

Case Number **S183365**

SUPREME COURT
FILED

NOV 16 2010

Frederick K. Onnion Clerk

In the
SUPREME COURT OF CALIFORNIA
Deputy

WALTER GREB and KAREN GREB

Plaintiffs and Appellants,

vs.

DIAMOND INTERNATIONAL CORPORATION,

Defendant and Respondent,

AFTER A DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION ONE, APPEAL NO. A125472;
ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SAN FRANCISCO, THE HONORABLE PETER J. BUSCH,
JUDGE PRESIDING, CASE NO. CGC-08-274989

**RESPONDENT'S REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF ANSWER BRIEF
ON THE MERITS**

Edmund G. Farrell III (SBN 111042)
Scott L. Hengesbach (SBN 146731)
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Attorneys for Defendant and Respondent,
DIAMOND INTERNATIONAL CORPORATION

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Attorneys for Defendant and Respondent,
DIAMOND INTERNATIONAL CORPORATION


Pursuant to California Rule of Court 8.523(g) and Evidence Code sections 452, 453, and 459, Respondent DIAMOND INTERNATIONAL CORPORATION requests that this Court take judicial notice of certain corporate records on file with the California Secretary of State and attached hereto as **Exhibit A**, and out-of-state authorities cited in its Answer Brief on the Merits, attached hereto as **Exhibit B** through **Exhibit N**. This request is being filed concurrently with Respondent's Answer Brief on the Merits.

This request is made pursuant to the above authorities, the attached memorandum of points and authorities, and all the files, records and briefs in this case.

DATED: November 15, 2010.

Respectfully submitted,

MURCHISON & CUMMING, LLP

By 
EDMUND G. FARRELL III
SCOTT L. HENGESBACH
MARIA A. STARN
Attorneys for Attorneys for Defendant
and Respondent, DIAMOND
INTERNATIONAL CORPORATION

MEMORANDUM OF POINTS AND AUTHORITIES

I.

JUDICIAL NOTICE SHOULD BE TAKEN OF RECORDS ON FILE WITH THE CALIFORNIA SECRETARY OF STATE

In support of its opening brief, Plaintiffs filed a request for judicial notice of documents issued by the California Secretary of State reflecting Diamond's purported qualification to transact intrastate business in California beginning in 1937 until approximately 1983. (Plaintiffs' Request for Judicial Notice, Exhibit A.) These documents are not part of the lower court's record and are introduced by Plaintiffs for the first time in their appeal to this Court.

More specifically, Plaintiffs seek judicial notice of the aforementioned corporate records in support of their argument that because Diamond was at one time qualified to do business in California, Diamond was "organized under" under California's General Corporate Law as that phrase is used in California Corporations Code § 102. (POB at 19-20.)

However, Plaintiffs have mistakenly referred to the Diamond International Corporation that was originally incorporated as The Diamond Match Company on December 26, 1930. That Diamond International Corporation was merged into Diamond (USA) Inc. on September 28, 1983, and was not the Diamond International Corporation that dissolved in Delaware on July 1, 2005. Diamond (USA) Inc. changed its name to Diamond International Corporation at the time of this merger.

Diamond (USA) Inc. was incorporated on April 2, 1982 and qualified under that name in California on July 21, 1983 – shortly before the merger noted above. (**Exhibit A** at pp. 1-4.) Diamond (USA) Inc. changed its name to Diamond International Corporation on its California qualification documents on December 28, 1983. (Id., at pp. 5-8.) This Diamond International Corporation terminated its qualification in California by filing a Certificate of Surrender of Right to Transact Interstate Business in California on March 21, 1986. (Id., at pp. 9-10.) This Diamond International Corporation dissolved in Delaware on July 1, 2005. As evidenced by the attached corporate records on file with the California Secretary of State, Diamond terminated its qualification in California on March 21, 1986.

To accurately reflect Diamond's corporate status in California, Diamond asks that this Court take judicial notice of the various official corporate records issued by the California Secretary of State and attached hereto as **Exhibit A** pursuant to Evidence Code sections 452(d)(2) and (h). In particular, Evidence Code section 452(d)(2) provides that judicial notice may be taken of records of this state. Evidence Code section 452(h) further provides that judicial notice may be taken of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to resources of reasonably indisputable accuracy.

California courts routinely take judicial notice of corporate records on file with the California Secretary of State. For example, articles of incorporation filed with the Secretary of State are "records" of the state of California and therefore subject to judicial notice under Evidence Code section 452(d). See, Cody F. v. Falletti, 92 Cal. App. 4th 1232, 1237 (2001) (finding that articles of incorporation filed with the Secretary of State were proper subject of judicial notice); Emmons, Williams, Mires & Leech v. State Bar, 6 Cal. App. 3d 565, 568, fn.1 (1970) (taking judicial notice of articles of incorporation of separate nonprofit associations filed with the Secretary of State); Santa Barbara

County Coalition Against Automobile Subsidies v. Santa Barbara

County Assn. of Governments, 167 Cal. App. 4th 1229, 1234, fn.3

(2008) (taking judicial notice of articles of incorporation and fictitious business name statement).

Further, Evidence Code section 453 provides that a trial court shall take judicial notice of any matters specified in section 452 as long as a party requests it, gives each party sufficient notice of the request to enable the adverse party to prepare to meet the request, and furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Finally, California Rule of Court 8.252 and Evidence Code section 459 grants appellate courts the same right and power to take judicial notice as the trial courts. As Diamond did not previously present this matter to the trial court, Diamond brings the instant motion for judicial notice as such materials are relevant to the new issues and theories raised by Plaintiffs and discussed supra.

II.

REQUEST FOR JUDICIAL NOTICE OF NON-CALIFORNIA AUTHORITIES CITED IN ANSWER BRIEF

Respondent further requests that this Court take judicial notice of the following out-of-state authorities cited in its Answer and attached hereto as **Exhibit B** through **Exhibit N**:

Exhibit B	8 Delaware Code § 170
Exhibit C	8 Delaware Code § 241
Exhibit D	8 Delaware Code § 242
Exhibit E	8 Delaware Code § 258
Exhibit F	8 Delaware Code §278
Exhibit G	<u>In re RegO Company</u> (Del. Ch. 1992) 623 A.2d 92
Exhibit H	<u>Territory of the United States Virgin Islands v. Goldman, Sachs & Co.</u> (Del. Ch. 2007) 937 A.2d 760
Exhibit I	<u>In re Dow Chem. Int'l Inc.</u> , 2008 Del. Ch. LEXIS 147
Exhibit J	<u>Marsh v. Rosenbloom</u> (2d Cir. N.Y. 2007) 499 F.3d 165
Exhibit K	<u>Town of Oyster Bay v. Occidental Chemical Corp.</u> (E.D.N.Y. 1997) 987 F.Supp.182

- Exhibit L** In re Flashcom., Inc. Bkrptcy
 (C.D.Cal. 2004) 38 B.R. 485
- Exhibit M** Akande v. Transamerica Airlines, Inc.
 (In re Transamerica Airlines, Inc.),
 2007 Del.Ch. LEXIS 68
- Exhibit N** Oklahoma Gas Co. v. Oklahoma,
 273 U.S. 257, 259-60 (1927)

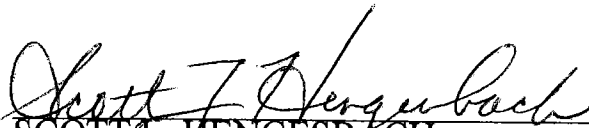
III.

CONCLUSION

For all of the foregoing reasons, Diamond respectfully requests that this Court take judicial notice of **Exhibits A through N** to this Request pursuant to California Rule of Court 8.252 and Evidence Code sections 452, 453, and 459.

DATED: November 15, 2010.

MURCHISON & CUMMING, LLP

By: 
SCOTT C. HENGESBACH
MARIA A. STARN
Attorneys for Defendant and
Respondent, DIAMOND
INTERNATIONAL CORPORATION

Statement and Designation

by

Foreign Corporation

DO NOT WRITE IN THIS SPACE

1147096

FILED

In the office of the Secretary of State
of the State of California

JUL 21 1983

MARCH FONG EU, Secretary of State

By *Jessie Allen*
Deputy

DIAMOND (USA) Inc.

(Name of Corporation)

a corporation organized and existing under the laws of Delaware

(Place or State of incorporation)

makes the following statements and designation:

1. The address of its principal executive office is 161 West Putnam Avenue
Greenwich, Connecticut 06830

(Insert complete address of principal executive office wherever located - Do not use Post Office Box)

2. The address of its principal office in the State of California is 3475 Orange Grove
Avenue, North Highlands 95660

(Insert complete address of principal office in California - Do not use Post Office Box)

DESIGNATION OF AGENT FOR SERVICE OF PROCESS WITHIN THE STATE OF CALIFORNIA

3. (Use this paragraph if the process agent is a natural person.)

a natural person residing in the State of California, whose complete business residence address is

(Do not use Post Office Box)

is designated as its agent upon whom process directed to the corporation may be served within the State of California in the manner provided by law.

NOTE: Either the business address or the residence address must be given. Indicate which by check mark in proper box.

FORM TO BE COMPLETED ON REVERSE SIDE

(Use this paragraph if the process agent is a corporation. See instructions)

United States Corporation Company a corporation
organized and existing under the laws of California

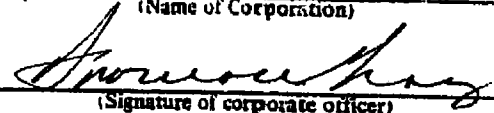
is designated as agent upon whom process directed to the undersigned corporation may be served within the State of California, in the manner provided by law.

NOTE: Before it may be designated by any foreign corporation as its agent for service of process, a corporate agent must comply with Section 1505, California Corporations Code. (See instruction 2.)

5. The undersigned corporation hereby irrevocably consents to service of process directed to it upon the agent designated above, and to service of process on the Secretary of State of the State of California if the agent so designated or the agent's successor is no longer authorized to act or cannot be found at the address given.

DIAMOND (USA) INC.

(Name of Corporation)



(Signature of corporate officer)

Bowman Gray III, Exec Vice Pres.
(Typed name and title of officer signing)

INSTRUCTIONS:

1. There must be annexed to this statement, a certificate by an authorized public official of the state or place of incorporation of the corporation, to the effect that the corporation making the statement is an existing corporation in good standing in that state or place. IF A NONPROFIT CORPORATION IS TO BE QUALIFIED, the certificate must also indicate that the corporation is a nonstock, nonprofit corporation.
2. No domestic corporation may be designated as agent for service of process unless it has filed with the Secretary of State the certificate provided for by Section 1505, Corporations Code, and no foreign corporation may be designated unless it has qualified for the transaction of intrastate business in California and has filed with the Secretary of State of the State of California the certificate provided for by Section 1505, California Corporations Code. A domestic or foreign corporation must be currently authorized to engage in business in this State and be in good standing status on the records of the Secretary of State of the State of California, in order to file a certificate pursuant to this section.

NOTE: A CORPORATION CANNOT ACT FOR ITSELF AS AGENT FOR SERVICE OF PROCESS.

3. If a corporation is required to qualify under a D.B.A. (name other than the true corporate name) pursuant to Section 2106(b), Corporations Code, then in the first line of this statement set out the correct corporate name, followed by "which will do business in California as _____," setting forth the D.B.A. in the space indicated. The D.B.A. should not be set out in connection with the corporate name anywhere else in the statement.
4. If the corporation changes its name or if there are any changes in the information contained in this statement, then the corporation must file an Amended Statement and Designation. A form may be obtained from the Secretary of State.



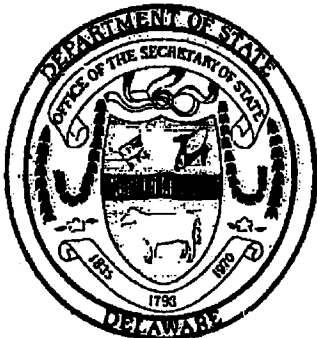
State of DELAWARE



Office of SECRETARY OF STATE

I, Glenn C. Kenton, Secretary of State of the State of Delaware,
do hereby certify that DIAMOND (USA) INC.

is duly incorporated under the laws of the State of Delaware and is in
good standing and has a legal corporate existence so far as the
records of this office show, as of the date below shown.





Glenn C. Kenton, Secretary of State

BY: M. Toon

DATE: July 19, 1983



**Diamond
International**

Diamond International Corporation

733 Third Avenue
New York, New York 10017
212/697-1700

George Pascale
Vice President
Secretary

July 19, 1983


The Secretary of State
of the State of California

Re: Application for Certificate of Authority
by Diamond (USA) Inc.


In connection with the application by Diamond (USA) Inc., a Delaware corporation, for a certificate of authority to transact business in the State of California, the undersigned hereby consents to the use by the above-mentioned corporation of the name "Diamond (USA) Inc." in the State of California.

DIAMOND INTERNATIONAL
CORPORATION

By

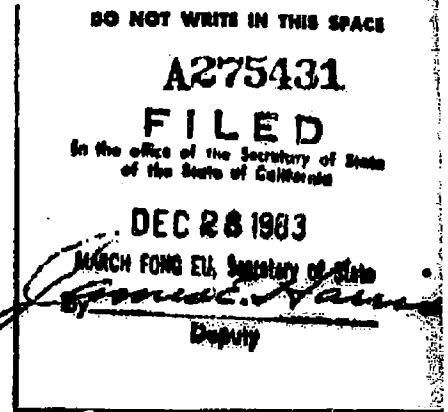

George Pascale
Vice-President and
Secretary

By


Ronald D. Rocheleau
Vice-President and
Treasurer

NAME CHG. TO: DIAMOND INTERNATIONAL CORPORATION
MAIN OFFICE CHANGED

1147096



Amended Statement and Designation by Foreign Corporation

DIAMOND INTERNATIONAL CORPORATION, a corporation
organized and existing under the laws of Delaware

_____ and which is presently qualified for the
transaction of intrastate business in the State of California, makes the following statements and/or
designation:

1. That the name of the corporation has been changed to that hereinabove set forth and that the name
relinquished at the time of such change was DIAMOND (USA) INC.

2. That the location and address of its principal executive office has been changed and the new location
and address of its principal executive office is 733 Third Avenue, New York,
New York 10017
(Insert complete address of principal executive office wherever located—Do not use post office box)

3. That the location and address of its principal office in the State of California has been changed to
No change

(Insert complete address of principal office in California—Do not use post office box)

4. The address of the individual agent designated for the service of process in the State of California has
been changed to N/A

(Do not use post office box)

5. (Use this paragraph if the new process agent designated hereby is a natural person.)

N/A, a natural person residing in
the State of California, whose complete business residence address is _____

(Do not use post office box)

is hereby designated as its new agent upon whom process directed to the corporation may be served within the State of California, in the manner provided by law.

(Note: Either the business address or the residence address must be given. Indicate which by check mark in proper box.)

6. (Use this paragraph if the new process agent designated hereby is a corporation. See instructions.)

The name of its new agent upon whom process directed to the undersigned may be served within the State of California is No change

A certificate in compliance with Section 1505 of the California Corporations Code has been filed by said corporate agent

DIAMOND INTERNATIONAL CORPORATION

(Name of Corporation)

By 

(Title)

Victor Stronski, Vice President

INSTRUCTIONS

1. This form is for use by a foreign corporation. Included in the definition "foreign corporation" is a "foreign association" which is defined as "a business association organized as a trust under the laws of a foreign jurisdiction."

2. Use only whichever of the foregoing paragraphs of this Amended Statement are applicable.

3. If this Amended Statement shows a change of corporate name, there must be attached to this Amended Statement a certificate of the public officer having custody of the original corporation documents in the state or place of incorporation to the effect that such change of name was made in accordance with the laws of the state or place of incorporation. In the case of a change of name by a foreign association there must be attached to this amended statement an officers' certificate stating that such change of name was made in accordance with its declaration of trust.

STATE OF DELAWARE

OFFICE OF SECRETARY OF STATE

I, GLENN C. KENTON, Secretary of State of the State of Delaware, do hereby certify that the Certificate of Incorporation of the "Diamond (USA) Inc.", was received and filed in this office the second day of April, A.D. 1982, at 9 o'clock A.M.

And I do hereby further certify that the said "Diamond (USA) Inc.", filed a Certificate of Designation, on the twelfth day of April, A.D. 1982, at 9 o'clock A.M.

And I do hereby further certify that the said "Diamond (USA) Inc.", filed a Certificate of Designation, on the twelfth day of April, A.D. 1982, at 9 o'clock A.M.

And I do hereby further certify that the said "Diamond (USA) Inc.", filed a Certificate of Ownership, on the tenth day of November, A.D. 1982, at 9 o'clock A.M.

And I do hereby further certify that the said "Diamond (USA) Inc.", filed a Certificate of Ownership, on the thirtieth day of December, A.D. 1982, at 9 o'clock A.M.

And I do hereby further certify that the said "Diamond (USA) Inc.", filed a Certificate of Merger, changing its corporate title to "DIAMOND INTERNATIONAL CORPORATION", on the twenty-ninth day of September, A.D. 1983, at 3:55 o'clock P.M.

And I do hereby further certify that the said "DIAMOND INTERNATIONAL CORPORATION", filed a Restated Certificate of Incorporation, on the twenty-ninth day of September, A.D. 1983, at 3:55 o'clock P.M.

And I do hereby further certify that the aforesaid Certificates are the only Certificates on record of the aforesaid Corporation.

And I do hereby further certify that the aforesaid Corporation is duly incorporated under the laws of the State of Delaware and is in good standing and has a legal corporate existence not having been cancelled or dissolved so far as the records of this office show and is duly authorized to transact business.

And I do hereby further certify that the Annual Reports have been filed to date.

IN TESTIMONY WHEREOF, I have hereunto set my hand
and official seal at Dover this third
day of November in the year of our Lord one
thousand nine hundred and eighty-three.




Glenn C. Kenton, Secretary of State



State
of
DELAWARE

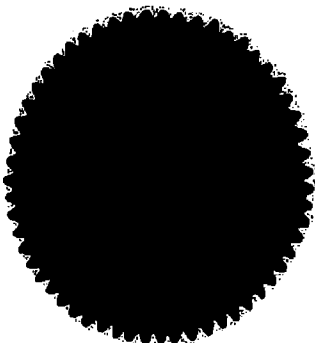


Office of SECRETARY OF STATE

I, Glenn C. Kenton Secretary of State of the State of Delaware,
do hereby certify that the Certificate of Merger of the "DIAMOND INTERNATIONAL
CORPORATION", merging with and into the "DIAMOND (USA) INC.", under the name of
"DIAMOND INTERNATIONAL CORPORATION", was received and filed in this office the
twenty-ninth day of September, A.D. 1983, at 3:55 o'clock P.M.

And I do hereby further certify that upon filing of the aforesaid Certificate
of Merger, the corporate existence of the "DIAMOND INTERNATIONAL CORPORATION, terminated.

In Testimony Whereof, *I have hereunto set my hand*
and official seal at Dover this third *day*
of November *in the year of our Lord*
one thousand nine hundred and eighty-three.




Glenn C. Kenton, Secretary of State

114 7096

**CERTIFICATE OF SURRENDER OF RIGHT TO TRANACT
INTRASTATE BUSINESS**

DO NOT WRITE IN THIS SPACE

D201849

FILED

In the office of the Secretary of State
of the State of California

MAR 21 1986

March Fong Eu
MARCH FONG EU, Secretary of State

On behalf and by authority of DIAMOND INTERNATIONAL CORPORATION

_____, a corporation organized and
existing under the laws of Delaware, the
undersigned, Victor Stronski Vice President
(Corporate Officer) (Title)
_____, of said corporation,

does hereby certify and declare:

1. Said corporation hereby surrenders its right and authority to transact intrastate business in the State of California.
2. Said corporation hereby revokes its designation of agent for the service of process in California.
3. Said corporation consents that process against it in any action upon any liability or obligation incurred within the State of California prior to the filing of this Certificate of Surrender of Right to Transact Intrastate Business may be served upon the Secretary of State of the State of California.
4. The post office address to which the Secretary of State may mail copies of any process against

the corporation that is served upon him is 650 Fifth Avenue
Suite 2400
New York, NY 10019

Dated: FEBRUARY 8, 1985

Victor Stronski

(Corporate Officer) (Title)

Victor Stronski

Vice President



STATE OF CALIFORNIA
FRANCHISE TAX BOARD
SACRAMENTO, CALIFORNIA 95857
TELEPHONE (916) 369-4124

March 12, 1986

MAR 12 1986
**TAX CLEARANCE
CERTIFICATE**

EXPIRATION DATE: June 13, 1986

DIAMOND INTERNATIONAL CORPORATION
650 Fifth Avenue, Suite 2400
New York, NY 10019-6179

ISSUED TO: DIAMOND INTERNATIONAL CORPORATION
Corporate Number 1147096

THIS IS TO CERTIFY THAT all taxes imposed on the above corporation under the Bank and Corporation Tax Law have been paid or are secured by bond deposit or other security.

A copy of this Tax Clearance Certificate has been sent to the Office of the Secretary of State at Sacramento, California. The original of this certificate may be retained for the files of the corporation.

The required Secretary of State forms to dissolve, withdraw, or merge must be obtained from and filed with the Office of the Secretary of State at 1230 J. Street, Sacramento, CA 95814 by the EXPIRATION DATE of this notice.

NOTE: If the above process is NOT completed with the Office of the Secretary of State prior to the expiration date, the corporation remains subject to the filing requirements of the Bank and Corporation Tax Law.

FRANCHISE TAX BOARD

By J. Snyder
Tax Clearance Unit
Corporation Audit
Telephone (916) 369-4124

JS:mh

FTB 2570-ATS (REV. 1-85)

SECRETARY OF STATE



I hereby certify that the foregoing transcript of 10 page(s) is a full, true and correct copy of the original record in the custody of the California Secretary of State's office.

KIM

NOV 05 2010

Date: _____

Debra Bowen

DEBRA BOWEN, Secretary of State



4 of 8 DOCUMENTS

DELAWARE CODE ANNOTATED
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All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH 77 DEL. LAWS, CH. 476 ***
*** ANNOTATIONS CURRENT THROUGH CASES POSTED AS OF SEPTEMBER 3, 2010 ***

TITLE 8. CORPORATIONS
CHAPTER 1. GENERAL CORPORATION LAW
SUBCHAPTER V. STOCK AND DIVIDENDS

GO TO DELAWARE STATUTES ARCHIVE DIRECTORY

8 Del. C. § 170 (2010)

§ 170. Dividends; payment; wasting asset corporations

(a) The directors of every corporation, subject to any restrictions contained in its certificate of incorporation, may declare and pay dividends upon the shares of its capital stock either (1) out of its surplus, as defined in and computed in accordance with §§ 154 and 244 of this title, or (2) in case there shall be no such surplus, out of its net profits for the fiscal year in which the dividend is declared and/or the preceding fiscal year. If the capital of the corporation, computed in accordance with §§ 154 and 244 of this title, shall have been diminished by depreciation in the value of its property, or by losses, or otherwise, to an amount less than the aggregate amount of the capital represented by the issued and outstanding stock of all classes having a preference upon the distribution of assets, the directors of such corporation shall not declare and pay out of such net profits any dividends upon any shares of any classes of its capital stock until the deficiency in the amount of capital represented by the issued and outstanding stock of all classes having a preference upon the distribution of assets shall have been repaired. Nothing in this subsection shall invalidate or other-

wise affect a note, debenture or other obligation of the corporation paid by it as a dividend on shares of its stock, or any payment made thereon, if at the time such note, debenture or obligation was delivered by the corporation, the corporation had either surplus or net profits as provided in clause (1) or (2) of this subsection from which the dividend could lawfully have been paid.

(b) Subject to any restrictions contained in its certificate of incorporation, the directors of any corporation engaged in the exploitation of wasting assets (including but not limited to a corporation engaged in the exploitation of natural resources or other wasting assets, including patents, or engaged primarily in the liquidation of specific assets) may determine the net profits derived from the exploitation of such wasting assets or the net proceeds derived from such liquidation without taking into consideration the depletion of such assets resulting from lapse of time, consumption, liquidation or exploitation of such assets.

HISTORY: 8 Del. C. 1953, § 170; 56 Del. Laws, c. 50; 56 Del. Laws, c. 186, § 9; 59 Del. Laws, c. 106, § 5; 64 Del. Laws, c. 112, § 17; 67 Del. Laws, c. 376, § 5; 69 Del. Laws, c. 61, § 3; 72 Del. Laws, c. 123, § 3; 77 Del. Laws, c. 253, § 18.

NOTES: CROSS REFERENCES. --As to dividends on stock of cooperative agriculture associations, see § 8532 of Title 3. As to dividends of state banks and trust companies, see § 748 of Title 5. As to dividends of building and loan associations, see § 1904 of Title 5.

REVISOR'S NOTE. --Section 13 of 72 Del. Laws, c. 123, provides: "This act shall become effective July 1, 1999." The act was signed by the Governor on July 2, 1999.

Section 71 of 77 Del. Laws, c. 253, provides: "Effective date. Sections 1 through 46, 51 through 60, and 63 through 70 shall be effective on August 1, 2010."

EFFECT OF AMENDMENTS. --77 Del. Laws, c. 253, deleted "or to its members if the corporation is a nonstock corporation" preceding "either (1)" in the first sentence of (a).

PAYMENT TO STOCKHOLDERS AS RETURN UPON THEIR INVESTMENT IS, IN GENERAL, TERMED A DIVIDEND. Penington v. Commonwealth Hotel Constr. Corp., 17 Del. Ch. 394, 155 A. 514 (1931).

AND DIVIDEND IS SUM OF MONEY OR PORTION OF DIVISIBLE THING TO BE DISTRIBUTED ACCORDING TO SOME FIXED SCHEME. Penington v. Commonwealth Hotel Constr. Corp., 17 Del. Ch. 394, 155 A. 514 (1931).



1 of 1 DOCUMENT

DELAWARE CODE ANNOTATED
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*** THIS DOCUMENT IS CURRENT THROUGH 77 DEL. LAWS, CH. 476 ***
*** ANNOTATIONS CURRENT THROUGH CASES POSTED AS OF SEPTEMBER 3, 2010 ***

TITLE 8. CORPORATIONS
CHAPTER 1. GENERAL CORPORATION LAW
SUBCHAPTER VIII. AMENDMENT OF CERTIFICATE OF INCORPORATION;
CHANGES IN CAPITAL AND CAPITAL STOCK

GO TO DELAWARE STATUTES ARCHIVE DIRECTORY

8 Del. C. § 241 (2010)

§ 241. Amendment of certificate of incorporation before receipt of payment for stock

(a) Before a corporation has received any payment for any of its stock, it may amend its certificate of incorporation at any time or times, in any and as many respects as may be desired, so long as its certificate of incorporation as amended would contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation filed at the time of filing the amendment.

(b) The amendment of a certificate of incorporation authorized by this section shall be adopted by a majority of the incorporators, if directors were not named in the original certificate of incorporation or have not yet been elected, or, if directors were named in the original certificate of incorporation or have been elected and have qualified, by a majority of the directors. A certificate setting forth the amendment and certifying that the corporation has not received any payment for any of its stock, or that the corporation has no members, as applicable, and that the amendment has been duly adopted in accordance with this section shall be executed, acknowledged and filed in

accordance with § 103 of this title. Upon such filing, the corporation's certificate of incorporation shall be deemed to be amended accordingly as of the date on which the original certificate of incorporation became effective, except as to those persons who are substantially and adversely affected by the amendment and as to those persons the amendment shall be effective from the filing date.

(c) This section will apply to a nonstock corporation before such a corporation has any members; provided, however, that all references to directors shall be deemed to be references to members of the governing body of the corporation.

HISTORY: 8 Del. C. 1953, § 241; 56 Del. Laws, c. 50; 64 Del. Laws, c. 112, § 23; 70 Del. Laws, c. 587, § 13; 77 Del. Laws, c. 253, §§ 31, 32.

NOTES: REVISOR'S NOTE. --Section 71 of 77 Del. Laws, c. 253, provides: "Effective date. Sections 1 through 46, 51 through 60, and 63 through 70 shall be effective on August 1, 2010."

EFFECT OF AMENDMENTS. --77 Del. Laws, c. 253, inserted "or that the corporation has no members, as applicable" in the second sentence of (b); and added (c).

SHAREHOLDER APPROVAL NOT REQUIRED. --Normally, a proposed amendment to the certificate of incorporation must be submitted to a vote of the corporation's stockholders entitled to vote thereon; there are two exceptions which are pertinent: first, if a corporation has not yet received payment for its shares, the board of directors may amend the certificate by board action alone; second, if a corporation has no capital stock, the governing body may approve a certificate amendment, on its own. *Farahpour v. DCX, Inc.*, 635 A.2d 894 (Del. 1994).

NOTES APPLICABLE TO ENTIRE TITLE

CROSS REFERENCES. --As to corporation law for cooperative agriculture associations, see Chapter 85 of Title 3. As to corporation law for state banks and trust companies, see Chapter 7 of Title 5. As to building and loan associations generally, see Chapter 19 of Title 5. As to violation of game and fish laws by corporation, see § 1305 of Title 7. As to Division of Corporations within Department of State, see § 8704 of Title 29. As to transfer of all powers, duties and functions vested in Secretary of State by this title to Division of Corporations of Department of State, see § 8704 of Title 29.

NOTES APPLICABLE TO ENTIRE CHAPTER

CROSS REFERENCES. --As to applicability of general corporation law to professional service corporations, see § 618 of this title. As to constitutional provisions relative to corporations, see Del. Const., art. IX. As to insurance corporations generally, see Title 18. As to inapplicability of general corporation laws to foreign insurers, see § 523 of Title 18. As to organization, corporate powers and procedures of domestic stock and mutual insurers, see Chapter 49 of Title 18. As to registration by insurance holding companies, see Chapter 50 of Title 18. As to health service corporations generally, see Chapter 63 of Title 18. As to corporation income tax generally, see Chapter 19 of Title 30.

NOTES APPLICABLE TO ENTIRE SUBCHAPTER

CROSS REFERENCES. --As to amendment of charter of state banks and trust companies, see § 749 of Title 5. As to transfer of powers, duties and functions vested in Secretary of State by this title to Division of Corporations of Department of State, see § 8704 of Title 29.



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TITLE 8. CORPORATIONS
CHAPTER 1. GENERAL CORPORATION LAW
SUBCHAPTER VIII. AMENDMENT OF CERTIFICATE OF INCORPORATION;
CHANGES IN CAPITAL AND CAPITAL STOCK

GO TO DELAWARE STATUTES ARCHIVE DIRECTORY

8 Del. C. § 242 (2010)

§ 242. Amendment of certificate of incorporation after receipt of payment for stock; nonstock corporations

(a) After a corporation has received payment for any of its capital stock, or after a nonstock corporation has members, it may amend its certificate of incorporation, from time to time, in any and as many respects as may be desired, so long as its certificate of incorporation as amended would contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation filed at the time of the filing of the amendment; and, if a change in stock or the rights of stockholders, or an exchange, reclassification, subdivision, combination or cancellation of stock or rights of stockholders is to be made, such provisions as may be necessary to effect such change, exchange, reclassification, subdivision, combination or cancellation. In particular, and without limitation upon such general power of amendment, a corporation may amend its certificate of incorporation, from time to time, so as:

(1) To change its corporate name; or

(2) To change, substitute, enlarge or diminish the nature of its business or its corporate powers and purposes; or

(3) To increase or decrease its authorized capital stock or to reclassify the same, by changing the number, par value, designations, preferences, or relative, participating, optional, or other special rights of the shares, or the qualifications, limitations or restrictions of such rights, or by changing shares with par value into shares without par value, or shares without par value into shares with par value either with or without increasing or decreasing the number of shares, or by subdividing or combining the outstanding shares of any class or series of a class of shares into a greater or lesser number of outstanding shares; or

(4) To cancel or otherwise affect the right of the holders of the shares of any class to receive dividends which have accrued but have not been declared; or

(5) To create new classes of stock having rights and preferences either prior and superior or subordinate and inferior to the stock of any class then authorized, whether issued or unissued; or

(6) To change the period of its duration.

Any or all such changes or alterations may be effected by 1 certificate of amendment.

(b) Every amendment authorized by subsection (a) of this section shall be made and effected in the following manner:

(1) If the corporation has capital stock, its board of directors shall adopt a resolution setting forth the amendment proposed, declaring its advisability, and either calling a special meeting of the stockholders entitled to vote in respect thereof for the consideration of such amendment or directing that the amendment proposed be considered at the next annual meeting of the stockholders. Such special or annual meeting shall be called and held upon notice in accordance with § 222 of this title. The notice shall set forth such amendment in full or a brief summary of the changes to be effected thereby. At the meeting a vote of the stockholders entitled to vote thereon shall be taken for and against the proposed amendment. If a majority of the outstanding stock entitled to vote thereon, and a majority of the outstanding stock of each class entitled to vote thereon as a class has been voted in favor of the amendment, a certificate setting forth the amendment and certifying that such amendment has been duly adopted in accordance with this section shall be executed, acknowledged and filed and shall become effective in accordance with § 103 of this title.

(2) The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase or decrease the aggregate

number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely. If any proposed amendment would alter or change the powers, preferences, or special rights of 1 or more series of any class so as to affect them adversely, but shall not so affect the entire class, then only the shares of the series so affected by the amendment shall be considered a separate class for the purposes of this paragraph. The number of authorized shares of any such class or classes of stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote irrespective of this subsection, if so provided in the original certificate of incorporation, in any amendment thereto which created such class or classes of stock or which was adopted prior to the issuance of any shares of such class or classes of stock, or in any amendment thereto which was authorized by a resolution or resolutions adopted by the affirmative vote of the holders of a majority of such class or classes of stock.

(3) If the corporation is a nonstock corporation, then the governing body thereof shall adopt a resolution setting forth the amendment proposed and declaring its advisability. If a majority of all the members of the governing body shall vote in favor of such amendment, a certificate thereof shall be executed, acknowledged and filed and shall become effective in accordance with § 103 of this title. The certificate of incorporation of any nonstock corporation may contain a provision requiring any amendment thereto to be approved by a specified number or percentage of the members or of any specified class of members of such corporation in which event such proposed amendment shall be submitted to the members or to any specified class of members of such corporation in the same manner, so far as applicable, as is provided in this section for an amendment to the certificate of incorporation of a stock corporation; and in the event of the adoption thereof by such members, a certificate evidencing such amendment shall be executed, acknowledged and filed and shall become effective in accordance with § 103 of this title.

(4) Whenever the certificate of incorporation shall require for action by the board of directors of a corporation other than a nonstock corporation or by the governing body of a nonstock corporation, by the holders of any class or series of shares or by the members, or by the holders of any other securities having voting power the vote of a greater number or proportion than is required by any section of this title, the provision of the certificate of incorporation requiring such greater vote shall not be altered, amended or repealed except by such greater vote.

(c) The resolution authorizing a proposed amendment to the certificate of incorporation may provide that at any time prior to the effectiveness of the filing of the

amendment with the Secretary of State, notwithstanding authorization of the proposed amendment by the stockholders of the corporation or by the members of a non-stock corporation, the board of directors or governing body may abandon such proposed amendment without further action by the stockholders or members.

HISTORY: 8 Del. C. 1953, § 242; 56 Del. Laws, c. 50; 57 Del. Laws, c. 148, §§ 18-21; 59 Del. Laws, c. 106, § 7; 63 Del. Laws, c. 25, § 12; 64 Del. Laws, c. 112, § 24; 67 Del. Laws, c. 376, § 10; 70 Del. Laws, c. 349, §§ 5-7; 70 Del. Laws, c. 587, § 14, 15; 72 Del. Laws, c. 123, § 5; 77 Del. Laws, c. 253, §§ 33-35; 77 Del. Laws, c. 290, § 7.

NOTES: REVISOR'S NOTE. --Section 13 of 72 Del. Laws, c. 123, provides: "This act shall become effective July 1, 1999." The act was signed by the Governor on July 2, 1999.

Section 71 of 77 Del. Laws, c. 253, provides: "Effective date. Sections 1 through 46, 51 through 60, and 63 through 70 shall be effective on August 1, 2010."

Section 36 of 77 Del. Laws, c. 290, provided in part: "Sections 1-15 and §§ 18-35 shall be effective on August 2, 2010."

EFFECT OF AMENDMENTS. --77 Del. Laws, c. 253, inserted "or after a nonstock corporation has members" in the first sentence of (a); in (b)(3), substituted "is a non-stock corporation" for "has no capital stock" in the first sentence, in the third sentence substituted "nonstock" for "such", deleted "without capital stock" preceding "may contain" and preceding "in the same"; and, in (b)(4), inserted "of a corporation other than a nonstock corporation or by the governing body of a nonstock corporation" and "members, or by the".

77 Del. Laws, c. 290, deleted "as the directors shall deem advisable" from the end of the third sentence of (b)(1).

THIS SECTION WAS DESIGNED PRIMARILY FOR CONVENIENCE OF CORPORATION. State ex rel. RCA v. Benson, 32 Del. 576, 128 A. 107 (1924).

LEGISLATIVE INTENT OF SUBSECTIONS (B)(2) AND (B)(3). --The contrasting provisions of subsections (b)(2) and (b)(3) regarding class approval of decisions which might adversely affect the class reflect a legislative intent to provide fewer voting rights, of pure statutory origin, to members of nonstock corporations in the adoption of amendments to the certificate of incorporation; in sum, such members have neither a right to vote on an amendment generally nor a right to vote on an amend-



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TITLE 8. CORPORATIONS
CHAPTER 1. GENERAL CORPORATION LAW
SUBCHAPTER IX. MERGER, CONSOLIDATION OR CONVERSION

GO TO DELAWARE STATUTES ARCHIVE DIRECTORY

8 Del. C. § 258 (2010)

§ 258. Merger or consolidation of domestic and foreign stock and nonstock corporations

(a) Any 1 or more corporations of this State, whether stock or nonstock corporations and whether or not organized for profit, may merge or consolidate with 1 or more other corporations of any other state or states of the United States or of the District of Columbia whether stock or nonstock corporations and whether or not organized for profit, if the laws under which the other corporation or corporations are formed shall permit such a corporation of such jurisdiction to merge with a corporation of another jurisdiction. The constituent corporations may merge into a single corporation, which may be any 1 of the constituent corporations, or they may consolidate into a new corporation formed by the consolidation, which may be a corporation of the place of incorporation of any 1 of the constituent corporations, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section. The surviving or new corporation may be ei-

ther a stock corporation or a nonstock corporation, as shall be specified in the agreement of merger required by subsection (b) of this section.

(b) The method and procedure to be followed by the constituent corporations so merging or consolidating shall be as prescribed in § 257 of this title in the case of Delaware corporations. The agreement of merger or consolidation shall also set forth such other matters or provisions as shall then be required to be set forth in certificates of incorporation by the laws of the state which are stated in the agreement to be the laws which shall govern the surviving or resulting corporation and that can be stated in the case of a merger or consolidation. The agreement, in the case of foreign corporations, shall be adopted, approved, certified, executed and acknowledged by each of the constituent foreign corporations in accordance with the laws under which each is formed.

(c) The requirements of § 252(d) of this title as to the appointment of the Secretary of State to receive process and the manner of serving the same in the event the surviving or new corporation is to be governed by the laws of any other state shall also apply to mergers or consolidations effected under this section. Section 251(e) of this title shall apply to mergers effected under this section if the surviving corporation is a corporation of this State; § 251(d) of this title shall apply to any constituent corporation participating in a merger or consolidation under this section (provided, however, that for purposes of a constituent nonstock corporation, references to the board of directors, to stockholders, and to shares shall be deemed to be references to the governing body of the corporation, to members of the corporation, and to memberships or membership interests of the corporation, as applicable, respectively); and § 251(f) of this title shall apply to any constituent stock corporation participating in a merger under this section.

(d) Nothing in this section shall be deemed to authorize the merger of a charitable nonstock corporation into a stock corporation, if the charitable status of such nonstock corporation would thereby be lost or impaired; but a stock corporation may be merged into a charitable nonstock corporation which shall continue as the surviving corporation.

HISTORY: 8 Del. C. 1953, § 258; 56 Del. Laws, c. 50; 56 Del. Laws, c. 186, § 22; 57 Del. Laws, c. 148, § 26; 76 Del. Laws, c. 145, § 10; 77 Del. Laws, c. 253, §§ 45, 46.

NOTES: REVISOR'S NOTE. --Section 17 of 76 Del. Law, c. 145, provided: "Sections 1 through 10 shall be effective on August 1, 2007."

Section 71 of 77 Del. Laws, c. 253, provided: "Effective date. Sections 1 through 46, 51 through 60, and 63 through 70 shall be effective on August 1, 2010."

EFFECT OF AMENDMENTS. --76 Del. Laws, c. 145, inserted "certified" in the last sentence in (b).

77 Del. Laws, c. 253, substituted "nonstock" for "membership" in the last sentence of (a); in the last sentence of (c), deleted "stock" following the first occurrence of "any constituent" and inserted the parenthetical proviso.

LexisNexis 50 State Surveys, Legislation & Regulations

Mergers & Acquisitions

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, subchapter, chapter, part or title.



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TITLE 8. CORPORATIONS
CHAPTER 1. GENERAL CORPORATION LAW
SUBCHAPTER X. SALE OF ASSETS, DISSOLUTION AND WINDING UP

GO TO DELAWARE STATUTES ARCHIVE DIRECTORY

8 Del. C. § 278 (2010)

§ 278. Continuation of corporation after dissolution for purposes of suit and winding up affairs

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees

therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.

Sections 279 through 282 of this title shall apply to any corporation that has expired by its own limitation, and when so applied, all references in those sections to a dissolved corporation or dissolution shall include a corporation that has expired by its own limitation and to such expiration, respectively.

HISTORY: 8 Del. C. 1953, § 278; 56 Del. Laws, c. 50; 66 Del. Laws, c. 136, § 36; 77 Del. Laws, c. 290, § 26.

NOTES: REVISOR'S NOTE. --Section 36 of 77 Del. Laws, c. 290, provided in part: "Sections 1-15 and §§ 18-35 shall be effective on August 2, 2010."

EFFECT OF AMENDMENTS. --77 Del. Laws, c. 290, added the last paragraph.

LexisNexis 50 State Surveys, Legislation & Regulations

Dissolution & Liquidation of General Business Forms

INTENT OF THIS SECTION is merely to permit the Court of Chancery, in its discretion, and prior to the expiration of 3 years from the date of dissolution, to continue corporate existence for such an additional period of time beyond 3 years as might be required in order to permit a corporation to complete the winding up of its affairs. *In re Citadel Indus., Inc.*, 423 A.2d 500 (Del. Ch. 1980).

THIS SECTION CREATES NEW RIGHT OF SUBSTANCE, for at common law a dissolved corporation could neither sue nor be sued. *International Pulp Equip. Co. v. St. Regis Kraft Co.*, 54 F. Supp. 745 (D. Del. 1944).

SECTION LIBERALLY CONSTRUED. --When considered together, this section, authorizing suit within 3 years after dissolution, and § 321 of this title, concerning service of legal process on corporation, both remedial in nature, must be liberally construed. *International Pulp Equip. Co. v. St. Regis Kraft Co.*, 54 F. Supp. 745 (D. Del. 1944).

SECTION EXPANDS EQUITABLE DOCTRINE PRECLUDING ESCHEAT. -- This section is in effect a statutory expansion of the equitable doctrine that upon dissolution of a corporation its property, notwithstanding the technical rules of the early common law, does not escheat to the sovereign or revert to the original grantor, and will be administered in chancery for the purpose of winding up the corporate affairs



LEXSEE 623 A.2D 92

IN RE REGO COMPANY

Civil Action No. 11651

**COURT OF CHANCERY OF DELAWARE, NEW CAS-
TLE**

623 A.2d 92; 1992 Del. Ch. LEXIS 205

August 26, 1992, Submitted

October 16, 1992, Decided

SUBSEQUENT HISTORY: As Re-vised October 22, 1992. Released for Publication April 15, 1993 in accordance with Supreme Court Rule 93.

COUNSEL: [**1] A. Gilchrist Sparks, III, Esquire and David G. Thunhorst, Esquire, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; Attorneys for Petitioner.

Robert K. Payson, Esquire, Michael D. Goldman, Esquire and Stephen C. Norman, Esquire, of POTTER ANDERSON & CORROON, Wilmington, Delaware; OF COUNSEL: KATTEN, MUCHIN, ZAVIS & WEITZMAN, Los Angeles, California; Attorneys for Emerson Electric Company, Claimant.

Clark W. Furlow, Esquire and Michele C. Gott, Esquire, of SMITH, KATZENSTEIN & FURLOW, Wilmington, Delaware; Guardian Ad Litem.

Thomas J. Allingham, II, Esquire and Robert A. Glen, Esquire, of SKADDEN, ARPS, SLATE, MEAGHER & FLOM, Wilmington, Delaware; OF COUNSEL: LOCKE, PURNELL, RAIN & HARRELL, Dallas, Texas; Attorneys for Trinity Industries.

Elizabeth McGeever, Esquire of PRICKETT, JONES, ELLIOTT, KRISTOL & SCHNEE, Wilmington, Delaware; OF COUNSEL: FOLEY & LARDNER, Washington, D.C.; Attorneys for Matheson Gas Products, Inc.

James W. Semple, Esquire and Thaddeus J. Weaver, Esquire of MORRIS, JAMES, HITCHENS & WILLIAMS, Wilmington, Delaware; Attorneys for Empire Gas, Inc. of Jacksonville.

Allen M. Terrell, Jr., Esquire and David L. Zicherman, Esquire, of RICHARDS, [**2] LAYTON & FINGER, Wilmington, Delaware; OF COUNSEL: ADAMS, KLEEMEIR, HAGAN, HANNAH & FOUTS, Greensboro, North Carolina; Attorneys for Engineered Controls International, Inc.

JUDGES: ALLEN

OPINION BY: ALLEN

OPINION

[*94] *OPINION*

ALLEN, Chancellor

This is an action under recently enacted provisions of the Delaware General Corporation Law creating a procedure by which a dissolved Delaware corporation may achieve, after a judicial proceeding, court approval of a plan of security for corporate claimants. The effects of such approval include (1) the preclusion of liability on the part of the directors of the dissolved corporation to claimants of the dissolved corporation for matters arising out of the making of liquidation distributions, (2) the limitation of potential liability of stockholders to the lesser of a *pro rata* share of each claim against the corporation, or the

amount distributed in dissolution, and (3) the establishment of a limitations period for actions against stockholders on claims against the corporation. *See 8 Del. C. §§ 280-282 (1991).*

These statutory provisions are innovative. They provide a judicial mechanism designed to afford fair treatment to foreseeable future, yet unknown claimants [**3] of a dissolved corporation, while providing corporate directors with a mechanism that will both permit distributions on corporate dissolution, and avoid risk that a future corporate claimant will, at some future time, be able to establish that such distribution was in violation of any duty owed to the corporation's creditors on dissolution.

This petition provides the first application of these novel statutory enactments. *Cf. Gans v. MDR Liquidating Corporation*, Del. Ch., C.A. 9630, Hartnett, V.C. (Jan. 10, 1990) (dicta). Applicant, RegO Company, a Delaware corporation, filed a certificate of dissolution with the Delaware Secretary of State on February 3, 1989. On February 28, 1991, it filed its petition in this case seeking judicial approval of the security aspects of a plan of dissolution pursuant to which RegO would transfer all of its assets -- approximately \$ 36,000,000 in receivables and intangible assets (including its tradename and rights under an insurance policy) -- to a trustee, to be held and administered pursuant to a Claimants Trust principally for the benefit of its present and future creditors.

The case is before the court on exceptions to the February 14, 1992 [**4] Final Report of Ann E. C. Stilson, Esquire, who was appointed Master in Chancery *pro hac vice*. Speaking generally, the Master's Final Report recommends the approval of the plan proposed by the Company with several modifications, to which, for the most part, the Company takes no exception. Contestants at this stage include the Company; Emerson Electric Company, who in other jurisdictions is presently asserting cross-claims and rights to contribution or indemnification against the Company in pending product liability suits; and Clark W. Furlow, Esquire, who, pursuant to *Section 280(c)(2)*, was appointed guardian ad litem in this proceeding to represent the interests of future unknown corporate claimants. ¹

1 A number of other claimants participated in the proceeding before the Master but have not actively participated on this review.

For the reasons set forth below I am unable to accept the Final Report in all respects. I conclude that, as presently constituted, the security aspects of the Company's plan of final [**5] distribution are not sufficient to meet the statutory requirements. In what follows, this judgment is explained and particularized, and acceptable alternatives are described.

That explanation is involved, as the legal questions raised by this application are of some complexity. To address

them requires, as a predicate, an understanding of the problem that the new statutory structure addresses (Part I-A, below); and an understanding of the new statutes' structure (Part I-B). Next the background of the dissolution insofar as it is necessary to understand the parties positions is set forth (Parts II & III) and the terms if the Claimants Trust are outlined (Part IV). The central issues are identified (Part V). Thereafter the principal exceptions of Emerson (Part VI and of the guardian (Part VII) will be considered. Lastly, I address a subordinate issue, concerning termination [**95] of the trust. In a supplemental opinion issued today, I also address the question of the identity of the trustee and a series of administrative provisions of the proposed trust.

I.

