IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PHARMACIA CORPORATION f/k/a MONSANTO COMPANY, Plaintiffs/Appellees, v. MOTOR CARRIER SERVICES CORP.; CSX INTERMODAL, INC.; CSX CORPORATION; G.O.D., INC.; RILEY LEASING CORP., Defendants Motor Carrier Services Corp.; CSX Intermodal, Inc. CSX Corporation, Appellants	No. 07-3204 Appeal from the United States District Court for the District of New Jersey D. Ct. No. 04-3724 (GEB) (MF) Civil Action

BRIEF FOR APPELLANTS AND VOLUME 1 OF JOINT APPENDIX

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

Appellants respectfully request oral argument. The issues in this case are complex, and the Court's decision process would benefit from the opportunity for the Court to discuss the case with counsel.

STATEMENT OF JURISDICTION

The district court had diversity jurisdiction under 28 U.S.C. §§ 1332 and 2201. It also had subject-matter jurisdiction under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9607(a) and 9613(b), and supplemental jurisdiction over the contract claims under 28 U.S.C. §1367(a).

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) because the district court, in the June 22, 2007, order appealed from, entered injunctive relief. See Appellants' Response to Clerk's Notice Questioning Appealability of Order of June 22, 2007 (filed in this Court August 6, 2007). Although the notice of appeal was premature to the extent it invoked 28 U.S.C. § 1291, the district court entered a final judgment on May 19, 2008. Under the doctrine of *Cape May Greene, Inc.* v. *Warren*, 698 F.2d 179 (3d Cir. 1983), recently followed in *DL Resources, Inc.* v. *FirstEnergy Solutions Corp.*, 506 F.3d 209, 215 (3d Cir. 2007), the premature notice of appeal "ripened" on the district court's disposal of the remaining claims, so this Court has appellate jurisdiction under Section 1291 as well.

On May 21, 2008, appellants filed a notice of appeal from the final judgment entered May 19, 2008. In the appeal triggered by that notice of appeal, appellants intend to brief the issues that arose after the district court's order of June 22, 2007, which is the subject of the present Brief. Appellants respectfully submit that the two appeals should be consolidated for purposes of oral argument and disposition.

STATEMENT OF ISSUES ON APPEAL

1. Whether the district court erred in interpreting the Kearny Site Purchase and Sale Agreement (the Agreement) to assign responsibility to Motor Carrier Services Corp. (Motor Carrier) for remediating hazardous substances that migrated from the Kearny Site before the Agreement's Effective Time. See JA92-97; JA103.

2. Whether the district court erred in holding that, despite Motor Carrier's explicit contractual rights (1) to prompt written notice of any government claim against the Kearny Site; (2) to be excused from any indemnity obligations to the extent of prejudice if such notice is not provided; and (3) to take over the defense of any claim against the Kearny Site at any time, Motor Carrier was not prejudiced by Pharmacia's failure for eight years to provide notice of an investigation and claim by the United States Environmental Protection Agency (USEPA). See JA91-92; JA103.

3. Whether the district court erred in piercing the corporate veil separating Motor Carrier Services Corp. from CSX Intermodal, Inc. (Intermodal). See JA57-60; JA65.

4. Whether the district court erred in holding that CSX Corp. (CSX) had become an "Assurance Affiliate" of Motor Carrier under the Agreement, and thus directly liable to Pharmacia for Motor Carrier's indemnity obligations. See JA100-101; JA103.

STATEMENT OF THE CASE

This case concerns environmental liabilities arising from the operation of a former Monsanto Company plant on the Kearny Peninsula of New Jersey. USEPA and the New Jersey Department of Environmental Protection (NJDEP) have initiated administrative proceedings to determine whether and how to go about cleaning up the Lower Passaic River. The former Monsanto plant is one of scores of pollution sources that may ultimately have to share in the cleanup costs.

The land on which the Monsanto plant once sat was sold in 1994 to appellant Motor Carrier. This lawsuit concerns the contractual allocation of environmental liabilities between the seller, plaintiff/appellee Monsanto Company (now Pharmacia Corporation), and the buyer, defendant/appellant Motor Carrier.

The trial occurred before the Honorable Garrett E. Brown, Jr., sitting without a jury, in January 2007. The district court issued findings of fact and conclusions of law on June 22, 2007. In addition to holding Motor Carrier contractually liable, Judge Brown pierced the corporate veil to hold appellant Intermodal liable. Intermodal had acquired Motor Carrier in a stock transaction in 1998. Furthermore, construing the 1998 agreement by which Intermodal had acquired Motor Carrier, Judge Brown held CSX, the parent of Intermodal, liable as well.

STATEMENT OF FACTS

Over 35 years, plaintiff/appellee Pharmacia[1] manufactured and stored numerous environmentally hazardous chemicals on a 28-acre lot in the Town of Kearny, New Jersey (Kearny Site), many of which contaminated soil and groundwater. Beginning in 1989, under the supervision of the New Jersey Department of Environmental Protection (NJDEP), Pharmacia undertook required environmental remediation before selling the site in December 1994 to defendant/appellant Motor Carrier, which intended to use the site as a parking lot for intermodal storage containers.

The Agreement allocated environmental liabilities between the parties. How it did so is in dispute. As appellants read the Agreement (and will argue in this Brief), it provided that Pharmacia would complete its remediation and retain responsibility for any emission of hazardous substances that predated the Agreement. Motor Carrier, conversely, would bear responsibility for any substances emitted after it took ownership of the Kearny Site. Key to this arrangement were provisions requiring that each party give the other immediate notice of any governmental com-

[1] In March 2000, Monsanto Company changed its name to Pharmacia Corporation but retained its contractual rights under the Kearny Site Purchase and Sale Agreement. JA112G. For simplicity, this Brief will refer to both companies as Pharmacia unless context dictates otherwise.

munication that might give rise to liability for which the other could owe indemnification, and stating that, if the required notice is not given, indemnity is not owed to the extent of resulting prejudice. Motor Carrier also enjoyed the right to take over the defense of any environmental claim that might arise.

Pharmacia violated the Agreement before the ink dried. Mere weeks after the Agreement became effective, Pharmacia received and responded to a request for information from USEPA about contamination of the Passaic River, which abutted the Kearny Site. But it elected not to notify Motor Carrier. In fact, over the next *eight years*, it corresponded with the USEPA without once alerting Motor Carrier to the issue. Quite the contrary, in 1998, when Intermodal was deciding whether to purchase Motor Carrier's stock or merely lease its land, Pharmacia represented that no environmental concerns were hanging over the property, on the strength of which Intermodal decided to purchase Motor Carrier.

When Motor Carrier received an administrative directive from NJDEP concerning the Passaic River in 2003 and promptly forwarded it to Pharmacia, it became apparent that Pharmacia had long known about the possible claim but done nothing to persuade USEPA and NJDEP that the contaminating discharges had come from elsewhere; instead, Pharmacia had directed its energy toward persuading the agencies to target Motor Carrier (rather than Pharmacia) in their investigation. USEPA, how-

ever, issued a second notice letter to Pharmacia in September 2003, and in early 2004 negotiated a consent order that obligated Pharmacia and dozens of other companies to contribute to remediation. Pharmacia partially settled the claim by agreeing to share in funding of an eight-figure remedial study, and sought ongoing indemnification from Motor Carrier.

At trial there was no evidence, and certainly no finding, that any emissions had occurred from the Kearny Site during Motor Carrier's ownership. But, because Pharmacia failed for so long to notify Motor Carrier as required under the Agreement, Motor Carrier had no chance to exercise its right to take over defense of the claim – indeed, to *offer* a defense of the claim – against the Kearny Site, or to negotiate with the agencies to reach a favorable disposition. The district court nevertheless found that Motor Carrier had not been prejudiced *to any extent* by Pharmacia's disregard for the Agreement, and went even further to pierce the corporate veil separating Motor Carrier from Intermodal, its corporate parent, for the sole reason that "injustice" could result from Motor Carrier's potential inability to satisfy a massive environmental claim. It also held, in a patent misreading of the Agreement, that CSX Corp. – *Intermodal's* corporate parent – had automatically and involuntarily become Motor Carrier's "Assurance Affiliate" under the Agreement, even though the Agreement provided

only that, upon an (unmet) triggering condition, Motor Carrier and Pharmacia would enter discussions to select and formalize such an Assurance Affiliate.

The district court misconstrued the Agreement, which allocates responsibility for environmental cleanup to Pharmacia unless the pollutants migrated after the Kearny Site was sold. The court's finding of no prejudice from lack of notice was based on a misapprehension of New Jersey law and clearly erroneous. Its decision to pierce the corporate veil misapplied the doctrine. Moreover, its holding that CSX had become an Assurance Affiliate was wholly inconsistent with the Agreement's provisions for designating Assurance Affiliates. This Court should reverse.

A. Pharmacia's Contamination Of The Environment And Its Remediation Efforts

From 1956 to 1991, Pharmacia manufactured and stored environmentally hazardous chemicals on the Kearny Site. JA112G. Even though stormwater from the site drained directly into the Passaic River, at times Pharmacia was reckless its disposal of these toxins; for example, at one point in the 1960s, it dispensed approximately 2000 gallons of liquids containing polychlorinated biphenyls (PCBs) into an unlined pit, a clear violation of the prevailing environmental laws. JA2916. Although Pharmacia disposed of contaminated topsoil in 1979 and dug a series of monitoring wells in the early 1980s, the damage remained evident: soil analyses in 1984

revealed high levels of PCBs (*ibid.*); concurrent groundwater analyses detected benzene, ethylbenzene, methylene chloride, naphthalene, and chlorobenze (*ibid.*); and, in 1986, petroleum hydrocarbons were found floating on top of the groundwater (JA2917).

