instead, they urge us to accept the trial judge's determination that the surrounding circumstances justify disregarding the Employment Agreement's express terms, and to treat it essentially as a nullity.

In particular, the individual defendants urge us to concur in the trial judge's determination that despite all of the features that compel the conclusion that the document creates an employment relationship, plaintiff "understood that [she] would not be required to perform any services for TMEI." Such a contention is belied by the uncontroverted evidence in the record showing that for more than three years after the Employment Agreement was adopted, plaintiff did, in fact, work as an outside salesperson for TMEI. Defendants' argument is also belied by the corporation's issuance of a W–2 to plaintiff in 2005, 2006, 2007, 2008, 2009 and 2010, and by the filing of a corporate income tax return in which TMEI availed itself of an itemized deduction for the wages it paid to plaintiff. Moreover, as the record makes clear, in the May 2011 correspondence between the parties' counsel before plaintiff filed her complaint, defendants' attorney referred to the payments being made to plaintiff as "salary payments," further evidencing defendants' recognition that the twice-monthly payments were salary, not an asset purchase.

We decline to accept the trial judge's approach, in which she stated, "I don't care if it [, the Employment Agreement,] says wages. If they are not wages, then they are not subject to this [A]ct." There is only one way the judge could have reached the conclusion that the Employment Agreement was, in reality, an asset purchase agreement that obligated defendants to make continued payments for the purchase of plaintiff's telemarketing company: by resorting to parol evidence and by considering matters outside the provisions of the Employment Agreement. Doing so was error.

*7 Where, as here, the terms of a contract, (the Employment Agreement), are clear and unambiguous, resort to parol evidence is improper. Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 268 (2006). Although a court that construes a document is obliged to "consider all of the relevant evidence that will assist in determining the intent and meaning of the contract," extrinsic evidence should never be permitted to "modify[ ]" or "curtail[ ] its terms [.]" Id. at 269 (citation omitted). As the Court explained in *Conway,*

> [e]vidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement. This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded. *The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said. So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant.* The judicial interpretive function is to consider what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose.

[*Ibid.* (emphasis added) (quoting *Atl. N. Airlines v. Schwimmer*, 12 *N.J.* 293, 301–02 (1953)).]

Thus, extrinsic evidence concerning the "circumstances leading up to the formation of the contract" is only permitted when necessary to interpret a disputed provision of the document. *Ibid* . When the contract terms are unambiguous, extrinsic evidence must not be considered. *Ibid.* In light of *Conway,* the judge's use of extrinsic evidence to alter, indeed curtail, the straightforward and unambiguous provisions of the Employment Agreement was error. However much the individual defendants may have hoped, intended or expected to be relieved of personal responsibility for payment of plaintiff's wages, this is not what the transactional documents said. Defendants did not ask plaintiff to sign a waiver of her right to hold them personally liable under the Wage Payment Law. Having failed to do so, they cannot take refuge in extrinsic evidence to alter the Employment Agreement by treating it as an asset purchase agreement. We reverse the judgment in favor of the individual defendants.

Plaintiff acknowledges that the obligation of the individual defendants to pay her a salary terminated on September 1, 2011, when TMEI filed its bankruptcy petition. Because the actual amount of wages remaining unpaid as of that date is unclear, we remand for a calculation of the amount of money due plaintiff. The remand shall be limited to that narrow purpose.

***8** Reversed and remanded.

All Citations

Not Reported in A.3d, 2012 WL 2283044

Footnotes

1 The tax return contains an aggregate deduction for employee salaries, without listing the employees' names. Plaintiff asserts—and defendants do not dispute—that the salary paid to plaintiff comprised part of the itemized deduction.

End of Document

2013 WL 395875
United States District Court, D. New Jersey.

Richard SNYDER, Plaintiff,
v.
DIETZ & WATSON, INC., et al., Defendants.

Civ. A. No. 11–0003 (NLH)(AMD).
|
Jan. 30, 2013.

Attorneys and Law Firms

Justin L. Swidler, Esq., Joshua S. Boyette, Esq., Swartz Swidler, LLC, Cherry Hill, NJ, for plaintiff.

Alan C. Milstein, Esq., Jeffrey P. Resnick, Esq., Sherman, Silverstein, Kohl, Rose & Podolsky, PC, Moorestown, NJ, Claude Schoenberg, Esq., Schoenberg Law Offices, Bala Cynwyd, PA, for defendants.

OPINION

HILLMAN, District Judge.

***1** In this putative class action, plaintiff, Richard Snyder, a former delivery driver for defendant Dietz & Watson, claims that Dietz & Watson, and its president and vice president, also defendants, violated the Racketeer Influenced Corrupt Organizations Act ("RICO") and the New Jersey Wage Payment Law ("NJWPL") by misrepresenting that deductions from drivers' paychecks to account for shortages were lawful and placed in an escrow account, when instead such withholdings were unlawful and used by defendants for their own benefit. [1] Presently before the Court is defendants' motion for judgment on the pleadings with respect to plaintiff's RICO claims. [2] Also pending before the Court is plaintiff's motion to certify a class for his RICO and NJWPL claims. For the reasons that follow, defendants' motion for judgment on the pleadings will be denied, and plaintiff's motion for class certification will be denied without prejudice.

I. JURISDICTION

Plaintiff sets forth claims derived from both federal and New Jersey law. The Court has subject matter jurisdiction over plaintiff's federal claims pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over plaintiff's related state law claims pursuant to 28 U.S.C. § 1367.

II. BACKGROUND

Plaintiff contends that in the spring of 2000, when he was first given a permanent driving route, a Dietz & Watson employee, Louisa Bergey, told him that a certain amount of money would be deducted from his paycheck and placed in an escrow account in order to cover any shortages in the money collected from customers. Plaintiff claims he was advised that once any shortages were paid to defendants, the remaining funds would be returned to him. In February 2005, this policy was included in the collective bargaining agreement defendants entered into with the drivers' union, the Food Driver Salesmen, Dairy & Ice Cream Workers, Local No. 463 Union.

Plaintiff claims that in 2007, he was advised via telephone by Ms. Bergey that she would begin to prospectively deduct $75 per pay period because he did not have sufficient funds in his escrow account. Plaintiff claims that he objected, but was told that it was mandatory. This $75 deduction was marked on each of his paychecks as going to "Drivers Escro."

Plaintiff claims that not only were defendants' deductions unlawful, defendants (1) knew they were unlawful, (2) knowingly misrepresented the propriety of taking the deductions, (3) never put the money in escrow and instead used the money for themselves, and (4) perpetrated this scheme on many other drivers. These actions, plaintiff claims, violate RICO and NJWPL, and such claims should be vindicated through a class action.

Defendants have moved for judgment on the pleadings on plaintiff's RICO claims, arguing that they are preempted by the National Labor Relations Act ("NLRA") and cannot be maintained because of plaintiff's separate count for a NJWPL violation. Defendants have also opposed plaintiff's request to certify a class on his RICO and NJWPL claims.

III. DISCUSSION

A. Defendants' motion for judgment on the pleadings

1. Standard

***2** A Rule 12(c) motion for judgment on the pleadings may be filed after the pleadings are closed. Fed.R.Civ.P. 12(c); *Turbe v. Gov't of V.I.*, 938 F.2d 427, 428 (3d Cir.1991). In analyzing a Rule 12(c) motion, a court applies the same legal

standards as applicable to a motion filed pursuant to Rule 12(b)(6). *Turbe*, 938 F.2d at 428. Thus, a court must accept all well-pleaded allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Evancho v. Fisher*, 423 F.3d 347, 351 (3d Cir.2005).

2. Analysis

Defendants have moved for judgment in their favor on plaintiff's RICO claims.

The RICO statute provides,

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). It is also unlawful for anyone to conspire to violate § 1962(c). *See* 18 U.S.C. § 1962(d).

In order to adequately plead a violation of RICO, a plaintiff must allege: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity, and a pattern of racketeering activity requires at least two predicate acts of racketeering. *Lum v. Bank of America*, 361 F.3d 217, 223 (3d Cir.2004) (citing *Sedima, S.P .R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985); 18 U.S.C. § 1961(5)). These predicate acts of racketeering may include, *inter alia,* federal mail fraud under 18 U.S.C. § 1341 or federal wire fraud under 18 U.S.C. § 1343. *See* 18 U.S.C. § 1961(1). The federal mail and wire fraud statutes prohibit the use of the mail or interstate wires for purposes of carrying out any scheme or artifice to defraud. *See* 18 U.S.C. §§ 1341, 1343. " 'A scheme or artifice to defraud need not be fraudulent on its face, but must involve some sort of fraudulent misrepresentation or omission reasonably calculated to deceive persons of ordinary prudence and comprehension.' " *Lum*, 361 F.3d at 223 (citation omitted).

Defendants argue that plaintiff's RICO claims are unsupportable because the CBA contains a provision allowing for the deductions, and claims for unfair labor practices under a CBA are exclusively the domain of the NLRA, are for the National Labor Relations Board ("NLRB") to decide, and cannot serve as the predicate acts for a RICO claim. Defendants also argue that because plaintiff claims that the deductions violate the NJWPL, and the NJWPL has its own administrative scheme to remedy wage violations, plaintiff cannot maintain a RICO claim. Defendants further argue that the NJWPL violation allegations cannot serve as a predicate act for RICO because a NJWPL violation constitutes a disorderly persons offense, which is not considered a crime.

Defendants' positions could have merit if plaintiff's RICO claims were pleaded as defendants interpret them. With regard to defendants' NLRA argument, it is true that the "Supreme Court has consistently emphasized the primacy of the NLRB in resolving unfair labor practice disputes." *U.S. v. Boffa*, 688 F.2d 919, 929 (3d Cir.1982). Thus, if it must be determined whether the object of a scheme constitutes an unfair labor practice, such a determination would have to be made through the "exclusive authority of the NLRB to decide whether conduct of employers or employees constitutes an unfair labor practice." *Boffa*, 688 F.2d at 929. Consequently, an alleged violation of a right afforded by the NLRA, such as the duty to bargain collectively, cannot constitute a crime under the mail fraud statute. *Id.* at 930.

*3 Conversely, an allegation that an employer deprived an employee of an economic benefit, such as wages and seniority, can constitute a crime under the mail fraud statute. *Id.* This is because a contract between employer and employee, and not the NLRA, is the source of those benefits, and "[a]lthough they may have been obtained as a result of employees' exercise of rights guaranteed by ... the NLRA, these benefits are contractual, not statutory, in nature." *Id.*

In this case, plaintiff does not allege that defendants bargained unfairly in creating the CBA with the deductions provision, or even that defendants' conduct constitutes unfair labor practices in violation of the NLRA. If he did, such claims would most likely fail to serve as predicate acts under RICO. Instead, in his RICO claims, plaintiff alleges that defendants committed fraud through the mail and wires, in violation of 18 U.S.C. §§ 1341 and 1343, when they (1) mailed and wired every paycheck to him that contained the deductions, and (2) telephoned him to tell him about the deductions, which defendants misrepresented they were entitled to take, and which defendants used for themselves rather than depositing

in an escrow account. Like *Boffa* explains, plaintiff's right to his earnings is an economic benefit conferred to him by virtue of his employment with defendants, and the scheme to defraud him of that benefit through the mail and wire can constitute predicate acts to support a RICO claim. Simply because plaintiff could possibly bring claims under the NLRA regarding defendants' actions[3] does not mean that he is precluded from bringing claims under another statute for those same actions.[4] *See* Boffa, 688 F.2d at 931 ("[W]e decline to accept the proposition that the NLRA precludes the enforcement of a federal statute that independently proscribes that conduct as well.").