A. *The Legal Problem With Which the New Statutes Deal*

The law concerning the existence and scope of director and shareholder [**6] liability for corporate obligations following the dissolution of a corporation is an evolving one of some complexity and uncertainty. ² At an early stage of our law, that law was clear, if harsh. Dissolution of a corporation was its civil death; not only could the corporation not thereafter be sued, but pending suits against it abated. ³ Corporate dissolution thus stood as a substantial risk to corporate creditors, threatening to deprive them of a party to sue on their claims. The trust fund doctrine very early

evolved, in part, to offer some protection to corporate creditors when dissolution occurred. While in some of its aspects the trust fund doctrine has had a varied history, its central concepts have been widely acknowledged. Those core concepts are that on dissolution corporate directors have obligations to creditors and that creditors, at least creditors of whom the corporation had reason to know, have an equitable right to follow corporate assets and to impress a constructive trust upon them in the hands of shareholders.

UNKNOWN

2 See generally Harry Henn & John R. Alexander, *Effects of Corporate Dissolution on Product Liability Claims*, 56 Cornell L. Rev. 865 (1971); Michael Green, *Successor Liability*, 72 Cornell L. Rev. 17 (1986); Mark R. Sarlitto, *Recognizing Product Liability Claims at Dissolution*, 87 Colum. L. Rev. 1048 (1987); Mark Roe, *Mergers, Acquisitions and Tort: A Comment on the Problem of Successor Corporate Liability*, 70 Va. L. Rev. 1559, 1564 (1984).

[**7]

3 See *In re Citadel Industries, Inc.*, Del. Ch., 423 A.2d 500, 503 (1980); *Johnson v. Helicopter & Airplane Services Corp.*, 404 F.Supp. 726, 730 (D.Del. 1975); *Stone v. Gibson Refrigerator Sales Corp.*, 366 F.Supp. 733, 734 (E.D.Pa. 1973) (in absence of con-

trary statutory provision, dissolution terminates all rights against a corporation); *Crossman v. Vivienda Water Co.*, Cal. Supr., 89 P. 335 (1907); *Canadian Ace Brewing Co. v. Anheuser-Busch, Inc.*, 448 F. Supp. 769, 771 (N.D. Ill. 1978); *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 259 (1927).

4 The doctrine which is employed in insolvency settings as well as in formal dissolution, traces its roots to Justice Story's opinions in *Wood v. Drummer*, 3 Mason C.C. Rpts. 308, Fed. Cas. No. 17,944 (1824) and *Mumma v. The Pototmac Company*, 33 U.S. (8 Pet.) 281 (1834).

5 *Fogg v. Blair*, 133 U.S. 534 (1890) (rejecting creditor's attempt to use trust fund theory to defeat priority of other creditors); *Central Hanover Bank & Trust Co. v. United Traction Co.*, 95 F.2d 50, 55 (2d Cir. 1938) ("in no real sense are the assets of an insolvent debtor a trust fund for creditors"); *Patek v. California Cotton Mills*, Cal. App., 40 P.2d 927, 930 (1935). See generally 15A Fletcher's Cyc. Corp. §§ 7384-85 (Perm Ed. 1990).

[**8]

6 E.g., *Koch v. United States*, 138 F.2d 850, 852 (10th Cir. 1943); *Trubowitch v. Riverbank Canning Co.*, Cal. Supr., 182 P.2d 182 (1947); *Snyder v. Nathan*, 353 F.2d 3 (7th Cir. 1965). Cf. *Bovay v.*

H.M. Bullesby & Co., Del. Supr., 38 A.2d 808, 813 (1944) (involving an insolvent but not a dissolved corporation); *Geyer v. Ingerwoll Publication Company, Del. Ch., C.A. 12406, Chandler, V.C. (June 18, 1992)*.

Modernly, the problem that the trust fund doctrine addresses has been ameliorated by provisions in the corporate codes of most or all jurisdictions that continue the existence of the corporation as a jural entity for limited purposes following dissolution. Now, by statute, we have a formal winding-up period in which claims can be asserted, settled or adjudicated. *See, e.g., 8 Del. C. § 278 (1991)*. Moreover, under modern statutes, any suit against the corporation, which was filed before dissolution or during the three year statutory wind-up period, does not abate, [*9] even on the expiration of the wind-up period. 7

7 Section 278 of the Delaware General Corporation Law provides in part:

With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or

decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.

[*96] This modern scheme still leaves open the question, what, if any, rights are afforded to persons who have no claim against a corporation at the time of its dissolution, or during the statutory wind-up period, but who do thereafter acquire such a claim. Such a person might, for example, be a tort claimant who is injured by an arguably defective product some [**10] time after, perhaps years after, the corporation has been dissolved, and its affairs finally wound-up. It would seem apparent that such a person could not sue the dissolved corporation itself. Section 278 continues the corporation's existence beyond the statutory three year winding-up period "solely" for the purpose of concluding pending litigation. *In re Citadel Industries, Inc., Del. Ch., 423 A.2d 500 (1980)*. * But has such a person cognizable claim against others -- against directors or shareholders most notably?

8 *In Citadel* the court refused to grant an application, made after the three year winding-up period had expired, to "continue" a dissolved corporation's existence to permit the institution of litigation against it.

This I take to be an unclear and a troubling question. A number of cases in other jurisdictions have held that directors or shareholders of a dissolved cor-

poration have no personal liability for a corporate obligation that did not exist at the termination [**11] of the corporation's winding-up period. In both *Blankenship v. Demmler Mfg. Co., Ill. App.*, 411 N.E.2d 1153, 1155-56 (1980) and *Pacific Scene, Inc. v. Penasquitos, Inc., Cal. Supr.*, 758 P.2d 1182 (1988) courts rejected the contention that stockholders who received corporate distributions on dissolution were liable in equity for a claim that arose after the winding-up period had expired. *Accord Levin Metals v. Parr Richmond Terminal Co.*, 631 F. Supp. 303 (N.D. Cal. 1986).

On the other hand in *Green v. Oilwell, Okla. Supr.* 767 P.2d 1348 (1989) the Oklahoma Supreme Court, without focusing finely upon whether or not the winding-up period was completed, concluded that a shareholder could be held liable on an alleged tort claim that arose after the dissolution of the firm. *See also Chadwick v. Air Reduction Co.*, 239 F.Supp. 247 (N.D. Ohio 1965) (accord); *Gonzalez v. Progressive Tool and Dye Co.*, 455 F. Supp. 363 (E.D.N.Y. 1978) (it is "an open question" under Massachusetts law whether trust fund theory [**12] is available to hold stockholders liable on corporate claim that arose after winding-up period had concluded).

In this state of affairs, the question of a dissolving corporation's duty, if any, to potential future claimants is problematic in at least two ways. First, the problem of compensation to persons injured by defective products or by undiscovered and actionable environmental injury,

caused by dissolved corporations, is of obvious social concern. If, in the context of a corporate dissolution, the corporation law does not treat these possible contingencies responsibly, it can be expected that other legal doctrines, such as successor liability doctrines, will be stretched and shaped to address them. A default in corporation law may mean that the market for the sale of corporate assets as part of a dissolution will be chilled by the prospect of buyers being forced involuntarily to assume unknown future liabilities.⁹ This is a practical problem that the law governing the creation and dissolution of corporate entities might well address. Secondly, the few adjudicated cases that hold that the trust fund doctrine is inapplicable to claims arising after the expiration of the winding-up [**13] period, may seem to corporate directors to give insufficient comfort to permit them safely to make a final distribution, if they have reason to know that future claims are quite likely to arise.

⁹ Cf. *United States v. Distler*, 741 F. Supp. 637, 643 (W.D. Ky 1990) (successor liability on CERCLA claim against dissolved corporation); *Traverse Bay Area Intermediate School Dist. v. Hitco, Inc.*, 762 F. Supp. 1298, 1301 n.2 (W.D. Mich. 1991) *See generally* Michael Green, *Successors and CERCLA: The Imperfect Analogy to Products Liability and an Alter-*

native Proposal, 86 Nw. U. L. Rev. (forthcoming 1992).

The new Delaware procedure codified at Sections 280-282 of the Delaware Corporate Law addresses both of these concerns. It structures a mechanism (alternative [*97] mechanisms actually) which under certain circumstances, for the first time recognizes rights in unknown future corporate claimants and provides a level of assurance to such persons that, [**14] as part of the corporate dissolution process, reasonable provision will be made for their future claims. Equally important, the new procedure offers to directors and shareholders (and perhaps transferees) assurance that, if the Court of Chancery approves security provisions for corporate claimants, then they will be protected from potential future claims arising from the decision to distribute the corporation's assets on dissolution.

The statutory mechanism that accomplishes this is not simple. I turn next to a summary description of it.

B. *The Statutory Scheme For Voluntary Dissolution*

One can best understand this statutory scheme by focusing first upon *Section 281(b)*, which despite its location, is the base-line provision. *Section 281(b)* is a default provision that governs every corporation in dissolution that does not elect to pursue the elective procedure set forth in *Sections 280* and *281(a)*.

Section 281(b) imposes upon the dissolved corporation the obligation:

to pay or make reasonable provision to pay all claims and obligations including all contingent, conditional or unmatured *contractual* claims known to the corporation . . . (emphasis added)

In going so far [**15] the statute appears merely to codify long settled law. *Section 281(b)* however, goes on to require the corporation to:

make such provision *as will be reasonably likely to be sufficient* to provide compensation for claims that have not been made known, or *that have not arisen, but that, based on facts known to the corporation . . . are likely to arise* or to become known . . . prior to the expiration of an applicable statute of limitation. (emphasis added)

The claims covered by this requirement, notably, are not limited to contractual claims but include all future claims that "are likely to arise . . . etc."

Subsection 281(c) provides that directors of the corporation "shall not be personally liable to the claimants of the dissolved corporation" [presumably under the common law trust fund doctrine] if the corporation has "complied with subsections (a) or (b) of this section." But compliance with subsection (b)'s standard, "reasonably likely to be sufficient" will, in principle at least, always be litigable. Thus, reliance upon the mechanism of *Section 281(b)* may present a risky situation for corporate direc-

tors regardless of their good faith and due care.

It is difficult [**16] to see the utility in preserving this risk. In fact, the more elaborate part of the new statutory scheme is devoted to the creation of an elective dissolution procedure, referred to in subsection (a) of *Section 281*, which, if successfully completed, can eliminate this risk. That elective procedure involves a current judicial proceeding to determine "the amount and form of security which will be reasonably likely to be sufficient to provide compensation for claims that have not been made known . . . or that have not arisen . . .". *Section 280(c)(2)*. Following this procedure allows corporate directors to assure themselves that they have satisfied the corporation's obligations to future claimants and that they will qualify for the protections afforded by *Section 281(c)*.

This elective alternative is set forth in *Sections 280* and *281(a)*. In barest outline it calls for notice for the presentation of claims to the dissolved corporation; ¹⁰ the rejection of, or the offering of security with respect to any claims presented; ¹¹ and the furnishing of notice of rights to petition for the appointment of a receiver. ¹² In its most innovative aspect, the new statute contemplates a determination [**17] by the Court of Chancery (1) of the amount and form of security that "will be sufficient" with respect to any contract claim that is [*98] contingent, conditional or unmatured (excepting claims on implied warran-

ties), ¹³ and (2) of the amount and type of security "which will be reasonably likely to be sufficient to provide compensation" for all other [i.e., non-contractual] future claims "that have not arisen but that based on facts known . . . are likely to arise . . .". ¹⁴

10 *Section 280(a)(1)* and (b).

11 *Section 280(a)(2)* and (b)(2).

12 *Section 280(a)(2)*.

13 *Section 280(c)(1)*.

14 *Section 280(c)(2)*.

Section 281(a) provides for the distribution of assets on dissolution where a corporation has followed the elective procedure:

(a) A dissolved corporation or successor entity which has followed the procedures described in § 280 of this title (i) shall pay the claims made and not rejected in accordance with § 280(a) of this title, (ii) shall post the security offered and not rejected pursuant [**18] to § 280(b)(2) of this title, (iii) shall post any security ordered by the Court of Chancery in any proceeding under § 280(c) of this title, and (iv) shall pay or make provision for all other claims that are mature, known and uncontested or that have been finally determined to be owing by the corporation or such successor entity.

This language is followed by a requirement that:

Such claims or obligations shall be paid in full and any such provision for payment shall be made in full if there are sufficient funds. If there are insufficient funds, such claims and obligations shall be paid or provided for according to their priority, and, among claims of equal priority, ratably to the extent of funds legally available therefor.

Finally, *Section 282* limits the future obligation of any stockholder of a dissolved corporation, in the aggregate, to amounts received in dissolution (subsection (c)) and, who the corporation has complied with § 281(a) or (b), to a *pro rata* share of corporate liability or the amount distributed, whichever is less (subsection (a)).

* * *

RegO elected to follow the new elective provisions of *Sections 280* and *281(a)*. I turn now to a brief description of [**19] the factual background against which that decision was made.

II.

The Factual Background of this Dissolution

RegO was incorporated in Delaware in 1976, as an indirect wholly owned subsidiary of the Marmon Corporation. RegO engaged in the business of manufacturing and marketing valves and other components for systems using liquified petroleum, anhydrous ammonia and other compressed gases.

Due to its explosive nature, systems transporting or using L.P. gas are involved from time to time in accidents resulting in property damage and/or personal injury. Victims of these incidents, of course, often bring suit against all parties associated with the LP system involved in the accident. As a result, RegO, as a component parts manufacturer, has often been required to appear as a defendant in such product liability actions.

Until 1987, RegO was insured against loss due to products liability under an umbrella policy negotiated by Marmon. The premiums for this coverage were based primarily upon the claims experience of each Marmon company in relation to the total claims experience of the Marmon group. In the mid-1980s RegO was subject to judgments of millions of dollars and, as a result, [**20] its insurance expense increased dramatically. Due in significant part to these spiralling costs, RegO terminated its participation in the Marmon liability insurance policy and became self-insured effective January 1987.

The Company continued to experience large judgments in product liability suits, some of which involved products that had been in service for 30 years. This continuing liability pattern led to a decision by Marmon in August or September of 1988 to reorganize RegO's business in order to disassociate the manufacturing capability that [*99] it owned from the claims legacy associated with it.

In connection with this decision, Marmon retained Duff & Phelps Financial Consulting Co. ("Duff & Phelps") to assess the value of RegO and retained the Wyatt Company ("Wyatt") to render an actuarial analysis for RegO's potential liability risk for LP products then in the market. On November 1, 1988, Wyatt reported to Marmon an estimated present value, as of January 1989, of predictable product liability claims against the company. Based on the methodology, including interest rate assumptions, employed, Wyatt's final report opined that the present value of product liability claims on already [**21] manufactured products, as of November 1988, would fall between \$ 102,697,000 million and \$ 115,919,000 million. (See Px 331 at 82083). This report anticipated claims occurring until the year 2027. On October 24, 1988 Duff & Phelps reported its valuation of the RegO business, if all product liabilities were ignored, at \$ 53,000,000 to \$ 60,000,000 and at \$ 24,000,000 to \$ 27,000,000 if only product liability for products manufactured prior to the date of the Report were ignored.

On January 31, 1989, pursuant to an Asset Purchase Agreement, RegO sold substantially all of its operating assets, not including the RegO trademark, to Engineered Controls International, Inc., ("ECII"), a Delaware corporation. ¹⁵ ECII paid to RegO approximately \$ 23,000,000, comprised of \$ 18,405,000 in cash and the assumption by ECII of approximately \$ 4,658,000 of RegO li-

abilities to trade creditors. Simultaneously with the asset sale, RegO and ECII entered into a Trademark License Agreement ("License Agreement") under which ECII is entitled to use the RegO trademark in return for annual royalty fees which in 1990 aggregated approximately \$ 1,200,000. Under neither the Asset Purchase Agreement nor [**22] the License Agreement, did ECII assume any liabilities of RegO for products manufactured prior to the asset transfer. Instead, RegO agreed to indemnify ECII for any losses it suffered arising from RegO equipment manufactured prior to the sale.

15 The Final Report states that the "discovery process yielded the following information. RegO, which is wholly-owned by Marmon, is ultimately controlled and largely owned by the Pritzker family who own 100% of Marmon. ECII is owned and operated for the benefit of the Pritzker grandchildren through stock ownership in twelve separate Pritzker trusts." Final Report at 5 n.5.

Three days after the asset sale, RegO filed a Certificate of Dissolution with the Delaware Secretary of State. It is asserted by certain of the respondents that "concurrently with RegO's decision to dissolve, it declared a \$ 38,402,725.15 dividend by a post-dated corporate resolution." (Exceptions of Emerson Electric Company at 9). ¹⁶

16 The Master made no finding with respect to this asserted fact. In light of the resolution reached it is unnecessary to do so in this proceeding.

[**23] RegO's directors elected to make distributions on dissolution pursuant to the elective procedure of *Section 280(a)*. Consequently, immediately following its dissolution, RegO mailed notice of this proceeding to all persons and entities known to have a claim or potential action against the Company and published notice of its dissolution in newspapers of appropriate local and national circulation.

As a result of its notice, RegO received widespread response by potential claimants who sought security from the Company for their anticipated claims. These claims fell into three categories. The first category represented claims from general creditors of RegO which, with the exception of those trade liabilities assumed by ECII according to the Asset Purchase Agreement, have been paid by the Company in the ordinary course of winding-up its affairs. The two remaining categories consist of notices of pending suits against the Company involving product liability claims and future claims of the same type that might be brought in the future against RegO. The Company has rejected all claims for security included in the latter two categories.

[*100] III.

*RegO's Financial Ability to Provide Security [**24] for Statutory Future Claimants*

Before turning to a description of the security arrangement that RegO proposes, it may be well to focus upon the critical fact, as I see it, that RegO's present assets will most probably be inadequate to compensate all of the present and future claimants that it has reason to expect will eventually arise.¹⁷ Actuarial studies submitted by both RegO and the guardian conclude that the present value of probable future liabilities of the trust arising from continued product liability claims far exceed the present value of the assets of the Company. RegO's actuarial expert, The Wyatt Company, estimated in 1988 that, as of January 1, 1989, the outstanding and future claims against RegO had, based on a number of reasonable assumptions, a future liability value of between \$ 564,376,000 million and \$ 656,803,000 million. Discounted to present value at reasonable discounts as of 1988, these foreseeable future liabilities fall between a range of \$ 102,697,000 to \$ 115,919,000 in present value as of November 1988. (Wyatt Report, Section II).

17 I put aside whatever limitation on future liability may be afforded to RegO by statutory limitation provisions incorporated into *Section 280*, as it cannot now be reasonably estimated what, if any, relief that might ultimately provide. See note 27, *infra*.

[**25] The Guardian's expert, Millman & Robertson, Inc. estimated in 1991 that as of February 1, 1992, (in a rather different interest rate environment) unpaid present and future claims against RegO had a present discounted value of \$ 57,633,000. (Millman Report at 2). The Master's Report notes that, assuming RegO's projections are correct, if all claims were paid in full as they matured, the trust's assets would be exhausted by 1996, while the adoption of a \$ 500,000 interim limit, described below, would extend the life of the trust until the year 2000 approximately. (Final Report at 43 n.48). Claims are expected, however, to continue to arise for another 20-30 years. (Millman Report Exh. 11); Wyatt Report Exh. 11).

Once one focuses upon the fact that RegO's present assets are unlikely to be adequate to compensate all future claimants that it can presently reasonably anticipate over an indefinite time, " and upon the fact that all of its present assets are proposed to be dedicated to providing security to its claimants, the principle issues that are raised by this application necessarily emerge. They will involve the relative rights of various RegO claimants, present and future. In [**26] addition, in whatever way those relative rights are seen, where the total fund appears inadequate to compensate all qualifying future claims, the innovative aspects of Sections 280-81 " require that a mechanism be utilized to assure that some part of the fund remains for the more distant foreseeable claimants.

RegO proposes an interim payment mechanism that would, initially at least, cap certain payments at a pre-set amount. Then upon termination of the trust, when one is in a position to know what all the claims come to, creditors who have been limited by the cap will qualify for further distributions.

18 See once more note 27, *infra*.

19 That is the consideration the statutes accords to unknown future claims including its definition of "priority". 8 Del. C. § 281(e) (1991).

This and other aspects of the proposed Claimants Trust are described in the next section of this opinion.

IV.

The Proposed Plan of Security For Claims

RegO proposes a plan for the payment and the security of its [**27] known and future unknown creditors including the establishment of a Claimants Trust and the transfer to the trust of all of RegO's assets.

The central fact of the Claimants Trust is that it will hold all of the present assets of RegO for distribution to claimants pursuant to its terms, with RegO shareholders receiving distributions only if unexpended funds remain at the termination of the [*101] trust. The trust will be under the control of a single trustee who will conduct its affairs, which will primarily involve the supervision of

the litigation and settlement of claims brought against RegO or the trust, as well as the investment and preservation of the trust's assets. ²⁰

20 The assets of the trust will primarily consist of cash and investment grade securities as well as the RegO Trademark.

The Trust Agreement divides the claims which may be paid by the trust into six categories of "obligations":

(1) Administrative Obligations; *i.e.*, all the costs and expenses incurred in the administration of the trust and in [**28] the litigation of claims brought against, or on the behalf of, the trust.

(2) Contractual Obligations; *i.e.*, claims determined to be properly payable pursuant to (a) the Asset Purchase Agreement between RegO and ECII or (b) the indemnification provisions of the Trust Agreement. ²¹

(3) Product Obligations; *i.e.*, all valid claims arising from settlements or judgments establishing claims for personal injury and property damage caused by products manufactured by the Company, including related claims for indemnification or contribution.

(4) Pre-Existing Obligations; *i.e.*, all claims for amounts incurred prior to the effective date of the trust in connection with winding-up the affairs of the Company and Contractual, Product, and Non-Compensatory Damage Obligations ex-

isting but unpaid as of the effective date of the trust.

(5) Non-Product Obligations; *i.e.*, those obligations arising from claims other than Product Claims, which were asserted in lawsuits prior to the Effective Date of the trust and not settled or reduced to judgment until after the settlement date.

(6) Non-Compensatory Damage Obligations; *i.e.*, those obligations arising from claims for punitive, [**29] exemplary or other non-compensatory damages, which are claimed in connection with a product claim.

21 The indemnification provisions provide that the Trust shall indemnify the Trustee as well as the officers and directors of the Company for any claims brought against them in connection with their performance of their duties. *See pp. 38-39, infra.*

The Trust Agreement provides for the payment of these obligations in one of three ways: (1) payment in full upon maturity; (2) payment in full subject to a \$ 500,000 cap; or (3) payment only after all other obligations have been paid in full.

The Trust Agreement requires the trustee to pay Administrative Obligations, ²² *Pre-Existing Obligations* and Contractual Obligations (other than those for indemnification,) ²³ *in full, as they mature*. But the trustee is directed to Pay Product Obligations, Non-

Product Obligations and Non-Compensatory Damage Obligations that are settled or reduced to judgment *after the effective date of the trust, in full, but subject* **[**30]** *to an interim limit* ²⁵ of \$ 500,000 occurrence. ²⁵ That is, payment will be limited to \$ 500,000 unless and until the trust terminates with unpaid funds, at which time amounts in excess of the interim cap may be paid. These Obligations will be paid for a proven occurrence in the order in which they arise.

²⁶

22 Administrative Obligations are granted priority over all other Obligations of the Trust.

23 ECII claims for indemnification under the Asset Purchase Agreement for Products and Non-Compensatory Damages Claims are subject to the \$ 500,000 limit per occurrence.

24 This Interim Limit may be raised or lowered by the Court, at the request of the Trustee.

25 Any Product Obligation covered by insurance will be paid up to the amount of the available coverage. If a Product Obligation is only partially remitted by insurance, the Trust will pay the difference, subject to the Interim Limit. The Trustee may seek a modification to the Interim Limit by the Court at any time. The Trust Agreement also requires the Trustee to conduct a review and make a recommendation to the Court at the end of five years of the Trust regarding the appropri-

ateness of the Interim Limit or whether an adjustment should be made.

[31]**

26 To the extent two or more Obligations relating to a single occurrence arise simultaneously and full payment would exceed the Interim Limit, payments will be made ratably.

[*102] The Trust Agreement provides the following procedures with respect to the termination of the trust. After five years of operation, the trustee is to recommend to the Court whether a deadline for the assertion of all Product and Non-Compensatory Damage Claims (the "Claims Assertion Date") should be set. If the Court establishes a Claims Assertion Date, the trust will thereafter not be authorized to pay any Product or Non-Compensatory Damage claim asserted against the trust after that date. The trust is to terminate automatically on the date (the "Termination Date") ninety days after the first to occur of the following two events: (a) all Product, Non-Compensatory Damage and Non-Product Claims asserted against the Company or trust have been settled or reduced to final judgment and paid as provided in the Trust Agreement and the Claims Assertion Date has passed; or (b) the trustee has consented to, and the Court has approved, **[**32]** the termination of the trust.

Upon the termination of the trust, any remaining monies are to be distributed: (1) ratably for remaining Administrative

Obligations; (2) to the extent funds remain, ratably to the holders of Contractual Obligations, Non-Product Obligations and Product Obligations who did not previously receive payment in full; (3) to the extent funds remain, ratably to all holders of Non-Compensatory Damage Obligations who did not receive full compensation; and (4) to the extent funds remain, to the stockholder of the Company as of the date of the establishment of the trust.

V.

The central issue presented by this proceeding arises under *Section 280(c)*. It is whether the Claimants Trust provides security that will be sufficient for the claims of present claimants, and will be reasonably likely to be sufficient for claims that have not made known or that have not yet arisen, but that based on facts known to RegO are likely to arise or become known, prior to the expiration of applicable statutes of limitation.²⁷

27 Where as here the corporation has reason to know that claims will arise but cannot know the jurisdictions in which such claims may arise and thus cannot know what statute of limitations will apply to the claims or when, under applicable law that statute may be tolled, the limitation provision of *Section 280(c)*, in effect, provides no limitation for planning (*Section 280(c)*) purposes. See J.D. Lee & Barry A. Lindahl, 2 Mod. Tort Law § 27.96

(rev. ed. 1989) ("The general rule is that when [a products liability] action is based on negligence or strict liability in tort, the date of accrual is the time of injury."); *Arrowood v. General Motors Corp.*, 539 F.2d 1321, 1325 4th Cir. (1976) (describing the rule fixing the time of the accrual of a tort action for product defects by the date of purchase, as "outdated and generally repudiated"); Annotation, Statute of Limitations: When Cause of Action Arises on Action Against Manufacturer or Seller of Product Causing Injury or Death. 4 A.L.R. 3rd 821 (1965 & Supp. 1992). Compare Model Business Corporation Act § 14.07 (3rd Ed. 1984) (statute itself fixes a single, five year limitation period).

[**33] In addressing this question one must first ask the factual question whether the assets held by RegO are likely to offer security that will be adequate to reasonably assure the payment of all foreseeable future claims. As noted above, I conclude that they are not. See pp. 14-15. Next one must ask whether that fact disables RegO from proceeding to wind-up its affairs pursuant to *Sections 280* and *281(a)*. I conclude that in the situation in which a dissolved corporation is dedicating all of its assets to the security arrangement offered under *Section 280(c)*, that the inadequacy of those assets to offer full security ought not to deprive the directors of the corporation from proceeding un-

der *Section 280* and *Section 281(a)*. See pp.28-31. That is sufficiency of the security agreement may be achieved in spite of the inability to assure or secure future compensation in full to all foreseeable future claimants. Where the dissolved corporate assets are in total inadequate to secure full compensation to all foreseeable future claimants, the sufficiency of the security arrangement will inescapably involve questions of the fairness of the proposed security among various claimants or classes [**34] of claimants. In making those judgments, the Court may be guided by the policies reflected in the statutes [*103] as a whole and especially by the innovative aspects of *Section 281(a)* and *(b)*.

Thus, the more difficult questions presented by the Claimants Trust are whether its terms, especially the preference that it accords to present claimants over unknown or future claimants, is appropriate. At pp. 28-32 below I conclude that, in light of the legislative intent reflected in *Section 281(b)*, and less vividly but no less recognizably in *Section 281(a)*, this preference is not justified in this factual context. This conclusion has implications for several important aspects of the Claimants Trust.

VI.

The Principal Exceptions of Respondent Emerson Electric

Emerson is a co-defendant with RegO in pending product liability suits and reasonably expects to be a defendant

in future product liability suits involving equipment that includes RegO manufactured devices. It has made, and expects in the future to make, additional claims against RegO that if it suffers liability, then RegO is liable over to it for contribution or indemnification. Its primary objection to the plan of dissolution, and [**35] the adequacy of the security the trust offers to it for its future claims, is that the Claimants Trust is inadequately funded. It asserts that the RegO dissolution and this proceeding are a transparent effort by those who control and own RegO to deprive foreseeable future creditors of the company of the ability to hold RegO answerable for its [future] liabilities.

This scheme, it says, entails wrongs; specifically it entails the alleged fraudulent conveyance by RegO of substantial assets out of the corporation: RegO's alleged dividend of some \$ 38 million shortly before filing its certificate of dissolution, and the sale of the Company's assets, allegedly for less than their true value. It is contended that, in fact, all of the corporations' assets at dissolution cannot provide adequate security under *Section 280(c)*. Rather, to provide adequate security it would be necessary for RegO to recover amounts of which it was wrongfully deprived, or for the recipients of those payments or assets to bind themselves to the trust to make such payments. Since this cannot be coercively accomplished in this proceeding, Emerson asks that the court decline

to approve the proposed plan under *Section* [**36] 280(c)(1) and (2).

The Master acknowledged the apparently litigable nature of Emerson's position in two ways. First, she recommended that language suggested by RegO in its proposed final order that would have purported to preclude the future appointment of a receiver for RegO under Section 279 of the General Corporation Law ²⁸ be deleted from any order fixing or approving adequate security. With this recommendation, I concur. Secondly, she proposed that the order to be entered include the following language:

nothing contained in this Order is intended to alter existing suitable rights of legitimate claimants to pursue appropriate relief against RegO, its directors, stockholders or their transferees from any claim for fraudulent or wrongful transfer of RegO's assets. Report at 58-59.

[*104] This recommendation is made with knowledge of the fact that Emerson has initiated suit against RegO and others in the United States District Court for the Northern District of Illinois, alleging that the transactions that it now points to were fraudulent conveyances.

28 Section 279. Trustees or receivers for dissolved corporations; appointment powers; duties

When any corporation organized under this chapter shall be dis-

solved in any manner whatever the Court of Chancery, on application of any creditor, stockholder or director of the corporation, or any other person who shows good cause therefore, at any time, may either appoint one or more of the directors of the corporation to be trustees, or appoint one or more persons to be receivers, of and for the corporation, to take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid.

[**37] The parties disagree about the appropriateness of this particular language, but they agree that this proceeding is not intended to interfere with the adjudication of the fraudulent conveyance litigation. In my opinion, it would not in any event do so. The various limitations on stockholder liability reflected in *Section* 282 are limitations on liability that might arise under the

trust fund doctrine. Where they apply, these provisions provide that shareholders will not have derivative liability for "any claim against the corporation." In my opinion a claim of fraudulent conveyance is not "a claim against the corporation" within the meaning of *Section 282*. It entails a claim that the corporate entity itself has been misused; that its assets have been conveyed for less than fair value for no proper business purpose. A claim to reverse such a conveyance is obviously not a claim against the corporation in the same sense, for example, that an action by a corporate creditor against her debtor to collect the debt is a "claim against the corporation." Thus, I conclude that, *Section 282* is not intended to limit the ability of a court to recover for the benefit of creditors or for a receiver [**38] appointed under *Section 279* (or in this instance for the Claimants Trust), funds fraudulently conveyed to a corporation's stockholders prior to dissolution, the transfer of which left the corporation insolvent. ²⁹

29 I do agree with RegO that it is inappropriate to attempt in a final order to preserve some right to sue RegO itself that extends beyond the scope of *Section 278* as the Master's suggested language would appear to do. *Section 278*, however, should have impact on the ability of a creditor or a receiver to maintain, or indeed to commence, a fraudulent conveyance action against the recipient of corporate

assets. Nor would it prevent the appointment of a receiver to recover them.

Thus, in approaching the issues presented by this application I put to one side the economically important question that these pre-dissolution payments may raise, and assume, but do not decide, that the assets held by RegO at the time of its dissolution, and subject to the proposed trust, comprise all of the property of the corporation [**39] to which its present and future claimants have an entitlement to look for satisfaction of their rights.

* * *

This assumption still leaves open the question whether those assets are sufficient to support the security arrangement called for by *Section 280(c)*. It is arguable that the benefits afforded by compliance with the elective procedure of *Section 280* are only available where it is possible to offer a certain level of security to both present known claimants (*i.e.*, security that which "will be sufficient," § 280(c)(1)) and unknown or future claimants future (*i.e.*, that "which will be reasonably likely to be sufficient"). Arguably if the circumstances do not permit *that* level of security, then the corporation is required to dissolve under the more risky default provisions of *Section 281(b)*. All exceptors urge that the level of assurance mandated by *Section 280(c)* cannot be supplied here.

The alternative approach, urged by RegO, holds that where of the corpora-

tion's assets offered as security, the issue of sufficiency of the security does not arise, since the company's creditors will be entirely as secure upon dissolution as they were before dissolution. On this [**40] alternative reading of *Section 280(c)*, where all of the dissolving corporation's assets will be dedicated to providing security, issues of the structure of the security arrangement (*i.e.*, the relative treatment of different classes of claimants) will, of course exist, but the issue of sufficiency of the security will not.

This latter view is the correct one in my opinion. At least in the special case in which all of the corporation's assets are dedicated to affording security, the sufficiency of the security must be deemed established insofar as the availability of *Section 281(a)* procedure is concerned. To conclude [*105] otherwise would serve no valid interest of claimants (since they, as a class, are to be the beneficiaries of all of the corporation's assets in all events) and would deprive corporate directors of such benefits as they may draw from judicial approval of the plan of security. That benefit may be real where, as here, some future claimants may (under the plan) possibly collect a smaller proportion of their claim than others. Being forced to liquidate under *Section 281(b)* would leave open for possible future litigation the question whether the plan was "reasonably likely [**41] to be sufficient" to compensate future claims and the consequences of any determination that it was

not. The 1987 and 1990 legislation that enacted Sections 280-82 was designed, at least in part, to provide a mechanism with which such uncertainty could be dissipated and fairness to future as well as present corporate claimants could be presently established through adjudication. No interest of the corporation's claimants is advanced by denying to the corporation the ability to have such adjudication now under *Section 280(a)*.

Thus, although I do conclude that all of RegO's assets are inadequate to be reasonably likely to provide compensation for all of its future claims that are likely to arise, I conclude as well that the Court of Chancery is not prevented by that fact from approving a security arrangement under *Section 280(c)* if that arrangement is funded by all of the dissolving corporation's assets and is fair to all classes of present and future claimants. I thus reject Emerson's exception.

VII.

The Principal Objections of the Guardian Ad Litem

The guardian makes several fundamental complaints about the proposed plan of dissolution. They were rejected in the Final Report. [**42] First, he complains that the Claimants Trust gives some claimants (*i.e.*, those who claim "Pre-Existing Obligations") (*see* p.17) rights superior to those of future claimants who "based on facts known to the corporation . . . are likely to become known to the corporation prior to the

expiration of an applicable statute of limitation". In this case, such claimants are statistically likely to become known from time to time until, in the opinion of the guardian's expert, at least the year 2028. They are the "long-tail" claimants (representing the tail of the bell-shaped curve of distribution of product-related injuries). It is unfair, the guardian asserts, to favor present claimants over unknown, yet statistically certain future claimants. More pointedly the guardian asserts a security plan that does so is so inconsistent with the policy of *Section 281* that it cannot be approved by the Court as appropriate under *Section 280(c)*. The policy that the guardian infers arises from the fact that *Section 281(a)* and *(b)* both provide that where there are insufficient funds to pay or make provisions for all claimants, including foreseeable future claimants, claims of equal priority shall be [*43] paid or provided for ratably.³⁰

30 Moreover, future and present tort or contribution claimants share the same priority, the guardian says, because by reason of its statutory definition "the term 'priority' does not refer . . . to the relative times at which any claims mature or are reduced to judgment." 8 *Del. C. § 281(e)*.

This objection to a perceived preference for present or near term claimants over more distant foreseeable claimants has a second aspect relating to the Airco indemnity contract purchased by the di-

rectors following dissolution. This aspect is treated below at pp.33-35.

The second principal exception of the guardian is that the interim limit of \$ 500,000 is too high. The guardian asserts that with such an interim limit the trust is quite likely to be exhausted within 8 years, leaving future injured persons with no recourse. Thus, this level of interim limit is likely to advantage claimants who sustain injury in earlier years and are able to bring their claim to judgment or settlement in the earlier [*44] years. This again is claimed to be unfair and inconsistent with the direction of *Section 281* which requires, it is said, [*106] equal treatment for all claimants of the same class.

The guardian proposes a \$ 300,000 interim limit, which based upon his expert's study, would likely be sufficient to permit the trust to pay this amount to all statistically foreseeable injured persons no matter when their claims arise and would, on this expert's view, so be sufficient to fully compensate 95% of all such persons. This issue is addressed at pp.36-38 below.

A related issue concerning the applicability of an interim limit to indemnification payments is addressed at p.38 below.

(a) *The guardian's objection to the payment in full of matured or untested obligations during the winding-up period.*

I am forced to concur with the guardian's reading of the statute insofar as it relates to the sufficiency of the proposed security under *Section 280(c)*. Thus, for the reasons set forth below, I conclude that the differing treatment afforded by the Claimants Trust of present claims ("Pre-Existing Obligations") and claims that are unknown or that have not arisen but that based on facts known are likely [**45] to arise, is inconsistent with the express policy of *Section 281* and renders the trust, as written, an inappropriate security arrangement under *Section 280(c)*.

* * *

It is contended that the enactment of *Section 281* changed the law governing payment of claims on dissolution. Prior to enactment of these new provisions, a corporation in dissolution arguably had no obligation to claimants whose claim did not arise until after the termination of the winding-up period. (See cases cited at pp.4-6 *supra*). The compliment of that statement is the statement that, previously, the existence of facts making such future claims very likely, did not, create any ground to impinge upon the ability of existing creditors to be paid in full during the winding-up period. Creditors had a right to be paid in full, if their claim was valid, providing that the dissolved corporation was solvent.

Sections 280 and *281* do incontestably create (or recognize) rights of a certain sort in future claimants.³¹ They now have a right under *Sections 280* and

281(a) optional procedure for a judicial determination of reasonable security and the funding of that security. Under the default procedure of *Section 281(b)* [**46] future claimants have an entitlement to such provisions as will be reasonably likely to be sufficient to provide compensation for future claims.

31 I have not bothered to restate on each occasion I use the terms "future claimants" or "future claim" the limitations set forth in *Sections 280* and *281* (*i.e.*, foreseeability and arising while not barred by applicable statute of limitation), but do mean to imply them in each instance.

But the creation of these entitlements may have consequences not just for shareholders, but also for present creditors. For example, where, under the *Section 281(b)* procedure, the dissolved corporation does not have sufficient funds to pay all of its obligations and make reasonable provision to pay all contingent and all future claims then, "such claims and such obligations shall be paid or provided for according to their priority and among claims of equal priority, ratably to the extent of funds legally available." *Section 281(b)*. Since "priority" is defined as "not" referring [**47] to the relative times at which any claims mature or are reduced to judgment" (*Section 281(e)*), *Section 281(b)* must mean that a corporation in dissolution which cannot both pay its present creditors and make adequate provision

for contingent and future claims, and which follows the *Section 281(b)* procedure, is directed not to pay its current creditors in full but to pay them ratably.
22§

32 While in this respect *Section 281(b)* is no doubt a radical change in the law, it is within the constitutional power of the state of incorporation to so regulate the dissolution of a domestic corporation, in my opinion. See, e.g., *Riehle v. Margolies*, 279 U.S. 218, 228 (1929), (Brandeis, J.) ("where a statutory proceeding for the winding-up of an insolvent corporation is brought in the state of the incorporation . . . assets will be distributed only among those persons who have been found to be creditors either by that court or elsewhere with its leave, and that a judgment recovered in another state without leave from it will not entitle the plaintiff to share in the assets."); *In re International Reinsurance Corp., Del. Ch.*, 48 A.2d 529, 536-542 (1946) (discussing *Margolies*). The Full Faith and Credit Clause requires Delaware law to recognize the validity of foreign judgments against a Delaware corporation. Such judgment conclusively establishes the fact and the amount of liability, but, analogously to the law of receiverships, full faith and credit does not require that such judgment be paid

other than in conformity with the corporation dissolution law of the state law substantively governing corporate dissolution. Thus, while in most instances I would agree with the Master's conclusion that "a corporation cannot prevent a creditor during a post-dissolution winding-up period from executing a valid judgment against corporate assets" (Final Report p.30), I do not believe it is correct that a *valid state law* cannot, in effect, preclude a valid judgment from being paid by a dissolved corporation under certain conditions. It is the law governing corporate dissolution that in this context would be entitled to Full Faith and Credit in those sister-state jurisdictions in which execution of a judgment against a dissolved corporation was sought.

[**48] [*107] The optional procedure of *Sections 280* and *281(a)* does not contain precisely parallel requirements. With respect to future and contingent claimants, a dissolved firm that follows that procedure needs only to pay the security fixed by the court. The statutory language that mandates ratable payments to all claimants of the same priority is only triggered under *Section 281(a)* when the corporation cannot pay its various claimants and fund the court ordered security. Thus, the new protections created by *Sections 280* and *281* for foreseeable future corporate claimants appear to offer less of a threat to the

interests of existing corporate claimants when the corporation pursues *Sections 280 and 281(a)* procedure.

Let me try to relate all of this to this case. The guardian claims that RegO cannot create a security arrangement that one can conclude is likely to reasonably compensate all future claims that are reasonably foreseeable. It argues that therefore, RegO cannot consistently with the scheme of *Section 281(a)(b)* and *(e)*, pay its present claimants in full (as it has done and the Claimants Trust would do). It is claimed that rather those sections require, in this factual circumstance, [**49] that the security arrangement, to be approved, should not prefer present creditors over contingent or future creditors.

RegO's answer (and that of the preferred creditors) is first that the provisions of *Section 281(b)*, which might mandate ratable payment, are entirely irrelevant to this proceeding. Secondly it is said that the requirement of "ratable payment" contained in *Sections 280 and 281(a)* that are relevant will not be triggered here since RegO can and will pay the security the court fixes under *Section 280(c)*. Thus there will be no inability to all of the payments that *Section 281(a)* identifies and therefore there is no occasion for the court, in passing upon the sufficiency of security, to consider the "ratable payment" concept of *Section 281*.³³

33 In addition, RegO doubts the constitutional power or effect of a

determination by this court, that present creditors should only be paid *pro rata*. The last point is treated above at note 32.

This argument is nicely technical, but incorrect in my view. [**50] RegO cannot claim both that *all of its assets* must constitute "sufficient" security under *Section 280(c)* regardless of the probability that some foreseeable future claimants will not be fully compensated (*see pp. 25-26 above*), and claim that, in passing on the appropriateness of the security proposed, the court should ignore the policy contained in both subsections (a) and (b) of *Section 281*. While our corporate law statute is a technical statute, we are not authorized by that fact to apply it in ways that defeat the expressed intention of its drafters.

In my opinion, where it appears that all of the assets of a dissolved corporation are likely to be inadequate to compensate all foreseeable future claims, fidelity to the abundantly clear policy of *Section 281(a)(b)* and *(e)* requires this court, in passing upon the reasonableness of a proposed security arrangement under *Section 280(c)*, to decline to approve discrimination among claimants of the same class based upon "the relative times at which any claims mature or are reduced to judgment." *Section 281(e)*.

[*108] The Claimants Trust does reflect such discrimination and to that extent, I am forced to conclude that I cannot approve [**51] it.

This conclusion does not mean that I accept the guardian's suggestion that, where directors who are following a *Section 280* procedure have reason to know that the corporation is unlikely to have sufficient assets to assure compensation to all future claimants, they are precluded by *Section 281(a)* and *(e)* from paying in full present corporate creditors. While I suppose that the state of incorporation could constitutionally so require, *Sections 280* and *281(a)*, at least, do not do so. They do require the court to approve a security arrangement and in that connection it is appropriate for the court to consider the policy of *Section 281(a)(b)* and *(e)*. But those provisions do not direct directors of a dissolved corporation to pay existing creditors only ratably when they have reason to know that the corporation will not be able fully to secure the payment of compensation to all foreseeable future claimants.³⁴

34 I express no view on the question whether a corporation dissolving under *Section 281(b)* has such a duty or on the question whether the holding of *Asmussen v. Quaker City Corp., Del. Ch. 156 A. 180 (1931)*, which plainly has been overruled with respect to *Section 281(b)* dissolutions has vitality when a corporation follows the alternative elective procedure.

[**52] (b) *The guardian's objections to the treatment of RegO liabilities*

qualifying for indemnification under the Airco policy.

Following dissolution the directors of RegO caused the Company to purchase, for \$ 15,225,000, a ten year contract of indemnity insurance from American International Reinsurance Company Ltd. ("Airco"). The policy will pay RegO up to \$ 1,000,000 per occurrence and up to \$ 2,000,000 in total per year, as indemnity for sums RegO pays as damages. The policy's term is ten years concluding on December 31, 1998. At the conclusion of the term of the arrangement, if total payments under the policy have not aggregated \$ 20,000,000 million, the unexpended portion will be paid to the Company or its successor.

Thus the indemnity policy carries very little, if any, true insurance. It is rather like a contractual arrangement in which one holds funds at interest subject to a duty to disburse them in a predetermined manner. In entering into this agreement the directors assured that some funds would be available each year through 1998 to satisfy judgments rendered against RegO, even if some judgments that were large enough to otherwise deplete the company's assets were suffered [**53] in early years.

The Airco policy gives rise to several issues. The most significant is the question whether, after the Claimants Trust is funded, payments made pursuant to that policy should be limited to amounts permitted by the interim limit. This

question involves issues of contract as well as corporate law.

The Airco contract will determine to whom and in what amount Airco is obligated to make payments. As that contract is one of indemnity, Airco is presumably obligated to make payments to RegO or its successor. Thus, the question is whether RegO or its successor will have liability that is not subject to the interim limit, on judgments rendered after the establishment of the Claimants Trust. RegO itself will continue to be a proper party to any lawsuit commenced before dissolution or during the winding-up period. 8 *Del. C.* § 278. But, after the establishment of the Claimants Trust, RegO will no longer have assets to respond to any future judgment. If the Airco contract requires RegO to make a payment to a claimant before Airco is legally obligated to pay, then the establishment of the Claimants Trust will have the effect of subjecting the funds payable under the Airco policy [**54] to the overall plan of security for present and future claimants established by the Claimants Trust, because the trust and not RegO will hold title to RegO's property. I assume that this is the case.

If this is so, then the question arises whether the trust should be authorized to pay post-winding-up judgments without regard to the interim limit, where and to the [*109] extent such payments will qualify for indemnification by Airco under its policy.

The guardian asserts that the trust should not authorize treating future claimants differently depending upon whether or not their claim can qualify for payment through the Airco policy. Two of the respondents appearing before the Master and RegO itself assert the contrary: that payments by the Claimants Trust that qualify for indemnification under the Airco policy should not be subject to the interim limit. In support of that position, RegO asserts that "certain claimants had relied upon" the existence of the Airco policy, but it does not state in what way they did so, and whether this reliance was reasonable or was detrimental to them. Beyond this, RegO suggests that purchasing the Airco policy reflected a judgment ("was part of a delicate balance [**55] . . . between rights of known persons whose claims it had rejected . . . and the rights of potential future claimants") that should be respected. This argument misunderstands the Court of Chancery's obligation under *Section 280(c)*. It is the court's duty "to determine the amount and form of security" that will be sufficient or reasonably likely to be sufficient. The court is not here passing upon potential liability of directors where the policy of the business judgment rule is implicated. Rather it stands as the statutorily designated arbiter of the security arrangement that is appropriate. Due respect for the expertise and authority of corporate directors does not dictate deference to their judgment on the question of what constitutes

adequate protections to various competing classes of claimants on dissolution.

I am forced to accept the guardian's view of this matter. I cannot render informed opinion on the question whether the Airco contract obligates Airco to make payments to anyone other than the trust after its establishment, but I am of the view that, insofar as the trust is concerned, the reasoning set forth above (See Part VII(a)) requires that the Claimants Trust [**56] not favor one set of product liability claimants (those whose claim is asserted and adjudicated or settled while the term of the Airco policy has not expired) over other future claimants whose claims will be subject to an interim limit.³⁵

35 On a related point, the Master recommended against the Court granting to the guardian power he seeks to institute suit against the RegO directors. The guardian claims that the payment of certain judgments by RegO and the purchase of the Airco policy constituted violations of the equal priority rule among present and future claimants that he finds in *Section 281*. I accept the Master's recommendation as correct. See p.32 *supra*. The decisions attacked were plainly disinterested decisions made in the good faith pursuit of duty. When directors of a dissolved Delaware corporation are, during the course of winding-up corporate affairs, required to make decisions

affecting various classes of interest holders, they are protected from liability in doing so, so long as they act disinterestedly, with due care and in good faith. *Devereaux v. Berger, Md. Ct. Apps., 284 A.2d 605 (1971)*; *In re Xonics Systems, 99 B.R. 870 (Bkrcty. N.D. Ill. 1989)*. Delaware law does not, in my opinions, impose duties on directors of a dissolved corporation of the kind reflected in *N.Y. Credit Men's Adjustment Bureau v. Weiss, N.Y. Ct. Apps., 110 N.E.2d 397 (1953)*. Thus even assuming that the guardian would have standing to bring such a suit, I could not authorize the waste of the estate's assets that such a suit implies.