When Pharmacia finally notified NJDEP of the contamination in November 1986, NJDEP required it to submit several reports and feasibility studies until, in July 1989, Pharmacia and NJDEP signed an Administrative Consent Order (ACO) that required Pharmacia to pay a $250,000 fine, prepare a remedial investigation and feasibility study, and undertake additional remedies NJDEP deemed appropriate. JA2918-2920. After completing its feasibility study, Pharmacia submitted and NJDEP agreed to a Preliminary Remedial Action Work Plan (Work Plan) that called for a host of remedial activities including, among other things, excavation, backfilling, treatment and disposal of soils and extracted water, and installation of an asphalt cap over the property. JA2286. Pharmacia completed work under that Work Plan in November 1994, after which it was required to conduct post-remediation groundwater sampling. JA2399-2400.

The following year, NJDEP issued a "No Further Action" (NFA) letter for the soils at the Kearny Site, explaining that "Monsanto has met the objectives * * * regarding the remedial investigation and remedial action of soils." JA1393. However,

the NFA made clear that "ground water * * * is not the subject of this No Further Action Approval, [and] must continue to be Monitored by Monsanto and/or its successors pursuant to the requirements of the referenced ACO." *Ibid.*

B. The Kearny Site Purchase and Sale Agreement

In 1994, Motor Carrier negotiated with Pharmacia to purchase the then-idle Kearny Site for use as a parking lot. It first executed a letter of intent to purchase the Site that highlighted Pharmacia's continuing obligations to "complete the remedial action at the Site required by the current ACO, including completing groundwater sampling." JA2408. Then, on December 19, 1994, Motor Carrier, along with Riley Leasing Corp., G.O.D., Inc., and Seigles Express, Inc., purchased the Site for $5.4 million, approximately $4.1 million of which was financed through a loan from Pharmacia.[2] JA2430.

1. Because Motor Carrier was aware that Pharmacia was in the midst of remediating the extensive environmental damage that it had caused – and because Motor Carrier's own planned use of the Site was environmentally neutral – the parties ensured that the Agreement demarcated their respective environmental responsibili-

[2] G.O.D. and Riley Leasing were named as defendants in this lawsuit and in the CSX Defendants' cross-claims. They failed to respond to discovery requests and various other proceedings, including trial. Judge Brown granted default judgments against them. JA137.

ties. Section 2.3 of the Agreement (JA2426), styled "Purchaser Responsibilities," states in relevant part:

> Purchaser * * * shall bear and be liable for: (i) any and all costs and expenses (including attorney's fees) of Clean-up * * * (ii) and any voluntarily incurred costs and expenses (including attorney's fees) to investigate, remediate, remove, treat, clean up or prevent the escape, *in each case* of any Substances present at or which migrate from the Kearny Site, the Plant or the Property *at any time after the Effective Time*, including but not limited to Substances, PCB's and/or Unknown ISRA/Spill Act Hazardous Material dumped, buried, injected, deposited or disposed of by Monsanto. [Emphasis added.]

In other words, the parties anticipated that (i) the property might become subject to mandatory environmental cleanup, and also that (ii) either of them might voluntarily undertake cleanup; they agreed that, "in each case," Motor Carrier (the Purchaser) would be responsible only for substances that migrated from the Kearny Site "after the Effective Time," *i.e.*, December 19, 1994.

As explained in greater detail below, all of the other sections in Article 2 of the Agreement – although sometimes phrased with less than perfect clarity – harmonize with that understanding of Section 2.3. Section 2.2, "Monsanto Responsibilities," explains Pharmacia's continuing obligations under the ACO. JA2422-2426. Section 2.4, "Monsanto Indemnification," sets out certain expenses for which Pharmacia will indemnify Motor Carrier. JA2427-2428. It states that Pharmacia will not be liable for post-Closing cleanup of substances, including those that Pharmacia "dumped,

buried, injected, deposited or disposed of," which – especially in light of Section 2.3 – is naturally understood to disclaim liability for contaminants that migrate after the Effective Time, regardless of when and how they found their way into the land. And Section 2.5, "Purchaser Indemnification," comes at the same issue from the other direction, emphasizing that Motor Carrier will take responsibility for hazardous substances that migrate from the Kearny Site after the Effective Time. JA2428-2430.

In short, Article 2 sensibly tethers liability for migrating substances to the Effective Time: Substances that migrated from the Kearny Site before then remain Pharmacia's responsibility, and those that migrate after it are Motor Carrier's problem, regardless of which party actually created the hazardous substances in question. This reading is confirmed by the overarching provisions in Section 9.6(b), which broadly require Pharmacia to indemnify Motor Carrier for "Liabilities and Damages * * * caused or occurring prior to the Effective Time" unless Article 2 dictates otherwise. JA2448.

2. In addition to allocating potential liability through Article 2 and Section 9.6(b), the Agreement includes provisions designed to minimize that liability by requiring each party to notify the other promptly, in writing, of matters on which it might ultimately seek indemnification. See, *e.g.*, § 9.8(b) (JA2450) ("[E]ach party will inform the other party of all substantive contacts between Governmental

Agencies and itself relating to the Property which could reasonably be expected to have an adverse impact on the other party."); § 9.9 (JA2450-2451) (allowing party potentially responsible for indemnifying the other to elect to take over the defense of the claim in question); § 9.10 (JA2451) (requiring "prompt[] * * * written notice" to other party of any "proceeding" that "has been or may be commenced or initiated against * * * one of the parties which may give rise to an indemnification obligation on the part of the other party"). Especially material to the present dispute is Section 9.12 (JA2451), which provides:

> Neither party shall take any action or make any communication which could reasonably be expected to have a materially adverse effect on the resolution or outcome of any matter for which the other party may be liable under Article 2 * * * without providing at least five (5) business days advance notice to the other party.

Any "material breach" of that requirement relieves the other party of its obligation to indemnify to the extent that it was prejudiced by the breach. *Ibid.*

3. Finally, the Agreement gave Pharmacia a measure of protection in the event that Motor Carrier breached its contractual obligations, by granting Pharmacia the "right to reenter and terminate the estate granted to Motor Carrier." § 1.5(b)(ii)(dd) (JA2417). That right of re-entry, however, was at most a tertiary remedy: before Pharmacia could terminate Motor Carrier's estate, it was required to attempt in good fath to resolve the dispute with Motor Carrier directly (§ 1.5(b)(ii)(aa) (*ibid.*)) and,

if that failed, to petition a court of competent jurisdiction for a declaratory judgment that Motor Carrier was in breach (§ 1.5(b)(ii)(bb) (*ibid.*)). Even if Pharmacia were to obtain such declaratory relief, the Agreement ensured that Motor Carrier would have at least 30 days to cure the deficiency before Pharmacia's right to re-entry ripened. § 1.5(b)(ii)(cc) (*ibid.*).

C. Pharmacia Immediately Breached The Agreement By Failing To Notify Motor Carrier Of USEPA's Investigation Of The Kearny Site

1. The Agreement became effective on December 19, 1994. Just 15 days later – on January 3, 1995 – Pharmacia received a Request for Information from the USEPA stating that USEPA "is investigating the presence of hazardous substances in the sediments of the Passaic River." JA3003. Despite the provisions Pharmacia had just signed compelling it to give Motor Carrier "prompt[] * * * written notice" of any "proceeding" that "may be commenced" relating to the Kearny Site (Agreement § 9.10 (JA2451)), Pharmacia did not notify Motor Carrier of USEPA's interest. Nor did it make any effort to convince USEPA that the hazardous substances in the Passaic River had come from elsewhere. Instead, throughout 1995, Pharmacia jousted with USEPA about USEPA's alleged "overly broad assumption of authority" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq*. (JA1298; JA2900) – none of

which communications were forwarded to Motor Carrier as required by the Agreement.

Pharmacia's posturing did little to diminish USEPA's interest in the Kearny Site. The following spring (April 26, 1996), USEPA sent Pharmacia a letter headed "URGENT LEGAL MATTER." JA1439. It stated that "[b]y this letter EPA is notifying Monsanto of its potential liability relating to the [Kearny] Site," and explained that "[i]nvestigations undertaken by EPA indicated that hazardous substances were being released from the Monsanto Company's former Kearny facility." *Ibid.* Pharmacia neither responded nor alerted Motor Carrier. Nor did it lift a finger when, later that year, USEPA encouraged it to attend an upcoming meeting of potentially responsible parties (PRPs) in the Study Area, where USEPA promised to "provide more information about the status of work concerning the Study Area." JA1444.

Pharmacia's inaction is all the more disturbing considering that it had previously commissioned Roux Associates, an environmental consulting firm, to study the possible discharge of hazardous substances from the Kearny Site. Roux Associates concluded that, even if it made hypothetical "worst case" assumptions about possible discharges, "it is extremely unlikely that the[] values would be considered significant" by governmental agencies. JA1253. At trial, Gregory Martin of Roux

Associates testified that the highest possible levels of benzene in water leaving the site were below the "practical quantification limit," *i.e.*, science's practical ability to measure it. JA372. And Roux Associates found that the (worst-case hypothetical) concentrations of other potentially hazardous discharged substances would have been "at least an order of magnitude lower" than that of benzene. JA1253. Pharmacia, however, did not confront USEPA with this analysis when USEPA began investigating the Kearny Site. Nor was Motor Carrier able to do so, given its lack of notice.

D. Intermodal Purchases Motor Carrier In Reliance On Pharmacia's "Estoppel Letter" Implying That No Environmental Liabilities Were Looming Over The Kearny Site

In 1997, Intermodal sought to acquire property in the Kearny area, and it viewed the Kearny Site as a strong contender among several. It was initially interested in purchasing the Kearny Site outright from Motor Carrier but ultimately reached an agreement either to lease the Kearny Site from Motor Carrier or to purchase the stock of Motor Carrier itself. JA1580. Intermodal decided to buy Motor Carrier's stock if it could receive assurance from Pharmacia that Motor Carrier itself had no anticipated indemnity obligations under the Agreement, and sought such assurance from Pharmacia.