Similarly, with regard to defendants' arguments that plaintiff's NJWPL claims preclude his RICO claims, the fact that defendants' alleged conduct could constitute violations of NJWPL does not preclude plaintiff's RICO claims. Putting aside issues implicating the Supremacy Clause, which instructs that a state law cannot be interpreted to override conflicting federal law, *see* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (citing U.S. Const. art. VI, cl. 2), plaintiff does not allege that defendants' purported violations of NJWPL serve as the predicate act for his RICO claims. As such, plaintiff's maintenance of a RICO claim based on allegations of mail and wire fraud is not inconsistent with a separate claim for NJWPL violations. Plaintiff's remedies and available damages under RICO and NJWPL are different, *compare* 18 U.S.C. § 1964(c) *with* N.J.S.A. 34:11–56a25, but that does not preclude either claim.

Consequently, plaintiff's RICO claims may proceed past the pleading stage.

B. Plaintiff's motion to certify a class action

Rule 23 of the Federal Rules of Civil Procedure allows a class action if certain requirements are met. First, the class must meet the "prerequisites" of Rule 23(a): numerosity, commonality, typicality, and adequacy. Second, the class must fit one of the Rule 23(b) types of classes. Where, as here, a plaintiff seeks certification under Rule 23(b)(3), it requires (1) "that the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b) (3). These requirements are known as predominance and superiority, and plaintiff bears the burden of establishing each element of Rule 23 by a preponderance of the evidence. *Behrend v. Comcast Corp.*, 655 F.3d 182, 190 (3d Cir.2011).

***4** According to plaintiff's complaint, he seeks to certify a class on his RICO and NJWPL claims on behalf of himself and those similarly situated, who "consist of all current and former drivers of Defendants who were residents of New Jersey and were subjected to Defendant's Wage Deduction and Escrow Account Policies."[5] (Amend. Compl. ¶ 90, Docket No. 18 at 13.) Plaintiff argues that even though discovery is still ongoing, he has enough evidence at this time to support all the elements of Rule 23(a) and (b)(3). Defendants have opposed plaintiff's motion, arguing that plaintiff cannot meet those elements.

The Court finds that resolving the issue of class certification is premature at this time. At first blush, plaintiff's proposed class of at least 49 drivers who were all subject to, and affected by, the same improper wage deduction policy over the course of four years appears to be a perfect candidate for certification as a class action. As defendants point out, however, a closer look at the proposed class shows some flaws. For example, even though plaintiff suggests that the class would consist of at least 49 drivers, it is unclear whether all of those drivers were subject to the deduction policy or had deductions taken out of their paychecks. Additionally, it is unclear how many of the proposed class members are residents of New Jersey.[6]

With the threshold issue of numerosity still unclear, the Court will refrain from considering the other elements. As discovery continues and the record expands, plaintiff may then be in a better position to meet his burden of demonstrating the propriety of having his case proceed as a class action.

IV. CONCLUSION

For the reasons expressed above, defendants' motion for judgment on the pleadings on plaintiff's RICO claims is denied, and plaintiff's motion for class certification is denied without prejudice to plaintiff's right to refile his motion at a later time. An appropriate Order will be entered.

All Citations

Not Reported in F.Supp.2d, 2013 WL 395875, 163 Lab.Cas. P 36,093

Footnotes

1 In claims separate from the putative class action, plaintiff also asserts that defendants retaliated against him by terminating his employment when he complained of the alleged wage violations, and by not paying him proper pay for the last two weeks he worked, along with reimbursement for sick and vacation time. The motions presently before the Court do not concern plaintiff's individual claims.

2 Defendants previously moved to dismiss plaintiff's complaint, which the Court granted in part and denied in part. With regard to plaintiff's RICO claims, the Court dismissed those claims, but granted plaintiff leave to file an amended complaint. Plaintiff did so, and he also filed a RICO case information statement.

3 Purportedly the CBA contains a provision allowing defendants to withhold some of its drivers' pay for shortages. Thus, read literally, defendants' conduct does not violate the CBA since the CBA permits such conduct. Because the alleged conduct does not violate the CBA, and plaintiff is not challenging the fairness of the CBA, it could be said that the NLRA is not implicated in this matter and is raised by defendant simply as a red herring. Of course, any unfair practices in the creation of the CBA would be a separate issue.

4 Plaintiff alleges that the paycheck deductions policy was in effect since the spring of 2000, and the CBA containing this provision was not created until February 2005. Setting aside statute of limitation issues, five years of the alleged mail and wire fraud precede the CBA and therefore the possible preemptive application of the NLRA.

5 Plaintiff further clarifies that the time period for his class concerns all employees employed by defendants for the four years prior to the filing of plaintiff's complaint.

6 Defendants argue that because some drivers live in New Jersey but have Pennsylvania or Delaware driving routes, those drivers would not be part of plaintiff's proposed class of drivers who live in New Jersey. The Court does not opine on that issue now, other than to note that the NJWPL may still apply to those drivers, and, regardless of that issue, plaintiff's RICO claims are not dependent on state law.

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by Lord Abbett Municipal Income Fund, Inc. v. Citigroup Global Markets, Inc., D.N.J., July 12, 2012

2008 WL 724352
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

PREMIER PORK L.L.C., Plaintiff,
v.
WESTIN, INC., Westin Packaged Meats L.L.C., f/k/a Cook County Cookers L.L.C., Premium Protein Products L.L.C., Alma Foods L.L.C., f/k/a Flint Hills Foods L.L.C., Lasalle National Bank, Brett Elliot, Brad Poppen, Bernard Hansen, & Todd Hansen, Defendants.

Civil Action No. 07–1661.
|
March 17, 2008.

Attorneys and Law Firms

Albert A. Ciardi, III, Thomas H. Chiacchio, Jr., Kevin Gordon McDonald, Ciardi & Ciardi, PC, Philadelphia, PA, for Plaintiff.

Ronald L. Glick, Stevens & Lee, PC, Princeton, NJ, Jonathan M. Korn, Blank Rome, LLP, Cherry Hill, NJ, for Defendants.

OPINION

RODRIGUEZ, Senior District Judge.

***1** This matter comes before the Court on two motions: First, Defendant LaSalle Bank National Association ("LaSalle")[1] moves to dismiss Counts II, IV, V, and VI of the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Second, Defendants Westin, Inc., Westin Packaged Meats, Inc. ("WPM"),[2] Brett Elliot ("Elliot"), and Brad Poppen ("Poppen")[3] move to dismiss all counts of the Amended Complaint under Federal Rule 12(b)(6). For the reasons stated below, the Court will grant LaSalle's motion. Additionally, it will grant in part and deny in part the Westin Defendants' motion.

I. BACKGROUND

Plaintiff in this case is Premier Pork ("Plaintiff"). It is a New Jersey limited liability company that is in the business of supplying various clients with pork bellies. It is also a creditor of an insolvent company. It is suing various individuals and entities in order to obtain compensation for pork bellies it sold to that company.

There are several defendants in this action and their relationship with one another is somewhat convoluted. Cook County Cookers ("CCC") is a now-defunct Illinois limited liability company that purchased pork bellies from Plaintiff and had its assets foreclosed upon by its senior secured creditor without ever having paid Plaintiff for the bellies it purchased. CCC was allegedly owned by a Kansas-based limited liability company known as Flint Hills Foods.[4] Premium Protein Products is a Nebraska limited liability company, which is allegedly majority owned by Flint Hills Foods. WPM is a Nebraska corporation, and is allegedly CCC's successor in interest. Westin, Inc., also a Nebraska corporation, is the corporate parent of WPM. LaSalle is an Illinois corporation and was CCC's senior secured creditor. Brad Poppen is a domiciliary of Nebraska who allegedly served as the chief financial officer of CCC and now serves in the same position for Westin, Inc. He is also allegedly a "contractor" for WPM, although there is no further allegation concerning what exactly this means. Brett Elliot is a domiciliary of Kansas. He was the president of CCC and is now the president of a non-party company called Anytime Foods, which is allegedly a joint venture between Westin, Inc. and Flint Hills Foods. Elliot is also, in some unspecified fashion, an employee of Westin, Inc. (*See* Westin Br., p. 5.) Bernard Hansen and Todd Hansen are domiciled in Nebraska and Kansas, respectively. The Amended Complaint is ambiguous regarding who these individuals are in relation to the other defendants. Ultimately, however, this ambiguity is unimportant to the disposition of the instant motions.

The substance of Plaintiff's factual allegations can be succinctly reduced to the following brief summary: Plaintiff alleges that CCC and its senior creditor, LaSalle, entered into a "friendly foreclosure"[5] that resulted in LaSalle holding a fraudulent auction of CCC's assets. (*See, e.g.,* Am.Compl., ¶¶ 5, 23.) The winning bid at the auction came from Flint Hills Foods, which, again, was CCC's parent company. (*Id.*, ¶¶ 6, 26.) Thereafter, Flint Hills Foods sold its newly-acquired assets to WPM, which was allegedly incorporated by its

parent, Westin, Inc., for the specific purpose of buying CCC's assets from Flint Hills Foods and moving them to a facility in Nebraska owned by Premium Protein Products. (*Id.*, ¶ 27.) Importantly, Premium Protein Products is allegedly "majority controlled" by Flint Hills Foods, which, according to Plaintiff, has been linked to Westin, Inc. through a "series of convoluted deals for over a year." (*Id.*, ¶ 11.) Thus, the wrong about which Plaintiff complains is that the parties' dealings permitted Flint Hills Foods, and its partner, Westin, Inc., to essentially shield CCC's assets from its creditors.

***2** Because Plaintiff was one of those creditors, it initiated this action on April 9, 2007. Subject matter jurisdiction is premised on both the presence of a federal question and the complete diversity of the parties' citizenship. (*See id.*, ¶¶ 1, 2.) On July 30, 2007, Plaintiff filed an Amended Complaint in which it asserts causes of action against all defendants, except LaSalle, for breach of contract (Count I) and fraudulent misrepresentation (Count III) relating to statements allegedly made about the payment of CCC's debt to Plaintiff. Additionally, Plaintiff asserts causes of action against all defendants, including LaSalle, for two violations of the Packers and Stockyards Act ("PSA" or the "Act"), 7 U.S.C. § 181, *et seq.* (Count II), fraud related to the so-called "friendly foreclosure" (Count IV), unjust enrichment (Count V), and civil conspiracy (Count VI).

LaSalle now moves to dismiss Counts II, IV, V, and VI of the Amended Complaint for failure to state a claim. Likewise, the Westin Defendants move to dismiss the Amended Complaint in its entirety for the same reason.[6] The Court will analyze both motions together.