[**57] (c) *The guardian's objection to the level of the \$ 500,000 interim limit.*

Having concluded that it would be inappropriate, in the circumstances of this case, to approve a security mechanism that authorized the Claimants Trust to prefer "Pre-Existing Claimants" to "future claimants" pp.29-30), one must inquire into what means are appropriately available to implement that view. As the directors of RegO and the court must here deal with likely future events over an undefined term (*see n.27 supra*) mathematical certainty is not possible. Certain of the interested parties recommend a percentage of claim technique in which each claimant is paid a stated percentage of his or her claim on an interim basis, with a final calculation on termi-

nation of the trust. Various percentages (from 65% to 80%) are suggested. The Company does not embrace this view, holding that it is impossible to determine fairly what such a percentage should be since it can be determined only after all qualifying future claims are [*110] known. As a consequence of that fact it is impossible to fix a percentage and still have reasonable confidence that the trust corpus will not be rather quickly depleted by a [**58] handful of very substantial judgments. I accept the Company's reasoning as consistent with the policy of *Sections 280(c)* and *281(a)* and (e).

The Company proposes instead that an interim limit of \$ 500,000 per claim be tentatively established, and that the appropriateness of that limitation be revisited in five years time in conjunction with the possible establishment of a claims Assertion Date and a trust Termination Date.³⁶ The guardian and certain other respondents object to this level of limitation as too high. They assert that the best estimates available suggest that use of the \$ 500,000 interim limit will lead to the exhaustion of the trust in eight years, but that the best available estimates suggest that future claims will arise for substantially longer than that.

36 See pp.18-19, *infra*.

The Master recommended acceptance of the \$ 500,000 interim limit. In doing so she relied in part upon her conclusion that *Sections 280* and *281(a)* created no rights in foreseeable future claimants

other than a [**59] right to be heard (through a guardian to be appointed by the court) and a right to such security as the court may fix or approve under *Section 280(c)*. She rejected the assertion by the guardian that all future claimants have a right under *Section 281* to equal treatment in the structuring of the proposed security. She accepted RegO's assertion that a plan that could be expected to pay 90-95% of all claims that occurred over the next eight years was sufficient.

I am constrained to view the requirements of *Sections 280* and *281(a)* differently. *Section 280(c)* mandates that security be provided "for claims . . . that have not arisen but that based on facts known to the corporation . . . are likely to arise . . . prior to the expiration of applicable statutes of limitation." This statutory command does not afford to the dissolving corporation, or the court passing upon the proposed security arrangement, an election to fail to afford security for foreseeable claimants who will meet this test, simply because their claims will arise some years hence. The statute might have done so by adopting a limitation provision of the type included in the Model Business Corporation Act (*see* n.27 *supra*). [**60] But, in adopting the limitation provision contained in *Section 280(c)*, the General Assembly left the determination of an appropriate liability cutoff date to the substantive law of the state in which the claim arises. In light of this statutory approach, one cannot now say, in the con-

text of the facts concerning RegO's potential liability situation, that the period implied by the \$ 500,000 interim limit (approximately eight years) is an appropriate point to terminate all rights of future claimants against the sole remaining potential defendant -- the Claimants Trust.

The guardian's suggested interim limit of \$ 300,000 per claim could be expected (or at more likely all events is certainly) to permit the trust to satisfy claims (to that extent) for the entire period in which it is reasonable to predict that claims will arise. That this implies a trust of long duration is not itself problematic when the interests of all foreseeable future claimants are considered, as *Section 280(c)* indicates they must be.

Since I find no basis in the statute at this point to foreclose distant claimants from protection from future injuries, I must decline to approve this aspect of the Claimants Trust, [**61] but will approve a interim limit of \$ 300,000.

(d) *Should the interim limit apply to indemnification claims that arise hereafter.*

As I understand this aspect of the matter, RegO has volunteered that indemnification payments arising out of any litigation challenging the propriety of the Asset Purchase Agreement be limited by the interim limit. The parties dispute then whether any indemnification from the trust to RegO officers and directors is appropriate, and if it is, whether the interim limit should apply to

all such future payments, if any. I accept the recommendation of the [*111] Master (Final Report pp.49-52). Plainly future indemnification claims are liabilities that the trust can and should accept. More importantly those claims legitimately deserve a priority and thus exception from the interim limit for several reasons. The express policy of Section 145 of the Delaware General Corporation Law provides one ground. More fundamentally, the innovative dissolution procedures of Sections 180-82, which confer benefits upon future claimants, will be less utilized than otherwise, if corporate directors who voluntarily employ those procedures can do so only at the cost of giving [**62] up existing indemnification rights. Thus, realization of the apparent objects of the statute will be promoted by recognizing the priority of such claims.

VIII.

Other Disputed Matters: A Claims Assertion Date

The Claimants Trust includes a provision authorizing the trustee, after five years, to recommend and apply to this Court for the determination of a date after which the trust will not be authorized to pay any claims not asserted by that date.

Emerson Electric objects to the inclusion of any such provision calling it unauthorized by *Sections 280* or *281*. In the alternative, several Respondents urge that in no event should less than ten

years of experience be had before any such date is considered.

This provision appears to be an attempt to deal with the massive uncertainty created by the nature of the Company's product liability history and prospects and the limitations provision of *Section 280(c)*. In my opinion, a provision of this type is permitted by *Section 280(c)* since its command is to fix "security which will be reasonably likely to be sufficient." There may come a time in the administration of the trust when it can responsibly be concluded that no further claims [**63] are likely to arise. At that point termination of the trust will be appropriate. A Claims Assertion Date would present a helpful mechanism to give notice to the world of termination of the trust.

Given the claims history and prospects of the Company however, in my opinion, in no event could such a termination occur here in as little as five years. *See, e.g., "RegO Product Claims (Occurrence Dates After 1/1/77) As of September 20, 1991," Guardian's App. Exh. E.* When the directors purchased the Airco indemnity policy they contracted for indemnity through the year 1998. Indeed, the record suggests that this Trust may have to exist substantially longer than ten years. RegO suggests that nothing is lost by permitting the trustee to petition to terminate the Trust in as little as five years. But this is not the case. An application to reconsider the matter of trust termination will not be without cost -- to the trust, to the

claimants and to the public that underwrites the expense of these proceedings. To incur those expenses in as little as five years, on this record, seems wasteful. Given the experience that RegO has had, one can conclude that only a statute of the type reflected [**64] in the Model Corporation Act would justify, on these facts, termination in less than ten years, if then, in my opinion.

A number of additional matters involving details of trust administration and the identity, powers and compensation of the trustee will be treated in a separate ruling to be issued contemporaneously with this already lengthy opinion.

* * *

For the foregoing reasons the exceptions of the guardian ad litem to the Final Report are accepted to the extent set forth above. Therefore, I am required to decline to approve the proposed security arrangement but would approve, as sufficient in the circumstances, a trust that complied with the foregoing.



LEXSEE 937 A.2D 760

THE TERRITORY OF THE UNITED STATES VIRGIN ISLANDS, individually and as assignee of the Successor Panex Industries, Inc. Stockholders Liquidating Trust, Plaintiff, v. **GOLDMAN, SACHS & CO.**, a New York limited partnership, Defendant.

C.A. No. 2505-VCS

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

937 A.2d 760; 2007 Del. Ch. LEXIS 186

**September 27, 2007, Submitted
December 20, 2007, Decided**

SUBSEQUENT HISTORY: Affirmed by Terr. of the United States V.I. v. Goldman, Sachs & Co., 2008 Del. LEXIS 344 (Del., July 29, 2008)

PRIOR HISTORY: *Rosenbloom v. Esso V.I., Inc.*, 766 A.2d 451, 2000 Del. LEXIS 534 (Del., 2000)

COUNSEL: [**1] Bruce E. Jameson, Esquire, Melissa N. Donimirski, Esquire, PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware; John K. Dema, Esquire, Scott E. Kauff, Esquire, LAW OFFICES OF JOHN K. DEMA, P.C., Christiansted, St. Croix,

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JUDGES: STRINE, Vice Chancellor.

OPINION BY: STRINE

OPINION

[*763] **STRINE, Vice Chancellor.**

In this decision, I grant the motion of defendant Goldman, Sachs & Co. to dismiss a complaint against it by the U.S. Virgin Islands. The Virgin Islands seeks to recoup from Goldman Sachs distributions made to it from a dissolved corporation, Panex Industries, Inc., in 1984 and 1985, and in 1987 from a liquidating trust established during Panex's dissolution, the Liquidating Trust. The Virgin Islands' theory is that Goldman Sachs is liable, to the extent of its receipt of distributions [*764] from Panex and the Liquidating Trust, for any liabilities owed by Panex and the Liquidating Trust, regardless of whether those liabilities were known at the time the distributions were [**2] made. In this case, the first claims that certain operations of Panex had caused environmental damage to the Tutu aquifer on St. Thomas, U.S. Virgin Islands were asserted in 1992, and the Virgin Islands itself did not assert such claims until 1996, nine years after the last distributions to Goldman Sachs were made. In fact, as of the time the distributions to Goldman Sachs were made, the Virgin Islands itself had owned and controlled for fifteen years, the former Panex facility that it later alleged was a source of pollution.

More than a generation's worth of corporate and judicial process precedes this ruling and is summarized in the pages that follow. That history is important to the conclusions I reach, which are as follows.

First, I conclude that §§ 278 and 325(b) of the *Delaware General Corporation Law* bar the Virgin Islands from seeking to hold Goldman Sachs responsible for distributions it received from Panex itself. Because the Virgin Islands never brought suit against Panex, it could not secure a judgment against Panex, a pre-requisite to claiming over against Panex's former stockholders. The reason that the Virgin Islands never brought suit against Panex is that by the time [**3] the Virgin Islands got around to bringing a claim for environmental damage, the Third Circuit had already correctly determined that Panex lacked the capacity to sue and be sued at that time by operation of § 278 of the *DGCL*. Alternatively, even if §§ 278 and 325(b) do not preclude common law making, I would, for reasons I detail, decline to recognize a common law cause of action for a later arising corporate claimant against a stockholder who received a prior distribution in good faith.

Second, because the Virgin Islands did not file a claim against the Liquidating Trust until 1996, well after the Liquidating Trust's original term expired, it has no right to demand that Goldman Sachs return the distributions it received in 1987. After September 12, 1988, the Liquidating Trust only continued in existence to deal with the discrete issue of potential environmental liabilities related to a facility in New York, and not to address unknown claims, such as those later made by the Virgin Islands.

Finally, I conclude that the Virgin Islands is barred in any case by the doctrine of laches. In practical effect, it seeks to hold Goldman Sachs liable for activity undertaken by Panex's predecessors [**4] in the 1970s. The Virgin Islands bought the facility in question in 1981 but first raised environmental claims in 1996. In that 1996 suit, the Virgin Islands sued Goldman Sachs, raising essentially the same claims it now raises, but dismissed that suit without prejudice in 1998. Then, the Virgin Islands waited another eight years to sue Goldman Sachs.

The Virgin Islands has filed its claims long after the analogous statutes of limitation require. As important, its late filing puts Goldman Sachs, a passive stockholder of Panex who acquired its shares as compensation for creditor claims in a bankruptcy, in the unfair position of having to defend environmental claims, when it was never an operator of the facility in question, when many key witnesses are dead or have faded memories, and when the Virgin Islands itself has controlled the facility since 1981. And if the Virgin Islands claims that it can recover against Goldman Sachs simply because it obtained a default judgment in 2005 against the successor trust of Panex, which had no funds to [*765] defend itself, the inequity Goldman Sachs faces as a result of the Virgin Islands' torpor is made even plainer.

I. Facts

These facts are drawn from the [**5] amended complaint, the documents referenced and incorporated therein, and numerous judicial decisions since Panex's dissolution. The facts relevant to deciding this motion are complicated because they involve numerous entities and span several decades.

A. The Predecessor Corporations

Laga Industries, Ltd., a U.S. Virgin Islands corporation, was organized in 1968 with Paul Lazare and Andreas Gal as its initial stockholders and officers. Laga built and operated a textile manufacturing facility in the Tutu region of St. Thomas, U.S. Virgin Islands (the "Laga Facility" or "Laga"). In 1970, Lazare and Gal sold Laga to the Duplan Corporation, a Delaware corporation, and Duplan began dry-cleaning operations at the Laga Facility. Dry cleaning was the final step in the manufacturing process for certain Duplan textile products. ¹ In 1976, Duplan filed for bankruptcy reorganization. Duplan ceased all operations at the Laga Facility in late 1978. ² As part of the bankruptcy process, Panex Co., a New York partnership formed by Lazare and Gal, purchased the Laga Facility from Duplan's bankruptcy trustee in 1979. Panex Co. sold the Laga Facility to the Virgin Islands Department of Education in 1981. [**6] That same year, Duplan emerged from bankruptcy as Panex Industries, Inc. ("Panex"), a Delaware corporation.

1 *In re Tutu Wells Contamination Litig.*, 994 F. Supp. 638, 642, 38 V.I. 275 (D.V.I. 1998).

2 *Rosenbloom v. Esso Virgin Islands, Inc.*, 766 A.2d 451, 454 (Del. 2000).

B. The Post-Bankruptcy Owners Of Panex

Panex arose from bankruptcy in 1981 with over 300 stockholders; ³ however, most of Panex's stock was held by three groups of stockholders. Lazare and Gal owned approximately 27% of Panex's common stock, Firmanco Associates ⁴ owned 40%, and Goldman Sachs owned 13%. ⁵ Lazare and Gal, Firmanco, and Goldman Sachs received shares of Panex stock as part of the bankruptcy process because they were creditors of Duplan before its bankruptcy. ⁶ Firmanco, in building up to its 40% ownership, also acquired shares of Panex on the open market. ⁷

3 *In re Duplan Corp.*, 212 F.3d 144, 149 (2d Cir. 2000).

4 First Manhattan Co., itself a limited partnership, was the general partner of Firmanco Associates. Daniel Rosenbloom was the general partner of First Manhattan Co. *In re Tutu Wells Contamination Litig.*, 885 F. Supp. 776, 779 (D.V.I. 1995). In this opinion, "Firmanco" will refer to Firmanco Associates, First Manhattan, ⁸ and Rosenbloom collectively.

5 Am. Compl. P 18.

6 *In re Duplan Corp.*, 212 F.3d at 148.

7 *Id.*

Of the three primary groups of Panex stockholders, Goldman Sachs was the only entirely passive stockholder. Goldman Sachs did not participate in the management of Panex as either a director or officer. Indeed, it appears that Goldman Sachs was never even an eager equity holder. Rather, it received its equity in Panex as compensation for its creditor claims in the Duplan bankruptcy. By contrast, Lazare, Gal and Firmanco actively participated in the management of Panex. Lazare and Gal, who were the initial officers of Laga and served as officers of ⁹ Duplan, were directors of Panex. ⁸ Firmanco participated in Panex's management through Daniel Rosenbloom, who controlled Firmanco, and served as Chairman of Panex's board of directors. ⁹

8 *In re Tutu Wells Contamination Litig.*, 846 F. Supp. 1243, 1274 (D.V.I. 1993).

9 *Tutu Wells*, 885 F. Supp. at 779.

C. The Dissolution Of Panex

Panex soon returned to the ashes. In August 1984, the Panex board of directors approved a Liquidation Plan for Panex. The Liquidation Plan provided for the disposition of Panex's assets and the use of the proceeds to fund a series of liquidating ¹⁰ distributions to be made to its stockholders within one year. The Liquidation Plan also established

the Panex Liquidating Trust "to cover contingent and other liabilities of Panex which m[ight] arise during or after the Liquidation Period" and funded it with approximately \$ 6 million.¹⁰ The Liquidation Period is "the twelve-month period beginning on the date on which the Plan of Liquidation is adopted by the Panex stockholders."¹¹

10 Bouchard Aff. Ex. A ("Proxy Statement") at 5.

11 *Id.* at 2.

On August 31, 1984, Panex issued a proxy statement describing the Liquidation Plan and asking its stockholders to vote for the proposed Liquidation Plan (the "Proxy Statement"). In describing the Liquidating Trust, the Proxy Statement stated the following:

It is possible that the entire amount which will be held in the Liquidating Trust to cover contingent and other liabilities of Panex will be used to discharge such liabilities. . . . Moreover, although the Board of Directors believes that the amount of approximately \$ 6 million which will be deposited in the Liquidating Trust will be sufficient to cover any liabilities which may arise during or after the Liquidation Period, there can be no assurance [**9] that this will be the case. If the amount held in the Liquidating Trust is insuf-

ficient to discharge fully all liabilities which arise, or if liabilities arise after the Liquidating Trust is terminated, each Panex stockholder may be liable for any unpaid portion of such liabilities to the extent of the liquidating distributions paid to him¹²

The Proxy Statement focused its disclosure of potential liabilities on potential additional tax liabilities from years still subject to audit by the IRS and made mention of lease and other continuing contractual obligations of Panex.¹³ The Proxy Statement did not mention possible environmental liabilities. The Panex stockholders approved the Liquidation Plan on September 24, 1984, and Panex filed its Certificate of Dissolution on April 15, 1985.

12 *Id.* 6.

13 *Id.* at 5.

D. Sections 278 And 325 Of The Delaware General Corporation Code

When Panex's board sought to dissolve the company, certain provisions of the Delaware General Corporation Law became relevant to its actions. *Section 278 of the DGCL* was of particular importance to Panex.¹⁴ As then written in 1985, § 278 continued the existence of a corporation for a term of three years after its [**10] dissolution for several purposes, including winding-up the

business of the corporation and prosecuting [*767] and defending suits. The applicable portion of § 278 stated:

All corporations . . . shall nevertheless be continued, for the term of three years from such . . . dissolution . . . , bodies corporate for the purpose of prosecuting and defending suits . . . , and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities, and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized.¹⁵

Panex desired certain federal tax benefits that flowed from distributing its assets within one year.¹⁶ Therefore, it used a device that would allow it to satisfy the federal tax code's requirement for a corporation to distribute its assets within a year, while honoring § 278's three-year winding-up period requirement. That device was a liquidating trust.¹⁷

14 8 *Del. C.* § 278.

15 *Id.*

16 See Comment, *The Use of Liquidating Trusts to Obtain the Benefits of Section 337 of the Internal Revenue Code of 1954*, 34 U. CHI.

L. REV. 563, 564 (1967) ("*Section 337* [**11] requires that a corporation completely distribute all of its assets, 'less assets retained to meet claims,' within a twelve month period from the date it adopts a plan of liquidation if it wishes to avoid a corporate tax on the sale of appreciated assets.").

17 See *City Investing Co. Liquidating Trust v. Cont'l Cas. Co.*, 624 A.2d 1191, 1196 (*Del.* 1993) ("The acknowledged purpose for establishment of a liquidating trust is tax avoidance.").

Section 278 was also relevant to Panex's consideration of the liabilities that might arise after its dissolution. Specifically, § 278, as well as § 325(b) of the *DGCL*, bore on a question less than ideally certain under Delaware law (and American corporate law more generally): what, if any, liability was owed by corporate stockholders and directors for activities of a dissolved corporation that occurred before its dissolution but where the claims regarding those activities arose only after its dissolution?

On one view, §§ 278 and 325(b) clarified this uncertainty. Under this view, §§ 278 and 325(b) precluded any suit against a dissolved corporation's former stockholders and directors brought after the winding-up period set forth in § 278 -- three years [**12] unless otherwise extended -- because the corporation lacked the capacity to be sued. The corporation's lack of the capacity to be sued after the winding-up

period is an interpretation of the following portion of § 278, which at the time stated:

With respect to any action, suit or proceeding begun by or against the corporation either prior to or within three years after the date of its . . . dissolution, the corporation shall, for the purpose of such actions, suits or proceedings, be continued as a body corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed¹⁸

The rationale for such an interpretation is that if a specific statutory provision was required to continue the corporation's existence beyond the three-year winding-up period for the resolution of pending suits, the corporation must have ceased to exist at the end of the three-year period for all other purposes, including prosecuting or defending new lawsuits. Meanwhile, § 325(b) stated at that time: "No suit shall be brought against any officer, director, or stockholder for any debt of a corporation of which he is an officer, director or stockholder, until judgment [**13] be obtained therefor against the corporation and execution [**768] thereon returned unsatisfied."¹⁹ Therefore, one view of the combined effect of §§ 278 and 325(b) was that directors, officers, and

stockholders of a corporation could not be held liable for the debts of a corporation after the § 278 winding-up period had expired because no judgment could be obtained against the dissolved corporation, a prerequisite for director, officer, and stockholder liability for the debts of a corporation under § 325(b).²⁰

18 8 Del. C. § 278.

19 8 Del. C. § 325(b).

20 See, e.g., *infra* note 72 and accompanying text.

But the comfort given by §§ 278 and 325(b) was lessened by the absence of Delaware case law embracing this interpretation. This gap created doubt because of case law from other jurisdictions applying the so-called trust fund doctrine.²¹ This doctrine is a notoriously squishy one,²² but generally involves the notion that funds distributed from a dissolved corporation to its stockholders constitute a hypothetical trust fund, against which creditors and tort claimants with claims against the dissolved corporation may make claims, by suing the stockholders directly, but only to an extent co-extensive [**14] with the defendant-stockholder's receipt of distributions from the defunct corporation.²³ Thus, there existed the concern that §§ 278 and 325(b) did not provide iron-clad protection for directors, officers, and stockholders of a dissolved corporation. The rationale for this view was that the trust fund doctrine might co-exist with corporate dissolution statutes and provide a supplemental method to hold di-

rectors, officers, or stockholders liable for debts of a dissolved corporation.²⁴ Against this backdrop of legal uncertainty, it is unsurprising that Panex made a cautious disclosure of potential post-dissolution stockholder liability in its dissolution Proxy Statement by warning Panex stockholders that they "may" face liability for Panex liabilities to the extent of the liquidating [*769] distributions they received from Panex.²⁵

21 See DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, *CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY* § 12-7[c] (2007) ("To date, no Delaware court has had occasion to apply the trust fund doctrine in a case by a creditor seeking to recover assets that have been distributed to the stockholders of a dissolved or insolvent corporation").

22 See [**15] 15A WILLIAM M. FLETCHER, *CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 7369 (2006) ("Perhaps no concept has created as much confusion in the field of corporate law as has the 'trust fund doctrine.'"); see also Joseph Jude Norton, *Relationship of Stockholders to Corporate Creditors upon Dissolution: Nature and Implications of the "Trust Fund" Doctrine of Corporate Assets*, 30 *BUS. LAW.* 1061, 1072-77 (1975) (detailing several of the un-

certain features of the trust fund doctrine).

23 19 *AM. JUR. 2D Corporations* § 2419 (2007) ("Under the trust fund doctrine, once a corporation is dissolved, the property of a dissolved business corporation ultimately passes to its stockholders as the actual owners of such property, subject, of course, to the payment of the corporate debts. Thus, under the trust fund theory, when the assets of a dissolved corporation are distributed to shareholders, creditors may pursue the assets on the theory that in equity the assets are burdened with a lien in the creditor's favor. Stated another way, the assets of a dissolved corporation become a trust fund against which the corporation's creditors have a claim."); see also 15A WILLIAM M. FLETCHER, *CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 7369 [**16] (2006) (noting that the trust fund doctrine has also been applied to hold directors of a dissolved or insolvent corporation liable for the debts of the corporation when they breach their fiduciary duty by improperly distributing the assets of the corporation).

24 See George I. Wallach, *Products Liability: A Remedy in Search of a Defendant--The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims*, 41 *MO. L. REV.* 321, 328-35 (1976) (discussing how and why

corporate dissolution statutes and the trust fund doctrine might co-exist).

25 This uncertainty is not merely the result of my after-the-fact analysis in 2007. The uncertainty was well-known at the time of Panex's dissolution. See Joseph Jude Norton, *Relationship of Stockholders to Corporate Creditors upon Dissolution: Nature and Implications of the "Trust Fund" Doctrine of Corporate Assets*, 30 BUS. LAW. 1061, 1076 (1975) ("The question arises whether or not the three year period does in fact preclude a creditor's claim under the 'trust fund' doctrine subsequent to the three year period. On this point Delaware case law is silent.").

E. The Creation Of The Panex Liquidating Trust

After formulating the Liquidation [**17] Plan, disclosing its details in the Proxy Statement, obtaining stockholder approval, and filing its certificate of dissolution, the next step in Panex's liquidation process was the execution of the Liquidating Trust Agreement on September 12, 1985. The Liquidating Trust Agreement named Rosenbloom and Gal as the original trustees of the Liquidating Trust. ²⁶ Within a short period, Lazare succeeded Gal as a trustee of the Liquidating Trust. ²⁷ The Liquidating Trust Agreement created a trust that was strictly limited in its purpose, the assets

it received, the distributions it could make, and its duration. The Liquidating Trust was

established for *the sole purpose* of holding the Assets transferred to it by Panex on behalf of the Beneficiaries, enforcing the rights of the Beneficiaries thereto, collecting income thereon, satisfying any and all liabilities of Panex which are not paid or otherwise discharged, distributing the Trust Property to the Beneficiaries, and taking such other action as is necessary to conserve and protect the Trust Property and to provide for the orderly liquidation of any and all of the Assets. ²⁸

The only assets the Liquidating Trust received from Panex were any [**18] assets not readily distributable to the stockholders in kind, assets held on behalf of stockholders who could not be located, and "\$ 6 million as a reserve for possible contingent or other liabilities which may arise during or after consummation of the [Liquidation] Plan." ²⁹ The trustees of the Liquidating Trust were required to pay over to the beneficiaries a distribution at least once annually "*provided, however*, that no distribution shall be made to the Beneficiaries without first satisfying or adequately providing for (i) a reserve for all known

or possible contingent or other liabilities, (ii) a reserve for reasonable expenses incurred or to be incurred by the Trustees, and (iii) a reasonable reserve for payments to be paid to Missing Beneficiaries." ³⁰

26 Jameson Aff. Ex. 1 ("Trust Agreement") at 1.

27 *Rosenbloom*, 766 A.2d at 454; see also Trust Agreement P 6.1 (designating Lazare as the successor trustee to Gal if Gal were unable to serve as trustee for any reason).

28 Trust Agreement P 3.1 (emphasis added).

29 *Id.* at Ex. A P 3.

30 Trust Agreement P 3.2.

By its express terms, the Liquidating Trust was required to terminate within three years after it was established except in certain *[**19]* circumstances. ³¹ One of those circumstances required "that this Trust Agreement shall continue to exist for a reasonable period beyond three years from the date of this Trust Agreement *for the limited purpose of discharging any known liabilities of the Trust or of Panex or liabilities of the Trust or of Panex which the Trustees have reasonable grounds to believe may be asserted*, but in no event *[*770]* beyond 12 years from the date hereof." ³²

31 *Id.* P 8.1

32 *Id.* (emphasis added).

Panex made distributions of approximately \$ 64 million to its stock-

holders between the time the Liquidation Plan was approved in September 1984 and the Liquidating Trust was created and funded with \$ 6 million in September 1985. By July 1987, the statute of limitations for an IRS audit of Panex's 1982 and 1983 tax returns had run. ³³ That development, when combined with the absence of any other known or suspected Panex liabilities, prompted the trustees of the Liquidating Trust to distribute approximately \$ 4.5 million to Panex's former stockholders in July 1987. ³⁴

33 *Rosenbloom*, 766 A.2d at 455.

34 *Tutu Wells*, 885 F. Supp. at 781; *Rosenbloom*, 766 A.2d at 455.

The Virgin Islands alleges that Goldman Sachs received a total *[**20]* of approximately \$ 9 million in liquidating distributions from Panex and the Liquidating Trust. ³⁵ An opinion from the U.S. District Court for the Virgin Islands details the liquidating distributions. ³⁶ That decision indicates that Goldman Sachs received \$ 9.3 million in liquidating distributions from Panex in 1984 and 1985. ³⁷ In 1987, Goldman Sachs received a \$ 617,000 distribution from the Liquidating Trust. ³⁸

35 Am. Compl. PP 30-31.

36 *Tutu Wells*, 885 F. Supp. at 781.

37 *Id.*

38 *Id.*

F. The Discovery Of Potential Environmental Liabilities In New York And The Extension Of The Liquidating Trust

In April 1988, approximately five months before the three-year period for the existence of the Liquidating Trust expired, the trustees received notice that Panex, as the former parent of Rochester Button, was a potentially responsible party for alleged environmental contamination in New York.³⁹ As a result, the Liquidating Trust remained in existence beyond its expected three-year duration for the limited purpose of discharging the potential liabilities related to that environmental contamination. Under the Trust Agreement, a specific purpose extension was the only extension available to the trustees. [**21]⁴⁰ The mechanics and details of the extension of the Liquidating Trust, however, remain a mystery as the court has not received any documentation on the extension of the Liquidating Trust.⁴¹

39 See *Rosenbloom*, 766 A.2d at 455; see also *New York v. Panex Indus., Inc.*, 1997 U.S. Dist. LEXIS 15860, 1997 WL 627635 (W.D.N.Y. 1997) (one of several decisions resulting from and detailing the alleged environmental violations in New York).

40 See *supra* notes 31 -32 and accompanying text.

41 Counsel for Goldman Sachs acknowledged the lack of any documentation on the extension of the Liquidating Trust at oral argu-

ment -- "What I don't know is whether there is a document extending the trust from three to 12 . . . -- I don't believe -- if it exists, it's not in the papers that we've supplied the Court." Tr. Of Oral Arg. On Def's Mot. To Dismiss (Sept. 27, 2007) at 32. Gaps such as this illustrate the predicament Goldman Sachs faces as a result of the Virgin Islands' tardiness. Goldman Sachs, which had no active role in the administration of the Liquidating Trust, is being forced to recreate and defend actions taken by trustees over twenty years ago.

G. Panex Is Sued In The Virgin Islands And Learns Of The Contamination Of The Tutu [**22] Aquifer

There is a large aquifer under St. Thomas in the U.S. Virgin Islands. That aquifer is the source of potable water for most [*771] of that island. In July 1987, a private citizen detected the aroma of gasoline in his well, which drew from the Tutu aquifer.⁴² That event inspired the filing of a lawsuit in 1989 (the "VI Environmental Litigation").⁴³ The plaintiffs in that first action were the owners and operators of the wells that the Department of Planning and Natural Resources of the Territory of the Virgin Islands ordered closed after the discovery of the contamination.⁴⁴ Those plaintiffs sued several oil companies and businesses operating on St. Thomas, in-

cluding Esso Standard Oil, S.A. and Texaco, Inc.⁴⁵

42 *Tutu Wells*, 846 F. Supp. at 1249.

43 *Id.* at 1250.

44 *Id.*

45 *Id.*

In 1992, four years after the Liquidating Trust had by its terms ceased to exist for any purpose other than discharging any potential liabilities in New York, the trustees of the Liquidating Trust first learned that the Laga Facility was being accused of contributing to contamination of the Tutu aquifer.

The source of the claim was itself somewhat surprising." By 1992, the Virgin Islands had owned the Laga Facility for [**23] eleven years, having bought it from Panex Co., a partnership with Lazare and Gal as its only partners, in 1981 for \$ 1.3 million.⁴⁶ Yet, in the period when the Facility was under its dominion and control, the Virgin Islands never informed Panex (during its existence) or the Liquidating Trust (thereafter) that the Laga Facility was suspected of having polluted the Tutu aquifer.⁴⁷ Indeed, the Virgin Islands did not even make such a claim in 1992.

46 Am. Compl. PP 15-16; Bouchard Aff. Ex. J ("Virgin Islands Brief to the Third Circuit") at 7.

47 Notifying Panex Co. would have put both Panex and the Liquidating Trust on notice because Lazare and Gal were the only own-

ers of Panex Co. Lazare and Gal were officers of Panex and one of them served as a trustee of the Liquidating Trust at all times during its existence.

Rather, the Liquidating Trust learned that the Laga Facility was being targeted as a potential source of pollution of the Tutu aquifer when the plaintiffs in the VI Environmental Litigation amended their complaint to allege that the Laga Facility had also contributed to the pollution of the Tutu aquifer. The plaintiffs sued Panex, as the former owner of the Laga Facility, and Lazare [**24] and Gal, in their capacity as former directors and officers of Panex, seeking to hold them responsible under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and under common law tort theories.⁴⁸ The existing defendants also filed cross-claims against Panex, Lazare, and Gal, alleging they should bear their proportionate share of liability for clean-up costs.⁴⁹

48 *Tutu Wells*, 846 F. Supp. at 1250. In addition to the CERCLA claims, there were claims under the Resource Conservation and Recovery Act ("RCRA"). I will refer to the CERCLA and RCRA claims collectively as the CERCLA claims because this is consistent with prior decisions and the RCRA claims were ultimately dismissed with prejudice. See *Tutu Wells*, 994 F. Supp. at 660.

49 *Tutu Wells*, 846 F. Supp, at 1251.

The emergence of the Virgin Islands claims also put the trustees of the Liquidating Trust in an awkward position. As of 1992, the trustees were Lazare and Rosenbloom.⁵⁰ Both of them were directors of Panex when it was an operating entity. Lazare was an officer of Panex [*772] and its predecessor companies and was alleged to have had control over the operations at Laga.⁵¹ As a result, Lazare faced [**25] potential liability if he was personally involved in directing the polluting activities at Panex facilities, a liability exposure that flowed out of his official positions, but that ultimately turned on his behavior in his official corporate capacities, and not simply his status as a former officer and director.

50 *Rosenbloom*, 766 A.2d at 454.

51 *Tutu Wells*, 994 F. Supp. at 666-75.

H. The Liquidating Trust Litigation

By 1994, there was environmental litigation pending in New York regarding Rochester Button (the "NY Environmental Litigation"), and environmental litigation pending in the Virgin Islands regarding the Laga Facility. In the NY Environmental Litigation, the defendants related to Panex included Panex; the Liquidating Trust; Rosenbloom and Lazare as trustees of the Liquidating Trust; and Lazare, Gal, Firmanco, and Goldman Sachs as distrib-

utees of Panex's assets.⁵² In the VI Environmental Litigation, although the Liquidating Trust would not be added as a defendant until 1996,⁵³ it was paying litigation defense costs for Panex, Lazare, and Gal.⁵⁴

52 *New York v. Panex Indus., Inc.*, 1997 U.S. Dist. LEXIS 15860, 1997 WL 627635 (W.D.N.Y. 1997).

53 *See Tutu Wells*, 994 F. Supp. at 646.

54 *Tutu Wells*, 885 F. Supp. at 782.

Of [**26] course, by the time even the Rochester Button issue emerged in 1988, the Liquidating Trust had already distributed most of the funds in its possession, because the trustees were unaware that any liabilities existed that required retention of the funds.⁵⁵ The NY Environmental Litigation started the Liquidating Trust's funding problem and the later emergence of the VI Environmental Litigation compounded that problem. The Liquidating Trust simply did not have sufficient funds to mount an effective defense to the environmental claims. Furthermore, the Liquidating Trust was only three years away from the twelve-year deadline on its existence.

55 *Id.* at 781.

The funding issue came to the surface in 1994 when the Liquidating Trust filed an action in this court to "obtain a determination as to the proper distribution of the trust assets under Delaware law."

⁵⁶ Specifically, the trustees were seeking approval to pay \$ 600,000 to cover Panex, Lazare, and Gal's share of a settlement reached with certain plaintiffs in the VI Environmental Litigation. ⁵⁷

56 *Id.* at 783.

57 *Tutu Wells*, 885 F. Supp. at 782-83; see also *In re Tutu Wells Contamination Litig.*, 157 F.R.D. 367, 372 (D.V.I. 1994).

Various other [**27] parties to the VI Environmental Litigation, including the Virgin Islands Department of Education, which owned the Laga Facility, moved in that litigation to preliminarily enjoin the Liquidating Trust from proceeding with its petition in the Court of Chancery. ⁵⁸ The moving parties were concerned that the payment of the settlement would exhaust the Liquidating Trust's assets. ⁵⁹ The U.S. District Court for the Virgin Islands granted the requested injunction, and the Court of Chancery proceeding was suspended.

58 *Id.* at 372-73.

59 *Id.* at 373.

Those same parties later moved for a permanent injunction prohibiting the trustees of the Liquidating Trust from proceeding in the Court of Chancery to obtain [*773] instructions regarding the disbursement of the Liquidating Trust's assets. ⁶⁰ In April 1995, the U.S. District Court for the Virgin Islands granted the permanent stay and enjoined the Liquidating Trust and its trustees from disbursing its assets. ⁶¹

60 See *Tutu Wells*, 885 F. Supp. at 777-78.

61 *Id.* at 791-92.

By that time, the District Court had dismissed all the common law claims against Panex, Lazare, and Gal for reasons that bear quotation:

In light of [*Delaware General Corporation Law Section 278*], [**28] this court must conclude that under Delaware law, the common law claims against Duplan, re-incorporated as Panex, Industries, Inc., may not be maintained and must be dismissed.

To the extent[] the complaints state claims against Lazare and Gal in their capacity as officers, directors, or stockholders of Duplan and Panex, Inc. [sic], these claims must also be dismissed under section 325(b) of the *Delaware General Corporation Law*. ⁶²

At that time, the U.S. District Court for the Virgin Islands, however, refused to dismiss the CERCLA claims because it found that CERCLA preempted the Delaware corporate dissolution and capacity statutes. ⁶³

62 *Tutu Wells*, 846 F. Supp. at 1280.

63 *Id.* at 1277; see also *In re Tutu Wells Contamination Litig.*, No. 95-7280, slip op. at 12-13 (3d Cir. 1995).

By 1995, however, the U.S. Court of Appeals for the Third Circuit had issued a decision in *Witco Corp. v. Beekhuis* holding that CERCLA did not preempt state capacity statutes like § 325(b).⁶⁴ Therefore, Panex, Lazare, and Gal renewed their request for dismissal of the CERCLA claims, arguing that the District Court's own logic in dismissing the common law claims now applied to the CERCLA claims as well.

64 38 *F.3d* 682 (3d Cir. 1994).

The [**29] U.S. District Court for the Virgin Islands acknowledged that it could not rest its refusal to dismiss the CERCLA claims on the ground that CERCLA preempted §§ 278 and 325(b). But, it refused to extend its reasoning for dismissing the common law claims to the CERCLA claims, relying upon its interpretation of an intervening decision of the Delaware Supreme Court in *City Investing Co. Liquidating Trust v. Continental Casualty Co.*⁶⁵ The District Court read *City Investing* as standing for the broad proposition that the creation of a Liquidating Trust for any purpose has the effect of extending the winding-up period of the dissolving corporation for any potential liability that surfaces during the Trust's existence.⁶⁶ Under its reading, the District Court found that "because of the existence and activities of the Liquidating Trust, the predecessor

corporation [i.e., Panex], has the attributes of a corporation in dissolution, with the capacity to sue and be sued."⁶⁷ Therefore, because under this view Panex was still in the winding-up period and it still had the capacity to sue and be sued, the District Court held that the CERCLA claims against Panex were not barred by [*774] *DGCL* § 278.⁶⁸ Relatedly, [**30] because Panex could still be sued, the District Court rejected Lazare and Gal's argument that because Panex's ability to be sued had expired, no judgment could be had against Panex and therefore claims against them for Panex's liabilities were barred by § 325(b).

65 *Tutu Wells*, 885 *F. Supp.* at 784-85 (citing *City Investing*, 624 *A.2d* 1191 (Del. 1993)). Although *City Investing* was not intervening in a purely temporal sense, it was intervening in a practical sense because it was decided only a few months before the District Court's prior decision dismissing the common law claims against Panex, Lazare and Gal and was not addressed in that decision.

66 *Id.* at 784.

67 *Id.*

68 *Id.*

Panex, Lazare, and Gal, in their capacity as former officers or directors of Panex, appealed. The Virgin Islands, which had still yet to sue over Laga, leapt into the appeal as an amicus against Panex, Lazare, and Gal.⁶⁹ It was

unsuccessful in seeking to have the Third Circuit sustain the District Court's ruling.

69 The Virgin Islands filed an amicus brief supporting one of the appellees in the Third Circuit action because it was concerned that if the injunction were overturned and the Liquidating Trust was allowed to terminate, ⁷⁰ the Virgin Islands, as the current owner of the Laga Facility, could be held responsible for the contamination at the Laga Facility. Virgin Islands Brief to the Third Circuit at 32.

In *In re Tutu Wells Contamination Litigation* ("Tutu Wells"), ⁷⁰ the U.S. Court of Appeals for the Third Circuit reversed the District Court's decision, holding "that no judgment can be obtained against the dissolved corporations and therefore no claims can be maintained against their former officers or directors." ⁷¹ The Third Circuit's reason for dismissing the CERCLA claims was the same as the District Court's reason for dismissing the common law claims: 1) the dissolved corporations (Panex and its predecessors) lacked the capacity to be sued by operation of § 278 of the *DGCL*; and 2) therefore, the claims against the directors and officers of those dissolved corporations must be dismissed because § 325(b) requires a judgment against the corporation be obtained before a suit may be brought against any director or officer. ⁷² In

reaching its conclusion, the Third Circuit disagreed with the District Court's interpretation of *City Investing*. The Third Circuit found that although *City Investing* stood for the ⁷³ proposition that a liquidating "trust could be sued so long as it exists" -- meaning that suits against the trust itself were not subject to the limitations period of § 278 -- the corollary to that proposition was that "the dissolved corporation cannot be sued whether or not the trust continues" because it lost capacity to sue or be sued at the end of the § 278 winding-up period.

70 No. 95-7280, slip op. (3d Cir. 1995).

71 *Id.* at 17.

72 *Id.* at 15.

73 *Id.* at 14-15.

Because one of the considerations relevant to the issuance of an injunction is the effect the injunction will have on third parties, the Virgin Islands spent a section of its amicus brief to the Third Circuit arguing that the District Court's injunction precluding procession of the Chancery litigation seeking instructions as to the distribution of the Liquidating Trust would not prejudice the former stockholders of Panex. ⁷⁴ That section of the brief presupposed that the parties seeking to hold Panex, Lazare, and Gal liable would prevail on the merits, which was necessary for the injunction below to be sustained.

74 Virgin Islands Brief to the Third Circuit at 21-25.

Based on that presupposition, the Virgin Islands argued that there ^[**33] was no prejudice to former Panex stockholders because the trust fund doctrine supposedly rendered the former stockholders of Panex liable for debts of Panex, but only to the extent that they possessed assets that were "identifiable ^[*775] and traceable" to a distribution from Panex. ⁷⁵ According to the Virgin Islands, "the creditors of [Panex] may retrieve th[o]se assets to satisfy the liabilities of Panex for environmental harm caused by the corporation's activities prior to dissolution." ⁷⁶ In other words, because the stockholders would be on the hook for the Virgin Islands' environmental claims if the Liquidating Trust could not satisfy them, the former Panex stockholders were not prejudiced by preserving the Trust's (already inadequate) assets for use for that purpose. Likewise, because the Virgin Islands viewed applicable law as imposing a fiduciary obligation on the trustees of the Liquidating Trust toward "future contingent creditors" of the dissolved Panex, it argued that the injunction was not unfair to them. ⁷⁷

⁷⁵ *Id.* at 24.

⁷⁶ *Id.*

⁷⁷ *Id.*

Hewing closely to its task, the Third Circuit eschewed addressing these arguments. Having found that the injunction had to be vacated because the

claims ^[**34] against Panex, Lazare, and Gal had to be dismissed on the merits, the Third Circuit had no occasion to address the part of the equitable calculus relevant to the issuance of an injunction addressing the interests of third parties. Having lost on the merits, the Virgin Islands lacked the essential foundation for even calling upon the court's equitable powers. Moreover, the injunction below was not premised on any claim against a party in its capacity as a former Panex stockholder. Even as to Lazare and Gal, who were former Panex stockholders, the only claims on which the injunction rested were against them in their capacity as former directors and officers of Panex, not against them in their capacity as former stockholders. Thus, for these two independent reasons, the Third Circuit had no need to and therefore did not address the viability of any claims against former stockholders of Panex for liabilities of that dissolved corporation. ⁷⁸

⁷⁸ *Tutu Wells*, No. 95-7280, slip op. at 16-17.

I. The Fate Of The NY Environmental Litigation

Meanwhile, the U.S. District Court for the Western District of New York, unlike the Third Circuit, did have occasion to address the viability of trust fund doctrine ^[**35] claims against the former stockholders of Panex in the NY Environmental Litigation. The defendants in the NY Environmental Litigation included Lazare, Gal, Firmanco, and

Goldman Sachs as former stockholder-distributees. In an October 1997 decision, Judge Elfvin granted the stockholder-distributees' motion to dismiss New York's trust fund doctrine claims against them.⁷⁹ In doing so, the District Court's reasoning was: "that the trust fund doctrine is inapplicable to a dissolved Delaware corporation subsequent to the three-year period provided in *section 278* and that the State's action under CERCLA against the Panex Distributees is barred by *section 325(b)*."⁸⁰

79 *New York v. Panex Indus., Inc.*, 1997 U.S. Dist. LEXIS 15860, 1997 WL 627635, at *3-4 (W.D.N.Y. 1997).

80 1997 U.S. Dist. LEXIS 15860, [WL] at *3.

J. The Establishment Of The Successor Trust

Under the Liquidating Trust Agreement by which the Liquidating Trust was formed, the Liquidating Trust had a maximum life span of twelve years, which would end on September 12, 1997. As that [*776] deadline approached, the VI and NY Environmental Litigations were still pending. The trustees of the Liquidating Trust were named personally as defendants in each of those suits.⁸¹ The Trust itself had a rapidly [*36] shrinking pot of cash to use to defend claims and to seek out coverage from the dwindling Panex insurance policies that had been transferred to it.

81 *See Tutu Wells*, 994 F. Supp. at 646; *New York v. Panex Indus., Inc.*, 1997 U.S. Dist. LEXIS 15860, 1997 WL 627635 (W.D.N.Y. 1997).

Facing the deadline for the termination of the Liquidating Trust, the trustees petitioned the Court of Chancery in 1996 for an order authorizing them to terminate the Liquidating Trust.⁸² Several parties, including the Virgin Islands, objected to the termination of the Liquidating Trust because they had unliquidated claims against the Liquidating Trust. The petition to terminate was warmly contested and eventuated in two oral arguments. The second of those oral arguments was held August 27, 1997 -- only two weeks before the absolute termination of the Liquidating Trust. By that time, the objecting parties' key objective was to seek to have the court create a successor trust to the Liquidating Trust.

82 *Tutu Wells*, 994 F. Supp. at 648.

The looming deadline put the court in a precarious situation and the court acted consistent with the flexibility and prudence characteristic of a court of equity. If the court terminated the Liquidating Trust, [*37] it risked precluding the objecting parties, such as the Virgin Islands, from being able to present claims against the Liquidating Trust based on the argument that the Trust was Panex's legal successor and liable for its debts. Likewise, the objecting parties had for-

mulated the contention that the Liquidating Trust itself could assert claims for recoupment against recipients of distributions from it (and in a more strained argument, Panex) in order for the Trust to satisfy debts to claimants against it (such as New York and the Virgin Islands). If the Liquidating Trust was terminated, no judgment could be entered against it, and therefore recovery theories dependent on the entry of a judgment against it would be precluded. On the other hand, the court also faced the danger of hastily affirming the objectors' theories of recovery if it shaped an order that appeared to validate their view of the law. With its back against the wall as a result of the impending deadline for the termination of the Liquidating Trust, and having no rational time frame within which to address the competing views of the Trustees and the objectors regarding the extent to which distributees from the Trust and [**38] Panex could be held responsible at the late date of September 1997 for liabilities of the long-ago dissolved Panex, the court shaped an order that preserved the status quo as to the interested parties' rights.

The court accomplished that goal by establishing the Successor Panex Industries, Inc. Stockholders Liquidating Trust first by bench ruling on August 27, 1997 and later by Order dated September 30, 1997, as amended October 10, 1997.⁸³ The "Successor Trust Order" is very specific about what it did and did not do. The Successor Trust Order stated that "the Successor Panex Trust shall be

established as the successor entity to the [Liquidating] Trust and Panex, Inc. and will succeed to and accept the assets, liabilities, rights, interests, and standing of the [Liquidating] Trust and Panex, Inc. as of September 12, 1997."⁸⁴ Beyond accepting the assets, liabilities, [*777] and standing of Panex and the Liquidating Trust as of that date, the Successor Trust Order detailed several specific purposes and capacities of the Successor Trust, including two which are relevant to this case: (1) "to serve as the successor entity to the [Liquidating] Trust and Panex, Inc. in continuing to litigate, defend [**39] against, have judgment entered against it on, and/or settle claims brought against it by Petitioning Claimants in the [NY and VI] Environmental Litigations" and (2) "to investigate, evaluate and, if desirable, to institute, assert and/or settle litigation at the expense of and on behalf of the Successor Panex Trust for recoupment of distributions made by Panex, Inc. to its shareholders . . . and distributions made by the [Liquidating] Trust to the former stockholders of the then dissolved Panex, Inc."⁸⁵

83 See *Rosenbloom*, 766 A.2d at 452.

84 Jameson Aff. Ex. 3 ("Successor Trust Order") at 3-4 (emphasis added).

85 *Id.* at 4-5.

What is critical about the Successor Trust Order is that it took absolutely no position on whether viable claims ex-

isted as of September 12, 1997 against the Liquidating Trust, or by the Trust or any other party against distributees from the Liquidating Trust or Panex. It only vested in the Successor Trust whatever rights and responsibilities the Liquidating Trust had as of September 12, 1997 as to the NY and VI Environmental Litigations -- whatever they were, if any. Similarly, the Successor Trust Order did not determine that the Liquidating Trust had viable recoupment [*40] claims against distributees as of September 12, 1997, it simply vested in the Successor Trust whatever rights the Liquidating Trust had, if any, to pursue such claims.