Even though USEPA had explicitly "notif[ied] Monsanto of its potential liability relating to the [Kearny] Site" (JA1439) – and although Pharmacia would

eventually bring this very lawsuit by demanding indemnification from Motor Carrier for precisely that liability – Solutia (Pharmacia's attorney-in-fact) informed Intermodal that, "to the best of [Pharmacia's] current knowledge, [Pharmacia] does not claim as of this date that [Motor Carrier] is in default under the Agreement." JA1838. In reliance on that letter (JA1070-1071), which Solutia said was intended "to facilitate your stock sale" (JA1670) and which has been referred to as the "estoppel letter" (JA1665) or "estoppel certificate" (JA1048-1049), Intermodal went through with the stock purchase.

Intermodal paid $14.5 million for Motor Carrier's stock, in the course of which it satisfied the $3.2 million mortgage held by Pharmacia. JA1837.

E. USEPA Increases Pressure On Pharmacia, Which Settles With USEPA And Seeks Indemnification From Motor Carrier

For years after it purchased Motor Carrier, Intermodal continued to use the Kearny Site as a parking lot, unaware that USEPA believed that hazardous substances had migrated from the Site into the Passaic River. Indeed, from the late 1990s through 2003, USEPA had been building its case while working in conjunction with those PRPs that had accepted its invitation to cooperate in 1996. USEPA concluded that its original focus on a 7-mile stretch of the Passaic River had failed to account for the full contamination. In late 2003, it refocused its attention on Pharmacia.

1. By letter dated September 15, 2003, USEPA reminded Pharmacia that it had previously announced Pharmacia's potential liability in April of 1996. JA1905. USEPA reiterated that it had previously "documented the release * * * of hazardous substances, pollutants and contaminants into the six-mile stretch of the river, known as the Passaic River Study Area." *Ibid.* "Based on the results of previous CERCLA remedial investigation activities," it continued, it had "further determined that contaminated sediments and other potential sources of hazardous substances exist along the entire 17-mile tidal reach of the Lower Passaic River," and had "decided to expand the Study" accordingly. *Ibid.* USEPA concluded by emphasizing that "Monsanto may be potentially liable for response costs," and inviting it to attend a informational meeting with it and the other PRPs, after which "PRPs will be given the opportunity to caucus." *Ibid.*

2. As it had in 1996, Pharmacia silently declined USEPA's invitation to meet and chose not to notify Motor Carrier, but this time its ability to avoid the issue was short lived. The following month, NJDEP issued a directive to dozens of companies – including *both* Pharmacia and Motor Carrier – ordering them to "arrange for implementation of natural resource injury assessment and interim restoration" under the Spill Act. Directive No. 1 – Natural Resource Injury Assessment and Interim Compensation Restoration of Natural Resources Injuries at 1 (Oct. 23, 2003) (the Di-

rective) (JA3703). In the portion of the Directive titled "The Monsanto Company Site," NJDEP explained that, in addition to dispensing PCB-laden liquid directly onto the ground, Monsanto had, at various times before 1994, "discharged hazardous substances directly into the Lower Passaic River," and also contaminated the river through runoff from a sewer pipe. JA3735. It further reported that both the soil and groundwater on the site are "contaminated with PCBs." JA3736.

NJDEP did not allege any contamination by Motor Carrier; its recitation of violations ended in 1991, the year Monsanto ceased its manufacturing activities. Nevertheless, under the Spill Act (which targets both dischargers and persons "in any way responsible" for discharges), NJDEP determined that both Monsanto and Motor Carrier were independently liable. *Ibid*. Motor Carrier promptly tendered the NJDEP Directive to Monsanto, as it was required to do under the Agreement. JA2549.

3. It was only in March of 2004 – six months after Motor Carrier learned through NJDEP about the concerns regarding the Kearny Site – that Pharmacia revealed USEPA's liability determination to Motor Carrier. Pharmacia explained by letter that on March 10, 2004, USEPA had issued a draft Administrative Order on Consent for the Lower Passaic River Study Area, an area that encompassed the Kearny Site, and Pharmacia emphasized that it "reserves all its rights and defenses,

including, without limitation, its right to seek defense and indemnity from Motor Carrier" under the Agreement. JA3056.

Motor Carrier responded that "[t]here are no facts presently available to us which suggest that Monsanto has a colorable claim for indemnification." JA2557. It explained that the Draft Order on Consent said nothing to implicate Motor Carrier in wrongdoing, and noted that the NJDEP Directive likewise "only makes reference to events which occurred prior to Motor Carrier's ownership of the former Monsanto site." *Ibid.* Motor Carrier renewed its longstanding request that Pharmacia provide it with data that it had gathered while monitoring groundwater on the Site after 1994, and requested any other information that would support Pharmacia's claim for indemnification.

Pharmacia did not provide Motor Carrier with the information it requested. Nor did it attempt to convince NJDEP and USEPA that, as Roux Associates had concluded, the hazardous substances in the Passiac River were unlikely to have migrated from the Kearny Site. Instead, Pharmacia focused its attention primarily on convincing USEPA to shift its scrutiny to Motor Carrier. JA3047. When it became clear that USEPA was intent on pursuing the company that actually used the types of chemicals that contaminated the river, Pharmacia reached an agreement with USEPA in which it pledged to pay its share of up to $10 million in response costs. JA2520.

If the remediation costs turned out to exceed that amount, USEPA reserved its right to assert its enforcement authority under CERCLA and Pharmacia reserved its right to resist it. JA2521.

F. The Proceedings Below

1. In August 2004, Pharmacia brought suit against Motor Carrier, Intermodal, and CSX (CSX Defendants), along with G.O.D., Inc., and Riley Leasing Corp., seeking declaratory judgment that defendants were liable for (1) contribution under various sections of CERCLA, 42 U.S.C. §§ 9601 *et seq.*; (2) recovery of costs under the Spill Act; and (3) indemnification under the Agreement. The CSX Defendants counterclaimed that Pharmacia had breached the contract by, among other things, failing to indemnify Motor Carrier from the NJDEP Directive. They also filed cross-claims for contribution against G.O.D. and Riley Leasing.

2. Following discovery, Pharmacia and the CSX Defendants cross-moved for summary judgment. Motor Carrier argued that, because Pharmacia had concealed USEPA's claims for years, it had breached the notice provisions in the Agreement and materially prejudiced Motor Carrier, thus excusing any contractual duty to indemnify that Motor Carrier might have had. It also contended that, because Pharmacia had induced Intermodal to purchase Motor Carrier by affirmatively assuring Intermodal that there had been no violations of the Agreement and encouraged

USEPA to take action against Motor Carrier, the common-law doctrine of equitable estoppel precluded Pharmacia from asserting its contractual claims. Doc. 78.

Pharmacia contended that no claim had arisen until USEPA's Administrative Consent Order issued in 2004, and therefore it had owed Motor Carrier no notice until then. It also asserted that Motor Carrier *had* received timely notice of USEPA's claims and that Motor Carrier had suffered no prejudice as a result of any late notice. Doc. 80.

The district court denied summary judgment on all of these contentions, and concluded that a trial was necessary to assess Motor Carrier's liability for contribution under CERCLA and the Spill Act. JA40-57. But it granted summary judgment to Pharmacia on one important point: that the court should pierce the corporate veil separating Motor Carrier from Intermodal. The court reasoned that Motor Carrier is "indisputably undercapitalized" because it "cannot demonstrate that it has the funds to cover any potential liabilities that may arise as a result of these proceedings"; observed that since 1998 Motor Carrier had not maintained a balance sheet or held officers' meetings; and concluded that it "exists solely as a holding company for the Kearny Property." JA59-60. The district court stopped short of piercing the corporate veil between Intermodal and CSX on summary judgment, reasoning a trial was necessary on that issue. JA60-61.

3. The six-day trial took place before the Honorable Garrett E. Brown, Jr., without a jury, in January 2007. Pharmacia adduced no evidence that any hazardous substances had migrated from the Kearny Site after 1994. Kathleen Moldthan, Pharmacia's remedial projects manager from 1992 to 1995 – and the official with direct responsibility for the Kearny Site from 1995 to 1997 – was asked: "[D]o you know of any discharges of hazardous substances at the Kearny site since Motor Carrier acquired title in December of 1994?" and responded: "No, I do not." JA421. Indeed, the only "evidence" of hazardous discharge after 1994 was not evidence of discharge at all, but rather the purely hypothetical Roux Associates study commissioned in 1992, which had concluded that any theoretical discharges would be vanishingly small.

Nor could Pharmacia produce one witness to testify that Pharmacia had provided Motor Carrier with notice of USEPA's investigation before 2004. Moldthan did not recall providing Motor Carrier with a copy of USEPA's April 26, 1996, letter, in which USEPA first alerted Pharmacia to its potential liability regarding the Kearny Site. JA450. Jeffrey Klieve, Pharmacia's director of environmental affairs, testified that his search of Pharmacia's records revealed no communication from Pharmacia to Motor Carrier regarding that letter, even though he admitted that "[i]t would be normal to retain that type of document." JA573, 578. And, although the potential

USEPA settlement was admittedly "the subject of conversations that * * * the Monsanto technical people had with our own attorneys and outside counsel" (JA592-593), Motor Carrier was not allowed to participate.