II. DISCUSSION

A. Standard on a Motion to Dismiss Under Rule 12(b)(6)

A complaint should be dismissed pursuant to Rule 12(b)(6) if the alleged facts, taken as true, fail to state a claim. Fed.R.Civ.P. 12(b)(6); *see In re Warfarin Sodium*, 214 F.3d 395, 397–98 (3d Cir.2000). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, ___ – ___, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (internal citations omitted). Thus, a motion to dismiss should be granted unless the plaintiff's factual allegations are "enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact)." *Id.* at 1965 (internal citations omitted).

When deciding a motion to dismiss pursuant to Rule 12(b)(6), only the allegations in the complaint, matters of public record, orders, and exhibits attached to the complaint, are taken into consideration. *Chester County Intermediate Unit v. Pa. Blue Shield*, 896 F.2d 808, 812 (3d Cir.1990). A district court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 (3d Cir.1994). Moreover, these allegations and inferences must be viewed in the light most favorable to the plaintiff. *Id.* However, a court need not accept " 'unsupported conclusions and unwarranted inferences,' " *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir.2007) (citation omitted), and "[l]egal conclusions made in the guise of factual allegations ... are given no presumption of truthfulness," *Wyeth v. Ranbaxy Labs., Ltd.*, 448 F.Supp.2d 607, 609 (D.N.J.2006) (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)); *see also Kanter v. Barella*, 489 F.3d 170, 177 (3d Cir.2007) (quoting *Evancho v. Fisher*, 423 F.3d 347, 351 (3d Cir.2005)) ("[A] court need not credit either 'bald assertions' or 'legal conclusions' in a complaint when deciding a motion to dismiss .").

***3** It is not necessary for the plaintiff to plead evidence. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir.1977). The question before the court is not whether the plaintiff will ultimately prevail. *Watson v. Abington Twp.*, 478 F.3d 144, 150 (2007). Instead, the court simply asks whether the plaintiff has articulated "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S.Ct. at 1974.

B. Analysis

1. Count I: Breach of Contract

In Count I, Plaintiff alleges that CCC breached its sales agreement contracts when it failed to pay for the pork bellies it purchased. It attempts to hold all defendants, except LaSalle, liable for this breach "because of their disregard of corporate entities." (Am.Compl., ¶ 35.) The Westin Defendants contend

that Count I must be dismissed because Plaintiff does not sufficiently allege that WPM is the successor in interest to CCC. As such, neither WPM, nor any other Westin Defendant, can be held liable for CCC's breaches of contract. The Court, however, finds that Plaintiff's breach of contract claim is properly pled, though only as to WPM and not the other Westin Defendants.

a. Allegations Regarding WPM's Liability for CCC's Breach of Contract

In order to properly plead a claim for a breach of contract, a plaintiff must allege "(1) a contract; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party performed its own contractual duties." *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 210 F.Supp.2d 552, 561 (D.N.J.2002). A claim for a breach of contract is subject to the liberal notice pleading requirements found in Rule 8(a) of the Federal Rules of Civil Procedure.[7] *See, e.g., St.-Val v. Domino's Pizza, LLC*, Civil No. 06–4273, 2007 U.S. Dist. LEXIS 50518, at *4–5, 2007 WL 2049120 (D.N.J. July 12, 2007) (applying Rule 8(a) to a plaintiff's breach of contract claim).

In interpreting Rule 8, the Supreme Court has previously indicated that it does not demand fact pleading nor that a plaintiff's legal theories be set out in particularity. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), *abrogated in part by Twombly*, 127 S.Ct. at 1968–69. Even in the more recent case of *Twombly*, the Court reiterated that Rule 8(a) "do[es] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." 127 S.Ct. at 1973–74. Ultimately, Rule 8 is satisfied where the complaint provides a "statement sufficient to put the opposing party on notice of the claim." *Weston v. Pennsylvania*, 251 F.3d 420, 428 (3d Cir.2001) (citations omitted).

In this case, Plaintiff has sufficiently alleged a breach of contract by CCC. It plausibly claims that: (1) contracts existed between it and CCC, (Am.Compl., ¶ 31,); (2) it performed under those contracts by supplying CCC with pork bellies, (*see id.*, ¶ 33,); (3) CCC failed to pay for the pork bellies it received, thereby breaching those contracts, (*id.*, ¶ 32,); and (4) it suffered resulting damages to the extent of CCC's failure to pay, (*see id.*, ¶¶ 32, 34.)

***4** The Westin Defendants do not challenge the sufficiency of these allegations. Instead, they argue that Plaintiff has not adequately alleged that WPM is CCC's successor in interest and, as such, WPM cannot be held liable for CCC's breaches. This assertion is contradicted, however, by the Amended Complaint, which clearly alleges that WPM is CCC's successor. (Am.Compl., ¶¶ 4, 11, 15.) Other courts have recognized that a plaintiff's claim of successorship liability is satisfied by general allegations of successorship. *See, e.g., Napolitano v. BAE Sys. N. Am.*, 2005 U .S. Dist. LEXIS 45272, at *8, 2005 WL 1703193 10 (D.N.J. July 20, 2005) (holding that a plaintiff stated a claim for breach of contract on a successor liability theory where the complaint alleged the elements necessary for a breach of contract and further alleged that the defendant was liable for the breach as a successor in interest); *Sealy Conn., Inc. v. Litton Indus., Inc.*, 989 F.Supp. 120, 122–23 (D.Conn.1997) (holding that a successor liability claim will be adequately pled even when only a bare allegation is made that the defendant is a successor in interest); *see also Kuhns Bros. v. Fushi Int'l, Inc .*, Civil No. 06–1917, 2007 U.S. Dist. LEXIS 51461, at *14–15, 2007 WL 2071622 (D.Conn. July 16, 2007) (reaffirming the approach taken in the *Sealy Connecticut* case even after the Supreme Court's decision in *Twombly*, 125 S.Ct. 1955, was handed down). The Westin Defendants cite no authority suggesting that more factual specificity is required under Rule 8(a). Thus, the Court is satisfied that Plaintiff has sufficiently pled its breach of contract claim and its related theory that WPM is CCC's successor in interest.

Moreover, even if Plaintiff had an obligation to plead particular facts supporting its successor liability theory, the Court is satisfied that it has done so in this case. The general rule of successorship liability is really one of nonliability.[8] Most jurisdictions adhere to the doctrine that a company which purchases the assets of another company will not ordinarily be held liable for the debts of the seller. *Vernon v. Schuster*, 179 Ill.2d 338, 228 Ill.Dec. 195, 688 N.E.2d 1172, 1175 (Ill.1997); *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 431 A.2d 811, 815 (N.J.1981). This rule " 'developed as a response to the need to protect bonafide purchasers from unassumed liability' and was 'designed to maximize the fluidity of corporate assets.' " *Vernon*, 228 Ill.Dec. 195, 688 N.E.2d at 1175 (citations omitted).

There are four widely recognized exceptions to the general rule, however: (1) where there is an express or implied agreement that the buyer will assume the liabilities of the seller; (2) where the transaction amounts to a consolidation or

merger of the buyer and seller; (3) where the buyer is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligations. *Id.* at 1175–76; *Ramirez*, 431 A.2d at 815. In the few cases where courts have reviewed the factual allegations upon which successor liability is premised, they have done so under the liberal notice pleading standards of Rule 8(a), even where a plaintiff bases its successorship claim on a fraudulent transfer theory. *See, e.g., Adani Exps. Ltd. v. AMCI (Export) Corp.*, Civil No. 05–0304, 2006 U .S. Dist. LEXIS 42986, at *3–4, 2006 WL 1785707 (W.D. Pa. June 26, 2006).

***5** In this case, Plaintiff has alleged enough facts to support its successorship theory. It claims that CCC, through LaSalle's foreclosure, sold its assets to its own parent company, Flint Hills Foods. (*See* Am. Compl., ¶¶ 5, 6, 23, 26.) In turn, Flint Hills Foods allegedly sold those assets to WPM so that WPM could move those assets to a facility run by Premium Protein Products, (*id.*, ¶ 27,) which is controlled by Flint Hills Foods, (*id.*, ¶ 11.) Taking these allegations as true and viewing them in the light most favorable to Plaintiff, it is plausible that WPM is CCC's successor in interest under at least the fraudulent transfer exception to the general rule of nonliability.

It is possible that facts gleaned through discovery and revealed at the summary judgment stage of this litigation may support the Westin Defendants' contention that WPM is not CCC's successor. Until that time, the Court concludes that Plaintiff may maintain its action for breach of contract against WPM. As discussed in the paragraphs that follow, however, the remaining Westin Defendants require a different approach.

b. Allegations Regarding the Other Westin Defendants' Liability: Piercing WPM's Corporate Veil

Having determined that Plaintiff can maintain its breach of contract claim against WPM, there remains the additional question of which of the other Westin Defendants, if any, can also be held liable under Count I. Plaintiff asserts that "all of the Defendants (except LaSalle Bank) are liable for this breach of contract because of their disregard of corporate entities." (Am. Compl., ¶ 35; *see id.*, ¶¶ 8, 10.) Presumably, Plaintiff is attempting to pierce WPM's corporate veil in order to hold its parent, Westin, Inc., and its parent's employees, Brad Poppen and Brett Elliot, liable for this breach. For the reasons discussed below, however, these allegations fail to state a claim.

It is a fundamental proposition under New Jersey law[9] that a corporation is a separate entity from its corporate principals. *State of New Jersey, Dep't of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150, 164 (N.J.1983). Indeed, "a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." *Id.* Thus, limited liability will normally not be abrogated, even in the case of a parent corporation and its wholly-owned subsidiary. *Id.*

Notwithstanding the general rule of limited liability, "courts may pierce the corporate veil by finding that a subsidiary was 'a mere instrumentality of the parent corporation.' " *Id.* (citations omitted). In order to state a claim for piercing the corporate veil, a complaint must contain factual assertions showing that: "(1) the parent corporation 'so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent,' and (2) 'the parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law.' "[10] *Ohai v. Verizon Commc'ns, Inc.*, Civil No. 05–0729, 2005 U.S. Dist. LEXIS 25703, at *23–24 (D.N.J. Oct. 28, 2005) (quoting *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 149 (3d Cir.1988) (in turn quoting *Ventron*, 468 A.2d at 164)); *see Bd. of Tr. of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 171 (3d Cir.2002).

***6** "To display the requisite 'control' over a subsidiary necessary to pierce the corporate veil, a corporate parent must have more than mere majority or complete stock control." *Ohai*, 2005 U.S. Dist. LEXIS, at *24 (citing *Craig*, 843 F.2d at 150); *see also Ventron*, 468 A.2d at 164. Instead, the parent must "completely dominate the finances, policy, and business practice with respect to the subject transaction." *Id.* (citing *Craig*, 843 F.2d at 150). In other words, the subsidiary must have "no separate mind, will, or existence of its own." *Craig*, 842 F.2d at 150 (citation omitted). Factors relevant to this inquiry include:

> gross undercapitalization ... "failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders."