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86 Judge Elfvin of the U.S. District Court for the Western District of New York recognized this. In his 1997 decision rejecting New York's argument that the Successor Trust Order established the viability of New York's trust fund claims against the Panex stockholder-distributees, he observed: "the September 30th Order makes no finding with respect to the substance of the plaintiffs' claims against Panex, the [Liquidating] Trust or the Successor Trust." *New York v. Panex Indus., Inc.*, 1997 U.S. Dist. LEXIS 20774, 1997 WL 805419, at *1 (W.D.N.Y. 1997).

Because the existing trustees of the Liquidating Trust were defendants in the NY and VI Environmental Litigations and recipients of a significant portion of

the liquidating distributions that might be subject to recoupment, the Successor Trust Order appointed an independent trustee, Michael DeBaecke (the "Successor Trustee"), and gave him the authority necessary to carry out the purposes of the Successor Trust. ⁸⁷ This put DeBaecke in the difficult position of addressing the interests of two competing [*41] constituencies, the former Panex stockholders, who wished to put that ill-fated company out of mind forever, and the plaintiffs in the NY and VI Environmental Litigations, who wished to obtain judgments holding those former stockholders, directors, and officers liable for Panex's activities at Rochester Button and Laga.

87 Successor Trust Order at 5, 12-13.

The Successor Trust Order was appealed by the remaining living trustee of the Liquidating Trust, Rosenbloom, as well as by the estate of Lazare, who had died in 1999. ⁸⁸ The two issues on appeal were "whether the Court of Chancery acted within its authority in establishing a successor trust to succeed a liquidating trust which was about to expire on its own terms" and "whether it was an abuse of discretion to replace on the grounds of conflict of interest, the trustees of the liquidating trust upon creation of a successor trust when the trustees, who had received a substantial portion of the [liquidating distributions], had petitioned for instructions [*778] requesting termination of the trust which, if

granted, would have denied a remedy to claimants, and avoided a possible recoupment action for the proceeds distributed." ⁸⁹ The Delaware ⁸⁸ Supreme Court, sitting en banc, affirmed the Court of Chancery on both issues. The Supreme Court found that the "Court of Chancery clearly had the authority to extend the term of the trust in order to complete its purpose of" ⁹⁰ discharging any "liabilities of the Trust or of Panex which the Trustees have reasonable grounds to believe may be asserted." ⁹¹ It went on to conclude that then-Vice Chancellor (now Chief Justice) Steele's decision to create a successor trust that had the benefit of "closing the door on other claimants" rather than just extending the existence of the Liquidating Trust was not in error because it did not "in any way compromis[e] the obligation of the successor trustee to defend" the Successor Trust against the claims by the existing claimants. ⁹² The Supreme Court also found that the Court of Chancery did not abuse its discretion by replacing the interested trustees with a disinterested trustee. In doing so, the Supreme Court determined that the Successor Trust Order did not establish the propriety of pursuing the potential recoupment claims:

Contrary to the Appellants' argument, the Vice Chancellor specifically and carefully refrained from deciding whether ⁹³ or not a recoupment or restitution action

would be necessary or appropriate, leaving that for further analysis by the Successor Trustee. The fact that the Successor Trustee has initiated such an action does not mean that his effort is immune from review. ⁹³

Finally, finding that the issue was not properly before the Court, the Supreme Court rejected the former trustees' attempt to have it delve into the merits of the potential recoupment claims by determining whether § 325(b) of the DGCL barred recoupment claims against the former Panex stockholders. ⁹⁴

88 *Rosenbloom*, 766 A.2d at 453.

89 *Id.* at 452.

90 *Id.* at 458.

91 Trust Agreement P 8.1.

92 *Rosenbloom*, 766 A.2d at 459.

93 *Id.* at 459-60. In dictum, the Supreme Court stated that "[b]y deciding to create a successor trust, the Vice Chancellor necessarily had concluded that the claims then pending must survive the termination of the Panex Trust." *Id.* at 459. This sentence is, as I interpret it, consistent with my interpretation of what the Successor Trust Order accomplished. That Order did not determine that any pending claim was viable, it only prevented any pending claim from being extinguished by the end of the Liquidating Trust.

As described, [**44] the Successor Trust Order was an exigent measure designed to address the imminent expiration of the Liquidating Trust's life and only gave the Successor Trust whatever rights and liabilities of Panex and the Liquidating Trust as of September 12, 1997. The Successor Trust Order makes no attempt to decide what those rights and liabilities were; in fact, it assigned the Successor Trustee the job of investigating and acting upon his own answers to those questions.

94 *Id.* at 462.

K. The 1996 Federal Recoupment Claims And The 1998 NRD Action

In 1996, while the petition to terminate the Liquidating Trust was pending in the Court of Chancery, the CERCLA claims were dismissed against Panex and Lazare and Gal in their capacities as former directors and officers as required by the Third Circuit's *Tutu Wells* decision.⁹⁵ Combined with the earlier dismissal of the common law claims against these parties, [**779] that dismissal left no pending claims against any of the parties related to Panex in the VI Environmental Litigation. As a result, the District Court allowed the oil companies to amend their third party complaints to assert claims against the remaining available parties related to Panex, including [**45] the Liquidating Trust, Lazare and Gal in their personal capacities, and Panex's primary stock-

holders -- Lazare and Gal, Firmanco, and Goldman Sachs.⁹⁶ The Virgin Islands Department of Education joined in that amended complaint.⁹⁷ This was the first time that the Virgin Islands brought claims related to the contamination at the Laga Facility.

95 *Tutu Wells*, 994 F. Supp. at 645.

96 *Id.* at 646.

97 *Id.*

The Virgin Islands' complaint, in part, asserted "equitable disgorgement" claims against Panex's former stockholders.⁹⁸ Although not explicitly described as trust fund doctrine claims, the equitable disgorgement claims mimicked the trust fund doctrine: the claims asserted that Panex's former stockholders were liable as "distributees of the assets of Panex and/or the [Liquidating] Trust . . . up to the amount of the distributions they . . . received."⁹⁹

98 *Id.* at 656-57.

99 Bouchard Aff. Ex. D ("1996 Complaint") PP 76-77.

Firmanco and Goldman Sachs contended that the U.S. [**780] District Court for the Virgin Islands did not have jurisdiction over them.¹⁰⁰ The Virgin Islands conceded that point and dismissed the equitable disgorgement claims against Firmanco and Goldman Sachs. The claims against the Liquidating [**46] Trust were dismissed because it had been replaced by the Successor Trust while the case was pending and

the District Court concluded that its jurisdiction over the Liquidating Trust did not give it jurisdiction over the newly created Successor Trust.¹⁰¹

100 *Tutu Wells*, 994 F. Supp. at 651, 655.

101 *Id.* at 678.

Lazare and Gal did not fare as well. The District Court found that factual issues precluded summary judgment on Lazare and Gal's personal liability under CERCLA.¹⁰² It also refused to dismiss the claims against Lazare and Gal as former Panex stockholders after finding that the Panex stockholders assumed liability for Panex's environmental liabilities based on the liability warning language in the Panex liquidation Proxy Statement.¹⁰³ Lazare and Gal eventually settled all claims brought against them by the Virgin Islands.¹⁰⁴ But Lazare and Gal were differently situated than Goldman Sachs. As the principal managers of Panex and its predecessors who owned and managed the Laga Facility from 1968 to 1981, Lazare and Gal faced responsibility under CERCLA for their personal involvement in the polluting activities that allegedly occurred at the Laga Facility.

102 *Id.* at 657, 664-75.

103 *Id.* at 675-77. [**47] In so holding, the District Court relied on precedent analyzing a liquidation agreement, but elided the fact that the Proxy Statement was a dis-

closure document rather than an actual liquidation agreement.

104 Tr. Of Oral Arg. On Def's Mot. To Dismiss (Sept. 27, 2007) at 82.

Once the 1996 recoupment claims against the Liquidating Trust had been dismissed, the Virgin Islands continued in its quest to hold Panex liable for the contamination at Laga. In September 1998, seven months after the dismissal of the claims against the Liquidating Trust, the Trustee for Natural Resources of the Virgin Islands filed a complaint in the U.S. District Court for the Virgin Islands against the Successor Trust, Successor Trustee, Lazare, Gal, and several oil companies and businesses operating on St. Thomas, including Esso and Texaco (the "NRD Action" which is also included in the broadly defined "VI Environmental Litigation").¹⁰⁵ That complaint sought damages for injuries to the Virgin Islands' natural resources.

105 Am. Compl. P 43; Virgin Islands Ans. Br. at 6.

L. The Successor Trustee Unsuccessfully Seeks Restitution From The Distributees Of The Liquidating Trust

In 1998, having investigated the recoupment [**48] claims as instructed in the Successor Trust Order, the Successor Trustee filed a petition in the Court of Chancery requesting a declaratory judgment that the Successor Trust was entitled to restitution of the monies distributed from the Liquidating Trust to its

beneficiaries.¹⁰⁶ The petition did not allege that the distributees were bound to pay to the Trust the distributions they received from Panex itself, only the distributions they received from the Liquidating Trust after Panex dissolved.¹⁰⁷ In the alternative, the petition requested a declaratory judgment that the former trustees of the Liquidating Trust -- Rosenbloom and Lazare -- had breached their fiduciary duties by failing to obtain an express undertaking from the beneficiaries that they would return distributions from the Liquidating Trust if requested by the trustees to meet obligations of the Trust, and that therefore the former trustees were liable for the amount not returned by the distributees.¹⁰⁸ This petition was obviously supported by the Virgin Islands and New York, which assisted the Successor Trustee in crafting it.

106 Bouchard Aff. Ex. E ("1998 Petition For Declaratory Judgment") at 1.

107 *Id.* at 15.

108 *Id.* at 1.

In [**49] 2001, this court denied the petition for a declaratory judgment on restitution because the petition was procedurally defective and requested further briefing before ruling on the fiduciary duty claims.¹⁰⁹ A key procedural defect cited by the court was the failure of the Successor Trustee to join the distributees -- that is, the former Panex stockholders -- as parties, because the relief requested so directly affected their interests.¹¹⁰

109 Then-Vice Chancellor (now Justice) Jacobs ruled that "the petition fails procedurally, and, therefore, will be dismissed, as far as the claims against the distributees are concerned." Tr. Of Oral Arg. On Mot. To Dismiss, Pet. For Decl. J., Mot. To Strike, and Ruling Of The Ct. (Aug. 14, 2001) at 131. He also found that he was "not in a position to rule" on "the claims against the former trustees" and requested that those claims be "repackaged into a much more compact set of briefs." *Id.* at 132. The record in this case is unclear on whether those fiduciary duty claims were ever pursued.

110 *Id.* at 131-132 (noting that the petition for declaratory judgment was procedurally defective because it was not prosecuted in "the way a normal *in personam* lawsuit [**50] would proceed" and because it failed to join all the distributees).

M. The Successor Trust's Lack Of Funds Causes It To Suffer A Default Judgment In The VI Environmental Litigation

After receiving this adverse ruling, the Successor Trustee did not attempt to cure the defects identified by this court by adding the former Panex stockholders as parties. Instead, the Successor Trustee soldiered on, trying to marshal resources to defend the NY and VI Environmental Litigations. The former Panex stockholders [*781] were not volunteering to

provide the Successor Trust with funds for that purpose. And insurance adequate to fund a defense of both actions was unavailable.

Despite the dearth of funds or insurance to cover litigation costs, the Virgin Islands continued to press its environmental claims against the Successor Trust in the VI Environmental Litigation. Penniless and facing the expensive task of defending claims based on conduct by Panex before 1981, the Successor Trustee had only one real option -- default. In April 2005, the U.S. District Court for the Virgin Islands entered a default judgment for \$ 51.6 million against the Successor Trust in the environmental litigation filed by the Virgin [**51] Islands. ¹¹¹

111 Jameson Aff. Ex. 5 at 2.

The Virgin Islands appears to have been fortunate to obtain a default judgment as opposed to having to litigate the merits of its claims. Otherwise, it would have faced questions about how it had owned the Laga facility since 1981 but did not itself discover the alleged contamination of its land and an important aquifer. Moreover, the Virgin Islands would have been forced to explain its own activities at the Laga Facility between 1981 and the discovery of the contamination in 1987. In his 1998 decision in the VI Environmental Litigation, Judge Brotman raised substantial concerns about the Virgin Islands' role in the contamination:

[T]here is still some question as to whether the chemicals used at the Laga site during the time the plant operated were the sole cause of the contamination ascertained there by the EPA. The Court has already expressed concern over the existence of many 55-gallon drums behind what is now known as [the Virgin Islands Department of Education's] Curriculum Center. While there is no way to state for certain, the existence of rotting drums of chemicals may be a factor in, and help explain, the contamination at the site. No [**52] appraisal report prepared in connection with the sale of the property mentions any drums, nor were any chemical drums listed on the inventory of items to be led [sic] on the site, suggesting that the Government may have placed them there after they acquired the property. There is also the allegation in need of ascertainment that [the Virgin Islands Department of Education] and other government agencies have used the open area behind the main building on the property to store drums containing paints, solvents, cleaners, roofing compounds, insecticides, floor wax, soap, strip-

pers and disinfectants. According to one witness, one chemical drum had partially obscured lettering on it reading "V.I. Dept. Of Educ . . . ," and other drums had on their exteriors names of companies with which [the Virgin Islands Department of Education] did business. ¹¹²

Judge Brotman's concerns are supported by the Virgin Islands' less than fervent denial of its role in the contamination of the Laga Facility in its own brief to the Third Circuit:

If the [Liquidating] Trust is allowed to liquidate, the Virgin Islands Government may be held liable for any contamination of the aquifer caused by Laga Industries, Ltd. [****53**] . . . Contrary to those factual assertions made or implied by Appellants, there is evidence including eyewitness testimony that the improper disposal of wastes from the manufacturing processes utilized by Laga *may* have [***782**] contaminated the property prior to the sale to the Virgin Islands Government. ¹¹³

112 *Tutu Wells*, 994 F. Supp. at 672-73 (internal citations omitted).

113 Virgin Islands Brief to the Third Circuit at 32 (emphasis added).

N. Requiem For A Successor Trust

By early 2006, the untenable position of the Successor Trustee was obvious. He had no funds to defend claims against the Successor Trust. Nor did he have funds to pursue claims against the distributees of the Liquidating Trust.

Even worse, he continued to be caught between two conflicting sets of interests. New York and the Virgin Islands wanted the Successor Trust to exist as a vehicle against which they could obtain a judgment, so that they could then use that judgment as a basis for going after Panex's former stockholders. Meanwhile, the former Panex stockholders believed that the Successor Trustee had a fiduciary duty to protect them against those very claims, which the former stockholders believed to be stale and meritless.

In [****54**] view of the reality that the existence of the Successor Trust was serving none of its original purposes, the court entered a stipulated order on February 9, 2006 terminating its existence. That order assigned to the Virgin Islands and New York whatever right the Successor Trust had to seek recoupment of the distributions made by Panex and the Liquidating Trust to Panex's former stockholders to the extent such claims

would satisfy the judgments in the VI and NY Environmental Litigations. ¹¹⁴ In all respects, the termination order was clear that this court was not deciding that the Successor Trust had rights in any respect. Rather, the termination order simply gave the appropriate constituencies the chance to prove that, as to any category of possible rights assigned to them, that the Successor Trust possessed currently enforceable rights.

114 Jameson Aff. Ex. 4 ("Successor Trust Termination Order") P 1.

The recoupment rights given to New York would turn out not to be of any use. In early 2007, the U.S. Court of Appeals for the Second Circuit upheld the earlier decisions in the U.S District Court for the Western District of New York dismissing New York's trust fund claims against the stockholder-distributees ¹¹⁵ of Panex, agreeing with the District Court that §§ 278 and 325(b) of the DGCL barred those claims.

115 *Marsh v. Rosenbloom*, 499 F.3d 165, 184 (2d Cir. 2007).

O. After Further Delay, The Virgin Islands Re-files Its Long-Shelved Claims Against Goldman Sachs

As has been mentioned, the Virgin Islands sued Goldman Sachs in the VI Environmental Litigation in 1996. In 1998, the Virgin Islands dismissed its claims against Goldman Sachs without prejudice. For over eight years, the Vir-

gin Islands did not seek to reinstate its claims against Goldman Sachs. Even though the Virgin Islands was active in the litigation that remained pending in this court during the entire existence of the Successor Trust, it never sought to join Goldman Sachs as a defendant.

But eight months after the Successor Trust was terminated, on October 30, 2006, the Virgin Islands brought this suit against Goldman Sachs. In its complaint, the Virgin Islands asserted that it was bringing its suit in two capacities. The first capacity was as a creditor of the Successor Trust, seeking to collect on the default judgment it had obtained against the Successor Trust in the VI Environmental [*783] Litigation. The second capacity was as an ¹¹⁶ assignee of the Successor Trust's right to seek recoupment against distributees from the Liquidating Trust and Panex.

The complaint is comprised of two formal counts. The first count alleges that Goldman Sachs will be unjustly enriched if it is permitted to keep the liquidating distributions it received in 1984 and 1985 from Panex, and in 1987 from the Liquidating Trust. This count is substantively identical to the theory the Virgin Islands used in the VI Environmental Litigation in 1996 when it first sued Goldman Sachs. Whether styled as an equitable disgorgement claim (the words used by the Virgin Islands in 1996) or an "unjust enrichment/trust fund doctrine claim" ¹¹⁶ (the words the Virgin Islands now prefers), the Virgin Islands' argument is identical to what it has always

been. To wit, to the extent that Goldman Sachs received distributions from Panex or the Liquidating Trust, it is liable to return those distributions if a later-arising claimant obtained a judgment against a successor to those entities, regardless of when that judgment was obtained or when the claim on which that judgment was entered was first asserted.

116 Virgin Islands Ans. Br. at 21.

The second count is based [**57] on a related theory. It argues that Goldman Sachs is estopped from denying its obligation to return the funds it received from Panex and the Liquidating Trust. The basis for this estoppel is that the Proxy Statement warned distributees that they "may be liable for any unpaid portion of [Panex's] liabilities to the extent of the liquidating distributions paid to [them]" if the funds left in the possession of the Liquidating Trust were insufficient to discharge all of Panex's liabilities.¹¹⁷

117 Proxy Statement at 6.

II. Procedural Framework

Goldman Sachs has moved to dismiss the complaint for failure to state a claim upon which relief may be granted. When addressing a motion to dismiss under Court of Chancery Rule 12(b)(6), I must assume the truthfulness of all well-pled facts in the complaint and draw all reasonable inferences in the light most favorable to the nonmoving party, the Virgin Islands.¹¹⁸ But conclusory allegations

that are unsupported by facts contained in the amended complaint will not be accepted as true.¹¹⁹ After evaluating the amended complaint in this manner, I must dismiss the complaint if the Virgin Islands would not be entitled to recover under any reasonable set [**58] of facts properly supported by the complaint.¹²⁰

118 E.g., *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

119 E.g., *Hughes*, 897 A.2d at 168 (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995)).

120 E.g., *Hughes*, 897 A.2d at 168 (quoting *Savor*, 812 A.2d at 896-97).

III. Legal Analysis

Goldman Sachs' motion to dismiss puts forth five primary arguments that it believes support dismissal of the Virgin Islands' complaint. The first two arguments are related, in the sense that both turn on the assertion that §§ 278 and 325(b) of the DGCL bar the claims asserted by the Virgin Islands. The first of these arguments, however, contends that I need not examine what effect those statutory provisions have on the Virgin Islands' claims because the Third Circuit's *Tutu Wells* decision has already done so. That is, Goldman Sachs [**784] contends that the Third Circuit has already held, in a proceeding in which the

Virgin Islands had an opportunity to contest the issue, that it cannot bring claims against Panex, per § 278, and that therefore § 325(b) bars claims against Goldman Sachs, as [**59] a former stockholder of Panex.

Secondarily, Goldman Sachs argues that even if the Third Circuit's decision is not preclusive on this issue, its reasoning, and the similar reasoning adopted by the U.S. District Court for the Western District of New York and the Second Circuit in rejecting New York's analogous claims, was sound and supports a holding that the combined effect of §§ 278 and 325(b) of the DGCL is to bar the Virgin Islands' claims. The third category of argument is similar and rests on the notion that, just as §§ 278 and 325(b) bar the Virgin Islands' claims regarding the distributions Goldman Sachs received from Panex, so too do the specific terms of the Liquidating Trust Agreement bar the Virgin Islands' claim that Goldman Sachs must return the funds it received from that Trust. The fourth category addresses the Virgin Islands' contention that Goldman Sachs is estopped from denying the Successor Trust's request for a return of the liquidating distributions from Panex and the Liquidating Trust. Finally, Goldman Sachs argues that, irrespective of the merits, the Virgin Islands' torpidity in pressing its claims constitutes laches.

The Virgin Islands' response to the arguments [**60] that its underlying claims lack merit and are barred by laches is predictable: it denies the force of

all of Goldman Sachs' arguments. The Virgin Islands' response to the allegation that §§ 278 and 325(b) of the DGCL bar its claims, however, is complex and dependent on its chameleon-like role in this litigation.¹²¹ The Virgin Islands, it must be remembered, purports to bring claims in two separate capacities. One capacity is as a CERCLA claimant and now, by virtue of the default judgment, as a judgment-creditor. The other capacity is as an assignee of whatever recoupment rights the Successor Trust had.

121 At one point in its brief, the Virgin Islands says that § 278 does not apply because the Successor Trust is suing itself. Virgin Islands Ans. Br. at 28.

In its capacity as a judgment-creditor, the Virgin Islands asserts that its claims are not barred by § 278 because I should adopt a version of the trust fund doctrine, in a way that is unprecedented in Delaware. The Virgin Islands claims that the trust fund doctrine is unaffected by § 278 and § 325(b) and that it allows creditors of a dissolved corporation, even those who first bring their claims after the statutory winding-up period [**61] has ended, to recoup assets of the dissolved corporation from its former stockholders. Alternatively, the Virgin Islands, also in its capacity as judgment-creditor, alleges that an extension of the reasoning in *City Investing* supports the proposition that because the Liquidating Trust was in existence as of the time the

Virgin Islands brought suit in 1996 -- albeit only for purposes entirely unrelated to the Virgin Islands' claim -- a judgment entered against that Trust may be used as a vehicle to demand that distributees of the Liquidating Trust return distributions they received from Panex and the Trust, even though the Virgin Islands did not assert a claim until after the Liquidating Trust's existence as a general successor to Panex for liability purposes had ended.

In its distinct capacity as an assignee of the rights of the Successor Trust, the Virgin Islands argues that § 278 does not bar its claims because § 278 only applies to suits by or against the corporation and § 325(b) does not apply because it only [*785] applies to suits by a creditor for a debt of the dissolved corporation. The Virgin Islands would have this court ignore §§ 278 and 325(b) because Panex no longer existed and [*62] the Virgin Islands obtained a judgment against the Successor Trust. But it would also, in a self-serving example of inconsistency, have me ignore that Goldman Sachs received most of its distributions in its capacity as a Panex stockholder, a much smaller sum as a beneficiary of the Liquidating Trust, and no distributions from the Successor Trust.

I cannot and do not ignore the important issue of the capacity in which Goldman Sachs received the distributions at issue. Goldman Sachs faces potential liability in two distinct capacities, as a former stockholder distributee of Panex and as a beneficiary distributee of

the Liquidating Trust. The legal basis for determining whether Goldman Sachs is liable is somewhat distinct for each capacity.

In an attempt to create some semblance of order and clarity, I address the issues as follows. First, I decide what issues, if any, are precluded by the Third Circuit's *Tutu Wells* decision. Second, I address the issue of whether the Virgin Islands has a claim against Goldman Sachs irrespective of the creation of the Liquidating and Successor Trusts. Third, I decide whether the Virgin Islands has a claim against Goldman Sachs because of the existence of [*63] the Liquidating and Successor Trusts. Fourth, I take up the Virgin Islands' estoppel claims. Finally, I discuss the defense of laches in reference to all the Virgin Islands' claims.

A. Which, If Any, Of The Virgin Islands' Arguments Are Precluded By The Third Circuit's *Tutu Wells* Decision?

Issue preclusion, also known as collateral estoppel, ¹²² "precludes a party to a second suit involving a different claim or cause of action from the first from re-litigating an issue necessarily decided in a first action involving a party to the first case." ¹²³ The doctrine of issue preclusion is commonly used by defendants seeking to prevent plaintiffs from asserting claims. ¹²⁴ "[T]he preclusive effect of a foreign judgment is measured by standards [used by] the rendering forum." ¹²⁵ Goldman Sachs grounds its argument for issue preclusion on the *Tutu Wells* deci-

sion of the U.S. Court of Appeals for the Third Circuit, and thus it must establish that the following elements of issue preclusion have been met: "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating [**64] the issue was fully represented in the prior action." ¹²⁶ The Third Circuit's issue preclusion jurisprudence also requires consideration of "whether the party being precluded had a full and fair opportunity to litigate the issue in question in the prior action and whether the issue was determined by a final and valid judgment." ¹²⁷

122 *E.g., Hendry v. Hendry*, 2006 Del. Ch. LEXIS 99, 2006 WL 1565254, at *8 n.77 (Del. Ch. 2006).

123 *One Virginia Ave. Condo. Ass'n of Owners v. Reed*, 2005 Del. Ch. LEXIS 115, 2005 WL 1924195, at *10 (Del. Ch. 2005).

124 *E.g., Nicholson v. Redman*, 620 A.2d 858, 1993 WL 22026, at *1 (Del. 1993) (TABLE).

125 *Columbia Cos. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217 (Del. 1991).

126 *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 249 (3d Cir. 2006) (internal quotation and citation omitted).

127 *Id.* (internal quotation and citation omitted).

The Third Circuit in *Tutu Wells* held that § 278 rendered Panex "without [the] [*786] capacity to be sued well before [the VI Environmental Litigation] was commenced." ¹²⁸ The court found that § 278 of the DGCL "provides that dissolved corporations may sue and be sued for a period of three years from the date of dissolution." ¹²⁹ Thus, "any suit brought after that period [**65] must be dismissed for lack of capacity." ¹³⁰ After finding that Panex dissolved in 1985 and the VI Environmental Litigation was not commenced until 1989, with Panex not being joined as third-party defendants in the litigation until 1992, the court held that Panex lacked the capacity to be sued and that the CERCLA claims against Panex must be dismissed. ¹³¹ The Third Circuit rejected the argument, based on *City Investing*, that the existence of the Liquidating Trust gave Panex itself the capacity to be sued. The court concluded that the *City Investing* decision only suggested that the Liquidating Trust could be sued directly in accordance with the terms creating it, ¹³² not that the existence of the Liquidating Trust extended the existence of Panex. ¹³³

128 No. 95-7280, slip op. at 15.

129 *Id.* at 9, 15 (describing the lower court's findings in *Tutu Wells*, 846 F. Supp. 1243, which it would adopt in making its ruling).

130 *Id.*

131 *Id.*

132 The Third Circuit noted that under *City Investing*, a "trust may

be sued so long as it exists" in order to discharge the liabilities vested in it under the "trust agreement." *Id.* at 14. In *City Investing*, the Third Circuit realized, the trust at issue was vested [**66] with all liabilities of the predecessor corporation. *Id.* In this case, the Liquidating Trust of Panex was vested with all liabilities of Panex for a period ending three years after the date of the Trust Agreement -- September 12, 1988 -- and after that, with only certain discrete liabilities, not including the Virgin Islands' claims at issue here.

133 *Id.* at 15 ("The *City Investing* case stands, as well, for the proposition that the dissolved corporation cannot be sued whether or not the trust continues.").

The Third Circuit went on to find that the "claims against Gal and Lazare in their capacities as former officers and directors of the dissolved corporations must . . . be dismissed because no judgment may be obtained against the former corporations." ¹³⁴ This conclusion was based on § 325(b) of the DGCL, which the court determined required the return of an unsatisfied judgment against the corporation before suit could be brought against any officer or director for any debt of the corporation. ¹³⁵

134 *Id.*

135 *Id.* at 9-10, 15; see also *Tutu Wells*, 846 F. Supp. at 1280.

The Third Circuit had no occasion to address the question of whether this same reasoning applied to protect former stockholders [**67] of Panex. The reason for that was that Lazare and Gal were only before the Third Circuit "in their capacities as former officers or directors of Laga, Duplan and Panex." ¹³⁶ Thus, the Third Circuit's holding only addressed Lazare and Gal's liability as former officers or directors of Panex and its predecessors: "We will reverse the injunction and remand with instructions . . . to dismiss Gal and Lazare, in their capacities as former officers and directors . . . on the ground that no judgment can be obtained against the dissolved corporations and therefore no claims can be maintained against their former officers or directors." ¹³⁷

136 *Tutu Wells*, No. 95-7280, slip op. at 3.

137 *Id.* at 17.

[*787] As noted previously, ¹³⁸ the Third Circuit expressly avoided opining on certain issues briefed by the Virgin Islands, which touched on the extent to which the former Panex stockholders might be liable to return the distributions they received if the Virgin Islands proved that Panex's operations at Laga caused environmental damage. ¹³⁹ These arguments related only to the question of whether the injunction, if sustained by an adequate merits showing, was unfair to parties not before the court. Because the [**68] Virgin Islands' claims against Lazare and Gal in their capacity as di-

rectors and officers were rejected on the merits, the Third Circuit did not reach the collateral arguments relating to Panex's former stockholders.

138 See *supra* notes 74-78 and accompanying text.

139 *Tutu Wells*, No. 95-7280, slip op. at 16.

And because the Third Circuit did not issue a determination as to the effect of § 325(b) on claims against former Panex stockholders, the *Tutu Wells* decision cannot have any preclusive effect on that precise issue.¹⁴⁰ It does, however, have a preclusive effect as to the narrower, and less controversial, issue of whether a judgment can be obtained against Panex. As to that narrow issue, the Virgin Islands had its turn at bat and swung and missed. The holding of the Third Circuit that Panex's ability to be sued expired three years after its dissolution, per the clear and unambiguous words of § 278, is binding against the Virgin Islands.

140 Issue preclusion does not bar the litigation of issues upon which a prior court purposefully reserved judgment. *E.g.*, *In re PCH Assocs.*, 949 F.2d 585, 593 (2d Cir. 1991).

In holding that the Third Circuit's *Tutu Wells* decision is not preclusive as to [**69] the issue of the former Panex stockholders' liability to the Virgin Islands, I reject Goldman Sachs' novel "a fortiori" theory of issue preclusion. Admitting of the reality that the Third Circuit only addressed the claims against

Lazare and Gal in their capacities as former Panex officers and directors, Goldman Sachs argues that *Tutu Wells* nevertheless precludes the Virgin Islands' claims against former Panex stockholders. Goldman Sachs notes that the "plain language of Section 325(b) leaves no doubt that it applies equally to officers, directors and stockholders" and that "[i]f officers and directors -- those who managed the enterprise -- are insulated from personal suit by Delaware law, then, *a fortiori*, so too are passive stockholders like Goldman Sachs."¹⁴¹ This argument ignores the requirement that issue preclusion only applies when the issues are identical,¹⁴² and that there is no doctrine of *a fortiori* issue preclusion. Rather, this type of argument is really one calling on a later court to recognize and give important precedential effect to the reasoning of a prior court because that reasoning is arguably both sound and fully applicable to the different, but analytically [**70] indistinct, issue the later court faces.

141 Goldman Sachs Rep. Br. at 5.

142 18 James WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 132.02[2][a] (2006) ("The doctrine of issue preclusion only applies when the issues presented in each matter are identical.").

This case actually illustrates why that is so. The claims presented in *Tutu Wells* against Lazare and Gal as former directors and officers are arguably different as a policy matter than the claims pre-

sented here against a former stockholder. The claims in *Tutu Wells* were based on Lazare and Gal's status as directors and officers. The claims presented in this [*788] case are premised on the stockholders' (allegedly inequitable) receipt of distributions from Panex and the Liquidating Trust. Although Goldman Sachs says that it is clear that a former director or officer should be more exposed to post-dissolution liability than passive stockholders, the grounds for holding these corporate constituencies responsible or not are likely to be different. In the case of former stockholders, the issue is really one of underlying fairness: should former stockholders be subject to a restitutionary kind of remedy if they, through no fault of their own, received [**71] distributions and the funds left in the corporate coffers turn out to be inadequate to cover a later-arising claim? It may well be that §§ 278 and 325(b) provide a uniform answer for claims against directors, officers, and stockholders. But I must come to that determination freshly, not by pretending that the Third Circuit already made that determination.¹⁴³

143 Goldman Sachs also asserts that the doctrine of claim preclusion bars the Virgin Islands' claims. I find this argument difficult to fathom. As discussed above, the Third Circuit did not address the issue at the heart of this case -- whether a former stockholder of Panex might be liable to return the

distributions it received if the Virgin Islands proved that Panex's operations at Laga caused environmental damage. Moreover, a key element of claim preclusion is that the presently suing party had an opportunity to bring its current claims against its adversary in a prior action and failed to do so, rendering the judgment in that prior action conclusive as to all claims that could have been litigated in the prior action. *E.g.*, *Churchill v. Star Enters.*, 183 F.3d 184, 194 (3d Cir. 1999) ("Claim preclusion gives dispositive effect [**72] to a prior judgment if a particular issue, although not litigated, could have been raised in the earlier proceeding.") (internal quotation and citation omitted). Goldman Sachs was not a party to the VI Environmental Litigation at the time of the Third Circuit decision. Although Goldman Sachs was later added as a party, it was dismissed as a party without prejudice after it asserted that personal jurisdiction over it did not exist in the U.S. District Court for the Virgin Islands. Therefore, Goldman Sachs cannot claim that the final judgment in the VI Environmental Litigation, if there be one, precludes the claims the Virgin Islands is now bringing. *E.g.*, *Saudi v. Acomarit Mar. Servs., S.A.*, 114 Fed. App'x 449, 454 (3d Cir. 2004) (finding that claim preclusion did not apply to a dismissal

without prejudice for lack of personal jurisdiction because the dismissal was neither on the merits nor a final judgment).

B. Does The Virgin Islands Have A Claim Against Goldman Sachs Irrespective Of The Creation Of The Liquidating And Successor Trusts?

For the sake of analytical clarity, it is useful to begin the analysis of the merits with a consideration of whether the Virgin Islands has viable claims [*73] against Goldman Sachs, irrespective of the creation of the Liquidating and Successor Trusts. In other words, would Goldman Sachs be on the hook for the distributions it received from Panex in 1984 and 1985 before Panex dissolved even though the Virgin Islands did not assert environmental claims related to Panex's Laga operations until 1996, many years after Panex's three-year post-dissolution existence under § 278 expired? After answering this isolated question, I will then address the implications of the Liquidating and Successor Trusts.

In embarking upon answering this initial question, I begin by noting one obvious point, a point the Virgin Islands is precluded from relitigating. By its plain terms, § 278 of the *DGCL* made clear that Panex's existence and ability to be sued or to bring suit as to claims that were not yet in existence terminated on April 15, 1988, three years from the date of its dissolution. *Tutu Wells* so held,

and the statutory language admits of no other reading.

The key question then becomes whether §§ 278 and 325(b)'s terms preclude [*789] the Virgin Island's claims against Goldman Sachs. It is here that the Virgin Islands resorts to its argument that I should find, as [**74] a matter of common law making, that a variant of the ill-defined trust fund concept permits suit against Goldman Sachs, despite the plain language of §§ 278 and 325(b). A court asked to make common law in an area addressed by legislative enactments should proceed with great caution, and the statutory language of § 325(b) is itself a powerful reminder of that need. *Section 325(b)* plainly states that "[n]o suit shall be brought against any . . . stockholder for any debt of a corporation of which he is a[] . . . stockholder, until judgment be obtained therefor against the corporation and execution thereon be returned unsatisfied." ¹⁴⁴

144 8 *Del. C.* § 325(b).

Taking the General Assembly's words literally, as one should if they express, as they do here, a rational purpose, § 325(b) clearly bars the Virgin Islands from seeking to hold Goldman Sachs, as a former Panex stockholder, responsible for a debt, such as its liability on claims relating to its allegedly environmentally irresponsible conduct at Laga, unless the Virgin Islands first obtained a judgment against Panex. Because Panex's ability to be sued and therefore subjected to a judgment by the

Virgin Islands expired in 1988 per the clear [**75] terms of § 278, before the Virgin Islands asserted claims, § 325(b) bars the Virgin Islands' claims.

The Virgin Islands would have me ignore the clear import of the statutory regime, by reference to public policy considerations that it contends justify overriding §§ 278 and 325(b) through judicial lawmaking. That judicial lawmaking, in the Virgin Islands' hopes, would involve the recognition of an open-ended obligation on the part of stockholders of dissolved corporations to return distributions they had received from the dissolved corporation whenever a post-dissolution claimant can prove that the corporation owed it funds based on its pre-dissolution activities. As thus conceived, this variant of the trust fund doctrine would impose a trust on the funds received by stockholders from a dissolving corporation, for the benefit not only of creditors that the directors of the dissolving corporation knew about or had reason to suspect existed during the dissolution process, but also as to any unsuspected future claimants.

Like many other courts who have addressed this issue, I conclude that the legislature's enactments preclude the room for judicial invention. The obvious intent of § 278 [**76] as of the relevant time was to establish a three-year period during which claims against a dissolved corporation could be brought. After that period expired, the only judgments that could be entered against the dissolved corporation were for claims that were

brought before that period expired. The intention of the statute was therefore to balance the competing public policy interests of ensuring that claimants against the corporation had a time period in which to assert claims against the dissolved corporation and ensuring that directors, officers, and stockholders of a dissolved corporation could have repose from claims regarding the dissolved corporation. The latter concern is not a trivial one. If, as it seems obvious, Delaware has an interest in fostering capital investments in its corporations, providing former stockholders of dissolved corporations with a temporal limitation on their exposure to claims against them based on corporate debts is a clearly rational way to advance that interest. Sections 278 and 325(b), when read in concert, achieve that objective in a measured way.

In determining that winding-up provisions like § 278 preclude stockholder liability [**790] under a common law [**77] trust fund theory, I join the majority of courts and commentators who have addressed the question of whether the adoption of corporate dissolution statutes supplanted the trust fund doctrine.¹⁴⁵ As to this point, I also agree fully with Goldman Sachs that the Third Circuit's *Tutu Wells* decision logically supports the conclusion I now reach as to the combined effect of §§ 278 and 325(b), because its reading of the words of the statutes has as much application to claims against stockholders, as against officers and directors.

145 See, e.g., 15A WILLIAM M. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 7373 (2006) ("[T]he adoption of corporate dissolution statutes has supplanted the equitable trust theory in most jurisdictions."); Mark J. Roe, *Mergers, Acquisitions and Tort: A Comment on the Problem of Successor Corporation Liability*, 70 VA. L. REV. 1559, 1564 n.15 (1984) ("[T]he trust fund theory has been largely displaced by corporate law statutory provisions for remedies subsequent to dissolution, however, incomplete those statutory remedies may be."). Numerous state courts have addressed the interaction of corporate dissolution statutes and the trust fund doctrine and concluded [**78] that the corporate dissolution statutes supersede the trust fund doctrine. See, e.g., *Pacific Scene, Inc. v. Penasquitos Inc.*, 46 Cal. 3d 407, 250 Cal. Rptr. 651, 758 P.2d 1182, 1189 (Cal. 1985) ("[W]e conclude that the Legislature has precluded the assertion of postdissolution claims against the former shareholders of a dissolved corporation under the equitable 'trust fund' theory."); *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 550 (Tex. 1981); ("The effect of these [corporate dissolution] statutes was to supplant the equitable trust fund theory by declaring a statutory

equivalent."); *Blankenship v. Demmler Mfg. Co.*, 89 Ill. App. 3d 569, 411 N.E.2d 1153, 1156, 44 Ill. Dec. 787 (Ill. App. Ct. 1980) ("We agree with defendant that extension of the trust fund theory to cover plaintiff's claim would mean that the corporation could never completely dissolve but would live on indefinitely through its shareholders. We do not believe that this result would be in accordance with the spirit of the laws governing the dissolution of corporations.").

My reading of § 278 is also consistent with the well-reasoned decision of the Second Circuit in rejecting New York's trust fund claims against Panex's former stockholders, including Goldman Sachs. As a policy matter, [**79] New York was in a stronger position than the Virgin Islands to have the court afford it a trust fund remedy against Goldman Sachs because New York had at least sent Panex a notice of its claims before the three-year extension period under § 278 expired although Panex did not receive that notice until shortly after the period had expired. Even though New York had attempted to raise its claims in a timely way, the Second Circuit rejected New York's argument that its trust fund claim against Panex's former stockholders should be recognized as consistent with §§ 278 and 325(b). The Second Circuit held, as I now conclude, that statutes such as § 278 set forth a period during which post-dissolution claims can be made and after which

stockholders should have repose, stating: "We are persuaded by the general consensus that modern statutory remedies have effectively replaced the trust fund doctrine and that there are sound reasons for abiding by the wind-up period established by *section 278*." ¹⁴⁶

146 *Marsh*, 499 F.3d at 176. In this regard, it is also notable that the primary case that the Virgin Islands cites as supporting the survival of the trust fund doctrine after the enactment of statutory ¹⁴⁶ corporate dissolution statutes instead supports the conclusion that §§ 278 and 325(b) bar the use of the trust fund doctrine for claims arising more than three years after dissolution. In *Green v. Oilwell*, the Supreme Court of Oklahoma found that the Oklahoma legislature did not displace the trust fund doctrine by enacting a corporate dissolution statute that extended the existence of a corporation for the purposes of prosecuting and defending actions by or against it without providing for a winding-up period during which post-dissolution claims could be filed against the dissolved corporation. 1989 OK 7, 767 P.2d 1348, 1351-52 (Okla. 1989). The court distinguished the numerous cases from other jurisdictions that held that statutory corporate dissolution statutes superseded the trust fund doctrine by observing that unlike the

other jurisdictions, Oklahoma's statutory scheme "did not provide creditors a direct statutory remedy . . . regardless of when the claim accrued" and that "a creditor's only direct remedy against a former shareholder of a dissolved corporation to recover assets received upon dissolution is in equity under the trust fund theory." *Id.* at 1352. Although the court focused its ¹⁴⁶ analysis on the non-existence of a direct statutory remedy for stockholders, a careful reading of the case indicates that the court's true concern was that the Oklahoma statute did not provide any redress for post-dissolution claims. Specifically, the court saw "no rational reason to differentiate between pre-dissolution and post-dissolution claims" and found that denying a product liability claim for an incident that occurred two weeks after dissolution and upon which a suit was filed within two years, a "reasonable time after . . . dissolution," would be "arbitrary and untenable." *Id.* at 1354. The critical difference between the statute at issue in *Green* and § 278 of the DGCL is that the Oklahoma legislature, unlike the Delaware General Assembly, intended for its statute to address only pre-dissolution claims. In fact, during the time the *Green* case was pending, the Oklahoma legislature passed a new General Corporation Act with sec-

tions almost identical to §§ 278 and 325(b). This prompted the court to observe that the trust fund theory would likely be limited to three years under the new statutory scheme:

Because under *18 O.S. Supp. 1986 § 1124(B)* of the new General Corporation Act [**82] no suit may be brought against a shareholder for a debt of the corporation until judgment is obtained against the corporation and under § 1099 of the new Act a suit against a dissolved corporation must be commenced within three years after dissolution, it would appear the equitable trust fund theory against a former shareholder would likewise be subject to the three year statute of limitations under the new Act.

Id. at 1353 n.9.

Even if I were to adopt a variant of the trust fund doctrine as an exception to §§ 278 [*791] and 325(b), I cannot imagine that it would be of the sort necessary to aid the Virgin Islands. The complaint does not allege that the fiduciaries charged with dissolving Panex

were on notice before 1992 of any potential claims relating to the Laga Facility. As of the expiration of the three-year period under § 278, the Virgin Islands had owned Laga for over seven years and never alleged that Panex had been environmentally irresponsible in its operations at the site.

To the extent that there is a sound basis for the trust fund doctrine, it is to address the potential for opportunism that exists when a corporation is winding-up its affairs or has become insolvent. In those circumstances, [**83] the corporation is unlikely to be able to generate future revenues to address creditor claims. Therefore, if it distributes its remaining assets to its stockholders without accounting for those claims, creditors could be stiffed and the stockholders could get a windfall, something akin to an illegal dividend. Indeed, it is precisely for this reason that many trust fund cases have the feel of fraudulent conveyance about them, as they involve situations when those winding-up the corporation's affairs were seeking to evade claims that were extant or feared.¹⁴⁷ In fact, the decision of Justice Story, then sitting as a Circuit Justice, that is commonly thought of as giving birth to the trust fund doctrine, involved just such a fact pattern.¹⁴⁸

147 *E.g., Snyder v. Nathan*, 353 F.2d 3, 4 (7th Cir. 1965) (invoking the trust fund doctrine when a dissolving corporation paid out substantially all of its assets to its

stockholders despite the knowledge of a pending claim); *Gaskins v. Bonfils*, 79 F.2d 352, 355 (10th Cir. 1935) (same).

148 Justice Story is credited with inventing the trust fund doctrine in the 1824 case *Wood v. Dummer*. 30 F. Cas. 435, F. Cas. No. 17944 (C.C.D. Me. 1824) (No. 17,944). In that case, Justice [**84] Story created the doctrine to address the inequity created by stockholders of a dissolving bank voting to distribute a large portion of the bank's paid-in capital to themselves without adequately providing for known debts of the bank. *Id.* at 436-37.

[*792] If the trust fund doctrine were as uncabined as the Virgin Islands would have it, stockholders of American corporations would live in constant fear. A multitude of formerly dividend-paying corporations have dissolved or gone bankrupt over the years. Many of these corporations did so in part because their profit-generating operations involved the manufacture of products -- think asbestos -- that gave rise to later liability, claims. Under the Virgin Islands' theory, all of the stockholders who received dividends as a result of the sales of asbestos and other claims-generating products should be forever on the hook to return those dividends. The same would be true of stockholders who received dividends and whose corporations were later unable to pay off contract creditors whose rights preceded the payment of the dividends.

If, as seems probable, the public interest in promoting economic growth would be impaired by exposing equity investors [**85] to perpetual risk of this kind, a container of some kind on the trust fund doctrine would have to be built. In sizing that container, judicial recognition would have to be given to § 278 's tempering of the common law doctrine of abatement, which held that the dissolution of a corporation immediately ended its legal existence and terminated its capacity to sue and be sued.¹⁴⁹ Statutes such as § 278 mitigated that harshness by continuing the legal existence of a dissolved corporation for a wind-up period during which claims can be asserted. These statutes also ensured that "any suit against the corporation, which was filed before the dissolution or during the three-year statutory wind-up period, does not abate, even on the expiration of the wind-up period."¹⁵⁰

149 *In re RegO Co.*, 623 A.2d 92, 95 (Del. Ch. 1992); see also Ann E. Conaway Stilson, *Reexamining The Fiduciary Paradigm at Corporate Insolvency and Dissolution: Defining Directors' Duties to Creditors*, 20 DEL. J. CORP. L. 1, 67 (describing the enactment of dissolution statutes in response to the common law of abatement).

150 *RegO*, 623 A.2d at 95.

Not only is that tempering relevant to my conclusion that no space exists for judicial [**86] invention here, it would also be relevant if I concluded that there

was room for a trust fund doctrine of some kind. Because the General Assembly would have already created a three-year period during which stockholders would be at risk -- a period that could be extended for claims arising and still pending as of the end of that period -- the protective necessity for any trust fund doctrine would be narrowed by that important statutory effect. Indeed, because the three-year period must be read as resting on a policy basis and that policy basis is most obviously that that was the General Assembly's belief as to a fair period to give claimants during which to either raise claims or lose them, the most logical room for a trust fund doctrine to operate would be to address some type of interstitial abuse of the dissolution process not captured by § 278's literal terms. One could conceive, I suppose, of a situation where those handling the funds of a dissolved corporation assured a creditor it would pay off her bill as the § 278 deadline approached and urged her not to file a collection action. Then they cause the corporation to make a distribution of all its funds to its stockholders [*793] as [**87] the § 278 deadline is reached without paying off the creditor.

The recognition of a trust fund claim against the recipient stockholders in that context would, however, have its roots in the kind of inequity that gave rise to the trust fund doctrine in the first instance.¹⁵¹ That is, it would involve the payment to stockholders of a distribution in the face of an unsatisfied creditor

claim. Even in that circumstance, one can think of non-statutory arguments for limiting the exposure of innocent stockholders to claims, and limiting the duped creditor to bringing claims against the crafty fiduciaries who tricked her.

151 I admit that certain commentators have advocated a version of the trust fund doctrine that bears little or no resemblance to the anti-fraud rationale that motivated Justice Story's *Wood v. Dummer* decision and its progeny. These commentaries appear to reflect the view that the common law ought to hold stockholder-distributees strictly liable to restore distributions received from corporations that have committed torts, regardless of whether the dissolution process was conducted entirely in good faith. See, e.g., James Boyd & Daniel E. Ingberman, *Fly by Night or Face the [**88] Music? Premature Dissolution and the Desirability of Extended Liability*, 5 AM. L. & ECON. REV. 189, 224 (2003) ("Extending liability to business partners, making shareholder liability unlimited, and allowing liability to follow shareholders postdissolution are all ways to foster greater cost internalization and the welfare benefits that spring from it. They are not without costs of their own, however."); Michael D. Green, *Successors and CERCLA: The Imperfect Analogy to Products Liabil-*

ity and an Alternative Proposal, 87 NW. U. L. REV. 897, 918-21 (1993) (suggesting a proposal that would essentially "reestablish the common-law trust fund doctrine of shareholder liability for CERCLA response costs of a dissolved corporation"); *see also United States v. Thomas*, 515 F.Supp. 1351, 1356 (W.D. Tex. 1981) ("Neither bad faith nor fraud is a prerequisite for recovery under [the trust fund] theory."). In my view, arguments that a broad-ended, reparations-based cause of action against stockholders who received distributions in good faith should be granted to late-emerging corporate claimants are properly addressed in our republic to those institutions called legislatures.