4. On June 22, 2007, the district court issued its Findings of Fact and Conclusions of Law.

The court first considered whether Pharmacia had breached the Agreement by failing to provide Motor Carrier with the notice required under Sections 9.8(b), 9.12, and others. Without citing any specific evidence, the court first found that Motor Carrier had failed to prove prejudice from any lack of notice insofar as it (purportedly) failed to point to any decision that Pharmacia made that was detrimental to Motor Carrier. JA91-92. It also found in the alternative that Motor Carrier "received adequate notice under the Agreement" (JA92) even though the testimony the court cited (JA82) proves at most that Motor Carrier learned in late 1997 only of USEPA's February 1995 request for information, and *not* USEPA's April 1996 letter that warned of liability. The court did not suggest that Pharmacia satisfied the requirement in Section 9.12 of the Agreement (JA2451) that each party would provide the other "at least five (5) business days advance notice" before "tak[ing] any action or mak[ing] any communication" that could result in liability for the other party under the Agreement.

The court turned to the question of how the Agreement allocates responsibility for response costs imposed by USEPA and NJDEP. It first found that "Pharmacia has met any and all obligations it had under Section 2.2," which details Pharmacia's ongoing responsibilities relating to compliance with its 1994 Work Order. Turning to Section 2.3, titled "Purchaser's Responsibilities," the court rejected Motor Carrier's argument that the phrase "Substances * * * present at or which migrate from the Kearny Site * * * after the Effective Time" draws a temporal distinction for liability purposes, assigning liability for migrating substances based on which party owned the site when the migration occurred. Instead, it held that "Motor Carrier assumed liability under Section 2.3 for the clean-up costs at issue in this case," reasoning that Sections 2.4 and 2.5 – neither of which contains explicit "after the Effective Time" language when discussing liability for cleanup – confirm its reading of Section 2.3. JA94-97.

Next, the district court rejected the CSX Defendants' argument that Pharmacia should be equitably estopped from enforcing the contract on the grounds that it with-held notice from Motor Carrier and issued the "estoppel certificate" to Intermodal. The court concluded that, given Motor Carrier's knowledge of the NJDEP ACO and the 1992 Roux Associates study, it would have been unreasonable to rely on Pharma-cia's statements (or omissions) regarding possible liability for migrating substances.

It also found no prejudice to Intermodal because "none of the alternative properties contemplated for purchase were suitable." JA99.

Finally, the court addressed whether CSX could be held liable for the liabilities of Motor Carrier and Intermodal, its subsidiaries. When Intermodal acquired Motor Carrier's stock in 1998, it and CSX became "Affiliates" of Motor Carrier under Section 2.1 of the Agreement (defining "Affiliate" to include, among other things, any corporation that directly or indirectly owns a majority of Motor Carrier's voting securities). Section 13.19 of the Agreement sets forth procedures by which Motor Carrier will work with Pharmacia to cause certain "Affiliates" to become "Assurance Affiliates" – that is, parties that share Motor Carrier's indemnity obligations under the Agreement – if Motor Carrier's net worth drops below $5 million. The court noted that Intermodal was a wholly owned subsidiary of CSX, and observed that Deloitte & Touche had measured Motor Carrier's net worth in October 1997 at $340,000. Therefore – even though Motor Carrier was sold in an arm's-length transaction for *$14.5 million* in January 1998 (three months *after* the Deloitte & Touche estimate) and Section 13.19 provides for no *automatic* procedure transforming

Affiliates into Assurance Affiliates – the court held that CSX "has become" an Assurance Affiliate of Motor Carrier under the Agreement. JA101.[3]

RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court, and there are no related proceedings pending before any other court. There are, however, related proceedings pending before the NJDEP and USEPA relating to cleanup liability under the Spill Act and CERCLA, respectively. See NJDEP Directive No. 2003-01; USEPA CERCLA Docket No. 02-2004-2011.

There is also a related proceeding pending before the National Oceanic and Atmospheric Administration (NOAA). In August 2007, after the order that is the subject of this appeal, NOAA served on Pharmacia a letter inviting it to investigate damage to natural resources in the lower Passaic River. See Letter from NOAA to Pharmacia (Aug. 2, 2007) (JA3676). Whether the CSX Defendants must indemnify Pharmacia for costs resulting from that investigation is a subject that was litigated in the district court after the order that is the subject of the appeal. The CSX Defendants

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[3] Because the court held that "Pharmacia and Motor Carrier properly assigned responsibility for the cleanup costs under the Agreement as a matter of contract law, it decided that it "need not * * * address Pharmacia's right to contribution under CERCLA and the Spill Act." JA99 n.4.

expect to address that issue in conjunction with the appeal initiated by the notice of appeal filed May 21, 2008.

STANDARD OF REVIEW

1. The district court's construction of the contractual provisions allocating responsibility for environmental cleanup between Pharmacia and Motor Carrier is reviewed *de novo*. *United States* v. *Williams*, 417 F.3d 373, 376 (3d Cir. 2005).

2. The district court's factual findings that Motor Carrier had not been prejudiced by lack of timely notice of USEPA's claim and, in the alternative, that it *had* received timely notice, are reviewed for clear error. *Ibid.* However, the clear-error standard of review "does not inhibit an appellate court's power to correct errors of law, including * * * a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Jenkins* v. *Red Clay Consolidated School District Board of Education*, 4 F.3d 1103, 1116 (3d Cir. 1993) (internal quotation marks omitted).

3. This Court reviews *de novo* the district court's holding on summary judgment that the corporate veil separating Motor Carrier from Intermodal should be disregarded. *Gottshall* v. *Consol. Rail Corp.*, 56 F.3d 530, 533 (3d Cir. 1995).

4. The question whether CSX became an Assurance Affiliate of Motor Carrier is a mixed question of law and fact. The question whether Motor Carrier's net worth fell below the Assurance Threshold at a relevant time is a question of fact and is

reviewed for clear error. But the district court's construction of the Agreement's stated process for selecting and formalizing Assurance Affiliates is reviewed *de novo*. *United States* v. *Williams*, 417 F.3d 373, 376 (3d Cir. 2005).

SUMMARY OF ARGUMENT

In holding that Motor Carrier must indemnify Pharmacia for any future cleanup costs for substances that migrated from the Kearny Site *even before 1994*, the district court misconstrued the clear contractual language making Motor Carrier liable *only* for costs related to (1) government-ordered "Clean-up," and (2) any "voluntarily incurred costs" incurred relating to cleanup and environmental investigation, "*in each case* of any Substances present at or which migrate from the Kearny Site * * * *at any time after the Effective Time*." Agreement § 2.3 (emphasis added) (JA2426). In further holding that Motor Carrier had not been prejudiced by Pharmacia's failure to provide it notice of USEPA's claim – on the reasoning that Motor Carrier could not prove that it would have defended the claim more successfully than Pharmacia – the district court contravened New Jersey law holding that prejudice will be *presumed* when a party's right to defend a claim is appropriated without its consent.

The district court also erred in holding Intermodal and CSX directly liable to Pharmacia for satisfaction of Motor Carrier's indemnity obligations. The corporate veil separating Intermodal from Motor Carrier cannot be disregarded because there

is no evidence that Intermodal *abused* Motor Carrier's corporate limited liability at Pharmacia's expense. Pharmacia entered into the Agreement with Motor Carrier years before Motor Carrier *had* any corporate parents, so Pharmacia could not possibly have relied on recourse to such parents' assets. Nor did Intermodal siphon assets from Motor Carrier in order to render it judgment-proof.

The district court's related belief that CSX had, at some unspecified time, automatically become an Assurance Affiliate of Motor Carrier by operation of an ephemeral legal chain reaction relies on a patent misconstruction of the Agreement.

ARGUMENT

The district court erred by interpreting the Agreement to saddle Motor Carrier with liability for hazardous substances that Monsanto caused to migrate from the Kearny Site long before Motor Carrier came into the picture. And, even if the district court's understanding of the contract is correct, it erred in holding that (1) Pharmacia had timely notified Motor Carrier of the April 16, 1996, letter from USEPA "notifying Monsanto of its potential liability," and (2) Motor Carrier was not prejudiced by Pharmacia's eight-year pattern of withholding information on a claim against which Motor Carrier had a contractual right to defend. The court's holdings that Intermodal and CSX fully share Motor Carrier's liability are based on wholly

inappropriate applications of the veil-piercing doctrine and a stark misinterpretation of clear contractual language.

I. UNDER THE AGREEMENT, MOTOR CARRIER IS NOT LIABLE UNLESS HAZARDOUS SUBSTANCES MIGRATED FROM THE KEARNY SITE "AFTER THE EFFECTIVE TIME" OF DECEMBER 19, 1994.

The USEPA and NJDEP cleanup efforts that implicate the Kearny Site concern hazardous chemicals that allegedly migrated from the Kearny Site into the lower Passaic River. But even if one credits their (unproven) allegations, there is no evidence in the record that any migrations occurred after the Agreement took effect on December 19, 1994. Under the Agreement, Motor Carrier is liable *only* for such post-Closing migrations.

A. There Was No Discharge After The Effective Time

For nearly 40 years before Motor Carrier purchased the Kearny Site, Pharmacia released significant volumes of PCBs and other hazardous chemicals into the soil on the Kearny Site. ACO ¶¶ 4-8 (JA1999-2000). The record also shows that, since the 1960s, Pharmacia had discharged hazardous substances directly into the river, both as a byproduct of its business operations and as a result of drainage from a storm sewer pipe. NJDEP Directive at 25 & nn.100, 101 (JA3735).