Id. (quoting *Am. Bell, Inc. v. Fed'n of Tel. Workers*, 736 F.2d 879, 886 (3d Cir.1984)). Significantly, a parent's domination or control of its subsidiary cannot be established by the mere fact that the corporations' boards of directors or officers overlap. *Seltzer v. I.C. Optics, Ltd.*, 339 F.Supp.2d 601, 610 (D.N.J.2004); *see United States v. Bestfoods*, 524 U.S. 51, 69, 118 S.Ct. 1876, 141 L.Ed.2d 43, (1998) ("It is a well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership.")

The Third Circuit recently evaluated the sufficiency of a plaintiff's dominance allegations in *Foodtown*, 296 F.3d 164. In that case, the plaintiff claimed that

> defendants failed to maintain formal barriers between the management structures of [two corporate entities]; failed to maintain formal barriers between [these entities] for purposes of legal representation; commingled funds and other assets; and failed to observe other corporate formalities. Furthermore, [the plaintiff] contends that [these entities] shared twelve of thirteen common directors and that at all times [the subservient entity's] Board of Directors was dominated and controlled by the [dominant entity]-affiliated Directors. [The plaintiff] also claims that all of [the dominant entity's] shareholder/members were also members of [the subservient entity] and that all the corporate defendants were common shareholder/members of [both entities]. [The plaintiff] also claims that [both entities] shared the same principal office and registered office.

Id. at 172 (internal citations omitted). Viewed as true, the Court of Appeals found that these allegations supported the first prong of the veil piercing test, i.e., complete dominance. *See id*.

This Court reached a different result in *Ohai*, 2005 U.S. Dist. LEXIS 25703. There, the complaint did not sufficiently support the complete dominance prong because the only allegation pertaining to the dominance of the subsidiary by the parent corporations related to the parents' 55% and 45% stakes in the subsidiary. *Id.* at *26. Critically, neither the complaint nor the plaintiff's opposition papers contained any claims that the parent companies influenced the subsidiary's finances, policy, or business practice related to the relevant transaction. *Id.* at *26–27. The Court therefore held that the veil piercing allegations failed to state a claim. *Id.* at *28.

*7 In opposing the instant motion, Plaintiff argues that "the entire Amended Complaint and [the news paper article attached thereto] is replete with detailed explanations of the corporate and Individual Defendants' disregard of the corporate entities." (Pl. Res. Br. to Westin M., p. 10.) For example, Plaintiff alleges that WPM is a subsidiary of Westin, Inc. (*See* Am. Compl., ¶ 27.) Likewise, it claims that Brad Poppen was the chief financial officer of both CCC and Westin, Inc., as well as a "contractor" for WPM. (*Id.*, ¶ 11.) The Amended Complaint further alleges that Brett Elliot has a controlling interest in Flint Hills Foods, and was the president of both CCC and Anytime Foods, which is a joint venture between Flint Hills Foods and Westin, Inc. (*Id.*, ¶ 27 n. 2.) Under cases like *Ventron* and *Seltzer*, however, these allegations are insufficient because the corporate form will normally be maintained even in the case of 100% ownership and notwithstanding an overlap in directors or officers.

As in *Ohai*, the critical allegations that are missing from the Amended Complaint in this case are those from which the Court could reasonably infer complete dominance of WPM by Westin, Inc, Poppen, or Elliot. For example, there are no allegations addressing whether and to what extent any defendant influenced the finances, policy, and business practice of WPM in relation to its acquisition of CCC's assets. Additionally, unlike in *Foodtown*, Plaintiff makes no allegations concerning which, if any, corporate formalities were disregarded.

Because the Amended Complaint is totally devoid of allegations relating to the dominance of WPM, Plaintiff has failed to raise his right to pierce that company's corporate veil above the speculative level. *See Twombly*, 127 S.Ct. at 1965. Accordingly, Westin, Inc., Brett Elliot, and Brad Poppen cannot be held liable for any breach of contract attributed to WPM as the possible successor in interest to CCC. [11]

2. Count II: The Packers and Stockyards Act

In Count II, Plaintiff asserts two claims based on the PSA. First, it contends that it is entitled to participate in the statutory trust created by section 206 of the Act, under which proceeds for certain cash sales must be held in trust for unpaid sellers. (Am.Compl., ¶ 37.) In essence, Plaintiff claims that, as an alleged trust beneficiary, it has priority over LaSalle for CCC's liquidated assets and can hold the Westin Defendants [12] liable for CCC's failure to maintain those assets in the trust. Second, Plaintiff alleges that LaSalle and the Westin Defendants engaged in an "unfair practice" made unlawful by section 202 of the Act insomuch as they delayed payment for the pork bellies Plaintiff delivered. (*Id.*, ¶ 41.) Notwithstanding these allegations, however, Plaintiff's PSA claims fail as a matter of law because the transactions at issue in this case involved pork bellies and not "livestock."

***8** Among other reasons, the PSA was enacted to assure fair trade practices in the livestock marketing and meat-packing industries, thereby safeguarding farmers and ranchers against receiving less than the true market value of their livestock. *Bruhn's Freezer Meats, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1337 (8th Cir.1971). To this end, the Act provides several sources of protection for sellers of livestock. [13] For example, section 206(b) of the Act creates a statutory trust for the benefit of livestock sellers and provides, in relevant part:

> All livestock purchased by a packer in cash sales, and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom, shall be held by such packer in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers[.]
> 7 U.S.C. § 196(b). This provision has been interpreted as granting trust beneficiaries priority over lenders who are given security interests in inventories or receivables that are subject to the trust. *See, e.g., First State Bank of Miami v. Gotham Provision Co., Inc. (In re Gotham Provision Co.)*, 669 F.2d 1000, 1010 (5th Cir.1982).

Under section 206, an entity will be a trust beneficiary only if it is an "unpaid cash seller[ ] of ... livestock ...." 7 U.S.C. § 196(b); *see Gotham Provision*, 669 F.2d at 1004 (stating that Congress limited the applicability of the PSA's trust provision to transactions in which the commodities sold are "livestock"); *Hedrick v. S. Bonaccurso & Sons, Inc.*, 466 F.Supp. 1025, 1030 (E.D.Pa.1978) ("In 1976, the Act was amended to specifically create a statutory trust for the benefit of the unpaid cash seller of livestock delivered and proceeds therefrom until the packer pays for his purchases."). The Act defines "livestock" as "cattle, sheep, swine, horses, mules, or goats whether live or dead." 7 U.S.C. § 182(4). Thus, a plaintiff must sufficiently allege that it is an unpaid seller of cattle, sheep, swine, horses, mules, or goats if it is "to raise a right to relief above the speculative level ...." *See Twombly*, 127 S.Ct. at 1965. In this case, however, the transactions at issue involved the sale of pork bellies. (*See* Am. Compl., ¶¶ 15, 33, 38.)

Plaintiff does not claim that pork bellies constitute livestock; instead, it concedes that pork bellies are "meat food products," (*see* Pl. Res. Br. to LaSalle M., pp. 3–4,) which are defined by the PSA as "all products and by-products of the slaughtering and meat-packing industry if edible," 7 U.S.C. § 182(3). Notwithstanding cases like *Gotham Provision* and *Hedrick*, Plaintiff contends that PSA trust benefits unpaid sellers of meat and meat food products to the same extent that it benefits unpaid sellers of livestock. (*See* Pl. Res. Br. to LaSalle M., pp. 3–4.) However, it bases its argument on an erroneous construction of selectively quoted statutory text.

***9** To support its position, Plaintiff quotes the following portion of section 206: "All livestock purchased by a packer in cash sales, and all inventories of, or receivables or proceeds from *meat, meat food products* ... shall be held in trust ...." (*Id.*, p. 3 (emphasis and omissions in original).) The problem with Plaintiff's argument is manifest upon examining the statutory language it omitted. Again, section 206 provides:

> All *livestock* purchased by a packer in cash sales, and all inventories of, or receivables or proceeds from meat, meat food products, or livestock products *derived therefrom,* shall be held by such packer in trust for the benefit of all *unpaid cash sellers of such livestock* until full payment has been received by such unpaid sellers[.]

7 U.S.C. § 196(b) (emphasis added). The full statutory language and the previously cited cases interpreting it make clear that the trust protects only unpaid cash sellers of livestock. Meat and meat food products are relevant only

insomuch as the property to be held in trust includes "all inventories of, or receivables or proceeds from meat[or] meat food products" that are "derived" from the livestock initially sold to the packer by the "unpaid cash sellers of such livestock." *See id.; see also* Gotham Provision, 669 F.2d at 1011 (indicating that inventories and receivables of meat products are subject to the trust if they are derived from livestock sold by an unpaid cash seller). Thus, because Plaintiff concedes that the relevant transactions involved only the sale of meat food products and not livestock, the Court concludes that Plaintiff is not entitled to participate in the statutory trust. [14]

Plaintiff's unfair practice claim fails for the same reason. Section 202 of the Act prohibits certain enumerated practices and provides, in relevant part:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to: (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device ....

7 U.S.C. § 192. In turn, section 409 of the Act, which deals with payment for the purchase of livestock, specifically declares:

> Any delay or attempt to delay by a market agency, dealer, or packer *purchasing livestock,* the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment *for such livestock* shall be considered an "unfair practice" in violation of this Act.

7 U.S.C. § 228b(c) (emphasis added).

In this case, Plaintiff alleges that "Defendants are also liable under the Act because they engaged in an 'unfair practice' ... in an effort to delay making payments to [Plaintiff]." (Am.Compl., ¶ 41.) In opposing the instant motions to dismiss, Plaintiff confirms that this claim is premised on section 409 of the Act. (*See* Pl. Res. Br. to. LaSalle M., p. 4; Pl. Res. Br. to Westin M., pp. 14–15.) However, the quoted statutory text clearly indicates that section 409 applies only to transactions involving the sale of livestock. Because Plaintiff concedes that it did not sell livestock, any delay in payment it endured cannot be deemed an "unfair practice" as defined in section 409 and prohibited by section 202.

***10** For these reasons, Plaintiff has failed to state a claim under the PSA. Accordingly, Count II will be dismissed as to LaSalle and all of the Westin Defendants.

3. Counts III and IV: Common Law Fraud

In Count III, Plaintiff asserts that all defendants, except LaSalle, committed common law fraud because Defendant Brett Elliot allegedly misrepresented that Plaintiff would receive payment for the pork bellies it shipped to CCC. In Count IV, Plaintiff alleges that all defendants, including LaSalle, are liable for common law fraud relating to the so-called "friendly foreclosure." The Westin Defendants argue that Counts III and IV must be dismissed because Plaintiff has failed to plead its fraud claims with sufficient particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure. LaSalle echoes this argument with respect to Count IV. For the following reasons, the Court agrees that the pleadings in both counts are inadequate.