What I find unfathomable [**89] is the notion that this state would adopt, as part of its common law of equity, a trust fund doctrine that puts stockholders receiving distributions from a dissolving corporation at risk of liability when the creditor-plaintiff made no demand of any type on the dissolving corporation and the dissolving corporation's directors had no reason to believe such a demand would be made before the expiration of the extra three-year period established by § 278. In that circumstance, not only the recipient stockholders, but the directors authorizing the distribution could not be said to have acted in subjective bad faith toward anyone.

In concluding that it would be imprudent to recognize such a cause of action against stockholder-recipients, I am not unmindful of the externalities that are often generated by profit-making entities or the opportunities the dissolution process presents for abuse.¹⁵² But those concerns [**794] are already addressed by a host of other means. Those include not only the three-year period established by § 278 itself, but also by statutes that hold individuals personally accountable for their own tortious and criminal behavior as business executives.¹⁵³ Here, for example, [**90] CERCLA presented the Virgin Islands the opportunity to seek relief from Lazare and Gal not for the status crime of simply having been a Panex officer or director, but for having personally been involved in polluting activities at Laga.¹⁵⁴ Likewise, to the extent the Uniform Fraudulent Transfer Act might be used to hold stockholders liable for dividends or distributions from a corporation, liability would be predicated on the recipients' own state of mind.¹⁵⁵

152 For example, Professors Hansmann and Kraakman point out this potential for abuse in their article arguing for unlimited shareholder liability for corporate torts:

The second factor that can exacerbate inefficient incentives under limited liability is the shareholder's option to

liquidate the corporation and distribute its assets before tort liability attaches. Since products and manufacturing processes often create long-term hazards that become visible only after many years, firms can -- and often do -- liquidate long before they can be sued by their tort victims. State law generally holds shareholders liable for a corporation's debts, including contingent tort liability, for a fixed period -- commonly three to five years -- [**91] after the dissolution of the firm. But many hazards may remain hidden until long after the expiration of this period.

Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 *YALE L.J.* 1879, 1884(1991).

153 *E.g.*, 3A WILLIAM M. FLETCHER, *CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 1137 (2006) ("Officers and directors may be held individually liable for personal participation in tortious acts even though performed

solely for the benefit of the corporation . . .").

154 *E.g.*, *Tutu Wells*, 994 *F. Supp.* at 666-75 (finding that Lazare and Gal were subject to liability under CERCLA "separate and apart from their corporate status" because CERCLA provides for owner, operator, and arranger liability).

155 *See* 6 *Del. C.* § 1301, *et. seq.* In my view, a stockholder who receives a dividend has already given equivalent value for future dividends as of the time she buys her shares. Thus, the relevant question under the Uniform Fraudulent Transfer Act becomes whether the stockholder received the dividend in good faith, i.e., without knowledge that the corporation was not in a position to lawfully pay the dividend. 6 *Del. C.* § 1308(a) ("A transfer or obligation is not voidable [**92] under § 1304(a)(1) of this title against a person who took in good faith and for a reasonably equivalent value . . ."). The reason that this is so, at least in this set of circumstances, is that § 1304(a)(1) would be the operative subsection of the Uniform Fraudulent Transfer Act. This defense would be unavailable under the strict liability theory the Virgin Islands would have me embrace.

Notably, even as to Panex, its directors, the Liquidating Trust, and its trustees, the Uniform Fraudulent Transfer Act would re-

quire the Virgin Islands, as a creditor who first asserted a claim after the challenged transfers, *6 Del. C. § 1304* (section of Act dealing with future creditors), to show that the distributions were made with an actual fraudulent intent, that the remaining assets were unreasonably small in relation to potential claims against Panex, or that the directors and trustees should have reasonably expected Panex liabilities to exceed the funds retained. *6 Del. C. § 1304(a)*. Given that the Virgin Islands did not assert a claim until 1996 and owned the property in question, given that the directors and trustees accounted for all claims that actually arose before the extended three-year [***93*] period mandated by § 278 expired, and given the absence of any pled facts suggesting the directors and trustees should have known that Laga would give rise to later claims, the Virgin Islands' complaint would not even state a claim against the transferors.

Notably, § 174 of the DGCL expressly addresses the subject of liability for the payment of illegal dividends, including those made by corporations that dissolve or become insolvent.¹⁵⁶ The statute provides for a cause of action against the directors authorizing the dividends, with specific proof requirements, and contains a six-year limitations period. In the event that the corporation has become insolvent or has dis-

solved, creditors may make such a claim. Most pertinently, the statute provides that any director who has to pay such a claim is subrogated to the corporation's rights "against stockholders who received the dividend on . . . their stock with knowledge of facts indicating that such dividend . . . was unlawful under this chapter, in proportion to the amounts received by the stockholders respectively."¹⁵⁷

156 *8 Del. C. § 174*.

157 *8 Del. C. § 174(c)*.

Section 174, like the fraudulent conveyance statute and § 278 itself, is evidence [***94*] that the General Assembly has addressed [**795*] in several ways the problem that inspired the trust fund doctrine.¹⁵⁸ Not only that, § 174's terms suggest, like the fraudulent conveyance statute, a legislative disinclination to hold stockholders liable in situations when they received a dividend or other distribution in the good faith belief that the corporation was making a lawful return to its equity holders.

158 *Section 162*, the DGCL provision creating stockholder or subscriber liability for shares not paid in full up to "the sum necessary to complete the amount of the unpaid balance of the consideration for which such shares were issued or are to be issued by the corporation," is also evidence that the General Assembly has addressed the problem that prompted the de-

velopment of the trust fund doctrine. 8 *Del. C.* § 162(a); see, e.g., *Sawyer v. Hoag*, 84 U.S. 610, 620, 21 L. Ed. 731 (1873) ("[W]e think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation."). Section 162(b) gives an insolvent corporation's creditors a direct action against stockholders who have not fully paid for their [**95] shares provided that the creditors follow the procedures in § 325, namely first obtaining a judgment against the corporation and having that judgment returned unsatisfied. 8 *Del. C.* § 162(b). Similar to § 174, § 162 does not create unfettered liability. Section 162(c) protects innocent assignees and transferees who take "in good faith and without knowledge or notice that the full consideration therefor has not been paid" from personal liability. 8 *Del. C.* § 162(b). In addition, § 162(e) states that "[n]o liability under this section or under § 325 of this title shall be asserted more than 6 years after the issuance of the stock or the date of the subscription upon which the assessment is sought." 8 *Del. C.* § 162(e).

There is no perfectly just or efficient answer as to how long or under what conditions the recipients of corporate funds should be accountable for later-

asserted claims. Our proud history as a nation is tainted by racist, sexist, environmentally irresponsible, and sweat shop practices by businesses, practices that regrettably were often sanctioned or tolerated by the governments those empowered to vote elected. Doubtless there are those whose fortunes can be traced to businesses [**96] conducted in a manner that we would now deem repugnant. A doctrine like the one that the Virgin Islands supports would, one supposes, encourage pristine corporate behavior through the means of putting equity holders at perpetual risk that their distributions could be clawed back if later arising claimants prove that the corporation violated statutory or common law rights.

But one can acknowledge that there is a lack of perfect equity in the distribution of societal wealth and that equity holders often take profits that are inflated by externalities foisted by their corporations on others without being persuaded to adopt the trust fund doctrine. Any system of perpetual reparations, and that is essentially what the Virgin Islands seeks, comes with costs. Just as capitalism's history has its negative effects, so too has it generated a great deal of wealth for our society. That wealth generation has resulted in no small measure from the confidence that equity investors have that there is limited recourse against them. If a broad trust fund doctrine like the Virgin Islands advocates were adopted, it could affect the economy in important ways.

For starters, contrary to the evident purpose [**97] of § 278 to establish a fair but discrete period within which claimants should come forward or lose their claims, the Virgin Islands suggests that our common law should countenance claims against innocent stockholders whenever later claims are made, which seems to encourage potential claimants - - such as buyers of land like the Virgin Islands itself -- to be less than diligent in investigating whether they possess viable [**796] claims.¹⁵⁹

159 *Cf. Bovay v. H. M. Byllesby & Co.*, 27 Del. Ch. 33, 29 A.2d 801, 804 (Del. Ch. 1943) ("Statutes of limitations are intended to prevent the enforcement of stale demands, and are based on reasons of sound policy; they are statutes of repose, intended to exact diligence."); 51 AM. JUR. 2D *Limitation of Actions* § 14 (2007) ("The primary purpose of a statute of limitations is . . . to encourage promptness and diligence in bringing actions.").

Furthermore, stockholders receiving distributions from dissolving corporations would hesitate to use those assets or to reinvest the assets for fear that the assets could be taken from them at any future time.¹⁶⁰ In turn, this could cause rational investors to question the wisdom of making equity investments in corporations in the first [**98] instance and reduce the social benefits that flow from such investments -- things like cre-

ating jobs and sparking innovation. Here, I note that the Virgin Islands has not pled that Goldman Sachs has held the distributions it received from Panex in some separate fund for over a generation. The Virgin Islands does not seek to have me adopt the purest form of the trust fund doctrine, which impresses a trust on specific assets received from the corporation or specific assets retained by a successor entity of the corporation after dissolution. Rather, it seeks a doctrine that puts stockholders who have changed position at perpetual risk, irrespective of the absence of scienter on their part.¹⁶¹ And, of course, there are significant practical problems with trying to effect the return of corporate distributions from stockholders, especially after a great deal of time has passed between the payment of the distributions and the attempted recovery.¹⁶²

160 *Cf. Developments in the Law Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) ("[T]he public policy of limitations lies in avoiding the disrupting effect that unsettled claims have on commercial intercourse.").

161 The Virgin Islands [**99] advocates the following doctrine:

[T]he USVTs right to recovery does not depend upon Goldman's participation in or knowledge of the actions which caused the envi-

ronmental damage or the subsequent assertion of claims arising from that damage. Rather, a right of restitution resides in the Successor Trustee (and now the USVI) based solely on the unfairness of Goldman retaining funds that were expressly placed in the Panex Trust and/or paid out to Goldman subject to recovery where the liabilities associated with Panex's activities were asserted during the life of the Panex Trust and reduced to judgment during the life of its legal successor.

Virgin Islands Ans. Br. at 17-18. In arguing that its right to recovery does not require bad faith by Goldman Sachs, the Virgin Islands cites unjust enrichment case law suggesting that "[r]estitution is permitted even when the defendant retaining the benefit is not a wrongdoer." *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999). The Virgin Islands, however, fails to mention that unjust enrichment requires an absence of justification for the transfer that enriches one party and impoverishes the other. E.g., *Palese v. Del. State Lottery*

Office, 2006 Del. Ch. LEXIS 126, 2006 WL 1875915, at *5 (Del. Ch. 2006), [****100**] *aff'd*, 913 A.2d 570 (Del. 2006). That requirement usually entails some type of wrongdoing or mistake at the time of the transfer. Correspondingly, unjust enrichment is "often deployed against persons who (although not acting with scienter themselves) are sufficiently aligned with a wrongdoer that they ought to disgorge an unearned benefit conferred upon them by the wrongdoer at the victim's expense." *Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 673 n.25 (Del. Ch. 2006). In my view, a passive stockholder who receives a dividend in good faith has not been unjustly enriched.

162 Then-Vice Chancellor Brown pointed out this same problem in *In re Citadel Industries, Inc.* 423 A.2d 500 (Del. Ch. 1980). Supporting his decision not to construe *Section 278's* grant of power to continue a corporation beyond *Section 278's* three-year period as allowing the court to revive the existence of a corporation after the three-year period contemplated by the statute had already passed, he observed:

And if the corporation is so "continued" after the passage of a period of years so as to enable others to sue it, what

happens if a large money judgment is obtained against it? Who pays? How are former liability [**101] insurance contracts affected? How can a vast number of former shareholders be compelled to return any final distribution of assets, etc.? In each such case these factors, along with a myriad of others, would have to be considered by this Court if it were to properly exercise its discretion to continue the entity. In the case of a large, publicly-held corporation, the task would be enormous and the potential problems and considerations would be boundless.

Id. at 506.

[*797] Perhaps most important of all, the adoption of the trust fund doctrine the Virgin Islands advocates would operate harshly against the corporate constituency least likely to have been involved in consciously tortious or inequitable corporate behavior; namely, the stockholders.¹⁶³ Even in today's world of activist investors, corporate managers and employees make most of the key decisions and engage in most of the conduct that affects society. As indi-

cated, a variety of statutory and common law causes of action exist to hold corporate managers responsible for their own behavior, and those causes of action give claimants the opportunity to secure any ill-gotten wealth received by the managers themselves. Given these realities, [**102] the adoption of an unlimited stockholder-focused trust fund doctrine seems a very inefficient way to encourage corporate compliance with societal obligations.

163 Under the breath of the Virgin Islands' arguments has consistently been the heart-tugging notion that it, a struggling Territory grappling with an expensive environmental problem, is simply asking one of the world's most successful entities to give back what is, to it, a trifle. This sort of contention is no basis for judicial adventurism. Indeed, it highlights some practical problems with recognizing a broad-ended trust fund doctrine. The likely targets of such claims will be big holders because, for reasons well explained in *Citadel*, it will be difficult to collect from disaggregated public stockholders who received distributions. Admittedly, the ever-increasing share of stock owned by institutions, now above 70%, makes collection efforts easier. But that phenomenon raises another policy point that has distributional and fairness implications. Many of the

larger holders of corporations are mutual funds and pension funds. These holders are the fiduciaries for ordinary investors, such as Americans saving for college and retirement. [**103] Recognizing trust fund claims against holders could result in a mutual fund, whose stockholders are now quite different, being subject to return a distribution a generation later, in the world as the Virgin Islands would have it. In such a case, it would be the end-user investor who would suffer. Similarly, the trustees of a pension fund could find themselves facing an order to return a long-forgotten distribution at a time when the fund was struggling for other reasons to meet its obligations to pensioners. Suffice it to say, the reality that Goldman Sachs is a wealthy entity is no basis for the formulation of common law affecting others, nor would it be just for a court to enter a judgment against a party simply because the party could pay it without great pain.

For all these reasons, even if §§ 278 and 325(b) left room for judicial common law making, I would not recognize the Virgin Islands' claim. The Virgin Islands does not seek to hold Goldman Sachs responsible for any wrongful conduct of its own. It simply seeks to hold Goldman Sachs strictly liable for activities of Panex to the amount of liquidating distributions it received in good

faith. Section 278 gave the Virgin Islands [**104] a three-year period to come forward with its claim. It did not do so, despite having owned the Laga Facility for seven years before the expiration of the three-year extension mandated by § 278. If this court were to recognize, some variant of the trust fund doctrine in these circumstances, thereby extending the length of time that stockholders face exposure, statutes such as § 174 of the DGCL suggest that any such judicial creation should incorporate a scienter requirement, [*798] a requirement that even in a very weak form would preclude the Virgin Islands from proceeding against Goldman Sachs.

Before ending this discussion, I must note the cognitive dissonance arguably injected by the General Assembly's adoption in 1987 of substantial amendments to the DGCL's provisions relating to dissolution ("1987 Amendments").¹⁶⁴ Those amendments do not apply to the Panex dissolution but arguably give some sense of what a later General Assembly believed that the pre-existing provisions of the DGCL meant.

164 See generally Stephen P. Lamb and Robert A. Glen, *The 1987 Delaware Law of Voluntary Corporate Dissolution*, 13 *DEL. J. CORP. L.* 11 (1988). The primary amendment to the DGCL's dissolution provisions [**105] occurred in 1987, with additional relevant amendments occurring in 1990, 1991, and 1994. See RODMAN

WARD, JR., EDWARD P. WELCH & ANDREW J. TUREZYN, FOLK ON THE DELAWARE GENERAL CORPORATION LAW §§ 280-82 (4th ed.). I refer to those changes collectively as the 1987 Amendments.

The 1987 Amendments created a detailed process, which involves judicial involvement, by which dissolving corporations can essentially smoke out claims, pay off claims in accordance with statutory priorities, and establish reserves for contingent claims. By this more detailed method of dissolution, which is optional and set forth in § 281 (a), the dissolving corporation's directors and stockholders are rewarded with more certainty and liability protection.¹⁶⁵ The statute also sets forth notice requirements that dissolving corporations wishing to use this more rigorous process have to follow to alert creditors of the dissolution.¹⁶⁶

165 8 Del. C. § 281 (a).

166 8 Del. C. § 280.

As one would expect, the Virgin Islands latches on to one of the 1987 Amendments in particular. That amendment created § 282(b) and purports to provide the following protection only to stockholders of dissolving corporations that follow the more [**106] rigorous dissolution process set forth in § 281 (a). That section states that a "stockholder of a dissolved corporation the assets of which were distributed pursuant to § 281 (a) of this title shall not be liable for any claim against the corpo-

ration on which an action, suit or proceeding is not begun prior to the expiration of the period described in § 278 of this title."¹⁶⁷ Section 282(c) also states more generally that the stockholders of a dissolved corporation who received distributions made under either the more rigorous process, § 281 (a), or the less exacting one, set forth in § 281(b), "shall not be liable for any claim against the corporation in an amount in excess of such stockholder's pro rata share of the claim or the amount so distributed to such stockholder, whichever is less."¹⁶⁸

167 8 Del. C. § 282(b).

168 8 Del. C. § 282(a). The current pro rata liability standard calls attention to the Virgin Islands' attempt to hold Goldman Sachs, a passive minority stockholder, liable for *all* of its liquidating distributions. By contrast, the Virgin Islands settled with Firmanco, an active blockholder, for only \$ 1.6 million, or less than five percent of its liquidating distributions. [**107] Am. Compl. P 51 (noting that the Virgin Islands settled with Firmanco for \$ 1.6 million); *Tutu Wells*, 885 F. Supp. at 781 (totaling Firmanco's liquidating distributions as \$ 35.5 million). Under pro rata liability, Goldman Sachs would only be liable for 13% of the \$ 51.6 million default judgment or approximately \$ 6.7 million.

Using § 282(b), the Virgin Islands makes a simple argument. If that section

must be construed as having some intended effect, it must preclude a reading of the preexisting §§ 278 and 325(b) as barring claims against stockholders after the [*799] three-year extension on the corporation's existence under § 278 expired. Otherwise, there would be no reward for following the more rigorous § 281 (a) process.

The problem for the Virgin Islands is that the 1987 Amendments do nothing to address the truly pertinent question: what causes of action, if any, does a claimant against a dissolved corporation who first asserted claims after the corporation's extended existence under § 278 have against an innocent stockholder who received distributions during the dissolution process? Neither the 1987 Amendments themselves nor learned commentary on those amendments answers that question. [**108] The first decision to address the 1987 Amendments expressly noted that there was no clarity on this question.¹⁶⁹

169 In *In re RegO Co.*, Chancellor Allen observed:

This modern scheme still leaves open the question, what, if any, rights are afforded to persons who have no claim against a corporation at the time of its dissolution, or during the statutory wind-up period, but who do

thereafter acquire such a claim. Such a person might, for example, be a tort claimant who is injured by an arguably defective product some time after, perhaps years after, the corporation has been dissolved, and its affairs finally woundup. It would seem, apparent that such a person could not sue the dissolved corporation itself. *Section 278* continues the corporation's existence beyond the statutory three year winding-up period "solely" for the purpose of concluding pending litigation. But has such a person a cognizable claim against others -- against directors or shareholders most notably?

This I take to be an unclear and a troubling question.

623 *A.2d* at 96 (internal citation omitted).

In fact, the 1987 Amendments were in large measure driven by the lack of certainty about issues of that kind. Rather than attempt [**109] to state what causes of action, if any, actually existed in these circumstances, the

amendments instead simply created greater insulation against these causes of action -- if and whatever they were -- for stockholders whose corporations used the new § 281 (a) dissolution process.¹⁷⁰ Notably, commentary on the amendments do not reference § 325(b) or its implications.

170 See *Marsh*, 499 F.3d at 175 n.5 ("[S]ections 280-282 do not recognize the continued vitality of the trust fund doctrine, but rather foreclose the use of the trust fund doctrine for post-dissolution claims, provided dissolved corporations follow the procedures outlined in section 281(a).").

In my view, I cannot responsibly read amendments that were designed to address uncertainty but whose authors clearly recognized that continuing uncertainty remained as somehow suggesting that a trust fund doctrine claim of the type the Virgin Islands now makes was viable in Delaware before these amendments. Nor do the 1987 Amendments illuminate the appropriate contours for trust fund doctrine claims in this context. That the 1987 Amendments injected more rigor into the overall dissolution process -- a rigor beneficial to creditors of [**110] all kinds, including those with contingent claims -- and used § 282(b) as an incentive, does not mean that the General Assembly was implicitly creating or somehow recognizing the existence of a cause of action holding innocent stockholders strictly liable to

return distributions received in dissolution whenever a later-arising creditor obtains a judgment based solely on the harm caused by a corporation's pre-dissolution activities.

If there is a gap in our law to fill, the General Assembly is the body with the legitimacy and tools to best balance the important policy considerations at stake. And if common law were to be made, it should be at the instance of a later arising claimant who can at least prove that the [*800] directors of the dissolving corporation engaged in some act of inequity during the dissolution process, by disregarding the corporation's likely obligations to some specific contingent creditor or class of contingent creditors. The Virgin Islands is not in that category. Even if it were, I would not embrace, as a matter of our common law, the notion that a stockholder who received a distribution without knowledge of the directors' inequitable conduct -- i.e., in good faith [**111] and without scienter -- should be exposed to a suit beyond the three-year extension period set forth in § 278. Both fairness and efficiency at that temporal point seem to weigh, for reasons previously articulated, in favor of affording repose to the innocent recipient.

C. Does The Virgin Islands Have A Claim Against Goldman Sachs Because Of The Existence Of The Liquidating And Successor Trusts?

The Virgin Islands contends that the existence of the Liquidating Trust after

the three-year statutory period allows it to maintain its claims against the former stockholders of Panex. The Virgin Islands asserts that, according to *City Investing*, had Panex obtained court approval to continue its existence beyond the three-year statutory period as opposed to creating the Liquidating Trust there would be no question that the Virgin Islands could have asserted its claims directly against Panex during that extended wind-up period.¹⁷¹ Therefore, because its "claims against Panex and its legal successors survived beyond the three year period, so too the [Virgin Islands'] ability to seek recovery of the liquidating distributions extended beyond that three year period."¹⁷² The Virgin Islands cites no [**112] legal authority for this conclusion. As Judge Stapleton accurately wrote for the Third Circuit in *Tutu Wells, City Investing* stands only for the proposition that a creditor of a dissolved corporation can sue that corporation's liquidating trust if it is in existence at the time of suit.

171 The Virgin Islands points to the following discussion in *City Investing*:

City Trust's efforts to restrict its liability to claims filed within three years of City's dissolution does not accommodate the statutory method for the assertion of creditors' claims nor

the purpose behind its adoption. By distributing its assets to a trust, City was able to achieve substantial tax savings but at the same time it extended its winding-up period by transferring its operations to a separate legal entity -- City Trust. Had City elected to seek court approval to continue its existence "for such longer period" beyond the three year term as necessary to wind up its affairs instead of creating City Trust, there is little question that its assets would be reachable by its creditor and subject to claims at the time Continental filed its claim in 1990.

624 A.2d at 1196.

172 Virgin Islands Ans. Br. at 32.

Although the Trust [**113] Agreement stated that the Liquidating Trust was established for the purpose of "satisfying any and all liabilities of Panex which are not paid or otherwise discharged,"¹⁷³ the Trust Agreement continued the Liquidating Trust beyond three years only for the "purpose of discharging any known liabilities of the Trust or of Panex or liabilities of the Trust or of Panex which the Trustees have reason-

able grounds to believe may be asserted." ¹⁷⁴ As admitted by the Virgin Islands, it did not provide notice of its claims to the trustees of the Liquidating Trust within three years. Nor has it pled facts supporting a rational inference that the trustees had reasonable grounds that claims might be raised regarding Panex's operations [*801] at Laga. ¹⁷⁵ That is, of course, not surprising given that Panex Co. had sold Laga to the Virgin Islands itself in 1981, some seven years before the expiration of Panex's winding-up period, and had not had any complaints.

173 Trust Agreement P 3.1.

174 *Id.* P 8.1.

175 When given the opportunity at oral argument to point out any pled facts suggesting that the trustees of the Liquidating Trust knew about or should have had reason to expect the potential environmental claims [**114] in the Virgin Islands before the expiration of Liquidating Trust's three-year period of unlimited existence, counsel for the Virgin Islands could not identify any:

THE COURT: There's not one fact pled that anyone gave notice to the trustees or to any former director or officer of Panex before that three year period of these potential claims; correct?

MR. JAMESON:
Specifically of the pollution in the Virgin Islands
-- no --.

Tr. Of Oral Arg. On Def's Mot. To Dismiss (Sept. 27, 2007) at 40-41. The Virgin Islands did advance the argument that the trustees should have anticipated the potential environmental liability in the Virgin Islands once they became aware of the potential environmental liability in New York. *Id.* at 47-49. That argument lacks logical force, especially since the Virgin Islands itself never raised a peep until fifteen years after it owned Laga. The source and type of contamination in New York were completely different from the source and type of contamination in the Virgin Islands. *Compare New York v. Panex Indus., Inc., 1996 U.S. Dist. LEXIS 9418, 1996 WL 378172, at *2 (W.D.N.Y. 1996)* (describing the allegations of pollution in New York as resulting from a "button-manufacturing facility . . . which [**115] . . . arranged for the disposal at the Landfill of hazardous substances produced by the manufacturing facility including styrene, TCE, methylene chloride, toluene, and lead carbonate") *with Tutu Wells, 994 F. Supp. at 642* ("The primary chemical discovered on Laga's property was PCE, which

had been allegedly discharged via underground pipes into the ground as a result of Laga's on-site dry cleaning operations—a final step in the manufacturing process of Laga's textile products.").

Thus, I interpret the Virgin Islands assertions as arguing that the language in *City Investing* regarding the general purposes for liquidating trusts somehow provides me with a basis for invalidating the Liquidating Trust's language limiting the purpose of its existence after three years to known or noticed claims. I do not read *City Investing* the same way the Virgin Islands does. *City Investing* simply acknowledges that one principled way for dissolving a corporation that wishes to obtain the federal tax benefits that come with distributing its assets within one year is to form a liquidating trust to assume corporate liabilities.¹⁷⁶ Nothing in *City Investing* suggests that a liquidating trust must exist perpetually [**116] as a corporate successor, capable of being sued on all claims upon which the corporation could have been sued. Rather, it simply recognizes that a dissolving corporation must responsibly address its potential liabilities and that a liquidating trust may be used for that purpose.

¹⁷⁶ 624 A.2d at 1196; see also *Marsh*, 499 F.3d at 175, n.6 (reading *City Investing* and *Rosenbloom* as being of no avail to New York in arguing its trust fund claims against Panex's former stockhold-

ers because those decisions did not shed any light on whether the former stockholders of dissolved corporations faced liability under the trust fund doctrine).

Here, Panex established the Liquidating Trust for just that purpose. For an initial period of three years from the execution of the Trust Agreement -- that is until September 12, 1988 or approximately five months later than the expiration of the three-year winding-up period after Panex's filing of its certificate of dissolution required by § 278 -- the Liquidating Trust was a general successor to Panex and was responsible for discharging any liabilities of Panex. Beyond that time, however, the Liquidating Trust could only be continued to deal with specific claims [**117] or liabilities that were pending and unresolved, or potential claims the Trustees had reasonable [*802] grounds to believe existed. That is, after the expiration of the three years from the execution of the Trust Agreement, the Liquidating Trust was not a general successor to Panex at all; it was a specific trust designed to assume responsibility only for defined liabilities of Panex. Laga-related claims were not within that scope of responsibility.

City Investing actually supports the proposition that the instrument creating the Panex Liquidating Trust should be enforced in accordance with its clear and unambiguous terms. In *City Investing*, the Supreme Court rejected a consideration of extrinsic evidence regarding the intent behind the creation of the liquidat-

ing trust at issue in that case, affirming this court's holding that the trust language was clear and unambiguous and should be enforced in accordance with its plain meaning.¹⁷⁷

177 *Id.* at 1197-98.

That the Supreme Court would enforce a trust instrument is hardly surprising. The beneficiaries of a liquidating trust typically include, as they do in this case, the stockholders of the dissolving corporation. Those stockholders are entitled [**118] to have their contractual expectations honored. Here, the Liquidating Trust's terms provided for its end as a general successor of Panex on September 12, 1988 and Goldman Sachs is entitled to have that instrument enforced.

Furthermore, the Panex Liquidating Trust is clearly distinguishable from the liquidating trust at issue in *City Investing*. In *City Investing*, the trustees extended the life of a liquidating trust past its original three-year period because they could not wind-up City's affairs within that time period and had yet to liquidate all of the trust's assets.¹⁷⁸ The *City Investing* liquidating trust had assumed all responsibilities for the dissolved corporation and there was no contractual bar on extensions of the trust. Therefore, the Supreme Court held that the trustees were within their authority to extend the trust's existence, an extension that did not violate the trust instrument. Because the trust's terms made it a general successor to the dissolved corporation, it could be sued on

all claims that could have been brought against the dissolved corporation.

178 *Id.* at 1193.

The situation here is starkly different. By the plain terms of the Trust Agreement, the Liquidating [**119] Trust expired as a general successor to Panex on September 12, 1988, and could live beyond that date only for another nine years as to specific purposes. That such a structure is rational and fair finds support in the second sentence of § 278 itself, which extends the life of the corporation for any action pending at the end of the three-year statutory wind-up period solely for the purpose of that action.¹⁷⁹ Indeed, to override the Trust Agreement and find that the Liquidating Trust existed as a general successor to Panex after September 12, 1988 would be at odds with this court's holding in *In* [*803] *re Citadel Industries, Inc.*¹⁸⁰ In that case, then-Vice Chancellor Brown refused to grant a petition to revive a corporation after the expiration of § 278's three-year period for the purpose of allowing a claim to be brought against it, finding that § 278 barred that result, for the obvious reason that such a revival would substitute the judiciary's appropriate view of the period during which a dissolving corporation should remain at jeopardy of suit for the General Assembly's.¹⁸¹

179 The fact that the word "solely" did not exist in § 278 at the time of Panex's dissolution

does not undermine [**120] this argument because § 278 has always been interpreted as if it contained the word "solely." The General Assembly's commentary to the amendment adding the word "solely" supports this conclusion: "Section 278 is amended to make clear that . . . the continuation of a corporation's legal existence beyond the period described in Section 278 by reason of the pendency of an action, suit or proceeding is solely for the purpose of that action, suit or proceeding." RODMAN WARD, JR., EDWARD P. WELCH & ANDREW J. TUREZYN, FOLK ON THE DELAWARE GENERAL CORPORATION LAW §§ 278.1 n.2 (4th ed.).

180 423 A.2d 500 (Del. Ch. 1980).

181 *Citadel*, 423 A.2d at 503-04.

When the Liquidating Trust was continued in existence after September 12, 1988, the sole reason that the Liquidating Trust was continued was the environmental claim in New York. As a result, the Virgin Islands cannot use a judgment against the Liquidating Trust as a basis to claim over against Goldman Sachs. The Liquidating Trust ceased to be a general successor of Panex on September 12, 1988, and the Virgin Islands did not sue it until 1996, some eight years after that point. As a result, the Virgin Islands has no claim against

Goldman Sachs for [**121] the distributions it received from Panex.

Likewise, because the Liquidating Trust faced no liability to the Virgin Islands for Laga-related claims, the Liquidating Trust had no basis to seek recoupment of distributions it made to its beneficiaries in 1987. Therefore, to the extent that the Virgin Islands bases its right of recovery on the assignment it received of the Successor Trust's recoupment rights, it has no claim. The Successor Trust only inherited whatever rights of recoupment the Liquidating Trust had as of September 12, 1997. Because the Liquidating Trust was not subject to liability on Laga-related claims, it had no right to seek recoupment from Goldman Sachs.¹⁸²

182 Interestingly, *City Investing* can be read as undercutting the Virgin Islands' recoupment and trust fund doctrine claims in another respect. In the course of ruling that the liquidating trust in that case was responsible for addressing a corporate liability, the Supreme Court specifically noted that its willingness to allow claims against the liquidating trust would not prejudice the dissolving corporation's stockholders because a "partial, but substantial, distribution to City's shareholders [had] already been [**122] accomplished." *City Investing*, 624 A.2d at 1196. This suggests that the Supreme Court did not believe that the stockhold-

ers needed to worry that they would be asked to return previously-received distributions simply because a later-arising claim was made; rather, the claim would have to be satisfied by whatever funds were remaining in the trust. In that respect, this court's *Citadel* decision also suggests that § 279 of the *DGCL*, which deals with the appointment of receivers for dissolved corporations, only permits receivers to address claims arising after the three-year period in § 278 has expired using assets still in the possession of the corporation. 423 A.2d at 506 ("Where there are no undistributed assets against which to effect a recovery, § 279 provides little solace to one possessing an after-discovered claim against a dissolved corporation.").

Similarly, because the trustees of the Liquidating Trust were only empowered to administer that Trust's assets, they never had any authority to seek recoupment of distributions Panex stockholders received from Panex itself, rather than the Liquidating Trust. As the inheritor of those trustees' rights, the Virgin Islands therefore has [**123] no basis to seek recoupment of the distributions Goldman Sachs received from Panex.

In holding that the Virgin Islands has no viable claim against Goldman Sachs as an assignee of the Successor Trust, I must address the Virgin Islands' argument that I have somehow undermined the only possible utility served by the

Successor Trust's creation. As explained previously, [*804] the Successor Trust was created to ensure that no one was prejudiced by the imminent expiration of the Liquidating Trust. The fact that the Successor Trust did not turn out to be the elixir the Virgin Islands and New York hoped is of no moment. The Virgin Islands got what it bargained for, insofar as the Successor Trust assumed all the rights and obligations of the Liquidating Trust as of September 12, 1997. The reality is that those rights and obligations did not, per the clear terms of the Liquidating Trust Agreement, extend to Laga. That it took until the end of 2007 to find that out is due largely to the Virgin Island's languid approach to pressing its claims.

Furthermore, the Virgin Islands was able to reach settlements with Lazare, Gal, Firmanco, and Rosenbloom, a benefit to it that was likely due in some measure to [**124] the continued existence of the Successor Trust. And it appears probable that the Successor Trust fulfilled some role in providing assistance to the former Panex directors and officers in defending claims against them.

D. Does The Virgin Islands Have A Promissory Or Equitable Estoppel Claim Against Goldman Sachs?

The Virgin Islands, in both its own capacity and as an assignee of the Successor Trust, argues that it has promissory and equitable estoppel claims against Goldman Sachs. The Virgin Is-

lands contends that the former stockholders' rights to the liquidating distributions from Panex were quasi-contractual in nature and that disclosures to the Panex stockholders in the Proxy Statement regarding their possible future liability for distributions received estop Goldman Sachs. The Virgin Islands claims that it has a right to enforce its promissory estoppel claims as assignee of the rights of the Successor Trust because the Successor Trust had the right to enforce these quasi-contractual rights as a party to the quasi-contract.

The Virgin Islands also asserts that as a creditor it has the right to enforce these quasi-contractual rights as a third party beneficiary of the quasi-contract. [**125] The Virgin Islands' equitable estoppel claims are almost exactly the same as its promissory estoppel claims. The only difference is that the Virgin Islands' frames its equitable estoppel claims in reference to Goldman Sachs' vote in favor of the Liquidation Plan and its acceptance of the conditional liquidating distributions rather than the alleged promise of recovery in the Proxy Statement.

Under Delaware law, a plaintiff asserting a claim for promissory estoppel must show by clear and convincing evidence that: "(i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because in-

justice can be avoided only by enforcement of the promise." ¹⁸³ The promise must be a real promise -- mere expressions of expectation, opinion, or assumption are insufficient. ¹⁸⁴ The promise must also be reasonably definite and certain. ¹⁸⁵ Equitable estoppel is based on similar principles. To make out a claim of equitable estoppel, the Virgin Islands must show that it was induced to rely [*805] detrimentally on Goldman [**126] Sachs' conduct. ¹⁸⁶

183 *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1032 (Del. 2003).

184 *E.g., Metro. Convoy Corp. v. Chrysler Corp.*, 58 Del. 286, 208 A.2d 519, 521, 8 Storey 286 (Del. 1965).

185 *E.g., Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1233 (Del. Ch. 2000).

186 *E.g., VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 87 (Del. 1998).

These estoppel arguments fail the straight face test. The Proxy Statement disclosure that the Virgin Islands claims created the contract or quasi-contract with Goldman Sachs states: "If the amount held in the Liquidating Trust is insufficient to discharge fully all liabilities which arise, or if liabilities arise after the Liquidating Trust is terminated, each Panex stockholder *may* be liable for any unpaid portion of such liabilities to the extent of the liquidating distributions paid to him." ¹⁸⁷ Descriptive statements in disclosure statements do not amount to a

promise.¹⁸⁸ This disclosure did nothing more than warn the Panex stockholders of the jurisprudential reality that the status of Delaware law, and American law more generally, regarding the liability of stockholders receiving distributions from a dissolving corporation was uncertain. That is, the disclosure [**127] by the Panex directors simply alerted Panex stockholders to a risk they faced. The idea that this sort of warning about a possible future litigation risk could give rise to a later estoppel claim is not one the Virgin Islands buttresses with citation to relevant authority, and that omission is unsurprising.

187 Proxy Statement at 6 (emphasis added).

188 *VonFeldt*, 714 A.2d at 87.

Delaware law encourages directors to provide stockholders with material information relevant to their voting decisions.¹⁸⁹ Treating warnings regarding possible future risks as a sufficiently binding promise to support a later estoppel claim would discourage full disclosure of risks.

189 *E.g.*, *Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 15 (Del. Ch. 2002) ("[U]nder Delaware law, the fiduciary duties of directors require that they disclose fully and with complete candor all material facts when they solicit proxies from stockholders. . . . [T]hat duty is best discharged through a broad

rather than a restrictive approach to disclosure") (internal quotation omitted).

Even worse, it would inject uncertainty into relationships that ought to have clarity. To wit, in this instance, what [**128] Goldman Sachs and other Panex stockholders were asked to approve was a Liquidation Plan and a Liquidating Trust Agreement.¹⁹⁰ But the Virgin Islands is unable to identify any statements in the Liquidation Plan or the Liquidating Trust Agreement providing for the right of Panex or the Liquidating Trust to seek recovery of the liquidating distributions.¹⁹¹ It is hardly unprecedented for trust agreements or other governing documents such as limited partnership agreements to provide a provision requiring beneficiaries to respond to capital calls at the request of the entity when necessary to meet its needs. The Liquidating Trust Agreement could have been crafted to include just such a provision, which would have required [*806] recipients to promise to return any distributions received if necessary for the Trustee to satisfy a liability relating to Panex's pre-dissolution activities. Similarly, a contract of this kind could have been the condition on which Panex made its last distributions as a corporation. But no such obligation was ever imposed on the recipients and it would be unreasonable to read the warning language in the Proxy Statement as implicitly forming such a contract, especially [**129] when that language does not in the slightest suggest that the recipients of

distributions would face a demand for recovery from the Liquidating Trust itself.

190 Proxy Statement Exs. A & B.
191 The Successor Trustee, the party whose shoes the Virgin Islands now stands in in one of its capacities, essentially admitted that the Liquidation Plan and Panex Trust do not explicitly provide a basis for recovery of the liquidating distributions by alleging that the original trustees of the Panex Trust breached their fiduciary duties by "failing -- before such distribution occurred -- to obtain an express undertaking from the beneficiaries" that the liquidating distributions from the Panex Trust would be returned, "if necessary, to allow the Liquidating Trust to satisfy its obligations." 1998 Petition For Declaratory Judgment at 1. No such express undertaking would have been necessary if it existed in the Liquidation Plan or Trust Agreement.

To the extent that the Virgin Islands claims that the disclosures in the Proxy Statement formed some quasi-contract between the Panex stockholders and those claiming to be Panex creditors, that claim is even less tenable, if that be possible. To turn a warning [**130] to stockholders that they may face liability at the instance of a later-arising creditor into a binding promise by the stockholders to give the dissolving corporation

back the funds they received from the corporation (or its liquidating trust) would convert the warning of possible liability into a confession of judgment. By judicial fiat -- a full generation later -- may become a contractually binding shall! This reading would also have the effect of turning the warning disclosure into an expansion of the liability faced by Panex stockholders. As the Virgin Islands would have it, the warning disclosure estopped the Panex stockholders from failing to return distributions they received if the Liquidating Trust needed them to satisfy a judgment against it, even if that judgment was based on a Panex liability that the Liquidating Trust Agreement's own terms excluded the Liquidating Trust from bearing. In the case of the Virgin Islands' claims related to Laga, the Liquidating Trust Agreement did just that. But the Virgin Islands would have the warning disclosure act as a de facto modification of that Agreement, rendering sound principles of contract ineffective and creating a precedent [**131] that would generate commercial uncertainty. And, of course, the idea that such a warning was intended in any way to benefit future creditors by giving them enforceable rights is textually unsupported and contextually absurd.

The Virgin Islands has also unsurprisingly failed to plead reasonable reliance by itself or the trustees of the Liquidating Trust on the warning disclosure. For the preceding reasons, it is clear as a matter of law that the warning disclosure could not have been reasonably relied

upon by either the trustees of the Liquidating Trust or Panex creditors as a behavior-changing promise.

The Virgin Islands' so-called estoppel claims shall be dismissed.

E. Are The Virgin Islands' Claims Time-Barred?

The Virgin Islands did not bring this suit until October 30, 2006. This was a full *twenty-five years after* the Virgin Islands bought Laga from Panex Co. This was *twenty-one years after* Panex dissolved. This was *eighteen years after* the three-year period under § 278 expired and after the Liquidating Trust's status as a general successor to Panex for liability purposes ended. This was *fourteen years after* the VI Environmental Litigation first raised the possibility that contamination [**132] had occurred at Laga. This was *ten years after* the claims against Goldman Sachs by the Virgin Islands in the VI Environmental Litigation were dismissed without prejudice. This was *five years after* Vice Chancellor Jacobs denied the petition of the Successor Trustee for recoupment in part because the Successor Trustee had failed [*807] to join the former Panex stockholders as interested parties.

Because of this record of torpidity, Goldman Sachs argues that the Virgin Islands' claims are barred by the doctrine of laches. I agree with that argument.

The analogous statute of limitations for the Virgin Islands' unjust enrichment/trust fund and recoupment claims

is the three-year period contained in *10 Del. C. § 8106*.¹⁹² Goldman Sachs argued that that was the case in its opening brief and the Virgin Islands did not refute that assertion.¹⁹³ Moreover, the Virgin Islands seeks money damages which is usually an action at law that would generally be subject to the three-year limitation period of *10 Del. C. § 8106*.¹⁹⁴ Finally, the Virgin Islands' estoppel claims are analogous to quasi-contractual claims which would also be subject to *10 Del. C. § 8106*.

192 *E.g., Wal-Mart Stores v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) [**133] ("[T]he applicable statute of limitations is *10 Del. C. § 8106*, which imposes a three year period of limitations on Wal-Mart's tort, contract, and fiduciary duty claims . . ."). I note the reality that I have found that § 278 itself acts effectively as a time bar. This section treats the laches question as if § 278 was no bar to the Virgin Islands.

193 Goldman Sachs Op. Br. at 47-49; Virgin Islands Ans. Br. at 46-48.

194 *Atlantis Plastics Corp.*, 558 A.2d at 1064 ("A claim brought in this Court which seeks money damages, which is generally an action at law, will therefore generally be subject to the three year limitations period of *10 Del. C. § 8106*.").

In its complaint, the Virgin Islands pleads no basis for equitable tolling of the statute of limitations. Frankly, sound arguments can be raised that the Virgin Islands should have been barred by laches from suing Panex after 1984 for any conditions at the Laga Facility. Having let three years expire without arguing that Panex breached any contractual obligation or any affirmative representation as to the condition of the Laga Facility or the earth and water under it, the Virgin Islands was poorly positioned to sue at a later date. That [**134] is especially so given that it was in possession of Laga, had every incentive before and after purchase to investigate whether the site was a source of pollution, and that its own conduct on the site could have changed the condition of the land and generated pollution.¹⁹⁵

195 The Virgin Islands -- a quarter of a century after the sale -- now alleges that "Panex Co. sold the Laga facility property to the Government of the U.S. Virgin Islands Department of Education for use as an education complex for children without revealing that the facility had been used for disposal of toxic chemicals." Am. Compl. P 16. Of course, if that be true, the Virgin Islands had a powerful incentive to inspect the site closely and to conduct environmental testing.

But I need not base my ruling on whether the Virgin Islands should have

sued during the Reagan Administration; it is enough that they waited until the second term of the second Bush Administration to bring this case. By 1992, the Virgin Islands clearly knew that parties in the VI Environmental Litigation were attributing pollution to Laga. By the time it got in the game, the Virgin Islands clearly knew that Panex was long dissolved. Under the theory [**135] it now espouses, the Virgin Islands had a right to bring a trust fund claim against Goldman Sachs then.¹⁹⁶

196 See Henry G. Henn & John R. Alexander, *Effect of Corporate Dissolution on Products Liability Claims*, 56 CORNELL L. REV. 865, 894, 909 n.222 (1971) ("Under the 'trust fund theory,' . . . [c]laimants, even with unliquidated claims, 'would have standing to sue, absent laches or any applicable statute of limitations'").

Indeed, the Virgin Islands asserted claims substantively identical to those it [*808] now advances in the VI Environmental Litigation in 1996. Those claims, which were arguably time-barred when they were brought in 1996 because the latest liquidating distribution was made in 1987, were dismissed without prejudice and without a tolling of the statute of limitations. Moreover, the Successor Trust was aware of its potential claims at the inception of its existence in 1997 -- the Order creating the Successor Trust clearly describes one of the purposes of the Successor Trust as

investigating and pursuing, if desirable, recoupment of the liquidating distributions. But the Successor Trustee never sued Goldman Sachs, even after Vice Chancellor Jacobs cited to the failure to do so [**136] as a basis for dismissing the Successor Trustee's recoupment petition. As an assignee of the Successor Trust, the Virgin Islands is stuck with that record of inaction.

As a result, having only filed this suit in 2007, the Virgin Islands, whether in its guise as a creditor or an assignee of the Successor Trust, has clearly exceeded the analogous three-year statute of limitations for bringing its claims against Goldman Sachs. The Virgin Islands fails to assert any unusual circumstances justifying its delay,¹⁹⁷ and thus its claims are time-barred.

197 The Virgin Islands does contend that it could not bring its claims as assignee of the rights of the Successor Trust until it was assigned these rights in 2006. Although this statement is factually accurate, it does not support the Virgin Islands' claim that laches should not apply because it ignores the fact that the Virgin Islands stands in the shoes of the Successor Trust, which did not bring its claim in a timely manner and would itself be time-barred.

In this court, a party's failure to file within the analogous statute of limitation is, absent a tolling of the limitations period, typically conclusive evidence of

laches.¹⁹⁸ But the doctrine [**137] of laches also permits this court to hold a plaintiff to a shorter period if, in terms of equity, the plaintiff should have acted with greater alacrity, and when the plaintiff's failure to seek equitable relief with alacrity threatens prejudice to the other party.¹⁹⁹

198 *E.g.*, *Albert v. Alex. Brown Mgmt. Servs.*, 2005 Del. Ch. LEXIS 100, 2005 WL 1594085, at *12 (Del. Ch. 2005) ("In the absence of unusual or mitigating circumstances, where the analogous statute of limitations at law period has run, a plaintiff is barred from bringing suit without the necessity of the court engaging in a traditional laches analysis.").

199 *E.g.*, *CertainTeed Corp. v. Celotex Corp.*, 2005 Del. Ch. LEXIS 11, 2005 WL 217032, at *6 (Del. Ch. 2005) (noting that with respect to equitable claims such as an injunction or specific performance laches may apply earlier than the end of the period of the analogous statute of limitations "if a plaintiff sits on its claim and does not demand prompt action.").

It is difficult to imagine a clearer instance of prejudicial delay.²⁰⁰ Goldman Sachs was a passive stockholder with no direct knowledge of or role in the Laga operations. The Virgin Islands seeks to base a recovery against Goldman Sachs on a default judgment it obtained [**138] against a penniless Successor

Trust. The District Court issuing that judgment had previously acknowledged that there were serious questions regarding whether the Virgin Islands was the party culpable for any polluting releases from Laga.

200 See *Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000) ("The essential elements of laches are: (i) plaintiff must have knowledge of the claim and (ii) there must be prejudice to the defendant arising from an unreasonable delay by plaintiff in bringing the claim.").

As a matter of due process and equity, I cannot conceive of how this court would permit the Virgin Islands to use that type of judgment collaterally against Goldman [*809] Sachs without affording Goldman Sachs an attempt to address the underlying merits. Of course, the Virgin Islands would say that the Successor Trust was penniless because distributions were made by Panex back in 1987 that should not have been. But by 1987, the Virgin Islands had owned Laga for six years and had had ample time to investigate conditions there.