Once Motor Carrier purchased the site and transformed it into a parking lot for shipping containers, things changed dramatically. The record contains no evidence that any hazardous substances were released on Motor Carrier's watch, or that any pre-existing substances migrated into the river during that time. In 2001, after NJDEP completed its analysis of the data gathered by Roux Associates during its 1995-2000 groundwater monitoring, NJDEP sent Roux Associates a letter confirming that "No PCBs have been detected in the groundwater samples for the entire 5-year monitoring period." JA1982. Similarly, at trial, Kathleen Moldthan, Pharmacia's remedial projects manager and the official with direct responsibility for the Kearny Site from 1995 through 1997, acknowledged that she does not "know of any discharges of hazardous substances at the Kearny site since Motor Carrier acquired title in December of 1994." JA421.[4]

The closest thing in the record to "evidence" of migration of substances after 1994 – the *1992* analysis by Roux Associates – was not evidence of discharge at all. Roux Associates concluded that, even if it made hypothetical "worst case" assumptions about potential discharges, "it is extremely unlikely that the[] values would be considered significant" by governmental agencies. JA1253. Indeed, at trial, Gregory

[4] Michael Bell, an Intermodal engineer who worked with the Kearny Site after 1998, testified similarly that "I know of no spills that have occurred on that site." JA915.

Martin of Roux Associates testified that the possible levels of discharged benzene – the hazardous substance with the *highest* potential discharge concentration – were below the "practical quantification limit" of scientific measurement. JA372. For PCBs and the other hazardous substances for which USEPA and NJDEP would eventually target the Kearny Site, Roux Associates found that the potential discharge concentrations would be "at least an order of magnitude lower" than that of benzene. JA1253.

In short, there is no evidence that Motor Carrier did anything wrong; perhaps that is why USEPA did not target Motor Carrier even after Pharmacia encouraged it to do so. JA3047. But Pharmacia argues that, under the Agreement, Motor Carrier assumed liability even for substances that Pharmacia dumped and that migrated into the river before Motor Carrier took ownership of the Kearny Site. It is incorrect.

B. Under The Agreement, Motor Carrier Is Liable Only For Migrations Occurring After The Effective Time

1. Section 9.6(b) of the Agreement – titled "Indemnification" – states in relevant part:

> Except for matters covered by Article 2 * * * Monsanto will remain responsible for, and will indemnify and hold harmless Purchaser * * * from and against any Liabilities and Damages of any of the Monsanto Group * * * caused or occurring prior to the Effective Time and arising out of Monsanto's ownership, operation, maintenance or use of the Property, the Plant and/or the Commitments prior to the Effective Time. (JA2448)

In plain English, Section 9.6(b) reserves to Monsanto all liability stemming from "operation, maintenance or use" of the Kearny Site "prior to the Effective Time" unless Article 2 *explicitly* assigns it to Motor Carrier.

With that background presumption in mind, one searches in vain for any provision in Article 2 that assigns to Motor Carrier liability for hazardous substances that migrated into the Passaic River before 1994. Section 2.3, titled "Purchaser's Responsibilities," makes Motor Carrier liable for any government-ordered or voluntary cleanup of substances that migrate from the Site *after* the closing date, but says nothing to alter the presumption in Section 9.6(b) regarding substances that migrated *before* the closing date. And the other two relevant sections of Article 2– titled "Monsanto Indemnification" and "Purchaser Indemnification" – merely confirm the temporal distinction set forth in Sections 2.3 and 9.6(b).

2. The natural starting place to explore Motor Carrier's responsibilities in Article 2 is Section 2.3, styled "Purchaser's Responsibilities":

> **2.3 <u>Purchaser's Responsibilities</u>.** Except as otherwise provided in Section 2.2 of this Agreement, Purchaser and its respective successors in title or interest and assigns shall bear and be liable for: (i) any and all costs and expenses (including attorney's fees) of Clean-up * * * including but not limited to any Clean-up or costs arising * * * under federal law * * * (ii) and any voluntarily incurred costs and expenses (including attorney's fees) to investigate, remediate, remove, treat, clean up or prevent the escape, *in each case* of any Substances present at or which migrate from the Kearny Site, the Plant or the Property *at any time after the Effective Time*, including but not limited to

> Substances, PCB's and/or Unknown ISRA/Spill Act Hazardous Material dumped, buried, injected, deposited or disposed of by Monsanto, its Affiliates, their respective predecessors in title, those claiming by, through or under any of the foregoing or any of their respective DOEA. (JA2426) [Emphasis added.]

Section 2.3 establishes two types of purchaser responsibility, and sets a clear temporal limit on each. Motor Carrier agrees to be liable for:

(i) any costs and expenses of government-ordered cleanup, and

(ii) any "voluntarily incurred costs" incurred "to investigate, remediate, remove, treat, clean up or prevent the escape"

"in each case of any Substances present at or which migrate from the Kearny Site * * * at any time after the Effective Time." Thus, under the plain language of Section 2.3, Motor Carrier is liable for each type of cost – mandatory and voluntary – incurred to clean up substances that are *present* at the Kearny Site after 1994, or that *migrate* from the Site after 1994. Because it is silent about substances present at or migrating from the Site *before* December 1994, it does nothing to defeat the presumption in Section 9.6(b) that Pharmacia remains liable for such expenses.

Although this reading of Section 2.3 is grammatically natural and hews to the same temporal line established in Section 9.6(b), the district court embraced a different understanding. It concluded that "the phrase 'any time after the Effective Time' modifies the proposition 'any and all voluntarily incurred costs * * * to remediate * * * any Substances' rather than the proposition 'Substances * * * which

migrate from the Kearny Site.'" JA95. In other words, in the district court's view, the phrase "in each case" encapsulates the various types of *voluntary* cleanup that Motor Carrier might undertake, such that the "after the Effective Time" limitation does not apply to government-ordered cleanup. On that view, broken down visually, Motor Carrier agreed to be liable for:

> (i) any costs and expenses of government-ordered cleanup, and
>
> (ii) any "voluntarily incurred costs" incurred "to investigate, remediate, remove, treat, clean up or prevent the escape in each case of any Substances present at or which migrate from the Kearny Site * * * at any time after the Effective Time."

This interpretation of Section 2.3, however, has at least one glaring flaw – it makes the phrase "in each case" meaningless. Indeed, if the district court's interpretation were correct, it would have been far more natural to omit the phrase "in each case" entirely. Motor Carrier would thus be liable for:

> (i) any costs and expenses of government-ordered cleanup, and
>
> (ii) any "voluntarily incurred costs" incurred "to investigate, remediate, remove, treat, clean up or prevent the escape [ ] of Substances present at or which migrate from the Kearny Site * * * at any time after the Effective Time."

That simpler phrasing would be the natural way to word Section 2.3 if the parties had intended the construction that the district court adopted. But it is not the phrasing they chose, and New Jersey law is clear that a contract "should not be interpreted to

render one of its terms meaningless." *Cumberland County Improvement Auth.* v. *GSP Recyling Co.* 358 N.J. Super. 484, 497 (App. Div. 2003). Indeed, if the task of contract interpretation is to discern the parties' intent (*Cruz-Mendez* v. *ISU/Insurance Services of San Francisco*, 156 N.J. 556, 570-571 (1999)), it would be strange to ascribe a meaning to a term that, if correct, *obfuscates* the understanding that the parties sought to codify.

In short, the natural reading of Section 2.3 is that the phrase "in each case" refers to the two types of cleanup that Motor Carrier might take – mandatory and voluntary. It follows that Section 2.3, which establishes "Purchaser's Responsibilities," does not alter the Section 9.6(b) presumption that Pharmacia remains liable for harm done before the Effective Time.

2. The CSX Defendants' understanding of Section 2.3 is supported by Section 2.4, "Monsanto Indemnification," which states that Pharmacia will indemnify Motor Carrier for a variety of fines that might be imposed against Pharmacia for its activities before the Effective Time, and for any costs of cleanup necessary to meet the requirements of the Work Plan in effect in 1994. JA2427-2428. The final paragraph of Section 2.4 states:

> From and after the Closing (except for * * * activities * * * contemplated under Section 2.2 * * *), Monsanto will have no obligations under this Agreement with respect to any Clean-up * * * whether or not such Clean-up

> arises from or is connected with Substances and/or PCB's and/or Unknown ISRA/Spill Act Hazardous Material dumped, buried, injected, deposited or disposed of by Monsanto, its Affiliates, their respective predecessors in title or interest, those claiming by, through or under any of the foregoing or any of their respective DOEA.

This language confirms that, after the Effective Time, whatever hazardous substances remained on the Kearny Site were Motor Carrier's responsibility to contain and remediate if necessary; just as in Section 2.3, if such substances migrated after closing, Motor Carrier would be on the hook for cleanup. But Section 2.4 does not address pre-1994 migrations of substances, and therefore the presumption remains, through Section 9.6(b), that such liability is Pharmacia's.

3. The final relevant section of Article 2 is Section 2.5, "Purchaser Indemnification." JA2428-2430. Section 2.5 contains two passages of note. The first states:

> **2.5 <u>Purchaser Indemnification</u>.** Purchaser * * * will be liable for and will indemnify, save and hold harmless Monsanto, * * * those for whom Monsanto would be liable and DOEA of any of the foregoing from and against:
>
> * * * * *
>
> > (b) any costs of Clean-up of Substances, including but not limited to, any Clean-up under federal law * * * or any Clean-up under the laws of the State of New Jersey * * * for all Substances, including but not limited to PCB's and Unknown ISRA/Spill Act Hazardous Material and whether or not such Clean-up arises from or in connection with Substances dumped, buried, injected, deposited or disposed of by Monsanto * * * (except to the extent covered under Section 2.2 of this

> Agreement as it pertains to the [No Further Action] Letter and performance of remedial or other action with respect to groundwater mandated by the current Work Plan and ACO or an amendment thereto)[.]

This passage is the counterpart to Section 2.4 (establishing that, after Closing, Pharmacia *will not* be liable for any cleanup of substances "dumped, buried, injected, deposited or disposed of by Monsanto" on the Kearny Site). Section 2.5 ("Purchaser Indemnification") establishes, accordingly, that Purchaser *will* be liable for cleanup of such substances, even if Pharmacia is at fault for them. But neither Section 2.4 nor this passage in Section 2.5 addresses substances that *migrated* from the Site before the Effective Time.