The general standard of review triggered by a defendant's motion to dismiss under Rule 12(b)(6) is altered by Rule 9(b). *In re Intelligroup Sec. Litig.*, 527 F.Supp.2d 262, 275 (D.N.J.2007). Rule 9(b) states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." In other words, the rule requires plaintiffs to plead with particularity the facts supporting the elements of fraud. *See In re Suprema Specialties, Inc. Sec Litig.*, 438 F.3d 256, 270 (3d Cir.2006). The purpose of this heightened standard is to "give defendants 'notice of the claims against them, provide[ ] an increased measure of protection for their reputations, and reduce[ ] the number of frivolous suits brought solely to extract settlements.' " *Id.* (alterations in original) (quoting *In re*

Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1418 (3d Cir.1997)).

In order to successfully plead fraud under Rule 9(b), plaintiffs must offer "some precision and some measure of substantiation." *Gutman v. Howard Sav. Bank*, 748 F.Supp. 254, 257 (D.N.J.1990). Plaintiffs may satisfy the rule's requirement "by pleading the 'date, place or time' of the fraud, or through 'alternative means of injecting precision and some measure of substantiation into their allegations of fraud.' " *Lum v. Bank of Am.*, 361 F.3d 217, 224 (3d Cir.2004) (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir.1984)). "Plaintiffs also must allege who made a misrepresentation to whom and the general content of the misrepresentation." *Id.*

Pleadings containing collectivized allegations against "defendants" as a group are insufficient under Rule 9(b). *Naporano Iron & Metal Co. v. American Crane Corp.*, 79 F.Supp.2d 494, 511 (D.N.J.1999); *see Eli Lilly & Co. v. Roussel Corp.*, 23 F.Supp.2d 460, 496 (D.N.J.1998) ("Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to 'defendants.' "). Instead, "[a] plaintiff must plead fraud with particularity with respect to each defendant, thereby informing each defendant of the nature of its alleged participation in the fraud." *Naporano*, 79 F.Supp.2d at 511.

***11** Rule 9(b) requires the identification of the elements of a fraud claim. *In re Craftmatic Sec. Litig.*, 890 F.2d 628, 645 (3d Cir.1989). To state a claim for common law fraud in New Jersey,[15] a plaintiff must allege: " '(1) a material misrepresentation [or omission] of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.' " *Delaney v. Am. Express Co.*, Civil No. 06–5134, 2007 U.S. Dist. LEXIS 34699, at *17, 2007 WL 1420766 (D.N.J. May 11, 2007) (alteration in original) (quoting *Wartsila NSD N. Am., Inc. v. Hill Intern., Inc.*, 342 F.Supp.2d 267, 287–88 (D.N.J.2004)).

Importantly, "Rule 9(b) also requires that the detrimental reliance element of a fraud claim be pleaded with particularity." *Gutman v. Howard Sav. Bank*, 748 F.Supp. 254, 257 (D.N.J.1990) (citing *Learning Works, Inc. v. Learning Annex, Inc.*, 830 F.2d 541, 546 (4th 1987)). That is, a "plaintiff must show that he or she acted upon the fraud or misrepresentation complained of." *Id* . at 258.

With these principles in mind, the Court finds that Counts III and IV are both deficient. In Count III, Plaintiff alleges that CCC, through Brett Elliot, misrepresented the fact that Plaintiff would be compensated for the pork bellies it supplied. (Am.Compl., ¶ 43.) These misrepresentations allegedly occurred "over the course of business from August 2006 forward." (*Id.*) In this regard, Plaintiff has sufficiently identified who made an alleged misrepresentation, its content, and when it was made. However, this is true only with respect to a fraud claim against Brett Elliot, and not the other Westin Defendants. There are no allegations concerning whether Westin, Inc., WPM, or Brad Poppen made any misrepresentations. Perhaps recognizing this, Plaintiff alleges that the remaining Westin Defendants should be held liable under a corporate veil piercing theory. (*See id.*, ¶ 47.) However, as discussed in section II.B.1.b., *supra,* of this Opinion, Plaintiff has failed to state a claim for piercing the corporate veil.

Moreover, Count III is deficient as to all Westin Defendants, including Brett Elliot, because Plaintiff does not plead with particularity facts showing how it reasonably and detrimentally relied on the alleged misrepresentations. In other words, the allegations do not show how Plaintiff acted on the alleged fraud. Instead, it merely states in a conclusory fashion that it "reasonably and justifiably relied on the intentional misrepresentations," (Am.Compl., ¶ 45,) which is precisely the kind of generalized pleading Rule 9(b) prohibits, *see Learning Works*, 830 F.2d at 546 (dismissing a fraud claim wherein the plaintiff alleged it detrimentally relied on the defendant's misrepresentations by ceasing its business operations, but provided no factual allegations supporting a conclusion that this reliance was reasonable).

***12** With respect to Count IV, Plaintiff frequently states throughout the Amended Complaint that the auction of CCC's assets was "fraudulent." (*See* Am. Compl., ¶¶ 5, 6, 23, 26, 27, 28.) However, Plaintiff does not provide the requisite specificity to satisfy Rule 9(b) with respect to its common law fraud claim. For example, Plaintiff alleges that "misrepresentations and omissions were made intentionally and are material," (*id.*, ¶ 50,) but fails to identify even generally the content of the misrepresentations of which it speaks. For that matter, the Amended Complaint does not even allege that any specific defendant made any statement whatsoever to Plaintiff in connection with the auction.

Plaintiff attempts to rescue Count IV by arguing that it sufficiently alleged a material omission insomuch as it claims it "was never informed of the auction." (Pl. Res. Br. to LaSalle M., p. 5; *see* Pl. Compl., ¶ 24.) However, this is a far cry from the kind of specificity required by Rule 9(b). As an initial matter, merely alleging that one was "never informed" of a piece of information is not the same as alleging with particularity that a *specific defendant intentionally omitted* that information.

Moreover, Plaintiff does not allege that any defendant owed it a duty to disclose information about the auction. "[W]here a claim for fraud is based on silence or concealment, New Jersey courts will not imply a duty to disclose, unless such disclosure is necessary to make a previous statement true or the parties share a 'special relationship.' " *Lightning Lube v. Witco Corp.*, 4 F.3d 1153, 1185 (3d Cir.1993) (citations omitted); *see Berman v. Gurwicz*, 189 N.J.Super. 89, 458 A.2d 1311, 1313 (N.J.Super.Ct. Ch. Div.1981). There are only three types of relationships that give rise to a duty of disclosure:

> (1) fiduciary relationships, such as principal and agent, client and attorney, or beneficiary and trustee; (2) relationships where one party expressly reposits trust in another party, or else from the circumstances, such trust necessarily is implied; and (3) relationships involving transactions so intrinsically fiduciary that a degree of trust and confidence is required to protect the parties.

Lightning Lube, 4 F.3d at 1185 (citing *Berman*, 458 A.2d at 1313).

Additionally, under section 9–611 of the Uniform Commercial Code ("U.C.C."), a secured creditor, such as LaSalle, that intends to sell the collateral of a defaulting party is required to provide notice to: (1) the debtor; (2) any secondary obligor; (3) any party that provided the secured creditor with an authenticated notification of a claim of interest in the collateral; (4) any other secured party who holds a security interest in the collateral perfected by filing a financial statement; and (5) any other secured party who holds a security interest in the collateral perfected by compliance with a statute or regulation. *See* 810 ILL. COMP. STAT. 5/9–611; N.J. STAT. ANN. § 12A:9–611.

***13** In this case, the Amended Complaint does not allege the existence of any kind of "special relationship" between Plaintiff and any defendant. Nor does it allege that Plaintiff was entitled to notice under the U.C.C. Nonetheless, Plaintiff argues in its brief that it is entitled to notice because it perfected a security interest in CCC's assets when it delivered pork bellies in compliance with the PSA. (*See* Pl. Res. Br. to LaSalle M, p. 5.) This argument fails, however, for two reasons. First, Plaintiff cannot defeat a motion to dismiss by raising new allegations, like its entitlement to notice under the U.C.C., for the first time in its brief. *See Town of Secaucus v. United States Dep't of Transp.*, 889 F.Supp. 779, 791 (D.N.J.1995) ("On a 12(b)(6) motion, the district court is limited to the facts alleged in the complaint, not those raised for the first time by counsel in its legal memorandum."). Second, the Court has already determined that Plaintiff is not an unpaid cash seller of livestock and is therefore not a beneficiary of the PSA's statutory trust. As such, Plaintiff cannot be said to have perfected a security interest as a trust beneficiary.

Furthermore, as with Count III, Plaintiff fails to plead with particularity facts in Count IV showing how it reasonably and detrimentally relied on the alleged fraud connected with the auction. Instead, it again states in a conclusory fashion that it "reasonably and justifiably rel[ied] on the intentional misrepresentations and omissions." (Pl.Am.Compl., ¶ 51.) Such generalized statements are insufficient under Rule 9(b).

For these reasons, the Court concludes that Plaintiff has not sufficiently alleged the necessary elements to sustain a common law fraud claim against LaSalle or any Westin Defendant in either Count III or IV. Accordingly, these counts will be dismissed for failure to state a viable claim. However, the Court will order this dismissal without prejudice so that Plaintiff may attempt to cure its pleading defects. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1435 (indicating that where a complaint is dismissed for failure to plead fraud with particularity, leave to amend should typically be granted).

4. Count V: Unjust Enrichment

In Count V, Plaintiff asserts a claim for unjust enrichment. However, this claim must be dismissed as to LaSalle and each of the Westin Defendants.

"Under New Jersey law,[16] '[t]he constructive or quasi-contract is the formula by which enforcement is had of a duty to prevent unjust enrichment or unconscionable benefit or advantage.' " *Suburban Transfer Serv., Inc. v. Beech Holdings, Inc.*, 716 F.2d 220, 226 (3d Cir.1983) (quoting *Borough of West Caldwell v. Borough of Caldwell*, 26 N.J. 9, 138 A.2d 402, 412 (N.J.1958)). Restitution for unjust enrichment is an equitable remedy, available only when there is no adequate remedy at law. *Nat'l Amusements, Inc. v. N.J. Tpk. Auth.*, 261 N.J.Super. 468, 619 A.2d 262, 267 (N.J.Super. Ct. Law Div.1992).

***14** 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." *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 641 A.2d 519, 554 (N.J.1994). However, a defendant will be liable only if the plaintiff shows that it "expected remuneration from the defendant at the time it ... conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." *Id.* It has been observed that quasicontract claims involve either some direct relationship between the parties or a mistake on the part of the person conferring the benefit. *See Callano v. Oakwood Park Homes Corp.*, 91 N.J.Super. 105, 219 A.2d 332, 335 (N.J.Super.Ct.App.Div.1966).