In attempting to mount a merits-based defense, Goldman Sachs would have to reconstruct a chain of events going back to the 1970s to which it was not a party. Not only would key [**139] witnesses' memories have faded, some are no longer among the living. Lazare, a key director and officer of Panex and one of the two trustees of the Liquidating Trust, died in 1999 and would be

unavailable to testify.²⁰¹ This sort of evidentiary prejudice clearly supports a finding of laches.²⁰² Compounding the reality that Goldman Sachs would be compromised by the passage of time in mounting a defense is the reality that the expense of doing so would likely not be cost-effective. The Virgin Islands would therefore benefit from its tardiness by being able to extract funds from Goldman Sachs, not because of the merits, but simply so Goldman Sachs could avoid the burden of defending the action. Just because Goldman Sachs is in the plush does not mean that it should be subjected to this type of pressure by an extraordinarily slow moving plaintiff.²⁰³

201 See *Rosenbloom*, 766 A.2d at 451 (showing Lazare represented by the executors of his estate in 2000); see, e.g., *Fike*, 752 A.2d at 114 (finding prejudice where key witnesses died while the plaintiff sat on its claim).

202 *Steele v. Ratledge*, 2002 Del. Ch. LEXIS 118, 2002 WL 31260990, at * 3 (Del. Ch. 2002).

203 As noted previously, the Virgin Islands did reach settlements [**140] with the Panex stockholders who served as directors and officers. Thus, it is not as if it did not obtain some recompense from those most directly involved in any polluting activities by Panex at Laga. And as a matter of proportion, it is worth noting that the Virgin Islands settled for a total of \$

9.3 million from Esso and Texaco in the VI Environmental Litigation, even though those parties were supposedly responsible for over 65% of the damage to the Tutu aquifer. *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 206 (3d Cir. 2003). However rich Goldman Sachs is, it was a passive investor who owned 13% of Panex, which was allegedly responsible for less than 20% of the damage in St. Thomas. *Id.* Now the Virgin Islands seeks to have Goldman Sachs pay \$ 9 million it received twenty years ago in good faith.

Furthermore, the Virgin Islands itself asserts that the conduct of Panex's directors might be relevant to a fair determination of its claims, in the sense that if a trust fund doctrine claim was recognized, a court might only allow a plaintiff to prevail if it proved that the fiduciaries who made distributions acted inequitably in failing to provide for certain claims (or possible [**141] claims). To that point, the Virgin Islands invites me to examine the liquidation plan and liquidating dividends of the mid-1980s, by determining "whether retention of less than 10% of the dissolving corporation's assets was reasonable." ²⁰⁴ This re-illustrates the problem. Lazare was one of the final directors of Panex and a trustee of the Liquidating Trust. Gal and Rosenbloom are alive but doubtless their memories about events twenty years ago have faded.

204 Virgin Islands Ans. Br. at 21 (arguing that "[s]uch factual inquiry is relevant in determining who in equity, as between Goldman and the citizens of the Virgin Islands, should bear the cost of the environmental damage suffered on St. Thomas.").

IV. Conclusion

For the foregoing reasons, Goldman Sachs' motion to dismiss is granted. IT IS [*810] SO ORDERED. Each side to bear its own costs.



LEXSEE 2008 DEL. CH. LEXIS 147

In the Matter of Dow Chem. Int'l Inc. of Delaware

Civil Action No. 3972-CC

COURT OF CHANCERY OF DELAWARE, SUSSEX

2008 Del. Ch. LEXIS 147

October 3, 2008, Submitted

October 14, 2008, Decided

SUBSEQUENT HISTORY: Reargument denied by, Motion denied by *In re Dow Chem. Int'l Inc., 2008 Del. Ch. LEXIS 169 (Del. Ch., Nov. 18, 2008)*

COUNSEL: [*1] David J. Ferry, Jr., Rick S. Miller, Ferry, Joseph & Pearce, P.A., Wilmington, DE.

Donald E. Reid, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, DE.

JUDGES: William B. Chandler III.

OPINION BY: William B. Chandler III

OPINION

This case arises out of an application by petitioner, Daniel Boone, requesting that this Court appoint a receiver for respondent Dow Chemical International

Inc. of Delaware ("Dow Chemical of Delaware"), a dissolved Delaware corporation. Dow Chemical of Delaware was formed in December 1971, dissolved in December 1988, and has had no assets since December 1988. ¹ Petitioner is an attorney representing a group of plaintiffs pursuing tort litigation in California who will be unable to maintain a civil suit against respondent unless a receiver is appointed. ² Respondent has been dissolved for almost twenty years and now petitioner seeks "to call the players back from the dressing room, get them back into uniform, and require them to play a little longer." ³ In the case of Dow Chemical of Delaware, however, the game is over. For the reasons explained briefly below, the application for a receiver is denied.

1 Aff. of Scott V. Scarpelli P 3.

2 Petitioner's clients, banana farmers in Nicaragua, allege [*2] that respondent intentionally distributed and exposed them to the chemical 1,2-Dibromo-3-Chloropropane, also known as DBCP, after knowing the product posed serious medical risks.

3 *In re Citadel Indus., Inc.*, 423 A.2d 500, 506 (Del. Ch. 1980).

Under 8 Del. C. § 278 there is a three-year window during which suits can be brought against a dissolved corporation. 4 Once the three-year period has expired, no new suits can be brought against the corporation. 5 Although § 278 grants the Court of Chancery discretion to continue the corporate existence for more than three years after dissolution, such discretion allows continuance of the corporate existence only for the purpose of resolving *pending* litigation or disposing of remaining assets. 6 There can be no continuance after the three-year period has expired because there is nothing to continue--the dissolved corporation "is no more." 7 Thus, once the three-year period has expired and there is no pending litigation or assets to be disposed of, the Court no longer has discretion to "continue" the corporate existence under § 278. 8

4 8 Del. C. § 278.

5 *U.S. Virgin Islands v. Goldman, Sachs & Co.*, 937 A.2d 760, 789 (Del. Ch. 2007); *In re RegO Co.*, 623 A.2d 92, 96 (Del. Ch. 1992) [*3] (noting that § 278 continues

the corporate existence beyond the three-year period "solely" for the purpose of concluding pending litigation and not to allow new tort claims to be brought against the company).

6 *See Virgin Islands*, 937 A.2d at 792.

7 *Citadel*, 423 A.2d at 504 ("[T]he emphasis is on 'continuing' that which is already in existence before the corporate entity, as a legal fiction, departs the legal realm and becomes only a recorded memory.").

8 *Id.* at 504-05.

Petitioner acknowledges that the three-year period under § 278 has expired and, therefore, seeks the appointment of a receiver under 8 Del. C. § 279. Section 279 allows the "Court of Chancery, on application of any creditor, stockholder or director of the corporation, or any other person who shows good cause therefor," to appoint a receiver for a dissolved corporation to:

take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid . . . and to do all other acts which might be done by the corporation, if in

being, that [*4] may be necessary for the final settlement of the unfinished business of the corporation. 9

The power to appoint a receiver under § 279 is necessary because corporate officers have no power to act after the § 278 three-year period has expired. 10 The purpose of § 279 is to benefit shareholders and creditors where there are undisposed of assets remaining after dissolution by allowing appointment of a receiver "to safeguard the collection and administration of still existing property interests of a dissolved corporation." 11 Thus, § 279 provides "little solace" for one possessing an after discovered claim against a dissolved corporation with no undistributed assets. 12

9 8 Del. C. § 279.

10 *Citadel*, 423 A.2d at 504-05.

11 *Id.* at 506.

12 *Id.* at 506-07 (noting that § 278 "has been compared to a statute of limitations").

At common law, the moment a corporation was dissolved it ceased to exist as a legal entity and lost the capacity to sue and be sued. 13 This harsh result was tempered by the enactment of § 278 which allows a time in which suits can be brought even after a corporation is dissolved. The intention of § 278 is to balance the public policy interest of ensuring that claimants have adequate [*5] time to bring claims against the corpora-

tion and the public policy interest of allowing directors, officers, and stockholders to be free from claims relating to the dissolved corporation after sufficient time has passed. 14 The General Assembly, in enacting § 278, balanced these policy interests by establishing the three-year window--a window that could be extended to allow resolution of claims pending at the end of that period. 15 I do not read the power of the Court to appoint a receiver for a dissolved corporation under § 279 to change the balance of the policy interests established by § 278. In short, petitioner cannot use § 279 to bypass the three-year limitation under § 278 when a dissolved corporation holds no assets.

13 See *RegO*, 623 A.2d at 95.

14 *Virgin Islands*, 937 A.2d at 789.

15 See *id.* at 792.

City Investing Co. Liquidating Trust v. Continental Casualty Co.

16 does not change this result. In *City Investing* the Delaware Supreme Court held that a liquidating trust was not shielded by § 278 from claims brought more than three years after dissolution of the predecessor corporation. The decision rested on the "significant factual element" that the corporation established a liquidating [*6] trust, a separate legal entity, to conduct the winding up process. 17 The Court reasoned that if the corporation in that case had sought to continue its existence beyond the § 278

William B. Chandler III

three-year period, then it would still be subject to claims beyond that period.¹⁸ The Court was preventing a corporation from creating a separate legal entity to avoid liability while still conducting the process of winding up, a concern not present in the case of Dow Chemical of Delaware.

16 *624 A.2d 1191 (Del. 1993)*.

17 *Id. at 1196*.

18 *Id.*

Petitioner seeks appointment of a receiver for a corporation that has no assets¹⁹ and was dissolved almost twenty years ago. As former-Chancellor Grover C. Brown wrote, "all things must come to an end at some point,"²⁰ and for Dow Chemical of Delaware the end has already come. For the foregoing reasons, the application for a receiver is denied.

19 As a practical matter, recovery of any judgment against Dow Chemical of Delaware is highly unlikely because the company has no remaining assets. The inability to collect from Dow Chemical of Delaware, however, does not leave petitioner's clients without recourse as they are suing a number of other companies in the California action, [*7] including The Dow Chemical Company, Dole Food Company, Inc., and Standard Fruit Company.

20 *Citadel, 423 A.2d at 507*.

IT IS SO ORDERED.

/s/ William B. Chandler III

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Citation: 499 F.3d 165

*499 F.3d 165, *; 2007 U.S. App. LEXIS 20555, **;
65 ERC (BNA) 1097; 37 ELR 20221*

Langdon Marsh, as Acting Commissioner of the New York State Department of Environmental Conservation and Trustee of the Natural Resources and Michael D. Zagata, as Commissioner of the New York State Department of Environmental Conservation, Plaintiffs, State of New York and Denise M. Sheehan, as Acting Commissioner of the New York State Department of Environmental Conservation and Trustee of the Natural Resources, Plaintiffs-Appellants-Cross-Appellees, -v.- Daniel Rosenbloom, Firmanco Associates, First Manhattan Company, as distributees of the assets of Panex Industries, Inc., Andreas Gal, Norman Halper and Oliver Lazare, in their capacities as co-executors of the Estate of Paul Lazare and Goldman Sachs & Company, as distributees of the assets of Panex Industries, Inc., Defendants-Cross-Defendants-Appellees-Cross-Appellants, Panex Industries, Inc., Panex Industries, Inc. Liquidating Trust, Alpine Group, Inc., and Rochester Button Company, Inc., Defendant-Cross-Defendant, Dresser Industries Inc., Intervenor-Plaintiff-Movant, Turbodyne Electric Power Corporation, McGraw-Edison Company, Inc., Dresser-Rand Company, ABB Air Preheater, Inc., and Village of Wellsville, Defendants-Cross-Claimants-Cross-Defendants, Successor Panex Industries, Inc. Stockholders Liquidating Trust, Michael D. Debaecke, Esq., as Trustee of Successor Panex Industries, Inc. Stockholders Liquidating Trust, Defendants, Cooper Industries, Inc., Intervenor-Third Party-Defendant.

05-0514-cv (Lead), -0702-cv (XAP), -0706-cv (XAP), -0708-cv (XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

499 F.3d 165; 2007 U.S. App. LEXIS 20555; 65 ERC (BNA) 1097; 37 ELR 20221

February 6, 2006, Argued
August 28, 2007, Decided

PRIOR HISTORY: [1]**

Appeal from a judgment of the United States District Court for the Western District of New York (Elfvin, J., District Judge) following orders dismissing the State of New York's claims against the dissolved corporation Panex's shareholder-distributees and denying the Panex trustees' motion to dismiss the State's CERCLA claims against Panex. We affirm the dismissal of the State's claims against the shareholder-distributees and reverse the judgment granted to the State on its CERCLA claims against Panex.

CASE SUMMARY

PROCEDURAL POSTURE: In an action in which plaintiff, the State of New York, asserted CERCLA cost recovery claims against defendant, a dissolved corporation, the State appealed an order of the United States District Court for the Western District of New York dismissing the State's claims against defendant shareholders on the ground that they were barred by Del. Code Ann. tit. 8, § 278. The shareholders appealed a summary judgment entered against the corporation.


OVERVIEW: Although the State's claims were filed outside the three-year wind-up period established by Del. Code Ann. tit. 8, § 278 and before the State obtained an unsatisfied judgment against the corporation as required by Del. Code Ann. tit. 8, § 325(b), the State argued that its claims were valid under the common law equitable trust fund doctrine. On appeal, the court held that the State's claims against the shareholders were barred by Del. Code Ann. tit. 8, § 278 because § 278 superseded the trust fund doctrine insofar as § 278 provided a remedy for the State's pre-dissolution claims against the shareholders. Because § 278 provided the only basis for liability, the State was required to comply with Del. Code Ann. tit. 8, § 325(b) before pursuing claims against the shareholders. The court held that the six-year CERCLA limitations period set forth in 42 U.S.C.S. § 9613(g)(2)(B) did not preempt Del. Code Ann. tit. 8, § 278's three-year wind-up period because § 278's limitation on a corporation's capacity to be sued did not significantly interfere with the goals of CERCLA, which did not manifest an intent to trace infinitely funds that once belonged to a party responsible for contamination.

OUTCOME: The court affirmed the dismissal of the State's claims against the shareholders. The court reversed the denial of the motion to dismiss the State's CERCLA claims against the corporation and the summary judgment granted against the corporation on those claims.


CORE TERMS: trust fund, shareholder-distributees, shareholders, state law, federal common law, dissolution, dissolved, wind-up, site, preemption, preempt, contamination, statutory remedy, equitable, successor, statute of limitations, post-dissolution, environmental, corporate law, federal policy, expiration, common law, pre-dissolution, cross-appeal, displacement, uniformity, intent to preempt, liquidating, distributed, preempted

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HN1  The court of appeals reviews a district court's decision to grant a motion to dismiss de novo. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN2  Like other post-dissolution statutes, Del. Code Ann. tit. 8, § 278 provides that any suit against a corporation, which was filed before dissolution or during the three year statutory wind-up period, does not abate, even on the expiration of the wind-up period. When the wind-up period expires, however, so does the corporation's capacity to be sued. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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

[Limited Survival](#) 


HN3  See Del. Code Ann. tit. 8, § 278.



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HN4  Del. Code Ann. tit. 8, § 278 covers all potential pre-dissolution claims, regardless of which corporate constituent is named as the defendant. [More Like This Headnote](#)


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HN5  [Del. Code Ann. tit. 8, § 282\(b\)](#) provides that if a corporation chooses to distribute its assets in accordance with procedures described in [Del. Code Ann. tit. 8, § 281 \(a\)](#), then its shareholders shall not be liable for any claim against the corporation on which an action, suit or proceeding is not begun prior to the expiration of the period described in [Del. Code Ann. tit. 8, § 278](#). [Del. Code Ann. tit. 8, §§ 280-282](#) do not recognize the continued vitality of the trust fund doctrine, but rather foreclose the use of the trust fund doctrine for post-dissolution claims, provided dissolved corporations follow the procedures outlined in [Del. Code Ann. tit. 8, § 281\(a\)](#). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN6  [Del. Code Ann. tit. 8, § 278](#) is a comprehensive statutory remedy available to creditors for claims against all potential defendants, including a corporation, its officers, and its shareholders. [More Like This Headnote](#)


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HN7  For [Del. Code Ann. tit. 8, § 325\(b\)](#) to apply, defendants must be liable by the provisions of the Delaware General Corporation Law. [Del. Code Ann. tit. § 325 \(a\)](#). [More Like This Headnote](#)


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HN8  See [Del. Code Ann. tit. 8, § 325\(b\)](#).


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HN9  [Del. Code Ann. tit. 8, § 278](#) applies to claims against shareholders that arise before dissolution. [More Like This Headnote](#)


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HN10  The Federal Rules of Civil Procedure provide that state law governs a corporation's capacity to be sued, [Fed. R. Civ. P. 17\(b\)](#). [More Like This Headnote](#)


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HN11  How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power, with the federal government powerless to resurrect a corporation which the state has put out of existence for all purposes. [More Like This Headnote](#)

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HN12  Preemption of areas that have been traditionally occupied by the states is inappropriate absent clear and manifest congressional intent to supersede state law. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN13  The Supreme Court of the United States has identified three situations that show congressional intent to preempt state law: (1) where Congress expressly states its intent to preempt; (2) where Congress's scheme of federal regulation is sufficiently comprehensive to give rise to a reasonable inference that it leaves no room for the state to act; and (3) where state law actually conflicts with federal law. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN14  CERCLA does not expressly state an intent to preempt state law across the board. While CERCLA does state that it applies notwithstanding any other provision or rule of law, [42 U.S.C.S. § 9607\(a\)](#), this clause refers only to substantive liability and does not express congressional intent to preempt state rules on how litigation proceeds, including a party's amenability to suit. Nor is the CERCLA regulatory scheme so comprehensive that the court reasonably can infer an intent to preempt; in fact, state corporate law can supplement CERCLA in several situations. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN15  An actual conflict between state and federal law exists when compliance with both federal and state regulations is a physical impossibility or when state law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Absent clear congressional intent to the contrary, federal preemption of state law is not favored, especially in areas of law traditionally occupied by the states. Corporate law is one of these areas. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN16  CERCLA does not automatically assign liability to every party with any connection to a contaminated facility. CERCLA's cost-recovery objective, while strong, is not absolute and may yield to countervailing considerations. CERCLA recognizes that recovery will not always be possible and manifests no intent that funds that once belonged to a party responsible for contamination should be frozen indefinitely or traced infinitely. CERCLA must be construed broadly to achieve environmental and cost-assignment goals, but CERCLA's reach is not unlimited. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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
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HN17  CERCLA does not preempt state statutes that limit a party's capacity to be sued. [More Like This Headnote](#)


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HN18  Del. Code Ann. tit. 8, § 278 limits capacity to be sued, not liability, and thus does not conflict with CERCLA's statute of limitations, [42 U.S.C.S. § 9613](#), even if in


operation the state law precludes a CERCLA plaintiff from recovering in some circumstances. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)



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HN19  There is no conflict between [Del. Code Ann. tit. 8, § 278](#) and the congressional policy manifested in CERCLA that leads the court to conclude that Congress intended to preempt Delaware's corporate wind-up period, which protects dissolved corporations' and their former shareholders' interests in finality. CERCLA does not suggest that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute or because it would net the government more money. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN20  To justify creation of a rule of federal common law, a party must show specifically a significant conflict between some federal policy or interest and the use of state law. Cases that call for the creation of federal common law are few and restricted, and it is difficult to prove the need for a federal common law rule. The existence of a complex federal statutory scheme does not automatically show that Congress intended courts to fill its gaps with rules of federal common law. Rather, where federal statutory regulation is comprehensive and detailed, the court presumes that matters left unaddressed are left subject to the disposition provided by state law. The court strongly presumes that state law should be determinative where private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards, as is the case with most corporate matters. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN21  Courts must refrain from creating CERCLA-specific federal common law rules in the face of applicable long-standing common law principles. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN22  The absence of a conflict between state law and federal policy weighs heavily against creation of a rule of federal common law as a threshold matter, because a significant conflict is normally a precondition to the creation of federal common law. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN23  In deciding whether to draw from state law or to create a rule of federal common law in cases involving federal programs, the court considers: (1) the need for a nationally uniform body of law; (2) whether application of state law would frustrate specific objectives of the federal programs; and (3) the extent to which application of a federal rule would disrupt commercial relationships predicated on state law. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN24 Although CERCLA is a federal statute for which there is presumably an interest in uniform application, where there is no conflict between federal policy and the application of state law, a mere federal interest in uniformity is insufficient to justify displacing state law in favor of a federal common law rule. To invoke the concept of uniformity is not to prove its need. Moreover, variations in rules among states do not prove a need for uniformity as long as the applicable standard is applied evenhandedly to particular disputes. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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** Alexander Grannis succeeded Erin M. Crotty to the office of Commissioner of the New York State Department of Environmental Conservation and is named here pursuant to [Federal Rule of Appellate Procedure 43\(c\)\(2\)](#).

JUDGES: Before: JACOBS, POOLER, and JOHN R. GIBSON, * Circuit Judges.

* The Honorable John R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION BY: JOHN R. GIBSON

OPINION

[*169] JOHN R. GIBSON, Circuit Judge.

The State of New York appeals from orders of the United States District Court for the Western District of New York (Elfvig, J., *District Judge*) dismissing its claims against shareholder-distributees of Panex Industries, Inc., a dissolved Delaware corporation. The State asserted these claims several years after Panex had been dissolved, outside the corporate wind-up period established by Delaware General Corporation Law § 278 and before obtaining a judgment against Panex as required by Delaware General Corporation Law § 325 (b), but the State argues that its claims are valid under the common law equitable trust fund doctrine. The shareholder-distributees cross-appeal from the **[*3]** district court's denial of a motion to dismiss the State's CERCLA claims against Panex and the summary judgment granted to the State on those claims. They argue that Delaware General Corporation Law § 278 governs and that Panex lacked capacity to be sued under the statute because it had been dissolved for over three years by the time the State notified Panex of its claims and

filed suit. The district court found that CERCLA preempted section 278 in this instance.

I.

The issues raised in this appeal are one chapter in a complex tale involving numerous parties. At the heart of the suit is the State's effort to recover \$ 4.5 million in unreimbursed environmental response costs that it has paid to investigate and clean up the Wellsville-Andover Landfill site in Allegany County, New York. ¹

FOOTNOTES

¹ In all the State paid or raised costs of \$ 10 million in connection with cleanup of the site, and the remaining sum is what is left after the State's settlements with other parties.

Panex Industries, Inc., was formed in 1981 under Delaware law as part of the reorganization plan of its predecessor company, Duplan Corporation. One of Duplan's operating divisions had been the Rochester Button Company, a manufacturing **[**4]** plant. In the early 1970s, Rochester Button used the Wellsville-Andover Landfill site to dispose of its industrial waste, placing much of it in a special disposal pit designated for Rochester Button's exclusive use. There was abundant evidence that Rochester Button made substantial deposits of hazardous waste at the landfill during the course of its operations. The New York State Department of Environmental Conservation ultimately determined that the site presented a significant threat to the public health and environment, and the State began incurring response **[*170]** costs in connection with its investigation of contamination at the site in April 1984.

Meanwhile, unaware of the contamination at the landfill site or of the State's recently commenced investigation, Panex's shareholders voted to dissolve the corporation on September 24, 1984. Panex filed its Certification of Dissolution effecting its formal dissolution under Delaware law on April 15, 1985. To facilitate the corporate wind-up, Panex's liquidation plan created a Stockholder's Liquidating Trust, which was intended in part to reduce tax liability arising after dissolution, see *City Investing Co. Liquidating Trust v. Continental Casualty Co.*, 624 A.2d 1191, 1196 (Del. 1993). **[**5]** Panex's former shareholders had received liquidating distributions totaling \$ 64 million before the Trust was created. The Trust received \$ 6 million in funding at its inception, and it distributed about \$ 4.5 million to former shareholders in July 1987 when the statute of limitations had run on its 1982 and 1983 tax years and there were no other known Panex liabilities. In all, the shareholder-distributees received over \$ 68 million in distributions. The defendant-appellees in this action were among those distributees.

Delaware General Corporation Law § 278 generally establishes a three-year continuation period, beginning at dissolution, for dissolved corporations to wind up their affairs and for unknown claimants to assert claims against the corporation. After this period, the corporation ceases to exist and lacks capacity to be sued. The State sent Panex formal notice of its claim for response costs at the landfill site in March 1988, but Panex did not receive the notice until April 25, 1988--just over three years after its dissolution (which occurred on April 15, 1985), thus just after the wind-up period expired. Upon receipt of this notice, the trustees of the Panex Trust extended **[**6]** the life of the Trust and postponed further distributions. For the next several years, the State conducted investigations at the site and, in 1994, formulated a remediation plan.

After adopting the remediation plan, the State filed this action in the Western District of New York against Panex, the Panex Trust, and the purchasers of the Rochester Button assets, among others, asserting federal claims under CERCLA and nuisance claims under New York

law. On behalf of Panex, its trustees moved to dismiss, arguing that Delaware General Corporation Law § 278 barred all claims against Panex because the suit was filed more than three years after its dissolution. The district court dismissed the state-law nuisance claims but denied the motion to dismiss the CERCLA claims, holding that CERCLA preempted Delaware's statutory limit on the dissolved corporation's capacity to be sued.

In March 1997, the costs of defending this and another CERCLA lawsuit ² had depleted the Panex Trust further, and the district court granted the State leave to join Panex's shareholder-distributees as defendants in this action. The State asserts claims under the common law equitable trust fund doctrine, which allows [*171] claimants [**7] against a dissolved or insolvent corporation to follow the distributed assets of the corporation into the hands of its shareholders in order to satisfy the corporation's liability. *See, e.g., Koch v. United States*, 138 F.2d 850, 852 (10th Cir. 1943).

FOOTNOTES

² Panex and the shareholder-distributees were involved in similar environmental litigation in the Virgin Islands, and the Third Circuit concluded that Panex lacked capacity to be sued under Delaware General Corporation Law § 278 and that Delaware General Corporation Law § 325(b) barred suit against the former shareholders. *In re Tutu Wells Contamination Litig.*, No. 95-7280, slip op. at 9 (3d Cir. Dec. 21, 1995) (noted in table at 74 F.3d 1228). The shareholder-distributees have argued that the State participated in that litigation and is bound by the outcome in that case, but we need not reach that argument to resolve the instant appeal and cross-appeal.

Panex's shareholder-distributees moved to dismiss the claims against them under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district court granted the motion on October 2, 1997, ruling that the trust fund doctrine did not survive Delaware's enactment of section 278, which [**8] barred the State's claims because they were not brought within three years of Panex's dissolution. The district court also concluded that the State's claim against the shareholder-distributees was premature on the ground that Delaware General Corporation Law § 325(b) required the State to obtain a judgment against Panex and the Panex Trust, and have that judgment returned unsatisfied, before pursuing recovery from the shareholder-distributees, which the State had not done. The court rejected the State's argument that it should adopt the trust fund doctrine as a matter of federal common law under CERCLA, which would in turn preempt the Delaware statutes. As a result of this ruling, the shareholder-distributees were dismissed as defendants.

Seven years later, the district court granted summary judgment to the State on its CERCLA claims against Panex and the successor trust that had succeeded the Panex Trust, concluding that CERCLA preempts the Delaware statutory limits that otherwise would bar suit against the dissolved corporation. The district court's judgment held Panex and the successor trust jointly and severally liable to the State for \$ 4,558,034.83 under CERCLA § 107, 42 U.S.C. § 9607, [**9] and declared that those entities were jointly and severally liable for all future response costs incurred by the State in cleaning up the site under CERCLA §§ 113(g)(2). Neither Panex nor the successor trust has any assets to pay the judgment, so, if the State is going to recover from anyone, it must be the shareholder-distributees. Thus, the State appeals the district court's 1997 order dismissing its claims against the shareholder-distributees. The shareholder-distributees cross-appeal the 2004 grant of summary judgment against Panex and the denial of an earlier motion to dismiss the claims against Panex in light of the State's failure to file suit within the three-year wind-up period established by Delaware General Corporation Law § 278.

The State advances four arguments in its appeal:

1. The district court erred in determining that section 278 bars the State's claim against the shareholder-distributees, because the common law trust fund doctrine survives enactment of the statute;
2. The district court erred in holding that the State's claims against the shareholder-distributees were premature under section 325(b) **[**10]** because it had not first obtained an unsatisfied judgment against Panex;
3. The district court correctly held that CERCLA preempts any time limits that Delaware General Corporation Law § 278 would place on the State's claims against Panex, and the court should have allowed its claims against the shareholder-distributees to proceed on the same grounds; and
4. The district court erred in refusing to recognize that the trust fund doctrine applies in any timely-filed CERCLA suit as a matter of federal common law.

On cross-appeal, the shareholder-distributees argue that the district court erred in finding that CERCLA preempts Delaware law's limitation on the dissolved corporation **[*172]** Panex's capacity to be sued after the expiration of the wind-up period.

II.

The State argues that the district court erred in holding that Delaware General Corporation Law §§ 278 and 325(b) bar its claims against the Panex shareholder-distributees. According to the State, the trust fund doctrine permits claims against dissolved corporations to go forward with no special time limit, and sections 278 and 325(b) have no effect upon its continued relevance. ^{HN17} We review the district court's decision to grant the motion to **[**11]** dismiss *de novo*. See Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998).

A. Section 278

We first address the State's argument that the trust fund doctrine survives enactment of Delaware General Corporation Law, Del. Code Ann. tit. 8, § 278, allowing its claims against Panex and the shareholder-distributees to proceed even though suit was filed more than three years after Panex's dissolution. Under the common law, dissolution of a corporation terminated its existence as a legal entity, thus abating all pending actions by and against it and terminating its capacity to sue or be sued. In re Citadel Indus., Inc., 423 A.2d 500, 503 (Del. Ch. 1980). The trust fund doctrine first arose, in part, to compensate for this rather harsh rule, giving creditors some protection in the event of a corporate dissolution. In re RegO Co., 623 A.2d 92, 95 (Del. Ch. 1992). Essentially, the trust fund doctrine gave creditors an equitable right to follow corporate assets after dissolution, such that the assets are held like a trust in which the creditors have a claim superior to that of the shareholders. *Id.*; see also Koch v. United States, 138 F.2d 850, 852 (10th Cir. 1943); Snyder v. Nathan, 353 F.2d 3, 4 (7th Cir. 1965).

Several **[**12]** states have enacted statutes that continue the existence of corporations for a definite period of time following dissolution, thereby providing a statutory remedy for the difficulties associated with the common law abatement rule. Considering that the equitable remedy arose in order to supply relief where none existed, it may be argued that adequate statutory remedies deprive courts of equitable jurisdiction. See George I. Wallach, *Products Liability: A Remedy in Search of a Defendant-The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims*, 41 Mo. L. Rev. 321, 332 (1976). Indeed, several courts construing such statutes have concluded that the statutory remedies available to creditors obviate reliance upon equitable remedies, thereby precluding their use by the courts. See, e.g., Reconstruction Fin. Corp. v. Teter, 117 F.2d 716, 727 (7th Cir. 1941)

(holding that Illinois statutes "completely regulate and control both the substantive and procedural rights" of a corporation's creditors); *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 550 (Tex. 1981) ("The effect of these statutes was to supplant the equitable trust fund theory by declaring a statutory **[**13]** equivalent."). *But see Green v. Oilwell, Div. of U.S. Steel Corp.*, 1989 OK 7, 767 P.2d 1348, 1352 (Okla. 1989) (holding that state law did not provide a direct remedy for creditors and therefore did not displace the trust fund doctrine). The Delaware Court of Chancery has addressed this issue briefly, explaining that "the problem that the trust fund doctrine addresses has been ameliorated by provisions in the corporate codes of most or all jurisdictions that continue the existence of the corporation as a jural entity for limited purposes following dissolution." *In re RegO Co.*, 623 A.2d at 95.

Delaware's post-dissolution statute, section 278 of the Delaware General Corporation **[*173]** Law ³, was enacted in order "to formalize the continued existence of corporate assets and to provide a mechanism for the assertion of claims as part of the 'winding up' process . . . [continuing] the corporation's existence by operation of law." *City Investing Co. Liquidating Trust v. Continental Casualty Co.*, 624 A.2d 1191, 1194 (Del. 1993). ^{HN2} Like other post-dissolution statutes, section 278 provides that "any suit against the corporation, which was filed before dissolution or during the three year statutory wind-up period, **[**14]** does not abate, even on the expiration of the wind-up period." *In re RegO Co.*, 623 A.2d at 95. When the wind-up period expires, however, so does the corporation's capacity to be sued.

FOOTNOTES

³ ^{HN3} Del. Code Ann. tit. 8, § 278 provides:

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose **[**15]** of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.

The initial question before this court is whether section 278 supersedes the trust fund doctrine, preventing the State's claims against Panex's shareholder-distributees from going forward because the State filed suit after the expiration of the three-year wind-up period. The State argues that because section 278 does not explicitly address the remedies available to creditors against shareholder-distributees, section 278 does not supersede the trust fund doctrine as to these defendants. The district court noted, however, that the trust fund doctrine has never been used by a Delaware law court to circumvent section 278 in any situation. Other courts also have recognized that the trust fund doctrine has been superseded

by wind-up statutes, and the district court cited three cases to support this proposition: Pacific Scene, Inc. v. Penasquitos Inc., 46 Cal. 3d 407, 250 Cal. Rptr. 651, 758 P.2d 1182 (Cal. 1985); Hunter, 620 S.W.2d 547; and Blankenship v. Demmler Manufacturing Co., 89 Ill. App. 3d 569, 411 N.E.2d 1153, 44 Ill. Dec. 787 (Ill. App. Ct. 1980).

The **[**16]** State argues that the district court's reliance upon these cases is misplaced because they involve statutes that provide specific statutory remedies against shareholder-distributees, unlike section 278, thereby limiting their applicability. Thus, California Corporations Code § 2009 "restored to creditors a direct remedy against the former shareholders of dissolved corporations," Pacific Scene, 758 P.2d at 1184; in Texas, Article 7.12 of the Texas Business Corporation Act "applies to officers, directors, and shareholders of a dissolved corporation," Hunter, 620 S.W.2d at 550; and in Illinois, the two-year survival statute provided that corporate dissolution "shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders" for claims accruing before dissolution as long as suit was filed within **[*174]** the two year period, Blankenship, 411 N.E.2d at 1156.

These cases support the conclusion that section 278 applies to this case. First, in concluding that statutory remedies supersede the common law trust fund doctrine, all three cases address as a policy matter the necessity of protecting shareholders, together with officers and corporations, from **[**17]** uncertain liability; this reduces the significance of differences in statutory language. See, e.g., Pacific Scene, 758 P.2d at 1187 (stating that "shareholders nonetheless possess an important statutory interest in the final and certain termination of their involvement with the affairs of a dissolving corporation"); Hunter, 620 S.W.2d at 551 (stating that "Article 7.12 expresses a legislative policy to restrict the use of the trust fund theory to pre-dissolution claims, and to protect shareholders, officers and directors of a dissolved corporation from prolonged and uncertain liability"). We recognize that shareholders, officers, and corporations all have an interest in certainty and finality. See 15A William M. Fletcher, Cyclopedia of the Law of Corporations § 7373 (2006) ("The trust fund doctrine is fuzzy; statutes by contrast are sharp. Accordingly, the adoption of corporate dissolution statutes has supplanted the equitable trust theory in most jurisdictions.").

Second, all three cases deal with post-dissolution claims, so the courts were addressing the availability of the trust fund doctrine despite statutory schemes that limit remedies to pre-dissolution claims. The cases question **[**18]** whether to apply the trust fund doctrine in order to provide extra-statutory remedies, which explains the emphasis on statutory construction and whether the statutes regulate corporate liability to the point of superceding the trust fund doctrine. See, e.g., Hunter, 620 S.W.2d at 551 (stating that "no real purpose would be served by . . . permitting suits against officers, directors, and shareholders of a dissolved corporation, unless the legislature intended for the statute to bar resort to the trust fund theory apart from the statute in order to enforce post-dissolution claims. To hold otherwise would violate the rule of statutory construction that the legislature is never presumed to do a useless act"); Pacific Scene, 758 P.2d at 1186 ("Courts and commenters . . . have been troubled by [the] implication that legislators uselessly created a redundant statutory remedy for a subclass of claims concurrently remediable in equity.").

In contrast, the instant case involves a claim accruing before Panex's dissolution. Therefore the key question is not whether section 278 completely supersedes the trust fund doctrine, but is instead the narrower question of whether section 278 provides a **[**19]** remedy for the State's pre-dissolution claim against Panex's former shareholders. ⁴ Contrary to the State's assertions, several Delaware cases suggest that the Court of Chancery interprets section 278 as applying to claims against both corporations and shareholders that arise before dissolution. The court in In re RegO Co. briefly discussed the relationship between the trust fund doctrine and statutory remedies. It acknowledged that section 278 addresses the same problems as the trust fund doctrine, but it also recognized that the "modern scheme still leaves open the question, what, if any, **[*175]** rights are afforded to persons who have

no claim against a corporation at the time of its dissolution, or during the statutory wind-up period, but who do thereafter acquire such a claim." *In re RegO Co.*, 623 A.2d at 96. The court concluded that a corporation could not be liable for a post-dissolution claim, but characterized the possibility that shareholders and directors may be liable as "an unclear and troubling question." *Id.*

FOOTNOTES

⁴ Even if section 278 does not encompass such a remedy, the differences in statutory language between section 278 and other state statutes are not necessarily dispositive. **[**20]** As the decisions cited by the district court indicate, the important issue is whether the State of Delaware would have enacted section 278 while preserving a subclass of claims, those against shareholders, remediable in equity. We believe it would not.

The crucial question for the court in analyzing statutory remedies was whether a claim arose before or after the statutory wind-up period, not whether the defendant was the corporation, the directors, or the shareholders. ⁵ By addressing the fact that shareholders and directors may be liable in the modern scheme, but only in the context of post-dissolution claims, the court was implicitly recognizing that ^{HN4} section 278 covers all potential pre-dissolution claims, regardless of which corporate constituent is named as the defendant.

FOOTNOTES

⁵ The distinction between pre-dissolution and post-dissolution claims articulated in *In re RegO Co.* also allows us to address another of the State's arguments. ^{HN5} Section 282(b) of the Delaware General Corporation Law provides that if a corporation chooses to distribute its assets in accordance with procedures described in section 281(a), then its shareholders "shall not be liable for any claim against the corporation **[**21]** on which an action, suit or proceeding is not begun prior to the expiration of the period described in § 278 of this title." The State argues that this demonstrates the continued vitality of the trust fund doctrine in Delaware law. As the Court of Chancery explained, however, sections 280-282 were passed in order to address the uncertainty associated with dissolving a corporation that faces potential future claimants. See *In re RegO Co.*, 623 A.2d at 96. In other words, sections 280-282 do not recognize the continued vitality of the trust fund doctrine, but rather foreclose the use of the trust fund doctrine for post-dissolution claims, provided dissolved corporations follow the procedures outlined in section 281(a). This is of no consequence for determining whether section 278 has an effect on the trust fund doctrine's applicability in pre-dissolution claims.

Similarly, in *In re Citadel Industries, Inc.* the court made no distinction between potential defendants when it analyzed the expiration of the three-year statutory wind-up period. The court concluded that the corporation "no longer existed as a body corporate. It no longer had legal existence as a corporation. . . . [T]here was **[**22]** no longer a legal entity which could be continued through its officers, directors and shareholders." *In re Citadel Industries, Inc.*, 423 A.2d at 507. The court also expressed concern that "[o]nce a corporation is dissolved, the following three-year period run, all known debts paid, [and] all remaining assets distributed to shareholders, . . . [h]ow can a vast number of former shareholders be compelled to return any final distribution of assets, etc.?" *Id.* at 506. Although section 278 does not set forth specific remedies against shareholders, there is evidence that the Court of Chancery considers ^{HN6} section 278 to be a comprehensive statutory remedy available to creditors for claims against all potential defendants, including the corporation, its officers,

and its shareholders. ⁶

FOOTNOTES

⁶ The Court of Chancery's decisions in *City Investing Co. Liquidating Trust* 624 A.2d 1191, and *Rosenbloom v. Esso Virgin Islands, Inc.*, 766 A.2d 451 (Del. 2000), are of no avail to the State in this case. Neither case makes any reference to the availability of the trust fund doctrine for pursuing claims against dissolved corporations and their former shareholders. *City Investing Co. Liquidating Trust* held that "a **[**23]** liquidating trust is the successor of the corporation whose assets it administers" and thus subject to creditors' claims despite the corporation's dissolution. 624 A.2d at 1197. Similarly, in *Rosenbloom*, the Court of Chancery recognized that the creation of a successor trust was necessary to preserve the claimants' rights and "complete the winding up process." 766 A.2d at 459. Instead of making any reference to the trust fund doctrine, both cases delineate the role of trusts in Delaware's statutory framework. Indeed, the State has an unchallenged judgment against Panex's liquidating trust; the difficulty is that its assets are insufficient to satisfy the claim.

[*176] We are persuaded by the general consensus that modern statutory remedies have effectively replaced the trust fund doctrine and that there are sound reasons for abiding by the wind-up period established by section 278. We therefore conclude that the district court correctly held that the State's claims against the shareholder-distributees are barred by section 278.

B. Section 325(b)

Having concluded that section 278 applies to the State's claims against Panex and its former shareholders, we must likewise conclude that Delaware **[**24]** General Corporation Law § 325(b) ⁷ bars the State's claims against the shareholder-distributees. As the State points out, Delaware law requires that ^{HN7} for section 325(b) to apply, the defendants must be liable "by the provisions of this chapter." Del. Code Ann. tit. § 325(a). The State argues that this precludes application of section 325(b) in this case because it is a suit arising in equity.

FOOTNOTES

⁷ ^{HN8} Del. Code Ann. tit. 8, § 325(b) provides:

No suit shall be brought against any officer, director or stockholder for any debt of a corporation of which such person is an officer, director or stockholder, until judgment be obtained therefor against the corporation and execution thereon returned unsatisfied.

In light of our conclusion that section 278 provides the only basis for liability, the State's argument must fail. ^{HN9} Section 278 applies to claims against shareholders that arise before dissolution, so therefore section 325(b) also applies and the State must obtain judgment against Panex before pursuing its claim against the shareholder-distributees.

III.

As we have concluded that the Delaware statutes bar the State's claims against Panex and its

shareholder-distributees, we turn to the State's argument **[**25]** that those statutes should not apply in the face of CERCLA. The district court accepted this argument as to Panex, holding that CERCLA preempted Delaware General Corporation Law § 278's three-year limitation on Panex's capacity to be sued. It rejected the argument as to the shareholder-distributees, however, reasoning that Delaware law controls because any liability of the shareholder-distributees would arise from their amenability to suit under Delaware law, not from CERCLA or federal common law. We hold that CERCLA does not require displacement of Delaware law in this case, and the suits against both the shareholder-distributees and Panex are barred.

The State first contends that Delaware law conflicts with the federal policy expressed in CERCLA, such that the six-year CERCLA limitations period set forth at 42 U.S.C. § 9613(g)(2) (B) preempts the three-year corporate wind-up period established by Delaware General Corporation Law § 278. **[**26]** Alternatively, the State urges this Court to displace the Delaware statutes and apply the trust fund doctrine as a matter of federal common law in CERCLA cases, allowing it to pursue Panex assets that have been distributed to Panex's former shareholders.

We begin with the observation that corporate law is overwhelmingly the province of the states. See *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98-99, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991). ^{HN10} The Federal Rules of Civil Procedure provide that **[**177]** state law governs a corporation's capacity to be sued, Fed. R. Civ. P. 17(b), and the Supreme Court has held ^{HN11} that "[h]ow long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power," with the federal government "powerless to resurrect a corporation which the state has put out of existence for all purposes." *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 127-28, 58 S. Ct. 125, 82 L. Ed. 147 (1937); see also *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 272, 79 S. Ct. 763, 3 L. Ed. 2d 800 (1959) (state law determines the question of corporate existence). Whether framed in terms of conflict preemption or in terms of the creation of federal common law, the Supreme Court expressly has cautioned **[**27]** against displacement of state law in areas traditionally occupied by the states. See, e.g., *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) (warning that ^{HN12} preemption of "areas that have been traditionally occupied by the States" is inappropriate absent "clear and manifest" congressional intent to supersede state law); *Atherton v. FDIC*, 519 U.S. 213, 218, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997) (stating that Congress legislates against the background of state law, so a "significant conflict" between federal policy and state law must be specifically shown before the creation of federal common law is justified). Keeping these principles in mind, we address in turn each of the State's arguments for displacement of Delaware corporate law.

A. Conflict Preemption

To determine whether CERCLA preempts the Delaware statutes, we must ascertain the intent of Congress. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987). ^{HN13} The Supreme Court has identified three situations that show congressional intent to preempt state law: (1) where Congress expressly states its intent to preempt; (2) where Congress's scheme of federal regulation is sufficiently comprehensive to give rise to a reasonable inference that it leaves no room **[**28]** for the state to act; and (3) where state law actually conflicts with federal law. *Id.* at 280-81. ^{HN14} CERCLA does not expressly state an intent to preempt state law across the board. See *Bedford Affiliates v. Sills*, 156 F.3d 416, 426 (2d Cir. 1998). While CERCLA does state that it applies "[n]otwithstanding any other provision or rule of law," 42 U.S.C. § 9607(a), this clause refers only to substantive liability and does not express congressional intent to preempt state rules on how litigation proceeds, including a party's amenability to suit. See *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019 (7th Cir. 1995). Nor is the CERCLA

regulatory scheme so comprehensive that we reasonably can infer an intent to preempt; in fact, state corporate law can supplement CERCLA in several situations. *Bedford Affiliates*, 156 F.3d at 426-27.

Our inquiry therefore focuses on the third preemption scenario, whether Delaware law actually conflicts with CERCLA. ^{HN15} An actual conflict between state and federal law exists when "compliance with both federal and state regulations is a physical impossibility," *Guerra*, 479 U.S. at 281 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)), **[**29]** or when state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Guerra*, 479 U.S. at 281 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)). Absent clear congressional intent to the contrary, federal preemption **[*178]** of state law is not favored, see *English*, 496 U.S. at 79, especially in areas of law traditionally occupied by the states. As we observed above, corporate law is one of these areas. *Kamen*, 500 U.S. at 99. For preemption to occur in this instance, then, the conflict between state law and federal policy must be a "sharp" one. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988).

The "physical impossibility" form of conflict does not exist here, because it is certainly possible to comply with the CERCLA limitations period and Delaware's limits on the amenability to suit of dissolved corporations and their shareholder-distributees. As long as a CERCLA plaintiff files its claim within three years of the corporation's dissolution as required by Delaware General Corporation Law § 278, or seeks extension of the wind-up period from the Court of Chancery within that time as section 278 allows, it also meets CERCLA's six-year **[**30]** limitations period, 42 U.S.C. § 9613(g)(2). See *Witco Corp. v. Beekhuis*, 38 F.3d 682, 688 (3d Cir. 1994) (finding no actual conflict where it was physically possible for CERCLA claimant to file within three-year CERCLA limitations period and eight-month period established by Delaware nonclaim statute, which also contained a mechanism to preserve contingent CERCLA contribution claims). That a CERCLA plaintiff, like the State here, might find it impossible to comply with both statutes in some circumstances is not enough to establish an actual conflict between the two in this case. See *id.* at 688. The question of preemption thus turns on whether Delaware law presents an obstacle to the accomplishment of CERCLA's objectives.

CERCLA manifests Congress's intent that hazardous waste sites should be cleaned up and that those responsible for the contamination should bear the costs. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989). To effectuate these goals, CERCLA looks backward in time and imposes wide-ranging liability. It allows the government to recover remediation costs directly from parties responsible for contamination, 42 U.S.C. § 9607(a)(4)(A); it allows private parties to seek indemnification **[**31]** and contribution for clean-up costs from potentially responsible parties, 42 U.S.C. § 9607(a)(4)(B); and it imposes strict liability on owners and operators of contamination sites, 42 U.S.C. § 9607(a)(1). See *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992). Even so, CERCLA's statutory scheme anticipates that, in some situations, it will be impossible to recover from responsible parties. See *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) ("neither does ^{HN16} CERCLA automatically assign liability to every party with any connection to a contaminated facility"). In other words, CERCLA's cost-recovery objective, while strong, is not absolute and may yield to countervailing considerations. As the Supreme Court has stated, "there is no federal policy that the fund should always win," and "'more money' arguments" alone are insufficient to justify displacement of state law. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994) (discussing federal common law in the context of the Financial Institutions Reform, Recovery, and Enforcement Act).

We cannot conclude that Delaware law is an obstacle to the accomplishment of CERCLA's objectives in this instance. The **[**32]** State's strongest argument on this point is that

CERCLA aims to hold corporations financially responsible for the environmental damage their activities cause, [*179] and dismissal of its claims under Delaware law will require taxpayers to pay for the Rochester Button cleanup, even though millions of dollars in Panex assets are traceable to the shareholder-distributees. CERCLA recognizes, however, that recovery will not always be possible and manifests no intent that funds that once belonged to a party responsible for contamination should be frozen indefinitely or traced infinitely. See *Onan Corp. v. Indus. Steel Corp.*, 770 F. Supp. 490, 494 (D. Minn. 1989) (recognizing need to construe CERCLA broadly to achieve environmental and cost-assignment goals but stating that CERCLA's reach is "not unlimited"), *aff'd*, 909 F.2d 511 (8th Cir. 1990). That Delaware law, in affording dissolved corporations and their shareholders a measure of finality, operates to leave the State with no source of recovery in this case amounts to the type of "more money" argument the Supreme Court rejected in *O'Melveny*, 512 U.S. at 88. It is not the sort of sharp conflict between state law and federal policy that justifies [**33] preemption.