The final paragraph of Section 2.5 simply confirms that Motor Carrier is liable for all *types* of substances – including "PCB's and any Unknown ISRA/SpillAct Hazardous Material" – for which government agencies might order remediation. It states:

> By way of explanation and not in limitation of the foregoing, the parties expressly agree that the indemnity of Monsanto by Purchaser * * * set forth herein includes indemnification for any PCB's and any Unknown ISRA/Spill Act Hazardous Material whether or not required to be remediated under a Government Mandated ISRA/Spill Act Clean-up and that any remedies or rights to reimbursement are limited to those reimbursement rights of Motor Carrier for Incremental Cost set forth in and limited by Section 2.2.

That Section 2.5 contains no temporal language is unsurprising, given its focus on the *types* of substances covered by the provision, as opposed to the means by which they came to migrate from the Kearny Site.

*   *   *

In short, no Section of Article 2 allocates responsibility for substances that migrated from the Kearny Site before the Effective Time. Section 2.3, the most relevant section and the one that expressly covers "Purchaser's Responsibilities," expressly allocates to Motor Carrier responsibility for migrations after the Effective Time. Its marked silence regarding migrations *before* the Effective Time reveals that Motor Carrier did not accept responsibility therefor, sensibly enough given Monsanto's checkered environmental history.

Because no provision in Article 2 addresses cleanup of substances that migrated before closing, such responsibility remains with Pharmacia under Section 9.6(b).

II. PHARMACIA'S FAILURE TO GIVE THE REQUIRED NOTICES EXCUSES ANY INDEMNITY OBLIGATIONS THAT MOTOR CARRIER MIGHT HAVE HAD

Even if the Agreement placed responsibility on Motor Carrier for cleaning up hazardous substances that migrated after the Effective Time, Pharmacia forfeited any right to indemnification by prejudicially breaching its obligations to notify Motor Carrier of the USEPA claim.

A. Pharmacia Failed To Give The Required Notices

1. The Agreement makes pellucid each party's obligation to notify the other immediately – in writing – if it learns of potential environmental liability for matters on which it might ultimately seek indemnification or communicates with the government about such matters. See, *e.g.*, § 9.8(b) (JA2450) ("[E]ach party will inform the other party of all substantive contacts between Governmental Agencies and itself relating to the Property which could reasonably be expected to have an adverse effect on the other party."); § 9.9 (JA2450-2451) (if "any notice, claim, action, suit or proceeding" is made, the party who receives it "will give prompt notice to the other party"); § 9.10 (JA2451) (requiring "prompt[] * * * written notice" to other party of any "proceeding" that "has been or may be commenced or initiated against * * * one of the parties which may give rise to an indemnification obligation on the part of the other party"); § 9.12 (*ibid.*) ("Neither party shall take any action or make any communication which could reasonably be expected to have a materially adverse effect on the resolution or outcome of any matter for which the other party may be liable under Article 2 * * * without providing at least five (5) business days advance notice to the other party.").

2. There is no colorable argument that Pharmacia complied with these provisions. Indeed, Pharmacia conducted a dialog with USEPA from 1995 through 2004

regarding potential migrations from the Kearny Site without notifying Motor Carrier of any potential concern.

On January 3, 1995, Pharmacia received a Request for Information from USEPA seeking information on the "nature and quantity of * * * hazardous substances and hazardous waste * * * which may have been generated, treated, stored, or disposed at your facility located at the foot of Pennsylvania Avenue in Kearny, New Jersey." JA3003. Throughout 1995, Pharmacia and USEPA corresponded about the matter. See JA1298 (first Response to Request); JA1314 (second Response to Request); JA1384 (Nov. 14, 1995) (second Request for Information); JA1405 (Dec. 29, 1995) (Response to second Request).

Then, in early 1996, USEPA sent to Pharmacia a letter headed by the words "URGENT LEGAL MATTER," which revealed that "[i]nvestigations undertaken by EPA indicated that hazardous substances were being released from the Monsanto Company's former Kearny facility." JA1439. It stated that "[b]y this letter EPA is notifying Monsanto Company of its potential liability relating to the [Kearny] Site." *Ibid.* On August 7, 1996, USEPA invited Pharmacia to an informational meeting about the remediation project in the lower Passaic River. JA1444.

Pharmacia did nothing to notify Motor Carrier of this dialog or the upcoming meeting. Jeffrey Klieve, Pharmacia's director of environmental affairs and

Rule 30(b)(6) witness, admitted that the April 1996 letter was "a contact with the government agency * * * * It was a substantive contact." JA575. Cf. Agreement § 9.8(b) (JA2450) ("[E]ach party will inform the other party of all substantive contacts between Governmental Agencies and itself relating to the Property which could reasonably be expected to have an adverse effect on the other party."). But Pharmacia was unable to produce one witness to testify that Pharmacia had provided Motor Carrier with notice the April 1996 letter at any time before 2004. Kathleen Moldthan testified that she "did not recall" providing Motor Carrier with a copy (JA450), and Klieve testified that his search of Pharmacia's records revealed no communication from Pharmacia to Motor Carrier regarding the letter even though "[i]t would be normal to retain that type of document" (JA573, 578).

3. Despite the absence of any testimony that Pharmacia *provided* Motor Carrier with notice – what the Agreement requires – the district court found that "the testimony * * * establishes that Motor Carrier *received* adequate notice under the Agreement." JA92 n.3 (emphasis added) (citing testimony that, while conducting due diligence in 1997 ahead of its purchase of Motor Carrier, Intermodal found Pharmacia's 1995 Responses to USEPA). See also JA1849 (due diligence inventory of Motor Carrier's files as of 1997). That finding is clearly erroneous for at least two reasons.

First, the Agreement states clearly that the parties must "promptly provide written notice" of potential proceedings. § 9.10 (JA2451). See also § 9.12 (*ibid.*) (requiring "at least five (5) business days advance notice" before "mak[ing] any communication" that might have a "materially adverse effect" on other party). The testimony the district court cited suggests only that Motor Carrier came to possess the 1995 communications by 1998 – it hardly confirms that they were "provided" by Pharmacia, or provided "promptly." *Second*, even the evidence upon which the district court relied contains no suggestion that Motor Carrier received notice of the critical April 16, 1996, letter from USEPA that notified Pharmacia of its "potential liability," or the August 7, 1996, letter inviting Pharmacia to the informational session.

The district court, in short, found that the multiple, emphatic, and explicit notice provisions in the Agreement were fully satisfied merely because Motor Carrier came to possess certain communications long after the fact. That finding is clearly erroneous, and it is evident that Pharmacia breached its contractual obligations. As shown below, that failing prejudiced Motor Carrier.

B. Pharmacia's Breach Of The Notice Provisions Prejudiced Motor Carrier

1. Section 9.12 of the Agreement gives teeth to the notice requirements by excusing a party's indemnify obligations to the extent that it is prejudiced by lack of notice:

> Neither party shall take any action or make any communication which could reasonably be expected to have a materially adverse effect on the resolution or outcome of any matter for which the other party may be liable under Article 2 or Section 9.6 without providing at least five (5) business days advance notice to the other party. *Any material breach of this obligation shall relieve the party to whom such notice was not provided of liabilities and indemnification under Article 2 or Section 9.6 with respect to such matter to the extent that such non-notified party has been prejudiced by the lack of timely and adequate notice.* [Emphasis added.]

Without notice of USEPA's potential claim, of course, Motor Carrier was unable to exercise at least one vital contractual right – "the right, at its election, to take over the defense or settlement of such Claim." Agreement § 9.9 (JA2450).

The district court, however, found that Motor Carrier was not prejudiced *to any degree* by Pharmacia's unilateral decision to control, negotiate, and settle USEPA's claim, and to involve Motor Carrier only when it came time to pay the bill. JA91. The court reasoned that "Defendants have failed to point out *any* strategy decisions made by Pharmacia that were 'questionable,' or in any way detrimental to Motor Carrier." JA92. Thus, in the court's view, Motor Carrier could show prejudice only

if it could prove – long after the fact – that it would have fought USEPA's claim more successfully than Pharmacia did.

2. The district court acted on a misapprehension of New Jersey law, and committed clear error, in finding a lack of prejudice.

New Jersey courts recognize that, although parties to contracts will generally be required to show prejudice from delayed notice, such prejudice should be *presumed* when the party to whom notice is owed is wholly denied its right to defend against a claim.[5] In *Sneed* v. *Concord Insurance Co.*, 98 N.J. Super. 306 (App. Div. 1967), an automobile liability insurer "appropriate[d] total control of the claim" while also contending, separately, that the insured's policy did not cover the claim at issue. The insurer denied coverage just before the claim went to trial, and the question was whether, having seized control of the case for so long, it was estopped from denying that it had an obligation to defend it. The answer turned on whether the insured would be prejudiced by the insurer's late notice that it was denying coverage, and the court acknowledged the general rule in New Jersey contract law that "prejudice in fact [from late notice] must be demonstrated by the insured." *Id.* at 316. However, it noted that, "if the company [actually] participated in a defense [of a claim]," it is

[5] Section 13.10 of the Agreement provides that it "shall be construed in accordance with, and governed by, the law of the State of New Jersey." JA2458.

"clear" that "the [estoppel] bar would arise on the basis of *presumptive prejudice*." *Ibid.* (emphasis added) (citation omitted).