"Quasi-contract liability will not be imposed, however, if an express contract exists concerning the identical subject matter." *Suburban Transfer*, 716 F.2d at 226–27; *see also Duffy v. Charles Schwab & Co.*, 123 F.Supp.2d 802, 814 (D.N.J.2000) ("[R]ecovery based on a quasi-contract theory is mutually exclusive of a recovery based on a contract theory."). "The authority of an express contract will take precedent over a theory of unjust enrichment or quasi-contract liability concerning the identical subject matter since '[t]he parties are bound by their agreement, and there is no ground for implying a promise so long as a valid unrescinded contract governs the rights of the parties.' " *Dovale v. Marketsource, Inc.*, Civil No. 05–2872, 2006 U.S. Dist. LEXIS 57679, at *24, 2006 WL 2385099 (D.N.J. Aug. 17, 2006) (quoting *Suburban Transfer*, 716 F.2d at 226–27). Although litigants may plead alternative and inconsistent claims, Fed.R.Civ.P. 8(d)(2) & (3), courts have on numerous occasions dismissed under Rule 12(b)(6) unjust enrichment claims that relate to the same subject matter as valid contracts. *See, e.g., Estate of Gleiberman v. Hartford Life Ins. Co.*, 94 Fed. Appx. 944, 947 (3d Cir.2004); *Royale Luau Resort v. Kennedy Funding*, Civil No. 07–1342, U.S. Dist. LEXIS 11902, at *30–31, 2008 WL 482327 (D.N.J. Feb. 19, 2008); *Kohn v. Haymount Ltd. P'ship, LP (In re Int'l Benefits Group, Inc.)*, Civil No. 06–2363, 2007 U.S. Dist. LEXIS 46889, at *11, 2007 WL 1875926 (D.N.J. June 28, 2007); *Oswell v. Morgan Stanley Dean Witter & Co.*, Civil No. 06–5814, 2007 U.S. Dist. LEXIS 44315, at *29–30, 2007 WL 1756027 (D.N.J. June 18, 2007).

With these principles in mind, the Court concludes that Count V fails to state a claim as to both LaSalle and the Westin Defendants. The Amended Complaint alleges that "Defendants had a benefit conferred upon them by [Plaintiff] in that [Plaintiff] has completed its contractual obligations by shipping" certain pork bellies and preparing for shipment other pork bellies, the order for which was ultimately cancelled. (Am.Compl., ¶ 54.) Further, Plaintiff contends "[i]t would be inequitable for Defendants to enjoy the benefits of [these pork bellies] without [Plaintiff] receiving the contracted for compensation that it is owed." (*Id.*, ¶ 55.) These allegations raise a number of problems.

***15** Even if true, no allegation in Count V, or anywhere else in the Amended Complaint, gives rise to an unjust enrichment claim against LaSalle. Plaintiff nowhere alleges any facts from which the Court could reasonably infer any direct relationship between it and LaSalle, or that there was any mistake on its part in shipping, or preparing for shipment, the pork bellies at issue in this case. Moreover, while Plaintiff argues that LaSalle was unjustly enriched because it kept the proceeds from the sale of CCC's assets for itself, (Pl. Res. Br. to LaSalle M., p. 6–7,) Plaintiff nowhere alleges that it conferred a benefit on LaSalle with an expectation of remuneration from LaSalle. Finally, Plaintiff does not allege that LaSalle received any benefits, from any source, that exceeded its contractual rights. Indeed, Plaintiff concedes that the proceeds LaSalle received from the sale of CCC's assets was "money [CCC] owed LaSalle ...." (*Id.*, p. 6.) Thus, the Court must dismiss the unjust enrichment claim as to LaSalle.

The claim is also defective as to the Westin Defendants. The only benefit allegedly conferred upon any defendant was Plaintiff's fulfillment of its "contractual obligations" to CCC. (*See* Am. Compl., ¶ 54.) To the extent that WPM can be held liable as a successor to CCC, this means there is no allegation that WPM was enriched beyond its contractual rights. Likewise, Plaintiff's only allegation concerning whether this benefit's retention would be unjust is that Plaintiff has

not received "the contracted for compensation that it is owed." (*See id.,* ¶ 55.) Thus, it is clear that Plaintiff's unjust enrichment claim against WPM relates to the exact same subject matter as the sales agreements at issue in its breach of contract claim. The unjust enrichment claim should accordingly be dismissed as to WPM.

Additionally, the Court fails to see how Plaintiff's fulfillment of its contractual obligations to CCC amounts to a benefit conferred upon the other Westin Defendants, *to wit,* Westin, Inc., Brad Poppen, and Brett Elliot. Even if it did, there are no allegations from which the Court could reasonably infer that Plaintiff had an expectation of remuneration from these defendants at the time it conferred the alleged benefit. Nor are there any allegations suggesting that there was a direct relationship between Plaintiff and any of these defendants. As such, the unjust enrichment claim must also be dismissed as to the remaining Westin Defendants.

5. Count VI: Civil Conspiracy

In Count VI, Plaintiff alleges that, by agreeing to the so-called "friendly foreclosure," all defendants civilly conspired to "inflict a wrong against or injury upon Plaintiff ...." (Pl.Compl., ¶ 59.) Given the Court's dismissal of Plaintiff's fraud claims, however, Count VI will also be dismissed without prejudice.

Under New Jersey law,[17] "a civil conspiracy is 'a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage.' " *Banco Popular,* 876 A.2d at 263 (quoting *Morgan v. Union County Bd. of Chosen Freeholders,* 268 N.J.Super. 337, 633 A.2d 985, 998 (N.J.Super.Ct.App.Div.1993)); *see also Eli Lilly,* 23 F.Supp.2d at 496. The unlawful agreement need not be expressed and the participants need not know all the details of the plan designed to achieve the objective. *Weil v. Express Container Corp.,* 360 N.J.Super. 599, 824 A.2d 174, 183 (N.J.Super.Ct.App.Div.2003). Instead, "the plaintiff must demonstrate that there was one plan and that its essential scope and nature was known to each person who is charged with responsibility for its consequences." *Id.*

***16** This Court further elaborated upon the nature of a civil conspiracy in *Eli Lilly:*

> A civil action for conspiracy is essentially a tort action. Therefore, to maintain an action for civil conspiracy, a plaintiff must also point to (1) an overt act of one or more of the conspirators in furtherance of the conspiracy; and (2) consequential damage to the rights of another, of which the overt act is the proximate cause. *[A p]laintiff cannot bring an action alleging civil conspiracy unless defendants committed an act which would be actionable even without the conspiracy.* Thus, "the conspiracy is not the gravamen of the charge, but merely a matter of aggravation, enabling the plaintiff to recover against all the defendants as joint tortfeasors." *The actionable element is the tort which the defendants agreed to perpetrate and which they actually committed.*

Eli Lilly, 23 F.Supp.2d at 496–97 (emphasis added) (internal citations omitted). Thus, the dismissal of a plaintiff's independent tort claims requires the dismissal of any corresponding conspiracy claims. *See Brown v. Philip Morris Inc.,* 228 F.Supp.2d 506, 517 n. 10 (D.N.J.2002); *Eli Lilly,* 23 F.Supp.2d at 497.

In this case, the only actionable tort allegedly committed by all defendants was common law fraud in connection with the auction of CCC's assets. Because the Court has already dismissed Count IV, there no longer remains any underlying tort upon which to premise the civil conspiracy claim. Therefore, the Court will dismiss Count VI as to LaSalle and each of the Westin Defendants. This dismissal will be ordered without prejudice to the extent that Plaintiff cures the pleading defects in Count IV.

III. CONCLUSION

For the foregoing reasons, the Court will dismiss the Amended Complaint in its entirety as far as LaSalle is concerned. However, as previously stated, this dismissal will be ordered without prejudice insomuch as Plaintiff may attempt to cure the defects in Counts IV and VI with respect to LaSalle. Likewise, the Court will dismiss the Amended Complaint in its entirety as to Westin, Inc., Brad Poppen, and Brett Elliot. It will also dismiss Counts II, III, IV, V, and VI, but not Count I, of the Amended Complaint as to WPM. Again, the Court's dismissal of Counts III, IV, and VI will be ordered without prejudice as to each of the Westin Defendants. Plaintiff may attempt to cure the pleading defects in Counts III, IV, and VI by filing a Second Amended Complain as directed in the accompanying Order.

All Citations

Not Reported in F.Supp.2d, 2008 WL 724352

Footnotes

1 LaSalle was incorrectly identified in the Amended Complaint as LaSalle National Bank.

2 WPM was incorrectly identified in the Amended Complaint as a limited liability company, rather than as a corporation.

3 The Court will frequently refer to Westin, Inc., WPM, Elliot, and Poppen collectively as the "Westin Defendants."

4 Flint Hills Foods apparently changed its name recently to Alma Foods. The Court will nonetheless refer to this entity as "Flint Hill Foods."

5 The Amended Complaint does not explain what Plaintiff means when it uses the phrase "friendly foreclosure." This phrase appears to have been borrowed from a news article about the defendants' various dealings with one another. (*See* Am. Compl., Exh. A.)

6 In moving to dismiss the Amended Complaint, the Westin Defendants attached a certification that potentially required the Court to convert their motion to dismiss to one for summary judgment. *See* Fed.R.Civ.P. 12(d). However, this certification is referenced in the Westin Defendants' moving papers only in the course of attacking Plaintiff's unjust enrichment claim. As discussed in section II.B.4., *infra,* of this Opinion, the Court will dismiss this claim because of a variety of pleading defects, all of which are unrelated to the issues raised in the certification. Thus, the Court finds it unnecessary to refer to the certification and, by extension, unnecessary to convert the Westin Defendants' motion to dismiss. *See Trans Hudson Express, Inc. v. Nova Bus Co.*, Civil No. 06–4092, 2007 U.S. Dist. LEXIS 26724, at *1 n. 1, 2007 WL 1101444 (D.N.J. Apr. 10, 2007) (declining to convert a motion filed pursuant to Rule 12(b)(6) to a motion for summary judgment notwithstanding the parties' submission of affidavits because conversion was unnecessary).

7 Rule 8(a) provides, in relevant part: "A pleading that states a claim for relief must contain ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief ...."

8 The Westin Defendants argue that Illinois law should govern the question of whether WPM is a successor to CCC. (Westin Br., pp. 13–15.) "Before a choice of law question arises, however, there must actually be a conflict between the potentially applicable bodies of law." *Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808, 813 (3d Cir.1994). "Where there is no difference between the laws of the forum state and those of the foreign jurisdiction, there is a 'false conflict' and the court need not decide the choice of law issue." *Id.* Instead, the court should resolve the matter before it by reference to each state's law. *Id.*

In this case, the Westin Defendants do not identify any differences between the laws of Illinois and New Jersey concerning successorship liability. Indeed, both states adhere to the same general rule of nonliability and the same limited exceptions, with one difference that is irrelevant to this case. For the purposes of evaluating the sufficiency of the Amended Complaint, it therefore appears that there is no actual conflict that requires a choice of law analysis. Accordingly, the Court will refer to both states' law in this Opinion, but will permit the parties to revisit the issue in the future should they decide to do so.

9 In challenging the sufficiency of the pleadings with respect to piercing the corporate veil, the Westin Defendants cite to New Jersey law thereby indicating that New Jersey law should govern this question. (*See* Westin Br., p. 24 & n. 6.) Plaintiff seemingly agrees. (*See* Pl. Res. Br. to Westin's M., pp. 11–12.)