The district court documented the disagreement among federal courts on this issue.⁸ Many of the cases that hold that CERCLA preempts state limits predate Supreme Court precedent strongly admonishing courts against displacing state law lightly, *see, e.g., O'Melveny*, 512 U.S. at 88. In light of that precedent and CERCLA's limits we join those Courts of Appeals that have held that ^{HN17}CERCLA does not preempt state statutes that limit a party's capacity to be sued. *See Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987); *Onan Corp. v. Indus. Steel Corp.*, 770 F. Supp. 490, 494 (D. Minn. 1989), *aff'd*, 909 F.2d 511 (8th Cir. 1990); *Witco Corp. v. Beekhuis*, 38 F.3d 682, 690 (3d Cir. 1994).

FOOTNOTES

⁸ Several district courts, like the court below, have held that CERCLA preempts state limits on the capacity of dissolved corporations to be sued in light of congressional intent that CERCLA impose broad-ranging liability. *See, e.g., United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1495-96 (D. Utah 1987); *BASF Corp. v. Cent. Transp., Inc.*, 830 F. Supp. 1011, 1013 (E.D. Mich. 1993) (collecting cases); *Idylwoods Assocs. v. Mader Capital*, 915 F. Supp. 1290, 1303-04 (W.D.N.Y. 1996) [**34] (collecting cases).

A conflict could exist if the Delaware statutes would thwart CERCLA's goals by encouraging corporations responsible for contamination to dissolve and distribute assets to avoid CERCLA liability, but this simply is not the case. States have incentives not to enact laws that would inspire such a "race to the bottom." *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring) ("States have a substantial interest in protecting their citizens and state resources."). Delaware law protects against this result, requiring dissolving corporations to provide security that will be "reasonably likely to be sufficient" to cover claims that have not been made known to the corporation or that, based on facts known to the corporation, are likely to arise within a period after dissolution. *Del. Code Ann. tit. 8, §§ 280(c)(3), 281(b)*. *See also* Bradford C. Mank, *Should State Corporate Law Define Successor Liability?: The Demise of CERCLA's Federal Common Law*, 68 U. Cin. L. Rev. 1157, 1160 (2000) (corporate successor liability laws of most states "generally prevent corporations from using sham transactions to escape CERCLA liability"). In addition, [**35] section 278 provides for extension of the wind-up period beyond three years "as the Court of Chancery shall in its discretion direct," which could give a potential CERCLA plaintiff time to investigate the [*180] contamination site while preserving its ability to make a claim against the dissolving corporation. Finally, we are not persuaded by the district court's rationale that it is "unlikely that Congress intended that CERCLA treat differently and inconsistently corporations in identical positions based upon the state of their incorporation"; preemption is not favored absent clear congressional intent to the contrary, *see English*, 496 U.S. at 79, and Congress's probable desire for uniformity is not enough to justify

displacement of state law where that state law does not actually conflict with the "clear and manifest purpose of Congress," *Witco*, 38 F.3d at 687. See also *New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 208 (2d Cir. 2006).

On a fundamental level, the CERCLA statute of limitations and Delaware's corporate wind-up period serve different purposes, reinforcing our conclusion that they do not actually conflict. CERCLA's statute of limitations "extinguishes the right to prosecute **[**36]** an accrued cause of action after a period of time." *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 362-63 (5th Cir. 2005). In contrast, Delaware's section 278 defines a dissolved corporation's capacity to be sued, creating a right for dissolved corporations and their former shareholders to be free from suit after a period of time. See *id.* As the State points out, an important goal of CERCLA's statute of limitations is to allow time for parties to gauge response costs before the suit is filed, H.R. Rep. No. 99-253, pt. 3, at 20 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3043; thus, the applicable CERCLA statute of limitations in this case did not begin to run until "6 years after initiation of physical on-site construction of the remedial action." 42 U.S.C. § 9613(g)(2)(B). The Delaware statute limiting capacity to be sued does not necessarily interfere with this goal, however, because it provides for potentially indefinite extension of the three-year wind-up period in the discretion of the Court of Chancery. Del. Code Ann. tit. 8, § 278. ^{HN18} Delaware's statute limits capacity to be sued, not liability, and thus does not conflict with CERCLA's statute of limitations--even **[**37]** if in operation the state law precludes the CERCLA plaintiff from recovering in some circumstances. See *Witco*, 38 F.3d at 690; *Louisiana-Pac. Corp. v. ASARCO, Inc.*, 5 F.3d 431, 433-34 (9th Cir. 1993); *Onan*, 770 F. Supp. at 494-95; *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987).

The State analogizes this case to *Bedford Affiliates*, where we held that CERCLA preempted state-law claims for restitution and indemnification. 156 F.3d at 427. In that case, however, the plaintiffs' state-law claims for restitution and indemnification stood in the way of CERCLA's objective of encouraging settlement, which it achieves by restricting the availability of contribution actions. The restitution and indemnification claims would have given the plaintiffs an alternative to the contribution action withheld by CERCLA, which flies in the face of the federal goal of encouraging settlements. CERCLA's statute of limitations and Delaware's corporate wind-up period present no such direct conflict.

In sum, ^{HN19} the State has not shown such a conflict between Delaware law and the congressional policy manifested in CERCLA as to lead us to conclude that Congress intended to preempt **[**38]** Delaware's corporate wind-up period, which protects dissolved corporations' and their former shareholders' interests in finality. CERCLA does not suggest that "the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute," *Burks v. [*181] Lasker*, 441 U.S. 471, 478, 99 S. Ct. 1831, 60 L. Ed. 2d 404 (1979), or because it would net the government more money, *O'Melveny*, 512 U.S. at 88, which is essentially all the State has shown here. That is not sufficient to justify preemption.

B. Federal Common Law

Having held that the CERCLA statute of limitations does not preempt Delaware law in this instance, we address the State's argument that we should create a rule of federal common law based on the equitable trust fund doctrine for CERCLA cases. The State's proposed rule would displace Delaware law and allow the State to pursue the assets Panex distributed to its former shareholders.

The Supreme Court has sharply curtailed the federal courts' ability to create rules of federal common law. ^{HN20} To justify creation of a rule of federal common law, the State must show specifically a "significant conflict between some federal policy or interest and the use of state

law." **[**39]** *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68, 86 S. Ct. 1301, 16 L. Ed. 2d 369 (1966). Cases that call for the creation of federal common law are "few and restricted," see *Atherton v. FDIC*, 519 U.S. 213, 218, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997), and it is difficult to prove the need for a federal common law rule, see *Atchison, T. & S.F. Ry. v. Brown & Bryant*, 159 F.3d 358, 364 (9th Cir. 1998). The existence of a complex federal statutory scheme does not automatically show that Congress intended courts to fill its gaps with rules of federal common law. *Id.* at 362 (citing *O'Melveny*). Rather, where federal statutory regulation is "comprehensive and detailed," as CERCLA is, we presume that matters left unaddressed are "left subject to the disposition provided by state law." *O'Melveny*, 512 U.S. at 85. We strongly presume that state law should be determinative where "private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards," as is the case with most corporate matters. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991).

While recognizing that Congress intended CERCLA to provide a sweeping remedy that requires responsible parties to bear **[**40]** the costs of cleaning up environmental contamination they cause, the Supreme Court has advised courts not to create CERCLA-specific rules to displace well-settled state corporate law just because a case involves CERCLA. *United States v. Bestfoods*, 524 U.S. 51, 63, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998). In *Bestfoods*, the Court refused to adopt a "relaxed, CERCLA-specific rule of derivative liability that would banish traditional standards and expectations from the law of CERCLA liability." *Id.* at 70. This Circuit has thus interpreted *Bestfoods* as a clear warning against creating CERCLA-specific federal common law rules. *New York v. Nat'l Servs. Indus.*, 352 F.3d 682, 685 (2d Cir. 2003) (holding that *Bestfoods* required us to overrule *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996), which had applied a federal common law rule of substantial continuity for purposes of determining corporate successor liability under CERCLA). The First Circuit likewise has interpreted *Bestfoods* as leaving "little room for the creation of a federal rule of [corporate] liability" under CERCLA. *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001). A split decision of the Third Circuit, in contrast, read *Bestfoods* to favor a uniform **[**41]** federal standard. *United States v. Gen. Battery Corp.*, 423 F.3d 294, 300 (3d Cir. 2005), cert. denied, *Exide [*182] Techs. v. United States*, 127 S. Ct. 41 (2006).

While *Bestfoods* stops short of expressly instructing courts to apply state law, ^{HN21} it clearly admonishes courts to refrain from creating CERCLA-specific rules in the face of applicable long-standing common law principles. Compare, *Gen. Battery Corp.*, 423 F.3d at 305, with *id.* at 312 (Rendell, J., concurring and dissenting). As a practical matter, those principles typically come from state law. See Ronald H. Rosenberg, *The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers*, 36 Conn. L. Rev. 425, 455 (2004).

Having concluded that we cannot create a rule of federal common law on the basis of the mere involvement of CERCLA in the case, we proceed to the traditional analysis. As discussed in Part III.A above, there is no significant conflict between state law and federal policy in this instance. ^{HN22} The absence of such a conflict weighs heavily against creation of a rule of federal common law as a threshold matter, because a significant conflict is "normally a 'precondition'" to **[**42]** the creation of federal common law. *Atherton*, 519 U.S. at 218 (citing *O'Melveny*, 512 U.S. at 87).

In light of these principles, it is questionable whether we even need to entertain the additional considerations set forth in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979), to analyze the State's invitation to apply the trust fund doctrine as a matter of federal common law, in place of the Delaware statutes, to permit it to recover CERCLA cleanup costs from Panex's shareholder-distributees. In *Bestfoods*, the Supreme Court flatly rejected the creation of federal common law without

even citing the *Kimbell Foods* test. See *Gen. Battery*, 423 F.3d at 318 n.19 (Rendell, J., concurring and dissenting). Nonetheless, the parties have addressed the *Kimbell Foods* considerations, and we typically examine them ^{HN23} in deciding whether to draw from state law or to create a rule of federal common law in cases involving federal programs. See *Nat'l Serv. Indus., Inc.*, 460 F.3d at 207. Under *Kimbell Foods*, we consider: (1) the "need for a nationally uniform body of law"; (2) "whether application of state law would frustrate specific objectives of the federal programs"; and (3) "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." 440 U.S. at 728-29.

First, the State argues that there is a strong need for a uniform body of federal law, because diverse state rules will frustrate CERCLA's goals of cleaning up environmental contamination and making sure that responsible parties, rather than taxpayers, bear the costs. ^{HN24} "Although CERCLA is a federal statute for which there is presumably an interest in uniform application, where there is no conflict between federal policy and the application of state law, 'a mere federal interest in uniformity is insufficient to justify displacing state law in favor of a federal common law rule.'" *Nat'l Serv. Indus.*, 460 F.3d at 208. "To invoke the concept of 'uniformity' . . . is not to prove its need." *Atherton*, 519 U.S. at 220. The need for uniformity is weak in this case. No state provides a safe "haven" for polluters. *Atchison*, 159 F.3d at 364. The State expresses concern that states' different corporate wind-up periods could prove troublesome, but the fifty states' laws on corporate dissolution are "largely uniform" already. *Ansproc*, 922 F.2d at 1249 (Kennedy, J., concurring). Cf. ^{**44} *Gen. Battery*, 423 F.3d at 303. Moreover, variations in rules among ^{*183} states do not prove a need for uniformity "as long as the applicable standard is applied evenhandedly to particular disputes." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979) (internal punctuation omitted).

Next, we inquire whether application of state law will frustrate federal objectives. Our preemption analysis in Part III.A faced the same question and concluded that Delaware law does not significantly frustrate the objectives manifested in CERCLA. We acknowledge that "corporate law's preference for limited corporate liability is theoretically at odds with CERCLA's broad remedial goals." *Mank, supra*, 68 U. Cin. L. Rev. at 1160. Nonetheless, CERCLA recognizes that recovery will not always be possible and does not mandate recovery from every person with any connection to a contaminated site. See *Commander Oil Corp.*, 215 F.3d at 327. That the fund would win under the State's proposed standard is not sufficient to justify adopting a rule of federal common law to expand the standard of liability for shareholder-distributees of a dissolved corporation whose predecessor owned a company that was responsible for environmental ^{**45} contamination. See *O'Melveny*, 512 U.S. at 88; see also *Mank, supra*, 68 U. Cin. L. Rev. at 1159 (stating that in *O'Melveny* the Supreme Court "rejected the view that the government is entitled to an expansive federal common law standard just because the government would win more often").

Finally, we inquire whether adoption of the rule the State proposes as a matter of federal common law would disrupt commercial relationships predicated on state law. *Kimbell Foods*, 440 U.S. at 729. We easily conclude that it would. The presumption that state law should be determinative "is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98; see also *Kimbell Foods*, 440 U.S. at 729. Shareholders have the expectation of limited liability under state law when they invest in corporations. Delaware General Corporation Law §§ 278 and 325(b) protect shareholders from buying into a perpetual threat of liability by providing that, after a period of time after their corporation dissolves, they no longer face liability on claims against the dissolved corporation ^{**46} and are free to conduct their financial affairs. The alternative would be unworkable. Dissolved corporations might delay distributions indefinitely, diminishing shareholders' incentive to invest. If distributions were made, shareholder-distributees would have to hold onto them, just in case an unknown claim arises at some point in the future, or

else come up with funds to replace any received distributions that have been expended once the claim and demand for disgorgement arise. See *City of Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1491, 1494 (E.D. Pa. 1989); *In re Citadel Indus., Inc.*, 423 A.2d at 506. Hanging a cloud of perpetual uncertainty over the former shareholders of dissolved business entities in the name of CERCLA would impair the finality that allows parties to proceed with confidence into new transactions. "Major economic decisions, critical to society, are best made in a climate of relative certainty and reasonable predictability." *Polius v. Clark Equip. Co.*, 802 F.2d 75, 83 (3d Cir. 1986) ("Unforeseeable alterations in successor liability principles complicate transfers and necessarily increase transaction costs."); Perry E. Wallace, Jr., *Liability of Corporations [**47] and Corporate Officers, Directors, and Shareholders under Superfund: Should Corporate and Agency Law Concepts Apply?*, 14 J. Corp. L. 839, 842 (1989) [***184**] (An unchecked interpretation of CERCLA liability engenders "uncertainties and fears" that "unnecessarily diminish the affected industries' contributions to certain basic economic and business functions in society.").

The absence of a significant conflict between Delaware law and CERCLA's goals directs our conclusion that we must not create a federal common law version of the trust fund doctrine in this case, a conclusion that is reinforced by the weak need for uniformity and the strong need to protect existing commercial relationships based on state law. We affirm the district court's holding that Delaware General Corporation Law §§ 278 and 325(b) must govern the shareholder-distributees' amenability to the State's CERCLA claims, and, accordingly, we hold that those claims were properly dismissed.

IV.

Finally, we consider the implications of our holding for the cross-appeal of the shareholder-distributees, acting as Panex trustees, of the district court's entry of summary judgment against Panex on the State's CERCLA claims. In refusing to [****48**] dismiss those claims, the district court concluded that CERCLA preempted Delaware's limits on Panex's capacity to be sued. As discussed in Part III.A, we reject that finding of preemption and reverse the judgment of the district court on the CERCLA claims against Panex.

The shareholder-distributees had suggested that we need not reach their cross-appeal if we were to uphold the dismissal of the State's trust fund doctrine claims against them, because as a practical matter this holding absolves them of liability whether or not the State has a viable claim against the defunct and penniless Panex. Nonetheless, the district court's conclusion that CERCLA preempts Delaware General Corporation Law § 278 for purposes of the CERCLA claims against Panex is not without consequence. As a matter of principle, displacement of state law is not favored under recent Supreme Court precedent, and, as a matter of practicality, refusal to apply state law in this instance would have unsettling implications for commercial relationships as discussed above. The claims against both the shareholder-distributees and Panex should be dismissed as both lack capacity to be sued under Delaware law.

V.

We affirm the [****49**] portion of the district court's order dismissing the State's claims against the shareholder-distributees. We reverse the denial of the motion to dismiss the State's CERCLA claims against Panex, as well as the summary judgment granted against Panex on those claims.

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LEXSEE 987 F.SUPP. 182

TOWN OF OYSTER BAY, Plaintiff, -against- OCCIDENTAL CHEMICAL CORPORATION, THE MARMON CORPORATION, COLUMBIA CORRUGATED CONTAINER CORPORATION, GREAT AMERICAN INDUSTRIES INC., a wholly-owned subsidiary of PLC ENTERPRISES, INC., G.A. CORRUGATED CORPORATION, GREAT AMERICAN CORRUGATED CONTAINER CORPORATION, LIN PAC, INC., LIN PAC CONTAINERS INTERNATIONAL, LTD., a wholly-owned subsidiary of LIN PAC GROUP, LTD., LIN PAC CORRUGATED CONTAINERS CORPORATION, LIN PAC CONTAINERS LIMITED, GRUMMAN CORPORATION, GRUMMAN AEROSPACE CORPORATION, JAKOBSON SHIPYARD, INC., LONG ISLAND LIGHTING COMPANY, KONICA IMAGING U.S.A., INC., KOLLMORGEN CORPORATION and PHOTOCIRCUITS CORPORATION, Defendants.

Case No. 94-CV-0694 (FB)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

987 F. Supp. 182; 1997 U.S. Dist. LEXIS 18151; 45 ERC (BNA) 2029; 28 ELR 20638

November 14, 1997, Decided

SUBSEQUENT HISTORY: [**1]
As Amended December 5, 1997.

DISPOSITION: Town's motion for summary judgment granted in part and denied in part; Defendants' motion for summary judgment granted in part and

denied in part; Great American defendants' motion for summary judgment granted to the extent that the fourth, fifth and sixth claims for relief dismissed as against G.A. Corrugated, and otherwise denied; Lin Pac defendants' motion for summary judgment granted and the complaint dismissed against these defendants.

COUNSEL: For Plaintiff: Peter R. Paden, Esq., Philip E. Karmel, Esq., ROBINSON SILVERMAN PEARCE ARONSOHN & BERMAN LLP, New York, New York.

For Occidental Chemical Corporation, Defendant: John Hanna, Jr., Esq., WHITEMAN, OSTERMAN & HANNA, Albany, New York.

For The Marmon Group, Defendant: Richard F. Ricci, Esq., LOWENSTEIN, SANDLER, KOHL, FISHER & BOYLAN, Roseland, New Jersey.

For Great American Industries, Inc., G.A. Corrugated Corporation, Great American Corrugated Container Corporation, Defendants: Michael R. Wright, Esq., LEVENE, GOULDIN & THOMPSON, Vestal, New York.

For Lin Pac, Inc., Lin Pac Containers International, Ltd., Lin Pac Corrugated Containers Corp., Lin Pac Containers Ltd., Defendants: [**2] Kevin C. Logue, Esq., PAUL, HASTINGS,

JANOFSKY & WALKER, New York, New York. Charles A. Patrizia, Esq., PAUL, HASTINGS, JANOFSKY & WALKER, Washington, D.C.

For Grumman Corporation, Grumman Aerospace Corporation, Defendants: Irvin M. Freilich, Esq., HANNOCH WEISMAN, P.C., Roseland, New Jersey.

For Jakobson Shipyard, Inc., Defendant: Paul Milmed, Esq., WHITE & CASE, New York, New York.

For Long Island Lighting Company, Defendant: Michael B. Gerrard, Esq., ARNOLD & PORTER, New York, New York.

For Konica Imaging, U.S.A., Inc., Defendant: DAVID R. CASE, Esq., Washington, D.C.

For Kollmorgen Corporation, Photocircuits Corporation, Defendants: Robert C. Davis, Jr., Esq., CROWELL & MORING, Washington, D.C. Henry Korn, Esq., KENSINGTON & RESSLER, P.C., New York, New York.

JUDGES: FREDERIC BLOCK, United States District Judge.

OPINION BY: FREDERIC BLOCK

OPINION

[*188] AMENDED MEMORAN-
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INTRODUCTION

In this action, which arises under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* ("CERCLA" or "the Act"), and New York common law, plaintiff Town of Oyster Bay ("Town") seeks recovery of costs for its response to the alleged release or threatened release of hazardous substances at a landfill formerly operated by the Town in Syosset, New York. The defendants are corporations that are alleged either to have brought hazardous materials to the landfill or to have succeeded to the liabilities of such corporations.

There are four motions currently before the Court: (1) a motion by the Town for partial summary judgment on the issue of CERCLA liability against defendants Occidental Chemical Corporation ("Occidental"), The Marmon Corporation ("Marmon"), Great American Corrugated Container Corporation ("GACCC"), Grumman Corporation and Grumman Aerospace Corporation (collectively "Grumman") pursuant to *Rule 56 of the Federal Rules of Civil Procedure* ; (2) a motion [**5] for summary judgment by defendants GACCC, G.A. Corrugated Corporation ("G.A. Corrugated") and Great American Industries, Inc. ("GAI") seeking dismissal of the complaint as against them; ² (3) a motion

by defendants Lin Pac, Inc., Lin Pac Containers International, Ltd., Lin Pac Corrugated Containers Corporation ("LPCCC"), and Lin Pac Containers Limited (collectively the "Lin Pac defendants") for summary judgment dismissing the complaint as against them; and (4) a motion by Occidental, Marmon, the Great American defendants, the Lin Pac defendants, Grumman, Jakobson Shipyard, Inc. ("Jakobson"), Long Island Lighting Company ("LILCO"), Konica Imaging, U.S.A., Inc. ("Konica"), Kollmorgen Corporation ("Kollmorgen"), and Photocircuits Corporation ("Photocircuits") for partial summary judgment dismissing the Town's CERCLA claims to the extent that they seek joint and several liability against the defendants, and dismissing the Town's State common law nuisance and unjust enrichment claims on statute of limitations grounds.

1 The four defendants that are the object of the Town's summary judgment motion will be referred to as the "target defendants."

[**6]

2 G.A. Corrugated, which was purportedly dissolved in 1981, was a wholly-owned subsidiary of GAI. GACCC, which was purportedly dissolved in 1982, was a wholly-owned subsidiary of G.A. Corrugated. The Court will discuss the structure of these three corporations in greater detail *infra*. Whenever practicable, the Court will re-

fer to GAI, G.A. Corrugated, and GACCC collectively as the "Great American defendants."

BACKGROUND

The Court's discussion of the facts giving rise to this action is drawn from the complaint, the numerous statements prepared by the parties pursuant to former Local Rule 3(g), now Local Rule 56.1, and the extensive record in this case. Unless otherwise noted, the facts are undisputed.

I. The Landfill

The approximately 35-acre former landfill is owned by the Town and is located just north of the Long Island Expressway in Syosset, within 1.25 miles of more than one thousand residences and less than 150 feet from a local elementary school. From 1936 until approximately 1975, the landfill, which was unlined, accepted residential and commercial waste, including [**7] cesspool waste, as well as demolition, agricultural and industrial waste. The complaint alleges, *inter alia*, that: (1) Occidental's predecessors-in-interest, Rubber Corporation of America ("RUCO"), Hooker Chemical Corporation and Hooker Chemicals and Plastics Corporation (collectively "Hooker") disposed of thousands of tons of hazardous wastes containing heavy metals, solvents, organics, oils and sludges, plasticizers and PCBs each year between 1946 through 1968; (2) Marmon's predecessor-in-interest, Cerro Wire & Cable

Corp. ("Cerro"), disposed of thousands of tons of industrial sludge containing iron, chromium, zinc, copper, lead, cadmium, and nickel each year for a period of 25 years; (3) Columbia Corrugated Container Company ("Columbia"), the alleged predecessor-in-interest [*189] of the Great American defendants and the Lin Pac defendants, disposed of more than 100,000 gallons of dyes, inks, and sludges containing iron, zinc, copper, lead, cadmium, nickel, chromium, titanium, manganese, magnesium and phenols for a period of many years ending in 1975; and (4) Grumman disposed of industrial sludge containing hydroxides of chromium, aluminum, iron, paint, ammunition, machine shop waste, [*8] and wastes from manufacturing processes.

II. The Groundwater Contamination and the Town's Response

On January 28, 1975, the Nassau County Department of Health ("NCDOH") closed the landfill based on concerns that it was polluting the groundwater. In 1983, an environmental report was prepared on behalf of NCDOH that indicated that the groundwater underneath and surrounding the landfill contained concentrations of arsenic, cadmium, chromium and lead at levels in excess of New York State drinking water standards. Also in 1983, the United States Environmental Protection Agency ("EPA") placed the landfill on the Superfund National Priorities List, which sets forth those sites that

pose the highest degree of risk to human health and the environment. The landfill has also been placed on New York's Registry of Inactive Hazardous Waste Disposal Sites, and the New York State Department of Environmental Conservation has determined that the landfill is a significant threat to the public health and environment, and that remedial action is required.

In 1986, the EPA and the Town entered into an Administrative Order on Consent that obligated the Town to prepare a Remedial Investigation and [*9] Feasibility Study ("RI/FS") of the landfill. Because of the complexity of the environmental problems at the landfill, the EPA divided the evaluation and cleanup of the landfill into two phases, or "operable units" (hereinafter "OU-1 and OU-2"). The RI/FS for OU-1 investigated the nature and extent of contamination at the landfill property and focused upon control of contamination at its source, while the RI/FS for OU-2 addressed the migration of contaminants from the landfill into the groundwater. In 1990, based on the results of the RI/FS report for OU-1, as well as an evaluation of comments submitted during the public comment period, the EPA determined that the Town should implement New York State closure requirements specified in the Official Compilation of Codes, Rules & Regulations of the State of New York at title 6, part 360. Specifically, the EPA directed that a geosynthetic membrane cap be constructed on the top surface of the

landfill. The EPA estimated the cost of this remedy as \$ 26 million. The EPA requested that Occidental, Grumman, Jakobson, Marmon, the Lin Pac defendants, Kollmorgen and LILCO, *inter alia*, voluntarily join the Town in performing or financing the [**10] remedial action selected by EPA; however, each declined. 3

3 In respect to OU-2, an EPA Record of Decision dated March 28, 1996 concluded that groundwater contamination was limited and did not pose a significant risk to human health or the environment. Accordingly, the EPA determined that no further remedial action would be required. The EPA specifically observed that the principal threats at the landfill were being addressed through the installation of the landfill cap as part of the OU-1 remediation.

III. The Complaint

This action, filed on February 18, 1994, seeks to recover the response costs that the Town has incurred in connection with the landfill remediation, estimated at approximately \$ 10 million, and to obtain a declaratory judgment that defendants are liable for future response costs. The complaint contains six claims for relief: (1) a claim for joint and several liability for past and future response costs pursuant to 42 U.S.C. § 9607(a)(4)(A); (2) a claim for joint and several liability [**11] for past and fu-

ture response costs pursuant to 42 U.S.C. § 9607(a)(4)(B); (3) a claim for contribution to the Town for past and future response costs pursuant to 42 U.S.C. § 9613(f)(1); (4) a State common law claim for creation and maintenance of a public nuisance; (5) a State common law claim for unjust enrichment based upon defendants' failure to abate the public nuisance; and (6) a State common law claim for contribution.

On February 13, 1995, Magistrate Judge Arlene R. Lindsay signed a Case Management Order that divided the action into two [*190] separate phases. During the first phase, the following issues are to be litigated: (1) whether each current defendant is liable under 42 U.S.C. § 9607(a)(3) or § 9607(a)(4); (2) whether the Town is liable pursuant to § 9607; (3) whether the Town's response costs are recoverable pursuant to § 9607(a)(4); (4) the extent to which the Town's response costs should be apportioned between the Town and all liable persons; and (5) claims among and between defendants regarding indemnification or successor and predecessor liability. The issues to be resolved during the second phase include the apportionment of response costs among defendants [**12] and third-party defendants on a percentage basis and the amount of plaintiff's response costs, including whether costs were necessary and incurred in a manner consistent with the National Contingency Plan. 4 Discovery, though largely complete, is still ongoing.

4 Pursuant to 42 U.S.C. § 9605, the National Contingency Plan must contain "procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants." These include criteria for prioritizing among releases and threatened releases across the United States based upon the "relative risk or danger to public health or welfare or the environment ... taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, the damage to natural resources which may affect the human food chain and which is associated with any release or threatened release, the contamination or potential contamination of the ambient air which is associated with the release or threatened release, State preparedness to assume State costs and responsibilities, and other appropriate factors." 42 U.S.C. § 9605(a)(8)(A). The statute also requires that the president assemble and revise a list of national priorities among the known releases and threatened releases in the United States (hereinafter "National Priorities List").

[**13] IV. The Target Defendants

In respect to the Town's motion for summary judgment pursuant to *Rule 56 of the Federal Rules of Civil Procedure* against the target defendants on the issue of their CERCLA liability, the Court summarizes the role that each of these defendants allegedly played in the disposal of hazardous waste at the landfill.

A. Occidental

Occidental is the successor-in-interest to RUCO, which operated a plant in Hicksville, New York from 1945 through 1965. In 1965, Hooker Chemical Corporation purchased RUCO and operated the Hicksville plant as its RUCO Division. Hooker Chemical Corporation changed its name to Hooker Chemical & Plastics Corporation in 1974 and to Occidental in 1982. The RUCO Division together with the Hicksville plant were sold to employees in 1982.

In its answer to the complaint, Occidental admitted that it "disposed of or arranged for disposal of hazardous substances or waste containing hazardous substances at the Landfill." Answer, Affirmative Defenses and Counterclaims of Defendant Occidental Chemical Corporation at P 48. More specifically, Occidental has admitted that RUCO sent waste from the Hicksville plant to the landfill from [**14] 1946 through 1965 and that Hooker sent waste to the landfill from 1965 through 1968. Further, although Occidental contends that RUCO and Hooker did not send all of the hazardous substances alleged in the com-

plaint to the landfill, Occidental does admit in the Defendants' collective response to the Town's Rule 3(g) Statement ("Collective Response") that Hooker deposited one ton of Aroclor 1248, a type of PCB, at the landfill between 1965 and 1967 and that, as a general matter, waste material from the RUCO plant contained N-butyl alcohol.

B. Marmon

Marmon is the successor-in-interest to Cerro, which manufactured steel electrical conduit, hot rolled copper rod, and steel strip at a plant on Robbins Lane in Syosset from 1952 through 1986. In the Collective Response, Marmon admits to having disposed of approximately 20,000 tons of metal hydroxide sludge at the landfill between 1952 and 1974. Further, Marmon also admits that the metal hydroxide sludge contained trace levels of copper, zinc, lead, cadmium, chromium, nickel, cyanides, arsenic, mercury, selenium, silver, [*191] chloroform, hydrazine, manganese and phenol.

C. Grumman

Grumman operated a complex of manufacturing [**15] buildings on approximately 500 acres in Bethpage, New York. In its complaint, the Town alleges that Grumman disposed of thousands of tons of industrial sludge at the landfill. Grumman has denied these allegations both in its answer to the complaint and in the Collective Response. However, included in the record before the Court is Grumman's answer to a 1986 EPA

questionnaire in which it indicated that between 1949 and 1966, it deposited sludge from its Industrial Waste Treatment Plant at the landfill and that the sludge contained hydroxides of chromium, aluminum and iron. The record also contains excerpts from the testimony of John H. Ohlmann, a Grumman consultant, who indicated that the sludges sent to the landfill between 1952 and 1965 contained chromium. Finally, in Grumman's response to the Town's interrogatories, it stated that the sludge may also have contained, *inter alia*, toluene, zylene, methyl ethyl ketone, trichlorethylene, chloroform, vinyl chloride and dichloroethylene.

D. GACCC

GACCC is allegedly the successor-in-interest of Columbia, which manufactured corrugated containers at a plant adjacent to the landfill. The Town alleges that Columbia disposed [**16] of more than 100,000 gallons of industrial sludge at the landfill each year before the landfill was closed in 1975. On July 15, 1976, defendant G.A. Corrugated, a Delaware corporation and wholly-owned subsidiary of GAI, purchased all of the issued and outstanding shares of Columbia, which was thereafter operated as a wholly-owned subsidiary of G.A. Corrugated. In 1978, G.A. Corrugated purchased the outstanding capital stock of Midland Corporation, and later that year, Columbia was merged into Midland, which then changed its name to GACCC. GACCC was a wholly-owned

subsidiary of G.A. Corrugated. In 1980, defendant LPCCC purchased substantially all of the assets of GACCC. G.A. Corrugated was dissolved pursuant to Delaware law on December 21, 1981, and GACCC was dissolved pursuant to New York law on February 26, 1982. The Town does not allege that any of the Great American defendants disposed of waste at the landfill; rather, their liability, if any, is premised upon the activities of Columbia. Although the Great American defendants admit that Columbia disposed of sludge at the landfill, they dispute whether that sludge was in fact hazardous.

V. The Pending Motions

The four pending [**17] motions present a number of overlapping issues regarding the scope and nature of CERCLA liability. Specifically, the Court is called upon to determine whether the Town, as a responsible person itself, may seek joint and several liability against the defendants or whether it is limited to contribution from those defendants ultimately found liable under CERCLA. Additionally, the Court, applying still emerging principles of successor liability, must determine the extent to which the Great American defendants and the Lin Pac defendants must shoulder the responsibility for Columbia's waste disposal practices.

A. *The Town's Motion for Summary Judgment*

In support of its motion for summary judgment against the target defendants, the Town argues that: (1) these defendants are liable under the four-part test set forth at 42 U.S.C. § 9607(a); (2) the liability of these defendants is joint and several; and (3) their affirmative defenses are insufficient as a matter of law. The target defendants have filed a joint response in which they argue: (1) the Town is not entitled to hold the target defendants jointly and severally liable under CERCLA; rather, the Town's CERCLA claim, if any, [**18] is limited to contribution; (2) the affirmative defenses asserted by the target defendants are relevant to the Court's allocation of response costs between the Town and the other defendants; and (3) the Town should not be able to recover from the target defendants if the Town's remediation costs were in fact attributable to landfill cleanup or closing requirements imposed by State law.

[*192] Each of the target defendants has also filed an individual response to the Town's motion. In its response, Occidental argues that: (1) the motion is premature because expert discovery is not complete; and (2) the motion should be denied because there are genuine issues of material fact regarding whether Occidental disposed of hazardous substances at the landfill and whether the Town's response costs have been incurred to deal with harm that resulted from Occidental's disposal of wastes at the landfill. Marmon and Grumman submit further papers on the issue of

joint and several liability; additionally, Grumman argues that the response costs incurred by the Town are not attributable to Grumman because the materials it disposed of at the landfill did not pose any danger to human health. GACCC contends that [**19] material issues of fact exist regarding the nature of the waste that Columbia sent to the landfill, which preclude an award of summary judgment.⁵

5 GACCC's Memorandum of Law is also offered in support of the Great American defendants' motion for summary judgment and will be discussed in greater detail *infra*.

B. The Great American Defendants' Motion for Summary Judgment

In support of their motion for summary judgment, the Great American defendants argue that: (1) GACCC, by virtue of its dissolution and its alleged lack of corporate assets, is not a proper CERCLA defendant; and (2) GAI and G.A. Corrugated are not liable under principles of "operator" liability for Columbia's disposal of waste at the landfill. The Town contends that: (1) GACCC has the capacity to be sued regardless of its dissolution and is therefore a proper party in this action; and (2) GAI is derivatively liable for the CERCLA liabilities of GACCC based on a traditional veil-piercing analysis. Defendants Occidental, Marmon, [**20] Grumman, Jakobson, LILCO, Konica, Kollmorgen and Photocircuits also submit a brief in

opposition to the motion of the Great American defendants in which they argue: (1) under New York and Delaware law, which they contend apply in this case, GACCC and G.A. Corrugated remain potentially liable under CERCLA; (2) genuine issues of material fact preclude a finding that GACCC and G.A. Corrugated have completely dissolved and are not proper CERCLA defendants; and (3) CERCLA's broad remedial purpose would be undermined if the Great American defendants were able to avoid liability.

C. The Lin Pac Defendants' Motion for Summary Judgment

In support of their motion for summary judgment, the Lin Pac defendants argue: (1) they are not liable for Columbia's disposal of waste at the landfill under principles of successor liability because LPCCC purchased the assets of GACCC in an arm's length transaction and did not substantially continue GACCC's business; (2) LPCCC did not expressly or impliedly agree to assume any of GACCC's liabilities under CERCLA; and (3) New York law similarly mandates dismissal of the state common law claims against the Lin Pac defendants. In opposition, the Town [**21] contends: (1) CERCLA liability is broad and expansive and should be found to hold the Lin Pac defendants responsible for the waste disposal practices of Columbia under the facts present here; (2) LPCCC substantially continued the business of GACCC and should be de-

terminated to be GACCC's successor-in-interest for purposes of CERCLA liability; and (3) the corporate transaction between LPCCC and GACCC was a *de facto* merger and the Lin Pac defendants are therefore liable under general principles of successor liability. These identical arguments are also contained in a Memorandum submitted by defendants Occidental, Marmon, LILCO, Grumman, Jakobson, Konica, Kollmorgen, and Photocircuits in opposition to the Lin Pac defendants' motion for summary judgment.

D. Defendants' Motion for Partial Summary Judgment

All of the defendants move for partial summary judgment seeking dismissal of the Town's claims for relief to the extent that the Town seeks to impose joint and several liability against them. They also seek dismissal of the Town's fourth and fifth claims, which arise under New York common law, as [*193] barred by the three-year statute of limitations applicable to actions to recover [**22] damages for an injury to property. The Town again responds that joint and several liability is appropriate, and further argues that its common law claims are not time-barred.

DISCUSSION

I. Standard on a Motion for Summary Judgment

As each of the four motions pending before the Court seeks summary judg-

ment pursuant to *Rule 56 of the Federal Rules of Civil Procedure*, the Court reviews, as a preliminary matter, the standard applicable to resolving summary judgment motions. The Court of Appeals for the Second Circuit has held that in CERCLA cases, summary judgment "is a 'powerful legal tool[]' that 'can avoid lengthy and perhaps needless litigation.'" *B.F. Goodrich Co. v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996), *reh'g. denied*, 112 F.3d 88 (1997) (quoting *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2d Cir. 1993) (*Alcan II*)). However, the Second Circuit has also stressed that the utility of the summary judgment motion in CERCLA cases "is not a license to use it when material facts are genuinely disputed." *Betkoski*, 99 F.3d at 521.

The standard for granting summary judgment in CERCLA cases is no different from other cases. *Id.* A motion [**23] for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The burden is upon the moving party to identify those portions of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits that it believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp.*, *supra*, at 323. All ambiguities must be resolved,

and all inferences drawn, in favor of the nonmoving party. *See Whalen v. County of Fulton*, 126 F.3d 400, 1997 WL 606476, at *3 (2d Cir. 1997). Once the moving party has carried its burden, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts The non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting [**24] *Fed. R. Civ. P. 56(e)*) (other citations omitted) (emphasis in original). The judge's role in reviewing a motion for summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *see also Beatie v. City of New York*, 123 F.3d 707, 710-711 (2d Cir. 1997).

II. The CERCLA Liability of the Target Defendants

A. General Principles Regarding CERCLA Liability

CERCLA is "a broad remedial statute that was designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills that threaten[] the environment and human health." *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1197 (2d Cir. 1992). As

a remedial statute, CERCLA should be construed broadly in order to give effect to its purposes. *See Betkoski*, 99 F.3d at 514. These purposes include "facilitating efficient responses to environmental harm, holding responsible parties liable for the costs of the cleanup, and encouraging settlements that reduce the inefficient expenditure of public funds on lengthy [**25] litigation." *Id.*

CERCLA is a strict liability statute that imposes liability upon four categories of parties: (1) owners and operators of facilities⁶; (2) any person who owned or operated a facility at the time hazardous materials were disposed at the facility; (3) any person who by contract, agreement or otherwise, arranged [**194] for disposal, treatment, or transport of hazardous substances owned or possessed by that person; and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities from which there is a release or threatened release of hazardous substances that causes the incurrance of response costs. 42 U.S.C. § 9607(a); *see also Murtha*, 958 F.2d at 1198; *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043 (2d Cir. 1985). Responsible parties are liable for response costs incurred by any other responsible party, the United States Government, a State, or an Indian tribe. 42 U.S.C. § 9607(a).

6 The term "facility" is defined in part as "any site or area where a hazardous substance has been de-

posited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9).

[**26] A plaintiff establishes a *prima facie* case under CERCLA by proving that: (1) the defendant is within one of the four categories of responsible parties; (2) the landfill site qualifies as a "facility" as defined in 42 U.S.C. § 9601(9); (3) there is a release⁷ or threatened release of hazardous substances at the facility; (4) the plaintiff has incurred response costs as the result of the release or threatened release; and (5) the costs and response actions conform to the National Contingency Plan. *See Betkoski*, 99 F.3d at 514; *see also ABB Indus. Sys., Inc. v. Prime Technology, Inc.*, 120 F.3d 351, 356 (2d Cir. 1997); *State of New York v. Lashins Arcade Co.*, 91 F.3d 353, 359 (2d Cir. 1996). Once the plaintiff has made a *prima facie* showing of liability, a defendant can only avoid responsibility by establishing that the release or threatened release of hazardous materials was caused by an act of God, an act of war, certain acts or omissions of third parties other than those with whom the defendant has a contractual relationship, or any combination of these factors. 42 U.S.C. § 9607(b).

⁷ 42 U.S.C. § 9601(22) defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of

barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)."

[**27] Finally, CERCLA expressly provides that it does not preempt any State "from imposing any additional liability or requirements with respect to the release of hazardous substances within such State," 42 U.S.C. § 9614(a); similarly, it does not "affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d); *see Shore Realty Corp.*, 759 F.2d at 1041.

B. The CERCLA Liability of Target Defendants Occidental, Marmon and Grumman

The Town argues that the four target defendants are liable as a matter of law for response costs under the test set forth above. Although the Great American defendants have joined with the other target defendants in responding to the Town's motion, as previously indicated they have also filed a separate motion for summary judgment largely premised upon matters unique to their corporate structure, which will be discussed in greater detail below. As to the remaining three target defendants, there is no real dispute that each is a potentially responsible person under § 9607(a), [**28] and that the landfill qualifies as a facility for purposes of 42 U.S.C. § 9601(9). Therefore,

the first and second prongs of the test are satisfied in this case. However, whether the Town has satisfied the final three prongs of the test is a matter of sharp dispute. These three defendants argue that the Town has failed to show that waste deposited by these defendants caused the release or threatened release of hazardous materials at the landfill. Moreover, all four target defendants argue that the remediation ordered by the EPA for OU-1 is independently required by New York State solid waste regulations and that the defendants should not be responsible for shouldering these costs under CERCLA. The Court will evaluate both of these arguments in turn.

1. Causation

Occidental, Marmon and Grumman argue that there is no evidence that the industrial waste they deposited at the landfill, although comprised of hazardous substances, actually caused a "release or threatened release" of [*195] hazardous substances. Occidental argues that the PCBs it deposited have not been detected in the soil, groundwater, or air emissions from the landfill, and that the N-butyl alcohol it admits to having [**29] deposited will normally biodegrade to water and carbon dioxide in a terrestrial environment. Similarly, Marmon argues that its metal hydroxide sludge did not cause the release of heavy metals at the landfill because of the extremely low concentration of metals observed in the leachate from Marmon's sludge. Finally, Grumman argues that its industrial waste contained only trace

levels of certain metals and that its waste was therefore not harmful to the environment.

However, the Second Circuit recently reaffirmed that causation is not required to establish liability under CERCLA. *Betkoski*, 99 F.3d at 517; see also *Alcan II*, 990 F.2d at 721; *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 264-267 (2d Cir. 1992) (Alcan I); *Shore Realty Corp.*, 759 F.2d at 1044. In *Alcan I*, the Second Circuit recognized "the difficulty CERCLA plaintiffs would face in the multi-generator context if required to trace the cause of the response costs to each responsible party." *Alcan I*, 964 F.2d at 264. The Court therefore rejected the precise argument made by Occidental, Marmon and Grumman here -- that a CERCLA plaintiff must demonstrate that a particular defendant's disposal of [**30] waste caused a release of hazardous waste or caused the plaintiff to incur response costs -- and instead held that a plaintiff "must simply prove that the defendant's hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs." *Id.* at 266 (emphasis in original); see also *Betkoski*, 99 F.3d at 517 ("If we required a plaintiff to show more than a release or threatened release, we essentially would be asking the plaintiffs to prove that a specific defendant's hazardous substances caused the release of a hazardous substance. No causation is needed, however, to establish liability under CERCLA.").

In *Betkoski*, the Second Circuit rejected a second argument made by these defendants: that they cannot be held liable under CERCLA if their waste contained only a trace amount of hazardous substances. Rather, the Court, citing *Murtha* and *Alcan II*, held that "the absence of threshold quantity requirements in CERCLA leads logically to the conclusion that the Act's 'hazardous substance' definition includes even minimal amounts." *Betkoski*, 99 F.3d at 505.

Accordingly, to the extent that Occidental, [*31] Marmon and Grumman argue that they are not responsible parties because the Town has failed to demonstrate that wastes deposited by these defendants caused the release of hazardous substances at the landfill and because their waste contained only trace amounts of contaminants, the Second Circuit has expressly determined that such considerations have no bearing upon whether these parties are liable under CERCLA. While they may be properly considered in the second phase of this case when allocating these defendants' responsibility, they do not serve as a defense to a finding of liability in the first instance. Therefore, the Court concludes that by introducing competent proof that each of these three defendants disposed of waste containing hazardous substances, the Town has satisfied its burden of demonstrating a release or threatened release of hazardous substances at the landfill.

2. *The Interplay between New York State Regulatory Requirements and CERCLA*

All four target defendants also contend that the costs that were concededly incurred by the Town in studying the landfill and in preparing to remediate the site are not CERCLA response costs because the remediation ordered by [**32] the EPA is essentially equivalent to that required by part 360 of New York State's Solid Waste Regulations. N.Y. Comp. Codes R. & Regs., tit. 6, part 360. They maintain therefore that they should not be required to bear the cost of remedial action that would have been required under New York State law even in the absence of EPA intervention. As part of this argument, the target defendants contend that the Town itself is largely responsible for the condition of the landfill and that it is the Town's failure to comply with regulatory requirements, and [*196] not the waste disposal practices of the target defendants, that caused the Town to incur response costs.

A number of district courts have recently considered the interplay between CERCLA and state regulatory regimes and whether responsible parties under CERCLA should be required to bear response costs to the extent that CERCLA remediation overlaps with state regulation. In *Barnes Landfill, Inc. v. Town of Highland*, 802 F. Supp. 1087 (S.D.N.Y. 1992), the district court held that the \$ 2 million that the plaintiff in that case had spent to abate the release of hazardous

substances would not be recoverable, concluding: "ordinary closing [**33] or clean-up costs not pertaining to hazardous substances, incurred under state law or otherwise, would not be a basis for holding defendants responsible under CERCLA." *Id.* at 1088; see also *City of Seattle v. Amalgamated Servs., Inc.*, 1994 U.S. Dist. LEXIS 9761, 1994 WL 869839 at *2 (W.D. Wash. Mar. 4, 1994) ("Any actions the City was already obligated to take to meet the [state and local minimum functional standards] were not caused by the escape of hazardous substances. Only costs incurred to meet additional requirements caused by the escape of hazardous substances, or listing as a Superfund site, qualify as necessary response costs.").

By contrast, in *Town of New Windsor v. Tesa Tuck, Inc.*, 919 F. Supp. 662 (S.D.N.Y. 1996), the district court, expressly rejecting the reasoning of *Barnes Landfill* and *City of Seattle*, held that "it would be illogical to conclude that as a matter of law a plaintiff could not recover costs associated with an appropriate remedy that included actions required by otherwise applicable state statutes and regulations." *Town of New Windsor*, 919 F. Supp. at 671. Terming *Barnes Landfill* and *City of Seattle* "anomalous," the Court observed that "the impetus [**34] behind a plaintiff's decision to begin the cleanup process is irrelevant to a determination of liability." *Id.* at 670; see also *Town of Wallkill v. Tesa Tape, Inc.*, 891 F. Supp. 955, 960-962 (S.D.N.Y. 1995); *City of Fresno*

v. NL Industries, Inc., 1995 U.S. Dist. LEXIS 14151, 1995 WL 570375 at *2 (E.D. Cal. Mar. 14, 1995); *State of Arizona v. Motorola, Inc.*, 805 F. Supp. 742 (D. Ariz. 1992).

The Court finds *Town of New Windsor* and the cases cited therein persuasive and elects to follow them. The mere fact that the remediation ordered by the EPA overlaps with New York regulatory requirements should not absolve the four target defendants from liability under CERCLA. As noted above, CERCLA is a strict liability statute that imposes liability regardless of relative degrees of fault or responsibility. The affirmative defenses contained in the statute are exclusive. See *Murtha*, 958 F.2d at 1198. One of the purposes of the statute is to ensure that parties responsible for the release of hazardous substances, and not the taxpayers, bear the cost of the cleanup. To permit these defendants to evade responsibility for the cleanup because of the fortuitous congruence of the EPA-mandated remediation [**35] and New York State regulation would completely subvert this purpose and would render CERCLA's strict liability regime a nullity.

Moreover, as the district court noted in *State of Arizona v. Motorola*:

It would be contrary to CERCLA's intentions to provide that a responsible defendant cannot be held liable where an appropriate remedy contained any provisions

identical to landfill closure aspects, or floodplain requirements. If that were the situation, then responsible defendants would construct a laundry list of measures which, because they were identical to other sound engineering and landfill management principles, would allow defendants to be absolved from costs, even though those activities may be needed to accomplish proper cleanup and containment according to a[] [Remedial Action Plan].