The court explained why a showing of prejudice-in-fact is required when the insured ultimately is allowed to defend his own claim, but prejudice will be *presumed* when the insurer denies him the right to defend his claim:

> [A]n insurer who exercises its policy right exclusively to control the handling of a claim against its insured for a substantial period after it knows it has a basis for denial of coverage will be estopped thereafter to disclaim liability on the policy. *Prejudice to the insured will be assumed because the "course cannot be rerun" so as to determine whether the insured would in fact have fared better on his own if the insurer had disclaimed promptly.*

Id. at 320 (emphasis added). Accord *Merchants Ind. Corp.* v. *Eggleston*, 37 N.J. 114, 129 (1962) (appropriation of control over the claim establishes prejudice as a matter of law "doubtless because, since the course cannot be rerun * * * it [is] futile to attempt to prove or to disprove that the insured would have fared better on his own"). That reasoning applies to Pharmacia's failure to notify Motor Carrier of USEPA's impending claim. By denying Motor Carrier the timely notice that *would have allowed it to control the defense* and then settling with USEPA, Pharmacia appropriated control of the defense just as surely as the insurer in *Sneed.* Thus, prejudice should be presumed because "the course cannot be rerun so as to determine whether [Motor Carrier] would have fared better" than Pharmacia against USEPA. *Ibid.*

Consideration of Motor Carrier's potential options in defending the USEPA claim underlines why New Jersey courts presume prejudice in such cases. *First*, Motor Carrier might have considered declaring bankruptcy and attempting to reject the executory portions of the Agreement – including the indemnity provisions – under Section 365(a) of the Bankruptcy Code, 11 U.S.C. § 365(a). Section 365(a) allows trustees in bankruptcy to reject executory contracts, which the Supreme Court defines as those "on which performance is due to some extent on both sides." *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984). The Agreement may well have qualified. *Second*, had Motor Carrier learned of the impending USEPA claim when Pharmacia did, it could have refrained from making further capital investments in the property in light of the potential outlays for remediation. *Finally*, Motor Carrier might have arranged for more cost-effective legal representation than Pharmacia, whose legal fees the district court ordered Motor Carrier to pay in full pursuant to the Agreement, despite a challenge to their reasonableness. JA159-160. In objecting to Pharmacia's fees, the CSX Defendants noted, among other things, that the rates charged by Pharmacia's attorneys were almost invariably, and often substantially (sometimes well over $100/hour), higher than those of the CSX Defendants' counsel of comparable experience. JA4099-4102. Indeed, those legal fees exceed the actual cleanup costs that Motor Carrier has been ordered to pay to date.

In any event, and especially probative in light of the presumption of prejudice, the district court was simply wrong in saying that Motor Carrier could identify no suspect decisions made by Pharmacia while handling the claim. In fact, Motor Carrier identified exactly such evidence: Klieve's testimony that Pharmacia declined USEPA's 1996 invitation to cooperate "[b]ecause there was inadequate evidence tying the [Kearny] site to issues in the river." JA534. Klieve was correct – indeed, Pharmacia might well have asked USEPA to reconsider its position on the Kearny Site in light of Roux Associates' conclusion that contaminant levels in any water leaving the Site would have been equal to or below the practical quantification limits of scientific measurement. JA1253; JA374-375.

But Pharmacia did not ask USEPA to consider Roux Associates' analysis – which, of course, had been done to satisfy NJDEP when it raised similar concerns years earlier. Instead, it sat on the sidelines while USEPA built its case against the Kearny Site. JA534 ("Q: How did Monsanto respond to the 1996 general notice letter? A: We responded that we were not at that time going to step forward and participate in remediation of the river."). Years later, when Pharmacia ultimately decide to engage USEPA, its efforts were focused not on minimizing liability, but on convincing USEPA to target Motor Carrier instead. See JA3047. Had Motor Carrier assumed the defense, its priorities of course would have been considerably different.

*   *   *

To be clear, the point is not that, had Motor Carrier received timely notice from Pharmacia, it necessarily would have taken any of these measures, or that they would have yielded a better outcome. Rather, the point is that it is *impossible to know* whether Motor Carrier would have been more successful than Pharmacia, which is why New Jersey courts sensibly presume prejudice in cases where a party its denied the right to defend itself. See *Sneed*, 98 N.J. Super. at 320. Despite the clear-error standard applicable to findings of fact, this Court has plenary authority to correct a no-prejudice finding based on a misunderstanding of New Jersey law. *Jenkins*, 4 F.3d at 1116. The district court committed reversible error by requiring Motor Carrier to prove a conjecture in order to show prejudice from Pharmacia's misappropriation of the defense.

III. THE DISTRICT COURT ERRED IN EXTENDING MOTOR CARRIER'S POTENTIAL LIABILITY TO INTERMODAL AND CSX

The district court erred in piercing the corporate veil separating Intermodal from Motor Carrier and holding that CSX had become an "Assurance Affiliate" of Motor Carrier.

A. The District Court Erred In Piercing The Corporate Veil Separating Intermodal From Motor Carrier

New Jersey law recognizes that "*a primary reason* for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." *New Jersey Dep't of Env. Prot.* v. *Ventron Corp.* 94 N.J. 473, 500 (1983) (emphasis added) (citing *Lyon* v. *Barrett*, 89 N.J. 294, 300 (1982)). That principle is "equally applicable when the shareholder is, in fact, another corporation, and hence, mere ownership of a subsidiary does not justify the imposition of liability on the parent." *Verni* v. *Harry M. Stevens, Inc.*, 387 N.J. Super. 160, 198 (App. Div. 2006) (quoting *Pearson v. Component Tech. Corp.,* 247 F.3d 471, 484 (3d Cir. 2001)). Thus, "[e]ven in the case of a parent corporation and its wholly-owned subsidiary, limited liability normally will not be abrogated." *Ventron,* 94 N.J. at 500.

Because limited liability is an *expected* result of and "primary reason" for the corporate form, a party must do more than point to that result as justification for piercing the corporate veil. Instead, it must establish that (1) the subsidiary was "a mere instrumentality of the parent corporation," *and* (2) the parent corporation used the subsidiary "to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise to evade the law." *Id.* at 500. See also *Verni*, 387 N.J. Super. at 199-200.

1. The district court offered two rationales for concluding that Motor Carrier was "a mere instrumentality" of Intermodal: that, since 1998, Motor Carrier had failed to observe corporate formalities by holding shareholder and director meetings; and that Motor Carrier was "indisputably undercapitalized" because it had "no revenues" and "cannot not demonstrate that it has the funds to cover any potential [environmental] liabilities." JA59. The first point is legally insufficient to justify veil-piercing, and the latter is simply wrong on the facts and law.

a. Although it is true that since 1998 Motor Carrier's officers, directors, and shareholders have not had meetings as set forth in its by-laws, that fact is hardly unique among small holding companies and is patently insufficient, by itself, to justify veil-piercing. See *Verni*, 387 N.J. Super. at 498 ("fail[ure] to observe corporate formalities" is but one "consider[ation]" among many); *Pearson*, 247 F.3d at 484-485 (terming such failure a "factor" in the analysis); *Judson Atkinson Candies, Inc.* v. *Latini-Hohberger Dhimantec,* 476 F. Supp. 2d 913, 941 (N.D. Ill. 2007) (refusing to pierce corporate veil of holding company that failed to hold its annual meetings). Accord JAMES D. COX AND THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS § 7.09 (2d ed. 2003) ("Disregard of corporate formalities * * * does not appear sufficient by itself to pierce the corporate veil. Some [courts] have even sought to restrict this factor further by requiring a causal relationship between the failure to

observe the corporate formalities and the fraud or inequitable result that would follow if the veil were not pierced."). As we explain below, however, there *are* no other factors to add to this commonplace transgression.

b. The only other veil-piercing factor the district court identified was its suggestion that "Motor Carrier is indisputably undercapitalized" because it "has no revenues, and has not had a balance sheet nor issued financial reports since 1998." JA59. But the court in *Verni* emphasized that "[t]he adequacy of capital is to be measured *as of the time of formation of the corporation*." 387 N.J. Super. at 200 (emphasis added) (quoting 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.33 at 652 (perm ed., rev. vol. 1999)). The "capitalization at founding" inquiry is proper because it gives insight into the ultimate question in veil-piercing doctrine – namely, "whether the corporation was established to defraud its creditors or other improper purpose such as avoiding the risks known to be attendant to a type of business." *Ibid.* See also 1 COX & HAZEN ON CORPORATIONS § 7.11:

> [T]he inadequacy of the firm's capital is to be measured at the time of the corporation's inception. Capital must then have been sufficient to meet the prospective risks of the business in which the corporation is to engage. To apply the test when the claim that is the subject of the suit arose would be tantamount to a denial of limited liability; limited liability exists to protect the shareholders from the situation where its assets are insufficient to satisfy a claim when it arises.

The record here contains no evidence suggesting inadequacy of Motor Carrier's capitalization when it was founded, a point doubly salient in light of the fact that Intermodal purchased Motor Carrier long after Motor Carrier was founded, and years after Pharmacia chose to do business with Motor Carrier.

Even if one considers Motor Carrier's capitalization after 1998 to be probative in the veil-piercing inquiry, there is no evidence that it was undercapitalized as of that point. "Adequate capitalization is a question of fact that turns on the nature of the business of the particular corporation." *Verni*, 387 N.J. Super. at 200 (quoting FLETCHER CYCLOPEDIA § 41.33 at 652). Although Deloitte & Touche estimated Motor Carrier's net worth to be $340,000 in October 1997 (JA68), just three months later Motor Carrier was sold on the open market for $14.5 million. Closing Statement, JA1837. Pharmacia has made no showing that such capitalization is inadequate for a company with Motor Carrier's function, nor is there any evidence that Intermodal leached existing resources from Motor Carrier after purchasing it. Quite the opposite, upon closing in 1998 for $14.5 million, Intermodal satisfied Motor Carrier's $3.2 million mortgage held by Pharmacia. *Ibid*.