10 This framework also applies to natural persons because " '[p]arent' corporations ... are not the only parties liable under a veil piercing theory. Shareholders have also been found liable when they have totally dominated the corporation, failed to maintain the corporate identity, and used the corporation to perpetrate fraud, injustice or some other illegality." *Bd. of Tr. of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 172 n. 9 (3d Cir.2002) (citations omitted). Likewise, corporate officers are also potentially liable under a veil piercing theory where evidence is presented that shows the corporation was a "sham," and existed only so that the officers could avoid personal liability. *See N.J. Dep't of Env't Prot. v. Gloucester Env't Mgmt. Servs., Inc.*, 800 F.Supp. 1210, 1219–20 & n. 9 (D.N.J.1992).

11 Plaintiff similarly fails to state a claim for piercing the corporate veil to the extent that it attempts to do so in relation to any other cause of action asserted in the Amended Complaint.

12 Plaintiff alleges that all of the Westin Defendants are liable for its PSA claims, although it does not specify whether this liability is premised on a corporate veil piercing theory or some other theory. Ultimately, however, this omission is unimportant because Plaintiff's PSA claims fail as a matter of law against all defendants.

13 The Act also creates several protections for sellers of poultry. *See* 7 U.S.C. §§ 192, 197. However, these protections are not at issue in this case and will therefore not be discussed in any detail.

14 LaSalle and the Westin Defendants also argue that Plaintiff's statutory trust claim is defective because Plaintiff did not plead that it complied with certain notice requirements found is section 206. However, because the Court has determined that Plaintiff is not a trust beneficiary in the first place, there is no need to address this argument.

15 Both LaSalle and the Westin Defendants indicate that New Jersey law applies in considering their motions to dismiss the fraud claims, (LaSalle Br., p. 8 n. 1; Westin Br., p. 22 n. 5,) although LaSalle reserves the right to challenge the choice of law "should this case proceed beyond the pleading stage," (LaSalle Br., p. 8 n. 1.) Plaintiff seemingly agrees as to the applicability of New Jersey law. (*See* Pl. Res. Br. to LaSalle M., p. 5; Pl. Res. Br. to Westin M., pp. 5–7.)

16 Both LaSalle and the Westin Defendants indicate that New Jersey law applies in considering their motions to dismiss the unjust enrichment claims, (LaSalle Br., p. 8 n. 1; Westin Br., p. 25 n. 7,) although LaSalle reserves the right to challenge the choice of law "should this case proceed beyond the pleading stage," (LaSalle Br., p. 8 n. 1.) Plaintiff raises no objection to this assertion.

17 Both LaSalle and the Westin Defendants indicate that New Jersey law applies in considering their motions to dismiss the civil conspiracy claim, (LaSalle Br., p. 8 n. 1; *see* Westin Br., p. 27,) although LaSalle reserves the right to challenge the choice of law "should this case proceed beyond the pleading stage," (LaSalle Br., p. 8 n. 1.) Plaintiff raises no objection to this assetion.

End of Document

Ryan T. Warden (I.D. No. 044322006)
Fotini Karamboulis (I.D. No. 029562013)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
Telephone: (973) 656-1600
Facsimile: (973) 656-1611
Email: Ryan.warden@ogletree.com
Fotini.karamboulis@ogletree.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANIBAL MEJIAS, DENNIS MINTER, JERRY FULLER, and JOSE PENA, on behalf of themselves and those similarly situated, Plaintiffs, v. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendants.	CIVIL ACTION NO. _____ **NOTICE OF REMOVAL UNDER THE CLASS ACTION FAIRNESS ACT**

EXHIBIT D

Fotini Karamboulis, Esq. (I.D. #029562013)
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
(973) 656-1600
Attorneys for Defendants

ANIBAL MEJIAS, on behalf of himself and those similarly situated, Plaintiff, v. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A. LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MERCER COUNTY DOCKET NO.: MID-L-001401-19 *Civil Action*

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR PARTIAL DISMISSAL OF PLAINTIFF'S COMPLAINT AND TO CHANGE VENUE TO HUDSON COUNTY

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Aaron Warshaw (*pro hac vice* pending)
Daniel M. Bernstein (*pro hac vice* pending)
599 Lexington Avenue, 17th Floor
New York, New York 10022

Fotini Karamboulis
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960

Attorneys for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. PRELIMINARY STATEMENT

Defendants Goya Foods, Inc. ("GFI") and Robert I. Unanue, Francisco R. Unanue, Joseph Perez, Peter Unanue, David Kinkela, Rebecca Rodriguez, Carlos G. Ortiz, Miguel A. Lugo, Jr., Conrad Colon (the "Individual Defendants," and collectively with GFI, "Defendants"), through their attorneys Ogletree, Deakins, Nash, Smoak & Stewart, P.C., respectfully submit this reply memorandum of law in further support of their motion, pursuant to New Jersey Court Rule 4:6-2(e) and 4:3-3(a)(3) *et seq.*, requesting partial dismissal of Plaintiff's complaint and to change venue to Hudson County.

Plaintiff's threadbare opposition brief ("Plaintiff's Opposition Brief") fails to refute, and should be deemed to concede, Defendants' material arguments warranting dismissal of Plaintiff's claims against the Individual Defendants, his claim under the New Jersey Racketeering Influenced and Corrupt Organizations Act ("NJRICO"), and Plaintiff's unjust enrichment claim.

First, Plaintiff does not dispute that individual liability under the New Jersey Wage Payment Law (the "WPL"), N.J.S.A. § 34:11-4.1 *et seq.*, is limited to cases where a plaintiff has established liability against a corporation and that corporation reneges on its salary obligations. Plaintiff's First Count under the WPL has not alleged, and cannot allege, any such risk here. In fact, Plaintiff repeatedly cites *Mulford v. Computer Leasing*, Inc., 334 N.J. Super. 385, 399 (Law Div. 1999), where the Court *specifically* declined to permit damages against individually named defendants absent a failure by the corporation to pay the damages assessed. Plaintiff does not cite a single decision under the WPL where a plaintiff was permitted to collect damages against an individual defendant, and Plaintiff has not alleged (and cannot allege) a single act by any Individual Defendant to warrant extending the WPL to impose individual liability.

Second, Plaintiff does not dispute that his NJRICO claim (Second Count) based on mail or wire fraud requires a fraudulent misrepresentation of *fact*. Yet, Plaintiff's Complaint alleges no

purported factual misrepresentations by GFI, but rather alleges erroneous legal conclusions by GFI in the classification of truck drivers and statutory wage violations. Plaintiff therefore has not pled, and he cannot plead, the necessary elements of mail or wire fraud with particularity, which is fatal to his NJRICO claim.

Third, Plaintiff does not dispute that his Independent Contractor Service Agreement with GFI precludes his unjust enrichment claim (Fourth Count). Plaintiff is barred as a matter of law from alleging unjust enrichment because the claim is duplicative of his breach of contract claim, and in any event the Independent Contractor Service Agreement governs the subject matter.

With respect to venue, Plaintiff merely cites the "convenience of the Plaintiff" and "Plaintiff's residence" as factors supporting venue in Mercer County, yet by Plaintiff's own admission he resides in Philadelphia, Pennsylvania. (Compl., ¶ 4.) Yet, Plaintiff lives in Philadelphia – *i.e.*, miles away in another state from Mercer County. By stark contrast, GFI maintains its principal place of business in Hudson County, and none of the Individual Defendants reside in Mercer County.

For the reasons set forth more fully below and in Defendants' opening memorandum of law filed August 22, 2019 ("Defendants' Opening Brief"), partial dismissal of Plaintiff's Complaint and change of venue are warranted.

II. ARGUMENT

A. Plaintiff's WPL Claim (Count One) Against the Individual Defendants Should Be Dismissed

1. Plaintiff Does Not Refute That Individual Liability Under the WPL Is Only Proper if GFI Reneges on Salary Obligations, Which Plaintiff Has Not Established

In their Opening Brief, Defendants emphasize that Plaintiff's WPL claim against the Individual Defendants is premature absent a finding of liability against GFI. (Defs.' Opp. Br. at

6.) In response, Plaintiff cites to *Mulford v. Computer Leasing, Inc.*, 334 N.J. Super. 385 (Law Div. 1999) – which was also cited in Defendants' Brief – for the proposition that the WPL permits personal liability of corporate officers. However, Plaintiff overlooks the key holding in *Mulford* that the plaintiff was not permitted to recover against individual defendants *unless and until the corporation failed to pay the damages assessed against the corporation. Id.* at 399. Plaintiff has in no way established this predicate to maintaining his WPL claim against the Individual Defendants, which is wholly premature. Plaintiff has instead named the Individual Defendants merely to harass individual officers whose only connection to this case is their roles with GFI.

There has been no finding of liability against GFI, nor can there be. Plaintiff has alleged no facts to show that GFI was his "employer," that GFI is liable for purported salary obligations, or that GFI is unable to satisfy any judgment (which Defendants maintain will never come to pass). For these reasons, Plaintiff's attempt to name GFI's corporate officers as defendants is, at a minimum, premature. The Court should – at the very least – dismiss the Individual Defendants without prejudice for Plaintiff to reinstate his WPL claim against them solely in the highly unlikely events that (1) Plaintiff establishes his WPL claim against GFI and (2) GFI reneges on its obligation to pay damages. To do otherwise would merely reward Plaintiff for dragging the Individual Defendants into a case where they do not belong.

2. Plaintiff Blatantly Misstates *Mulford*'s Holding on "Figurehead" Liability, and Cites No Facts Evincing Management Functions by the Individual Defendants

Moreover, Plaintiff's claim that *Mulford* permits liability for "figurehead" officers, regardless of whether they engage in managerial activity, is blatantly wrong. (Pl.'s Opp. Br. at 3.) *Mulford* states that liability should extend to purported figurehead *directors*, because "all *directors* are responsible for managing the business and affairs of the corporation." 334 N.J. Super. at 397 (emphasis added). *Mulford* makes no similar assertion regarding purported "figurehead officers."

Directors and officers are not synonymous. Black's Law Dictionary (2d Ed.) ("director" is "[a]n individual acting as agent of the shareholders of a company") ("officer" is "[t]he incumbent of an office; one who is lawfully invested with an office"). Plaintiff does not allege in his Complaint that any of the Individual Defendants are directors of GFI. (Compl., ¶¶ 11-19.)

Plaintiff instead goes to great lengths to interpret the text of N.J.S.A. § 34:11-4.1(a) – including through purported use of the "last antecedent rule of construction" – in a futile attempt to convince the Court that officers need not have management responsibilities to be subject to liability under the WPL. (Pl.'s Opp. Br. at 3-4.) Plaintiff's attempt to redefine the statute by excluding the "management" requirement should be rejected. New Jersey courts have already decided this issue and held that any individual liability under N.J.S.A. § 34:11-4.1(a) is limited to the "managing" officers of the corporation. *Mulford*, 334 N.J. Super. at 393; *Kaplan v. GreenPoint Global*, 2014 U.S. Dist. LEXIS 135140, *22 (D.N.J. Sept. 25, 2014).