Finally, the fact that "Motor Carrier has no employees, and exists solely as a holding company for the Kearny Property" (JA60), does nothing to imply that its existence should be disregarded. The purpose of a holding company is to control

assets while limiting risk, not perform services, and there is nothing suspect about that function. See, *e.g.*, *Judson Atkinson Candies*, 476 F. Supp. 2d at 941 (refusing to pierce corporate veil of holding company and noting that "[to be] a holding company * * * is a perfectly legitimate use of the corporate form"). Indeed, considering that the purpose of the corporate form is to control exposure to risk, disregarding holding companies' separateness *precisely when they succeed* in doing so would turn the law on its head.

2. Even if Motor Carrier were merely Intermodal's alter ego – which it is not – veil piercing would be appropriate only if Intermodal had *also "abused* the privilege of incorporation by using the subsidiary to *perpetrate* a fraud or injustice, or otherwise to *circumvent* the law." *Ventron,* 94 N.J. at 501 (emphasis added). The terms "abused," "perpetrate," and "circumvent" emphasize that the parent corporation must *actively manipulate* its subsidiary with the *purpose* of subverting justice. In *Verni* (387 N.J. Super. at 500) the court gave two clear examples of the requisite affirmative malfeasance. See *OTR Assocs* v. *IBC Services, Inc.,* 353 N.J. Super. 48, 55 (App. Div. 2002) (veil piercing warranted where parent *created subsidiary as a judgment-proof corporation* solely to insulate it from liability); *Karo Mktg. Corp.* v. *Playdrome Am.*, 331 N.J. Super. 430, 443 (App. Div. 2000) (act of *rendering subsidiary judgment proof* warranted veil piercing).

The district court's only theory of "fraud or injustice" is that, "given Motor Carrier's inability to satisfy a potential adverse judgment, adherence to the fiction of a separation between Intermodal and Motor Carrier would perpetrate an injustice." JA60. But such potential "inability to satisfy a judgment" is present in *every* case involving corporate limited liability, which "exists to protect the shareholders from the situation where its assets are insufficient to satisfy a claim when it arises." 1 COX & HAZEN ON CORPORATIONS § 7.11. The district court's reasoning is not an argument for veil-piercing in this case, but rather one for abolishing limited liability entirely.

The district court's theory is the *opposite* of the evidence of *active abuse* of limited liability required before piercing the corporate veil. And the record contains no suggestion whatever that Intermodal abused Motor Carrier's corporate form to shield itself from liability at Pharmacia's expense. On December 19, 1994, when Pharmacia chose to enter into the Agreement with Motor Carrier, Motor Carrier had no corporate parent and no prospect of acquiring one. Pharmacia therefore cannot possibly have relied on recourse to that then-nonexistent parent when seeking possible future indemnification from Motor Carrier. Moreover, Intermodal's un-expected acquisition of Motor Carrier helped rather than hurt Pharmacia – Intermodal paid Pharmacia $3.2 million in satisfaction of Motor Carrier's mortgage

and left Motor Carrier's assets as it found them. JA1837. Pharmacia thus got what it bargained for and more; the notion that Intermodal used Motor Carrier's limited liability "to perpetrate a fraud or injustice" on Pharmacia is insupportable.

B. The District Court Erred In Holding that CSX Had Become An "Assurance Affiliate" Of Motor Carrier

On summary judgment, while granting Pharmacia's request to pierce the corporate veil separating Motor Carrier and Intermodal, the district court denied Pharmacia's additional request to pierce the veil between Intermodal and CSX, Intermodal's corporate parent. JA60-61. After trial, however, it held CSX directly liable to Pharmacia on the theory that CSX had become Motor Carrier's "Assurance Affiliate" under the Agreement.[6] CSX did become an Affiliate of Motor Carrier – as distinct from an Assurance Affiliate – when Intermodal purchased Motor Carrier in 1998. See Agreement § 2.1 (JA2419). But the district court was plainly wrong to conclude that CSX had ever become an *Assurance Affiliate* of Motor Carrier.

The concept of Assurance Affiliates is set out in Section 13.19 of the Agreement (JA2459-2460):

[6] Because the district court had already found Motor Carrier and Intermodal jointly liable under the veil-piercing theory, it did not consider whether Intermodal had also become directly liable to Pharmacia as an "Assurance Affiliate." JA100. To the extent it is relevant, however, the "Assurance Affiliate" analysis for Intermodal is identical to the analysis for CSX.

13.19 <u>Net Worth Asssurance</u>. If at the end of any calendar quarter the consolidated net worth of the Purchaser shall be less than Five Million Dollars ($5,000,000), ("Assurance Threshold"), then the Purchaser shall promptly notify Monsanto and, within fifteen (15) days and from time to time thereafter until such time as Monsanto has been provided with financial assurance up to at least the Assurance Threshold, shall cause Affiliates to become Assurance Affiliates by causing them (*in a form satisfactory to Monsanto*) to become parties to this Agreement, to guaranty and/or to otherwise become liable for the obligations under the Agreement and the Deed to the same extent as the Purchasers hereunder, *in each case as Monsanto may elect*. For purposes of this Section, the term "Assurance Affiliates" means then existing Affiliates of any of the Purchaser and/or Riley and any other such Affiliates thereafter formed or acquired, *in each case reasonably satisfactory to Monsanto*, whose net worth when added to the consolidated net worth of the Purchaser will equal at least Five Million Dollars ($5,000,000). * * * After an Affiliate becomes an Assurance Affiliate as provided herein, it will be deemed to be included as a Purchaser and its net worth will be considered as part of the net worth of the Purchaser for purposes of determining a need thereafter to add additional Assurance Affiliates. [Emphasis added.]

This Section explicitly contemplates a two-step process by which Assurance Affiliates are selected and formalized. In this case, however, neither step took place.

First, Section 9.13 mandates that, if Motor Carrier's net worth drops below $5 million, Motor Carrier will promptly notify Pharmacia. But Motor Carrier never notified Pharmacia of such inadequate capitalization, precisely because it never happened. Intermodal purchased Motor Carrier for $14.5 million in January 1998, in the course of which it paid off the mortgage held by Pharmacia, the only encumbrance on the property. From that point forward, therefore, Motor Carrier's net worth was

at least $14.5 million – and given that its only asset was the Kearny Site, a strategically valuable lot, that net worth has likely increased since then.

The district court evidently believed that Section 13.19 had been triggered in October 1997 when Deloitte and Touche valued Motor Carrier's net worth at approximately $340,000. JA101. That figure is highly suspect given that Motor Carrier was purchased on the open market for more than *forty times that much* only three months later. But, even if the Deloitte estimate was somehow correct as of October 1997, that valuation could not possibly have triggered Section 13.19 because, before January 1998, neither Intermodal Carrier nor CSX was an Affiliate. When they *did* become Affiliates, of course, Motor Carrier's net worth was simultaneously confirmed to be $14.5 million.

Second, even if the $5 million Assurance Threshold *had* been passed at some point after Intermodal purchased Motor Carrier, it *still* would not mean that CSX had become an Assurance Affiliate. As the italicized language in the Section reprinted above makes clear, the Agreement envisioned a dialog between Motor Carrier and Pharmacia in which potential Assurance Affiliates are identified and ultimately sign on as guarantors. In the language of Section 13.19, following the provision of notice to Pharmacia, Motor Carrier will cause Affiliates to join the Agreement "in a form satisfactory to Monsanto," "and/or to otherwise become liable for obligations * * *

to the same extent as [Motor Carrier], in each case as Monsanto may elect." But that dialog never happened – no "form satisfactory to Monsanto" was negotiated, and Monsanto never "elect[ed]" whether to make a potential Assurance Affiliate a "part[y] to the Agreement," or only to have it "become liable for obligations."

The point is not that Monsanto waived its right to these choices. It is instead that the process of choosing and formalizing Assurance Affiliates *never happened,* almost certainly because the Assurance Threshold was never passed. Indeed, all of that aside, it is impossible that Motor Carrier could have caused CSX – its corporate *grand*parent, and a massive interstate railroad concern – to become directly liable to Pharmacia without CSX's knowledge or consent. The district court's apparent belief that the Deloitte valuation set off a legal cascade that swept up CSX as an Assurance Affiliate lacks any grounding in reality.

CONCLUSION

The Court should reverse the district court and hold that: (1) the Agreement allocates to Pharmacia responsibility for cleaning up hazardous substances that migrated from the Kearny Site before 1994; (2) Motor Carrier was prejudiced by Pharmacia's lack of notice within the meaning of Section 9.12 of the Agreement; and (3) neither Intermodal nor CSX is directly liable to Pharmacia, either under corporate

veil-piercing doctrine or as an Assurance Affiliate under Section 13.19 of the Agreement.

Respectfully submitted.

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Date: May 27, 2008

COMBINED CERTIFICATIONS OF COMPLIANCE

I hereby certify that:

1. Roy T. Englert, Jr., is a member of the Bar of this Court;

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,226 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

3. The electronic version of this Brief – which has been virus-scanned by Symantec AntiVirus and determined to be clean – is identical to the hard copies of the Brief filed with this Court and served on opposing counsel.

Date: May 27, 2008

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CERTIFICATE OF SERVICE

On this 27th day of May, 2008, I caused ten hard copies of the Brief for Appellants and Volume 1 of Joint Appendix to be filed with the Clerk of Court via overnight mail, and also emailed an identical PDF copy of the Brief (without Volume 1 of Joint Appendix) to electronic_briefs@ca3.uscourts.gov. I also caused identical hard copies of the Brief for Appellants and Volume 1 of Joint Appendix to be served by overnight mail and electronic mail (without Volume 1 of Joint Appendix) on:

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