As explained in Defendants' Opening Brief, Plaintiff has not alleged a single fact establishing management activities by the any of the Individual Defendants. (Defs.' Opening Br. at 6-7.) Plaintiff's opposition similarly fails to allege any such alleged facts that any of the Individual Defendants participates in any of the enumerated tasks by law. (*Id.*) (citing *Hearn v. Rite Aid Corp.*, 2012 N.J. Super. Unpub. LEXIS 643, *9-10 (Superior Ct. App. Div., Mar. 27, 2012)). Plaintiff has not alleged, and he cannot allege, that any Individual Defendant participates in such relevant management activities under New Jersey law. For this reason as well, Plaintiff's WPL claim against the Individual Defendants must be dismissed as a matter of law for failure to state a claim upon which relief can be granted.

B. Plaintiff Identifies No Fraudulent Misrepresentation of Fact to Sustain His NJRICO Claim (Count Three) Predicated on Mail or Wire Fraud

In their Opening Brief, Defendants established that a claim under NJRICO predicated on mail or wire fraud requires Plaintiff to allege – with specificity – fraudulent misrepresentations of material *fact* as part of a scheme to defraud. (Defs.' Opening Br. at 8-11.) Defendants further explained that the sole alleged "misrepresentations" identified by Plaintiff were alleged erroneous legal conclusions under the WPL, and courts have repeatedly dismissed NJRICO claims predicated on mail or wire fraud where the allegations of a fraudulent scheme merely allege statutory violations. (*Id.* at 8-9.) This is fatal to Plaintiff's NJRICO claim.

In opposition, Plaintiff does not dispute this requirement. Moreover, Plaintiff fails to identify any misrepresentations of *fact* alleged in the Complaint or otherwise, and he does not cite to a single decision or any precedent sustaining an NJRICO claim based on mere alleged erroneous legal conclusions. (Pl.'s Opp. Br. 6-12.) In fact, Plaintiff cites to a decision, *Snyder v. Dietz & Watson Inc.*, which specifically involved a misrepresentation of *fact* – and not law – as the basis for the RICO violation. 2013 WL 395875 (D.N.J. 2013). Specifically, in *Snyder*, the employer misrepresented to employees that it was placing money in escrow accounts for the employees, when *in fact* the employer never placed the money in escrow and used the money for itself. *Id.* Unlike here, the plaintiff in *Snyder* had alleged a blatant fraudulent misrepresentation of *fact*.

By stark contrast, here Plaintiff alleges erroneous conclusions of law with respect to Plaintiff's classification as an independent contractor rather than an employee, and the lawfulness of various wage deductions. Courts have repeatedly dismissed mail or wire fraud claims where the allegations of a fraudulent scheme merely assert statutory violations. (Defs.' Opening Br. at 10) (citing *Danielsen v. Burnside-Ott Aviation Training Ctr.*, 746 F. Supp. 170, 176 (D.C. Cir. 1990) (no mail or wire fraud where claims were based solely on alleged labor law violations); *Choimbol*

v. Fairfield Resorts, Inc., 2006 U.S. Dist. LEXIS 68225, *28 (E.D. Va. Sept. 11, 2006) (dismissing RICO claim based on violations of FLSA; "But for the proscriptions of the FLSA, the Defendants conduct would not constitute the fraudulent scheme Plaintiffs allege. The FLSA provides direct relief for such violations."); *Kilper v. City of Arnold*, 2009 U.S. Dist. LEXIS 63471, *69-71 (E.D. Mo. July 23, 2009) (city's alleged violation of state or federal law insufficient as predicate RICO offense; "otherwise, a RICO claim would exist in any instance when a party challenged the validity of a legislative provision and the implementation of that provision."); *Sluka v. Estate of Herink*, 1996 U.S. Dist. LEXIS 20330, *13 (E.D.N.Y. Feb. 9, 1996) ("the mere failure to comply with state law" does not constitute mail or wire fraud)). The same result is warranted here.

Plaintiff does not refute, nor does he even attempt to distinguish, any of the above decisions cited by Defendants. That is because Plaintiff has not alleged, and he cannot allege, that Defendants engaged in any fraudulent misrepresentation of *fact* to meet his pleading standard to allege mail or wire fraud with particularity. Plaintiff's attempt to harass Defendants should not stand, and his NJRICO claim must therefore be dismissed in its entirety against all Defendants for failure to state a claim.

C. Plaintiff Does Not Dispute That a Valid Written Contract Existed, Precluding His Unjust Enrichment Claim (Count Four)

In their Opening Brief, Defendants cite to the well-settled principle under New Jersey law that "[a] quasi-contract claim cannot exist when there is an enforceable agreement between parties." (Defs.' Opening Br. at 11) (quoting *MK Strategies, LLC v. Ann Taylor Stores Corp.*, 567 F. Supp. 2d 729, 733–34 (D.N.J. 2008) (citing *Callano v. Oakwood Park Homes Corp.*, 91 N.J. Super. 105, 219 (App. Div. 1966))).

Plaintiff does not refute this in his opposition, but instead asserts a general right under R. 4:5-2 to proceed under multiple theories (breach of contract and unjust enrichment) and seek

"[r]elief in the alternative." (Pl.'s Opp. Br. at 12-13.) However, Plaintiff's right to proceed under multiple theories does not extinguish his pleading requirements under each theory pled, nor the prohibition against duplicative claims. *Ribble Co,, Inc. v. Burkert Fluid Control Sys.*, No. 15-61732, 2016 WL 6886869, at *5 (D.N.J. Nov. 22, 2016) (in action alleging both breach of contract and unjust enrichment claims, unjust enrichment claim dismissed as duplicative and as barred by the existence of a valid contract).

As a matter of law, Plaintiff's unjust enrichment claim must be dismissed because it is entirely duplicative of Plaintiff's breach of contract claim, and because Plaintiff admits that his independent contractor status is governed by the Independent Contractor Service Agreement that he entered into with GFI in May 2018. (Compl., ¶¶ 5-7.) The case law cited by Defendants is dispositive of this issue. (Defs.' Opening Br. at 11-12) (citing *Bowen v. Bank of Am.*, No. 14-3531, 2015 WL 5542489, at *5 (D.N.J. Sept. 18, 2015) (where plaintiff pleads existence of valid contract, "the express contract binds the parties, and the court has no grounds from which to find an implied promise concerning the same subject matter"); *Ribble Co,, Inc.,* 2016 WL 6886869, at *5 (dismissing unjust enrichment claim concerning same conduct that forms basis of breach of contract claim where plaintiff admitted and relied upon existence of valid contract); *Saccomanno v. Honeywell*, No. BER-C-73-07, 2007 WL 5745989, at *4 (Superior Ct., Bergen Cty., June 18, 2007) (dismissing unjust enrichment claim that duplicated breach of contract claim where plaintiff admitted existence of valid and binding contract).

Yet again, Plaintiff does not refute nor even attempt to distinguish any of the above decisions in his opposition. Plaintiff's theoretical right to assert alternative theories of liability is irrelevant because his unjust enrichment claim cannot stand as a matter of law. That is because the Independent Contractor Agreement governs the alleged conduct asserted in his unjust enrichment

claim, and the claim is entirely duplicative of Plaintiff's breach of contract claim (Count Two). Accordingly, Plaintiff's unjust enrichment claim must be dismissed.

D. Plaintiff Has Not Established His Conclusory Belief Regarding Convenience of Venue

It is well-established that Defendants' motion to change venue under Rule 4:3-3(a)(3) may be granted "for the convenience of parties and witnesses in the interest of justice." As explained in Defendants' Opening Brief, it is inconvenient to maintain this action in a forum where *none* of the parties, underlying events, documents, or witnesses reside. Plaintiff merely responds that Defendants "overlook the convenience of the Plaintiff" and "ignore Plaintiff's residence as a factor." (Pl.'s Opp. Br. at 14.) Yet, Plaintiff resides many miles away in Philadelphia, Pennsylvania, (Compl., ¶ 4), *i.e.*, a different state than where he chose to commence this action. Plaintiff makes no effort to explain why Mercer County is a more convenient venue for him than Hudson County, which entails a mere additional hour drive from his residence in Philadelphia. By contrast, Defendants have described extensively why Hudson County is the more convenient venue to the parties, and why transfer of venue serves the interest of justice to avoid burdening this Court with a case utterly unconnected with this forum of Mercer County. (Defs.' Opening Br. at 12-14,) In the absence of any explanation by Plaintiff regarding convenience, and to avoid a clear instance of forum shopping intended to harass and oppress Defendants, the Court should transfer the venue of this action to Hudson County.

III. CONCLUSION

For the reasons set forth above and in their Opening Brief, Defendants respectfully request that the Court issue an order: (i) dismissing Plaintiff's Complaint in its entirety as against the Individual Defendants, with prejudice; (ii) dismissing Plaintiff's NJRICO claims against all Defendants, with prejudice; (iii) dismissing Plaintiff's unjust enrichment claim against GFI, with

prejudice; (iv) transferring the venue of this action to Hudson County to adjudicate Plaintiff's remaining WPL and breach of contract claims against GFI; and (v) granting such other and further relief as the Court deems just and proper.

Dated: September 9, 2019
Morristown, New Jersey

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By 

Aaron Warshaw (*pro hac vice* pending)
Daniel M. Bernstein (*pro hac vice* pending)
599 Lexington Avenue, 17th Floor
New York, New York 10022

Fotini Karamboulis
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960

Attorneys for Defendants

39915908.4

Fotini Karamboulis, Esq. (I.D. #029562013)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
(973) 656-1600
Attorneys for Defendants

ANIBAL MEJIAS, on behalf of himself and those similarly situated, Plaintiff, v. GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A LUGO, JR., CONRAD COLON, JOHN DOES 1 - 10 (said names being fictitious, real names unknown), ABC COMPANIES 1 - 10 (said names being fictitious, real names unknown), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MERCER COUNTY DOCKET NO.: MID-L-001401-19 *Civil Action* **CERTIFICATION**

I, Fotini Karamboulis, being of full age, certify and state as follows:

1. I am an attorney at law of the State of New Jersey and an Associate with the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. and counsel for Defendants GOYA FOODS, INC., ROBERT I. UNANUE, FRANCISCO R. UNANUE, JOSEPH PEREZ, PETER UNANUE, DAVID KINKELA, REBECCA RODRIGUEZ, CARLOS G. ORTIZ, MIGUEL A. LUGO, JR., and CONRAD COLON, (collectively "Defendants"). As such, I am fully familiar with the facts stated herein.

2. I submit this Certification in further support of Defendants' motion for partial dismissal of Plaintiff's complaint and to change venue to Hudson County, and in reply to the opposition of Plaintiff.

3. For the reasons set forth in Defendants' memorandum of law and reply brief in support of the motion, Defendants respectfully request that the Court issue an order: (i) dismissing Plaintiff's Complaint in its entirety as against the Individual Defendants, with prejudice; (ii) dismissing Plaintiff's NJRICO claims against all Defendants, with prejudice; (iii) dismissing Plaintiff's unjust enrichment claim against GFI, with prejudice; (iv) transferring the venue of this action to Hudson County to adjudicate Plaintiff's remaining WPL and breach of contract claims against GFI; and (v) granting such other and further relief as the Court deems just and proper.

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

Fotini Karamboulis, Esq.

Dated: September 9, 2019