Id. at 748. A decision absolving defendants from liability as a matter of law would, as the district court noted in *State of Arizona*, encourage potentially responsible persons to scour state and local statutes and regulations in an effort to find an overlapping provision that would in essence provide an escape hatch from CERCLA liability. This would discourage such [**36] parties from entering into settlements and would result in an even greater expenditure of public funds on lengthy CERCLA litigation, subverting yet [*197] another of CERCLA's remedial purposes. *See Betkoski, 99 F.3d at 514.*

The Court rejects the four target defendants' argument that the Town's alleged participation in the release of hazardous substances at the landfill and its failure to take prompt remedial measures

warrants the legal conclusion that these defendants are not liable under CERCLA. That the Town may itself have contributed substantially to the condition of the landfill will no doubt be relevant with regard to the allocation of responsibility for response costs. However, based upon the clear statutory language and the exclusivity of the affirmative defenses contained in § 9607, the Court concludes that the Town's alleged culpability does not absolve the target defendants from liability.

Finally, for purposes of the instant motion, the Court concludes that at least some of the costs incurred by the Town are consistent with the National Contingency Plan. The landfill was included on the National Priorities List in 1983 and is also included on New York's Registry of Inactive [**37] Hazardous Waste Disposal Sites. The costs incurred by the Town in preparing the RI/FS for OU-1 and OU-2 were pursuant to a consent order with the EPA, and the construction of a geosynthetic cap on the landfill was mandated by an EPA Record of Decision. On these facts, it is readily apparent to the Court that at least some of the costs incurred by the Town were consistent with the National Contingency Plan. Pursuant to the Case Management Order, the issue of precisely which costs were necessary and incurred in a manner consistent with the National Contingency Plan will be litigated in the second phase of this case.

3. Conclusion

In sum, the Court concludes as a matter of law that: (1) Occidental, Marmon, and Grumman are within one of the four categories of responsible parties set forth in 42 U.S.C. § 9607(a); (2) the landfill is a facility as defined in 42 U.S.C. § 9601(9); (3) there has been a release or threatened release of hazardous substances at the landfill; (4) the Town incurred costs responding to this release or threatened release; and (5) the costs and response actions are consistent with the National Contingency Plan. Occidental's argument that additional expert discovery is required and that the Town's summary judgment motion is consequently premature is without merit, as the causation arguments offered by Occidental and the other target defendants in opposition to the Town's motion are insufficient as a matter of law. To the extent that the target defendants' answers to the complaint contain affirmative defenses others than those set forth at 42 U.S.C. § 9607(b), those affirmative defenses do not serve as defenses to liability, but the Court may consider them in respect to the apportionment of responsibility for response costs. *See Thaler v. PRB Metal Prods.*, 815 F. Supp. 99, 102 (E.D.N.Y. 1993), *aff'd.*, 28 F.3d 102 (2d Cir. 1994). Accordingly, the Court concludes as a matter of law that Occidental, Marmon and Grumman are liable under CERCLA. The Town's motion for summary judgment is therefore granted to the extent that it seeks summary judgment on the issue of CERCLA li-

ability against these three target defendants.

C. The CERCLA Liability of the Great American Defendants

As set forth above, the liability of the Great American defendants, if any, derives from the waste disposal practices of Columbia before its acquisition [**39] by G.A. Corrugated. Apart from the arguments raised in the joint brief filed by the target defendants, the Great American defendants have filed a summary judgment motion of their own in which they argue that they are immune from suit under CERCLA for a number of reasons unique to their corporate structure and history. Generally, these arguments break down into three categories. First, the Great American defendants argue that the Town has failed to demonstrate by competent proof that Columbia's industrial waste contained hazardous substances. Second, they argue that the Town cannot hold GACCC or G.A. Corrugated liable because they have been dissolved and no longer possess assets. Third, they argue that GAI cannot be held liable under a traditional veil-piercing analysis. [*198] The Court will examine each of these three contentions in turn.

1. Did Columbia Deposit Hazardous Substances at the Landfill?

GACCC argues that there is inadequate evidence in the record to support the Town's claim that Columbia deposited hundreds of thousands of gallons of

hazardous sludge at the landfill. GACCC admits for purposes of these motions that Columbia did in fact transport its waste material to the [**40] landfill for a period of years. However, it disputes whether that waste material in fact contained hazardous substances that would subject GACCC to CERCLA liability. But in response to a Request for Admission served by the Town, the Great American defendants "admitted, on information and belief, that Waste Material that contained a hazardous substance and that was owned or possessed by [Columbia], which was the owner of a Plant that GACCC later owned, was disposed of or treated at the Landfill" *Rule 36(b) of the Federal Rules of Civil Procedure* provides that "any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." GACCC has not sought such relief here. Accordingly, regardless of GACCC's current effort to qualify its response to the Notice to Admit as somehow less than binding, the Court gives weight to GACCC's prior admission, despite the fact that it was made on information and belief. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1030 (C.C.P.A. 1982) (holding that admission contained in an answer was binding, despite the fact that it was made "on information and belief").

[**41] Further, the EPA Record of Decision for OU-1 and NCDOH documents contained in the record detail Columbia's disposal of industrial sludge at

the landfill. A January 20, 1975 NCDOH Memorandum shows that a sample of Columbia's sludge contained, *inter alia*, iron, copper, zinc, lead, cadmium, chromium, and nickel. The sludge was described in another NCDOH document as a "white-blue liquid with [the] consistency of heavy latex paint." However, GACCC contends that the EPA and NCDOH documentation is hearsay and does not serve as competent proof to support a finding of CERCLA liability.

Both the EPA Record of Decision and the NCDOH documents annexed to the Town's supporting papers are offered to prove the truth of the matter asserted therein, *i.e.*, that Columbia's sludge contained hazardous materials, and are therefore plainly hearsay. *Fed. R. Evid. 801(c)*. However, as the Town points out, these reports would likely be admissible as exceptions to the hearsay rule because they constitute "factual findings resulting from an investigation made pursuant to authority granted by law." *Fed. R. Evid. 803(8)(C)*. Further, although *Rule 56(e) of the Federal Rules of Civil Procedure* requires [**42] that affidavits offered in support of summary judgment have sworn or certified copies of materials referred to in the affidavit attached thereto, the Second Circuit has held that *Rule 56(e)* defects are waived where the objecting party fails to make a motion to strike. *See DeCintio v. Westchester County Med. Ctr.*, 821 F.2d 111, 113-114 (2d Cir. 1987).

The Court concludes that the Town has proffered compelling proof in support of its claim that Columbia deposited hazardous substances at the landfill. As the evidence offered by GACCC in opposition to the Town's proof constitutes mere conjecture at best, the Court concludes that the Town has adequately demonstrated that Columbia was responsible for a "release or threatened release" of hazardous substances. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 586-587.

2. *Are GACCC and G.A. Corrugated as "dead and buried corporations," subject to suit under CERCLA?*

As with Occidental, Marmon and Grumman, the Court is therefore satisfied that the Town has made an adequate *prima facie* showing that Columbia is a responsible party under CERCLA. It is uncontested that Columbia was merged into GACCC and that GACCC was a wholly-owned [**43] subsidiary of G.A. Corrugated. "In general, when two corporations merge pursuant to statutory provisions, liabilities become the responsibility [*199] of the surviving company." *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988). The Great American defendants maintain that GACCC and G.A. Corrugated, which dissolved in the early 1980s and distributed all of their assets, are "dead and buried" corporations that are no longer subject to suit under CERCLA, despite the fact that the Town's claims against the Great American defendants stem from hazardous waste disposal practices that continued

until 1975, well before these corporations were formally dissolved.

The term "dead and buried" corporation refers to those corporations that have been formally dissolved and have distributed all of their corporate assets to their shareholders. *See, e.g., Idylwoods Assocs. v. Mader Capital, Inc.*, 915 F. Supp. 1290, 1304 (W.D.N.Y. 1996). A substantial body of precedent has developed regarding the CERCLA liability of "dead and buried" corporations. As a starting point, the Court must determine the applicability of *Rule 17(b) of the Federal Rules of Civil Procedure*. *Rule [**44] 17(b)*, which addresses capacity to sue and be sued, provides, in pertinent part, that "the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." The question that is initially presented, therefore, is whether *Rule 17(b)* applies to CERCLA cases, and consequently requires the Court to look to New York and Delaware law to determine whether GACCC and G.A. Corrugated are subject to suit under CERCLA.

Among those courts that have considered the applicability of *Rule 17(b)* in the CERCLA arena, a split has emerged between the Seventh and Ninth Circuit Courts of Appeal on one hand, and numerous district courts from the remaining circuits on the other. In *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016 (7th Cir. 1995), the Seventh Circuit determined that *Rule 17(b)* applied to CERCLA cases and that state law therefore gov-

erned the question of whether a corporation should be subject to suit. The court held that 42 U.S.C. § 9607(a), which provides that CERCLA applies "notwithstanding any other provision or rule of law," refers only to substantive liability and not to procedural rules, and determined that the corporate [**45] capacity issue under *Rule 17(b)* was indeed a procedural rule. See also *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 5 F.3d 431 (9th Cir. 1993); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448 (9th Cir. 1987). By contrast, those district courts that have found *Rule 17(b)* to be preempted reason that CERCLA's broad mandate requires the preemption of state corporate capacity laws so that CERCLA liability will not vary from state to state. See, e.g., *Idylwoods Assocs., supra*; *AM Properties Corp. v. GTE Prods. Corp.*, 844 F. Supp. 1007 (D.N.J. 1994); *BASF Corp. v. Central Transport, Inc.*, 830 F. Supp. 1011 (E.D. Mich. 1993); *City and County of Denver v. Adolph Coors Co.*, 813 F. Supp. 1471 (D. Colo. 1992); *Traverse Bay Area Intermediate Sch. Dist. v. Hitco, Inc.*, 762 F. Supp. 1298 (W.D. Mich. 1991); *United States v. Distler*, 741 F. Supp. 643 (W.D. Ky. 1990); *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492 (D. Utah 1987). Still another approach was implicitly raised by the district court in *United States v. SCA Servs. of Indiana, Inc.*, 837 F. Supp. 946 (N.D. Ind. 1993). In that case, the court declined even to consider whether CERCLA preempted [**46] *Rule 17(b)* based on its

conclusion that the Indiana corporate capacity laws were not more restrictive than CERCLA, thus suggesting that preemption may be appropriate only when a state corporate capacity statute is more restrictive than CERCLA. *Id. at* 952.

The Court concludes that the cases finding *Rule 17(b)* to be superseded in the CERCLA context are more soundly reasoned, and elects to follow them, regardless of whether state law is more or less restrictive than CERCLA. With all due respect to the opinions of the Seventh and Ninth Circuits, their conclusion that corporate capacity should be determined on a state-by-state basis undermines the logic that exposure to CERCLA liability should be uniform throughout the country and not dependent upon variations of the states' corporate capacity laws. Accordingly, the Court determines that it need not resort to New York and Delaware corporate law to determine [*200] whether GACCC and G.A. Corrugated are liable under CERCLA.

Having determined that CERCLA preempts *Rule 17(b)* and hence controls the inquiry into the potential liability of GACCC and G.A. Corrugated as dead and buried corporations, the Court now evaluates the analytical framework [**47] adopted by federal courts to evaluate CERCLA claims against dead and buried corporations. Not surprisingly, there is no single uniform approach. See Joel R. Burcat and Craig P. Wilson, *Post-Dissolution Liability of Corporations and Their Shareholders*

Under CERCLA, 50 Bus. Law., Aug. 1995, at 1273, 1285-1291. Essentially, the courts have confined their focus and disagreements to the central issue of whether a dead and buried corporation may be considered a "person" under CERCLA. CERCLA defines person as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (emphasis added). This definition is not qualified in any way, unlike other remedial statutes. See *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 1990 U.S. Dist. LEXIS 19545, 1990 WL 322940 at *3 n.4 (N.D., Ill. July 6, 1990) (comparing CERCLA with Sherman Anti-Trust Act, 15 U.S.C. § 7, which defines "person" as including "corporations and associations existing under or authorized by the laws of ... any State.").

One line of cases holds that a corporation's [**48] dead and buried status is irrelevant to a determination as to whether it can be subject to suit under CERCLA. In *SCA Servs. of Indiana, Inc.*, *supra*, for example, the defendant SCA Services of Indiana commenced a third-party action against Levin & Sons, Inc. ("Levin"), an Indiana corporation, in 1992. Levin had disposed of all of its corporate assets in 1987 and had been administratively dissolved by the Indiana Secretary of State in 1990. Levin's alleged CERCLA liability arose out of its operation of a facility between 1966

and 1973, during which time hazardous wastes were disposed of at the facility. Levin sought to be dismissed from the third-party action on the ground that it had become a dead and buried corporation prior to suit. In denying Levin's motion, the district court, although concluding that Levin had not properly dissolved under Indiana law, noted that, in any event, "CERCLA allows suits against corporations [as 'persons'] without limitation as to whether the corporation is dissolved or its assets have been distributed." Quoting at length from the decision of Utah district court in *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1498 (D. Utah 1987), the [**49] Court determined that the fact that a corporate defendant may as a practical matter be judgment proof does not affect its capacity to be sued under CERCLA. See also *State of North Carolina v. W.R. Peele, Sr. Trust*, 876 F. Supp. 733, 739 (E.D.N.C. 1995); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, *supra*.

By contrast, the district court in *Traverse Bay Area Intermediate Sch. Dist.*, *supra*, while noting that a determination as to the scope of CERCLA liability "must not turn on the collectibility of judgments," 762 F. Supp. 1298 at 1301, nonetheless determined that a dead and buried corporation is not a person under CERCLA because any judgment entered against such a corporation would be uncollectible. *Id.* at 1301-1302; see also *AM Properties*, 844 F. Supp. at 1013 ("While the Court recog-

nizes that the determination of the scope of CERCLA liability must not turn on the collectibility of judgments, to allow a suit under CERCLA against a dissolved corporation that has completely wound down and distributed its assets would present various litigation difficulties and judgment collection problems...."); *City and County of Denver*, 813 F. Supp. at 1475 ("[A] court would be foolish [**50] to allow a suit against a dissolved corporation that has distributed its assets to the far corners of the country Fully dissolved corporations would also present inherent difficulties in the parties' ability to gather evidence and a dissolved defendant corporation's ability to present an adequate defense.").

Notably, none of the courts addressing the CERCLA liability of dead and buried corporations have properly prescinded between [*201] or analyzed the difference between corporate persons that are dead and buried at the time a CERCLA action is triggered and those that are dead and buried at the time of suit. See, e.g., *City and County of Denver*, 813 F. Supp. at 1475 (correlating CERCLA definition of "person" to the holding of assets at the time of suit); *Traverse Bay Area Intermediate Sch. Dist.*, 762 F. Supp. at 1301-1302 (same). Section 9607(a)(3) of the Act plainly subjects "any person ... who arranged for disposal or treatment ... of hazardous substances" to liability. There is no indication in CERCLA that liability under this section depends upon whether the defendant corporation is a person at the

time of suit. Rather, because liability is triggered by the disposal of [**51] hazardous waste, the only logical conclusion is that CERCLA "personhood" is also measured as of the time of this triggering event. This reading of the statute is consistent with the Court's recognition that a CERCLA claim invariably requires extensive investigation, testing and studies, and therefore may be brought at an indeterminate point in time, many years after the disposal of hazardous substances.

This interpretation promotes two policy concerns. First, a holding that personhood is measured at the time of suit and that consequently only extant, solvent corporations are persons under CERCLA would necessarily shrink the range of potentially responsible persons, which would run counter to the breadth of CERCLA's scheme for imposing liability. Second, the Court's holding that personhood for CERCLA purposes is measured at the time that the CERCLA person arranges for disposal of hazardous materials under § 9607(a)(3) promotes the interests in the uniformity of CERCLA enforcement that motivated the Court to conclude that *Rule 17(b)* must be preempted in the CERCLA context.

Accordingly, the Court concludes that a corporation subject to CERCLA claims based upon hazardous waste disposal [**52] that occurred *before* the corporation was dissolved and became dead and buried is not absolved from suit under CERCLA. This conclusion is

not only supported by CERCLA's statutory reach but also by common law notions affecting litigation against dead and buried corporations. Helpful to the Court in that respect are those federal cases that have refused to view corporate dissolution and distribution of assets as the linchpin of the inquiry into whether a corporation may be held liable under CERCLA, *see* *W.R. Peele, Sr. Trust*, 876 *F. Supp.* at 739; *SCA Servs. of Indiana*, 837 *F. Supp.* at 953; *Allied Corp.*, 1990 WL 322940 at *4, and New York authority predicated upon its common law notions as to the circumstances under which a dead and buried corporation can be subject to suit. It is well settled that federal common law, which is implicated under CERCLA because of the need for uniform federal rules of decision in assessing CERCLA liability, *see, e.g., AM Properties.*, 844 *F. Supp.* at 1012, may incorporate principles of state law as the rule of decision, provided that the state law is consistent with the policies underlying the particular federal interest. *See United States* [*53] *v. Kimbell Foods, Inc.*, 440 *U.S.* 715, 727-739, 59 *L. Ed. 2d* 711, 99 *S. Ct.* 1448 (1979); *United States v. One 1973 Rolls-Royce*, VIN SRH-16266, 43 *F.3d* 794, 806 *n.8* (3d *Cir.* 1994); *Lugo v. AIG Life Ins. Co.*, 852 *F. Supp.* 187, 193 (*S.D.N.Y.* 1994).

New York's Business Corporation Law 1006(b) provides, in pertinent part, that "the dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors,

officers or shareholders for any right or claim existing or any liability incurred before such dissolution." This statute is consistent with New York decisional law abrogating the English common law rule that the liabilities of a corporation are extinguished by its dissolution. *See Shayne v. Evening Post Publ'g Co.*, 168 *N.Y.* 70, 77, 61 *N.E.* 115, 115-116 (1901). In rejecting the traditional English rule, the New York Court of Appeals observed that it would be "unjust and arbitrary" to cut off all causes of action against a corporation upon its dissolution, and noted that such a rule would encourage corporate officers to extinguish meritorious causes of action by dissolving a corporation, only to reorganize the corporation later with impunity. [*54] *Shayne*, 168 *N.Y.* at 74, 61 *N.E.* at 115-116.

[*202] Moreover, in regard to dead and buried corporations, New York courts have embraced the principle that a corporation's capacity to be sued does not depend upon whether or not it has distributed its assets. The New York Court of Appeals has indicated that the determinative factor is whether the claim against the corporation existed at the time that it was dissolved; "whether the distribution of its assets in advance of dissolution may make a judgment, if recovered, futile, we do not now consider ... The collection of the judgment must wait upon its entry." *City of New York v. New York & S. Brooklyn Ferry & Steam Transp. Co.*, 231 *N.Y.* 18, 131 *N.E.* 554 (1921) (Cardozo, J.); *see also Hudson*

River Fishermen's Assn. v. Arcuri, 862 F. Supp. 73, 77 (S.D.N.Y. 1994); *Independent Investor Protective League v. Time, Inc.*, 50 N.Y.2d 259, 262-263; 406 N.E.2d 486, 488, 428 N.Y.S.2d 671, 673 (1980); *Fernandez v. Kinsey*, 205 A.D.2d 448, 613 N.Y.S.2d 894, 895 (1st Dep't 1994); *Dominguez v. Fixrammer Corp.*, 172 Misc. 2d 868, 656 N.Y.S.2d 111, 113 (Sup. Ct. Bronx Co. 1997).

The Court agrees with then-Judge Cardozo's observation in [**55] *New York & S. Brooklyn Ferry & Steam Transp. Co.* that liability and collectibility are two separate and distinct concepts. A corporation should not be permitted to insulate itself from exposure to CERCLA liability by dissolving and distributing its assets after the disposal of hazardous substances. As (1) Columbia deposited hazardous waste in the landfill, and (2) GACCC and G.A. Corrugated succeeded to Columbia's liabilities prior to their dissolution, the Court concludes that they are persons under CERCLA, regardless of whether or not they were dead and buried at the time the Town brought suit and that they are consequently proper CERCLA defendants. *

8 The issue of whether these corporations can be held liable under the state law claims will be addressed *infra*.

The bringing of a suit against a corporation that became dead and buried after being exposed to potential CERCLA liability may or may not prove to be pointless in the collection process,

which will be governed by state law. For example, [**56] under New York law, if a corporation is dissolved fraudulently and its assets subsequently distributed to its shareholders, the shareholders hold the assets they receive in trust for the benefit of the corporation's creditors and remain jointly and severally liable to existing creditors of the corporation to the extent of the corporate property they received. See *Trustees of the Tapers' Ins. Annuity and Pension Funds v. Albee Drywall Partitions Corp.*, 1996 U.S. Dist. LEXIS 7644, 1996 WL 294306 at *6 (S.D.N.Y. June 3, 1996); *Allen Morris Commercial Real Estate Servs. Co. v. Numismatic Collectors Guild, Inc.*, 1993 U.S. Dist. LEXIS 7052, 1993 WL 183771 at *9 (S.D.N.Y. May 27, 1993); see also *United States v. Oscar Frommel & Brothers*, 50 F.2d 73, 74 (2d Cir. 1931); *Flute, Inc. v. Rubel*, 682 F. Supp. 184, 187 (S.D.N.Y. 1988); *Rodgers v. Logan*, 121 A.D.2d 250, 253, 503 N.Y.S.2d 36, 39 (1st Dep't 1986).

3. Can GAI be held liable for Columbia's waste disposal practices under a veil-piercing analysis?

The inquiry into GAI's potential liability under CERCLA stands on a different footing than that undertaken for GACCC and G.A. Corrugated, and requires the Court to consider whether GAI's corporate veil should be pierced. [**57] This inquiry is appropriately made under federal common law. See *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1201-1203 (E.D. Pa. 1989) ("We conclude that the strong federal

interest in uniform enforcement of environmental legislation set forth by Congress [and] the very real risk that the application of state laws would frustrate [*203] the objectives of the federal program ... warrants the development of a uniform federal rule applicable to alter ego claims under CERCLA."); *see also Idylwoods Assocs.*, 915 F. Supp. at 1305 ("Whether or not a corporation is liable under corporate veil-piercing standards should be analyzed under federal common law, since 'it is well established that when a federal statute is silent as to the choice of law to be applied, but overriding federal interests exist, courts should fashion uniform federal rules of decision.") (quoting *City of New York v. Exxon Corp.*, 112 B.R. 540, 552-553 (S.D.N.Y. 1990), *aff'd in part*, 932 F.2d 1020 (2d Cir. 1991)). In determining whether to pierce the corporate veil under CERCLA, courts have considered the following factors, in approximately descending order of importance:

(1) inadequate capitalization [**58] in light of the purposes for which the corporation was organized[;] (2) extensive or pervasive control by the shareholder or shareholders[;] (3) intermingling of the corporation's properties or accounts with those of its owner[;] (4) failure to observe corporate formalities and separateness[;] (5) siphoning of funds from the corpora-

tion[;] (6) absence of corporate records[;] and (7) non-functioning officers or directors.

In re Acushnet River and New Bedford Harbor Proceedings, 675 F. Supp. 22, 33 (D. Mass. 1987); *see also Idylwoods Assocs.*, 915 F. Supp. at 1305; *Exxon Corp.*, 112 B.R. at 553; *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 20 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990). "No one of these factors is either necessary or sufficient to disregard corporate separateness. The equitable decision to pierce the veil is dependent on the facts peculiar to each case." *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. at 33.

9 Although the Great American defendants argue that GAI cannot be held liable for Columbia's waste disposal practices as an "operator" because it did not exercise control over its waste disposal practices, *see Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996), this argument is inapposite because it is clear from the Town's submissions that it seeks recovery against GAI not as the "operator" of a facility but as an "owner" of G.A. Corrugated and GACCC. *See id.* ("A finding of owner liability invokes the parent-subsidiary relationship and can be made only in circumstances that permit corporate veil

piercing Such owner liability is entirely distinct from parent operator liability, proof of which looks to the independent actions of the parent corporation, evidenced though its control over the polluting site." (citations omitted)).

[**59] In opposition to the Great American defendants' motion, the Town offers an expert affidavit to the effect that GAI exercised pervasive and dominant control over GACCC because, *inter alia*: (1) GACCC's Board of Directors consisted solely of GAI's Chairman/President, GAI's Secretary, and GAI's Vice-President and, moreover, several corporate officers of GAI were also corporate officers of GACCC; (2) GAI established a \$ 500,000 line of credit for GACCC's capital expenditures; (3) GAI provided management services to GACCC for a fee, but there was apparently no corporate documentation regarding the establishment of the arrangement, the scope of the proposed services and the cost of such services; (4) GAI and GACCC guaranteed certain of each other's financial obligations, which guaranties were not supported by consideration; (5) GAI essentially overlooked the existence of the intermediate subsidiary G.A. Corrugated and dealt with GACCC directly, making decisions that would ordinarily have been made by G.A. Corrugated, the parent corporation, and not by a grandparent; (6) GACCC was seriously undercapitalized and GAI advanced significant sums to GACCC for working capital without approval

[**60] from their respective Boards of Directors, and apparently without documentation setting forth the interest rates, terms and collateral for these advances; and (7) in connection with the sale of GACCC to LPCCC, LPCCC executed a \$ 3.2 million promissory note to GAI and not to GACCC, the nominal seller, as would be expected in an ordinary sale of assets.

While not specifically contesting the expert's observations regarding the corporate structure of GACCC and its interaction with its grandparent GAI, GAI seeks to be relieved from CERCLA liability because there has been no showing, nor could there be, that it exercised any control over the waste disposal practices of Columbia. As it is undisputed that neither GACCC nor G.A. Corrugated deposited hazardous waste at the landfill, GAI argues that there is no nexus between its purported control of those corporations and the disposal of hazardous waste at the landfill.

The Court disagrees that this purported lack of nexus is determinative and requires that GAI be dismissed from this action. Preliminarily, the Court concludes that GAI and GACCC did not observe corporate formalities and that, using the seven-part test set forth above as a [**61] guide, GACCC was the *alter ego* of GAI. Having reached that conclusion, the Court considers GAI's argument in favor of dismissal completely untenable. As noted [*204] above, when Columbia was merged into GACCC, GACCC assumed Columbia's

liabilities. As the Third Circuit observed in *Smith Land & Improvement Corp.*:

The concerns that have led to a corporations' common law liability . . . for the torts of its predecessor are equally applicable to the assessment of responsibility for clean-up costs under CERCLA. The Act views response liability as a remedial, rather than a punitive, measure whose primary aim is to correct the hazardous condition The costs associated with clean-up must be absorbed somewhere Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost Savings resulting from the failure to use non-hazardous disposal methods inured to the original corporation, its successors, and their respective stockholders and accrued only indirectly, if at all, to the general public.

Smith Land & Improvement Corp., 851 F.2d at 91-92.

Here, although GACCC may [**62] ultimately be held liable for Columbia's dumping practices, GACCC is by all accounts without assets and is therefore judgment-proof. On these facts, it would

be completely inappropriate and inequitable to absolve its presumably solvent *alter ego* from liability and pass that liability onto the other defendants. GAI pervasively controlled the financial and administrative dealings of GACCC. Although GAI appears to be taking the position that it should be free from CERCLA liability because its investment in GACCC was not as profitable as it might have hoped, immunizing GAI from liability under such circumstances would encourage corporate parents to disregard the corporate existence of subsidiaries with questionable environmental track records and then engage in paper corporate dissolutions and transfers of corporate assets as a means of evading CERCLA liability. This approach, if endorsed by the Court, would ultimately shift the intrinsic risk of investing in such business ventures to the taxpayers, which is completely contrary to both the history and the spirit of CERCLA.

4. Conclusion

The motion of the Great American defendants for summary judgment, to the extent that it [**63] seeks dismissal of the CERCLA claims against them, is denied. The Town's motion, to the extent that it seeks summary judgment against GACCC, is granted. Although the Town did not specifically seek summary judgment against GAI, the parties address the CERCLA liability of both GACCC and GAI at great length, and the Town has proceeded against GAI on the theory that it is liable as GACCC's

alter ego. Accordingly, the Court will construe the Town's motion as being directed to GAI as well as GACCC and hereby grants the Town summary judgment on the issue of CERCLA liability against GAI.

III. The Successor Liability of the Lin Pac Defendants

The liability of the Lin Pac defendants hinges upon emerging principles of "successor liability" in the CERCLA context. In April 1996, the Town and all of the defendants with the exception of the Great American defendants executed a Statement of Material Undisputed Facts with regard to the Lin Pac defendants' summary judgment motion. The material facts underlying the Lin Pac defendants' purchase of the assets of GACCC are therefore undisputed, leaving the Court with the purely legal question of whether the Lin Pac defendants are liable for [**64] Columbia's hazardous waste disposal practices. *See United States v. Mexico Feed and Seed Co.*, 980 F.2d 478, 489 n.13 (8th Cir. 1992) ("Whether a corporation is a 'substantial continuation' of another is a legal, not a factual, question."). This question is also resolved in accordance with federal common law. *See Betkoski*, 99 F.3d at 519.

A brief review of the details of LPCCC's acquisition of GACCC's assets and operation of its Syosset plant is in order. In March 1980, before CERCLA was enacted, LPCCC purchased all of the physical assets of GACCC, including

its plant in Syosset, for approximately 56 million. This purchase did not include GACCC's accounts receivable. LPCCC paid cash for the Syosset plant at the time of closing and executed a promissory [*205] note to cover the balance of the purchase price. There was no transfer, sale, purchase or exchange of stock. The purchase agreement provided that liabilities arising prior to the purchase would remain with the Great American defendants, which agreed to indemnify LPCCC for "all obligations and liabilities of the seller, direct and indirect, fixed or contingent, known and unknown, not expressly assumed by the purchaser."

At [**65] the time of the asset purchase, there was no identity of directors between the Lin Pac defendants and the Great American defendants, and LPCCC's directors continued in place after the purchase. There was similarly no identity of shareholders between the Lin Pac defendants and the Great American defendants. Following the purchase, GACCC and G.A. Corrugated continued to exist as corporate entities until their dissolutions in 1982 and 1981, respectively, though GACCC had no significant assets and G.A. Corrugated's assets were limited to its shares in GACCC.

Following the purchase, LPCCC replaced a senior manager employed by GACCC, but retained virtually all of GACCC's employees and managerial staff. LPCCC operated the plant and marketed the corrugated box products

manufactured at the plant under its own name to GACCC's existing clients, but also sought to expand its client base. LPCCC operated the plant for seven years, until it was closed in 1987, and during that time effected certain changes in the manufacturing process.

Based upon these undisputed facts, the Lin Pac defendants maintain that they cannot be held liable for Columbia's waste disposal practices as Columbia's successor [**66] because the acquisition of GACCC was a mere asset purchase that should not subject the Lin Pac defendants to GACCC's environmental liabilities. As a general rule, one corporation that acquires the assets of another does not additionally assume the predecessor corporation's liabilities unless one of four criteria are met: (1) the successor corporation either expressly or impliedly agrees to assume the predecessor's liabilities; (2) the transaction is a *de facto* merger; (3) the successor may be considered a mere continuation of the predecessor; or (4) the transaction is fraudulent. *See Betkoski*, 99 F.3d at 519; *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992); *Gould, Inc. v. A & M Battery and Tire Serv.*, 950 F. Supp. 653, 656 (M.D. Pa. 1997).

As there are no allegations that the transaction was fraudulent and as it is clear from the closing documents that the Lin Pac defendants did not agree to assume GACCC's liabilities, the Court therefore focuses on whether the transaction was a *de facto* merger or whether

LPCCC may be considered a mere continuation of GACCC. The Court concludes that the business dealings between the Lin Pac defendants [**67] and the Great American defendants did not result in a *de facto* merger. In determining whether a *de facto* merger has taken place, the Court considers: (1) whether there is a continuation of the enterprise of the seller corporation such that there is continuity of management, personnel, location, assets, and general business operations; (2) whether there is a continuity of shareholders; (3) whether the seller has ceased its operations, liquidated and dissolved as soon thereafter as possible; and (4) whether the purchasing corporation assumes those obligations of the seller necessary for the continuation of business operations. *State of New York v. Panex Indus., Inc.*, 1996 U.S. Dist. LEXIS 9418, 1996 WL 378172 at *7-8 (W.D.N.Y. June 24, 1996) (quoting *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 310 (3d Cir. 1985)); *see also Louisiana-Pacific Corp. v. ASARCO, Inc.*, 909 F.2d 1260, 1264-1265 (9th Cir. 1990). Here, as noted above, there was no identity of shareholders between the Great American defendants and the Lin Pac defendants either before or after LPCCC's acquisition of GACCC. Courts have not been willing to overlook the identity of shareholders requirement and have consistently [**68] refused to find that a *de facto* merger has taken place without such a showing. *See Louisiana-Pacific Corp.*, 909 F.2d at 1264-1265. Accord-

ingly, the Court concludes that there has been no *de facto* merger here, and that the liability of the Lin Pac defendants, if any, must be premised upon a finding that LPCCC was a "mere continuation" of GACCC.

[*206] A substantial body of case-law has arisen construing the scope of the "mere continuation" test. In *Betkoski*, the Second Circuit adopted, as have other courts, the "continuity of enterprise," also known as the "substantial continuity," rule for determining whether this criterion has been satisfied. *Betkoski*, 99 F.3d at 519. This approach looks to the following factors:

- (1) retention of the same employees;
- (2) retention of the same supervisory personnel;
- (3) retention of the same production facilities in the same location;
- (4) production of the same product;
- (5) retention of the same name;
- (6) continuity of assets;
- (7) continuity of general business operations;
- and (8) whether the successor holds itself out as the continuation of the previous enterprise.

Carolina Transformer Co., 978 F.2d at 838. Here, [**69] certain of these factors are unquestionably satisfied. It is undisputed that LPCCC retained most of the managerial personnel and virtually all of the employees of GACCC, at least

for some period of time. It purchased all of GACCC's physical assets and continued the same business in the same location. However, apart from a stray reference to GACCC in a filing with the State of New York's Department of Environmental Conservation, LPCCC did not hold itself out as GACCC's successor, nor did it market the containers that it manufactured under GACCC's name.

Several other courts have held that two other factors are relevant to a determination of whether successor liability should attach under the substantial continuity test -- the purchasing corporation's notice of the seller's potential liabilities and whether the purchasing corporation has "substantial ties" to the selling corporation. *See Mexico Feed & Seed Corp.*, 980 F.2d at 489; *Louisiana-Pacific Corp.*, 909 F.2d at 1265-1266; *Elf Atochem North America v. United States*, 908 F. Supp. 275, 282-283 (E.D. Pa. 1995); *United States v. Peirce*, 1995 U.S. Dist. LEXIS 4042, 1995 WL 356017 (N.D.N.Y. Feb. 21, 1995); *United States v. Atlas Minerals and Chemicals, Inc.*, 824 F. Supp. 46, 51 (E.D. Pa. 1993). The Court agrees with the district court in *Peirce* that these factors, while not dispositive, should be considered along with the other factors set forth in *Carolina Transformer Co.* in determining whether successor liability should attach under the substantial continuity test. *Cf. Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261 (E.D. Pa. 1994) (holding that notice not required because CERCLA is a strict liability

statute). Although the appropriateness of these two factors was not before the Second Circuit in *Betkoski*, the Second Circuit did cite approvingly to the *Mexico Feed & Seed* decision in its opinion, which is one of the leading cases supporting the consideration of these additional factors in the context of the inquiry into substantial continuity. See *Betkoski*, 99 F.3d at 581.

Applying those two factors to this case, the Lin Pac defendants clearly did not have notice of GACCC's potential liability under CERCLA because CERCLA was not yet enacted at the time LPCCC acquired GACCC's assets. While it is doubtless true that there was public debate regarding the clean-up of hazardous waste facilities in the months [**71] leading up to the enactment of CERCLA, the statute and common law setting forth and refining the very notion of successor liability were not in existence at the time of the asset purchase. Regarding the "substantial ties" factor, as in *Mexico Feed & Seed* the asset purchase was an arm's length transaction between competitors, and "not a cozy deal where responsible parties merely changed the form of ownership yet in substance remained the same, nor one where the actual managers of a corporation took over its ownership with full knowledge of its practices." *Mexico Feed & Seed*, 980 F.2d at 489. These additional two factors would thus appear to undermine a finding of substantial continuity.

Having considered these two factors, together with all of the other factors that comprise the substantial continuity test, in light of the undisputed facts of this case the Court concludes that the Lin Pac defendants are not proper CERCLA defendants since they cannot be viewed as the mere continuation of their Great American predecessor. The Court is mindful of the broad remedial purpose of CERCLA and the extent to which [*207] courts have expanded traditional principles of tort liability to hold [**72] parties responsible for the costs of compliance with CERCLA. See, e.g., *Schiavone v. Pearce*, 79 F.3d at 253-254. However, in this case, such an expansion would be inequitable and would impose an unwarranted penalty upon a good faith third-party purchaser for value. The Lin Pac defendants, with their roots in the United Kingdom, had no ties to the Great American defendants. They purchased the assets of an on-going concern, operated it under the Lin Pac name, sought to expand on the existing client base, and over time made manufacturing and other changes. There is no whiff of impropriety or self-dealing here. In short, to hold the Lin Pac defendants liable on these facts would essentially scrap the common law rule treating asset purchases differently from mergers and consolidations. Accordingly, to the extent that the Lin Pac defendants seek dismissal of the Town's CERCLA claims, their motion for summary judgment is granted.

IV. Joint and Several Liability vs. Contribution

Having determined that Occidental, Marmon, Grumman, GACCC and GAI are liable under CERCLA, the Court now turns to an examination of the nature of that liability. Each of the defendants contends that the [**73] Town may only seek contribution pursuant to § 9613 and cannot impose joint and several liability against them. Implicit in this argument is the assumption, which is not contested by the Town, that the Town is itself a responsible person under CERCLA. Indeed, the record evidence that the Town contributed to the condition of the landfill is compelling. Notwithstanding its status as a responsible person, the Town maintains that it is entitled to seek joint and several liability against the defendants pursuant to 42 U.S.C. § 9607. The parties' dispute regarding the interplay between § 9607 and § 9613 is part of a larger debate amongst the parties as to whether the Town will be required to bear a portion of the response costs attributable to "orphan shares" -- those shares attributable to potentially responsible persons that are either insolvent or cannot be located or identified. See *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997).

In arguing that it is entitled to seek joint and several liability against all the defendants, the Town relies primarily upon the language of § 9607(a)(4)(B), which, as set forth above, provides for a cause of action [**74] in favor of "any

... person" that has incurred response costs consistent with the National Contingency Plan. As noted above, CERCLA's definition of "person" includes municipalities. 42 U.S.C. § 9601(21). In a § 9607 action for recovery of costs, potential responsible persons are ordinarily jointly and severally liable for the costs associated with the cleanup and site remediation. See *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997). The Town argues that because it is a person that has incurred response costs under CERCLA, it is entitled to joint and several liability against the defendants pursuant to the clear and unequivocal language of § 9607(a)(4)(B), regardless of its status as a responsible person. The Town's argument is premised upon the assumption that a cause of action under § 9607 is procedurally distinct from the right to contribution among potentially responsible persons, which is codified at § 9613(f), and that it may elect to proceed under § 9607 instead of § 9613. This argument has some support among district courts. See, e.g., *Town of Wallkill v. Tesa Tape, Inc.*, 891 F. Supp. 955, 958-960 (S.D.N.Y. 1995); *Companies [**75] for Fair Allocation v. Axil Corporation*, 853 F. Supp. 575, 577-580 (D. Conn. 1994); *United States v. Kramer*, 757 F. Supp. 397, 416-417 (D.N.J. 1991).

All of the circuit courts to have considered this issue have determined, however, that a potentially responsible person, such as the Town, cannot seek joint and several liability against other poten-

tially responsible persons, but may only seek contribution pursuant to § 9613. See *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1997 WL 464633 (10th Cir. 1997); *Pinal Creek Group*, 118 F.3d 1298; *New Castle County*, 111 F.3d 1116; *Bancamerica Commercial Corp. v. Mosher Steel of Kansas*, 100 F.3d 792 (10th Cir.), amended by 103 F.3d 80 (1996); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996); [*208] *United States v. Colorado & E. R. R. Co.*, 50 F.3d 1530 (10th Cir. 1995); *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994); *Azco Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994). As articulated by certain of these courts, although the right of one potentially responsible person to pursue another for response costs [**76] derives from § 9607, the nature of that claim is necessarily one for contribution and is mapped out by § 9613. See, e.g., *Sun Co.*, 124 F.3d at 1191, 1997 WL 464633 at *5 ("While a [§ 9413] contribution action is not a 'cost recovery' action under [§ 9607] as that action has been defined, because it does not impose strict, joint and several liability on the defendant PRPs, it is an action for recovery of the costs referred to in [§ 9607]."); *Pinal Creek Group*, 118 F.3d at 1298 ("While [§ 9607] created the right of contribution, the 'machinery' of [§ 9613] governs and regulates such actions, providing the details and explicit recognition that were missing from the text of [§ 9607]."); *New Castle County*,

111 F.3d at 1122 ("[42 U.S.C. § 9613] does not in itself create any new liabilities; rather, it confirms the right of a potentially responsible person under section 107 [42 U.S.C. § 9607] to obtain contribution from other potentially responsible persons.").

The conclusion that § 9607 incorporates a contribution claim is consistent with the history leading up to the enactment of § 9613(f). As originally enacted, CERCLA did not provide specifically [**77] that one potentially responsible person could recover from other potentially responsible persons to the extent that its response costs exceeded its fair share; however, courts determined that a right to contribution in such cases could be implied from the language of § 9607. See, e.g., *Mardan Corp. v. C.G.C. Music Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986). In 1986, Congress enacted the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499 *et seq.*, 100 Stat. 1613, 1615 (1986), which amended § 9613 to expressly authorize contribution among responsible parties. A principal goal of the amended § 9613 was to "clarify and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances." *United Technologies Corp.*, 33 F.3d at 100 (quoting S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1985)).

Having considered the arguments on both sides, the Court agrees with the Courts of Appeal for the First, Third, Seventh, Ninth, Tenth [**78] and Eleventh Circuits that the Town, as a responsible person, may proceed against the defendants under § 9607, but that the nature of its claim is for contribution as set forth in § 9613. The Court reaches this conclusion for a number of reasons. First, regardless of how the Town seeks to cast its CERCLA claim, the reality is that because the Town itself is liable to some extent for the condition of the landfill, its claim is quintessentially a claim for contribution. *See Azco Coatings, Inc.*, 30 F.3d at 764; *see also New Castle County*, 111 F.3d at 1122; *Colorado & E. R.R. Co.*, 50 F.3d at 1536. Second, and more significantly, the Court observes that § 9607 is a generous statutory provision. It has a longer statute of limitations than § 9613 (six years as opposed to three years) and has been interpreted to provide for strict, joint and several liability. If the Court were to hold that § 9607 and § 9613 give potentially responsible persons two entirely separate theories of recovery from which to choose, it is difficult to imagine that any potentially responsible person would ever elect to proceed under § 9613. Such a reading would effectively eviscerate § 9613. [**79] *See New Castle County*, 111 F.3d at 1123; *Colorado & E. R.R. Co.*, 50 F.3d at 1536; *United Technologies Corp.*, 33 F.3d at 101. In the final analysis, to read § 9613 as mapping out the parameters of a contribution right

that has its genesis in § 9607 reconciles CERCLA's emphasis on placing the burden of environmental remediation upon those parties that created the environmental harm with the legislative history of SARA, which demonstrates Congress' concern that this burden be equitably apportioned. Accordingly, the Court grants the defendants' motion for summary judgment insofar as it seeks dismissal of the Town's first and second claims for joint and several [*209] liability under CERCLA, and denies the Town's motion for summary judgment to the extent that it seeks to impose joint and several liability against the defendants.

V. The Town's State Law Claims

As noted above, the complaint also contains three state law claims. The fourth claim is for creation and maintenance of a public nuisance, the fifth claim is for unjust enrichment based upon the defendants' alleged failure to abate the public nuisance, and the sixth claim is for common law contribution. Defendants [**80] now seek dismissal of the public nuisance and unjust enrichment claims on statute of limitations grounds. Additionally, the Great American defendants seek dismissal of the common law claims for the same reason as they sought dismissal of the CERCLA claims -- because GACCC and G.A. Corrugated are dead and buried corporations that are no longer amenable to suit. The Court will examine each of these arguments in turn.

A. Statute of Limitations

Turning first to the Town's nuisance claim, the Court notes that under New York law, a public nuisance:

consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place, or endanger or injure the property, health, safety or comfort of a considerable number of persons.

Copart Industries, Inc. v. Consolidated Edison Co. of New York, 41 N.Y.2d 564, 568, 362 N.E.2d 968, 971, 394 N.Y.S.2d 169, 172 (1977). "To establish a public nuisance the annoyance, discomfort or interference experienced by a considerable number of persons must be substantial." *State* [**81] *of New York v. Fermenta ASC Corp.*, 166 Misc. 2d 524, 531, 630 N.Y.S.2d 884, 890 (Sup. Ct. Suffolk Cty. 1995), *aff'd*, 238 A.D.2d 400, 656 N.Y.S.2d 342 (2d Dep't 1997).

The statute of limitations applicable to the Town's public nuisance claim is controlled by C.P.L.R. 214-c, which provides, in pertinent part:

The three year period within which an action to recover damages for ... injury to prop-

erty caused by the latent effects of exposure to any substance or combination of substances, in any form ... upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

In *Jensen v. General Elec. Co.*, 82 N.Y.2d 77, 623 N.E.2d 547, 603 N.Y.S.2d 420 (1993), the New York State Court of Appeals held that this section imposed a clear-cut discovery rule in actions for damages.

As discovery of the harm triggers the running of the statute of limitations under New York law, the Court looks to when the Town can be said to have discovered the harm. The landfill [**82] was placed on the National Priorities List in 1983 and the Town signed the Administrative Order on Consent in which it agreed to prepare the RI/FS for the landfill in 1986. Further, it was in 1990 that the EPA selected the remediation that would be required for OU-1. The complaint was filed in 1994. The Town clearly had notice of the alleged damage to the landfill property long before it elected to commence this action. To the extent that the Town seeks to re-

cover sums already incurred for remediation of the landfill, these sums are clearly in the nature of consequential damages and are time-barred.

The Town argues, however, that it is primarily seeking a declaration imposing liability and ordering the defendants to pay for or carry out future remediation of the landfill, and that *C.P.L.R. 214-c* applies only to actions for damages. In *Jensen*, the Court of Appeals held this distinction to be a proper one, concluding that the discovery rule contained in this section applies only to actions for damages and that the traditional common law rule applies to the extent that a plaintiff seeks injunctive relief. *Id. at 90-91*. Under common law, a continuing injury to real property gives [**83] rise to successive causes of [*210] action for the duration of the injury, and the right of the property owner to invoke the equitable power of the court similarly continues, regardless of the lapse of time that might occur before the commencement of legal proceedings. *See Galway v. Metropolitan Elevated Ry. Co.*, 128 N.Y. 132, 144-145, 28 N.E. 479, 481 (1891); *see also Jensen*, 82 N.Y.2d at 90-91; 509 *Sixth Avenue Corp. v. New York City Transit Auth.*, 15 N.Y.2d 48, 52, 203 N.E.2d 486, 488, 255 N.Y.S.2d 89, 92 (1964). Accordingly, to the extent that the Town seeks an order directing the defendants to carry out any remediation as may be needed in the future, such relief would not be in the nature of damages and is consequently not barred by *C.P.L.R. 214-c*.

As for the Town's fifth claim, for unjust enrichment, New York courts have held that the central inquiry on such a claim is whether it would be against "equity and good conscience" for the defendant to retain a benefit that it has allegedly received:

Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will look to see if a benefit has been conferred on [**84] the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent.

Paramount Film Distrib. Corp. v. State of New York, 30 N.Y.2d 415, 421, 285 N.E.2d 695, 698, 334 N.Y.S.2d 388, 393, modified, 31 N.Y.2d 678, 288 N.E.2d 811, 336 N.Y.S.2d 911 (1972). A cause of action for unjust enrichment is governed by a six-year statute of limitations that starts to run upon the occurrence of the wrongful act giving rise to the duty of restitution. *See Congregation Yetev Lev D'Satmar v. 26 Adar N.B. Corp.*, 192 A.D.2d 501, 503, 596 N.Y.S.2d 435, 437 (2d Dep't 1993). In this case, the EPA and the Town began negotiations regarding remediation of the landfill in

1990 and it was also in 1990 that the EPA wrote to a number of the defendants to determine whether they would contribute to the remediation effort. Later that year, the EPA selected the remedial action for OU-1. Since the defendants' obligation to contribute to the remediation was triggered by the EPA's 1990 letter and its subsequent selection of appropriate remedial action [**85] later that year, the Court will measure the six-year statute of limitations from 1990. As this action was commenced in 1994, the Town's fifth claim for relief is timely.

B. The Liability of GACCC and G.A. Corrugated under State Law

Having determined that the fourth (nuisance) and fifth (unjust enrichment) claims are timely, the Court now turns to the argument of the Great American defendants that these claims, along with the sixth claim for common law contribution, should be dismissed as against GACCC, formerly a New York corporation, and G.A. Corrugated, formerly a Delaware corporation, because these corporations are dead and buried. As to GACCC, which was incorporated under New York law, there is no evidence in the record that this corporation was not properly dissolved in accordance with *New York's Business Corporation Law § 1004*. However, as set forth at length above, the law in New York is that a claim that accrues prior to a corporation's dissolution may be interposed against the dissolved corporation, even if it has distributed its corporate assets. *See*

Independent Investor Protective League, 50 N.Y.2d at 262-263, 406 N.E.2d at 487-488, 428 N.Y.S.2d 671; [**86] *Fernandez v. Kinsey*, 205 A.D.2d at 448, 613 N.Y.S.2d 895. In this case, the Town's nuisance claim arose out of the disposal of hazardous waste at the landfill that occurred until 1975, seven years before GACCC's corporate dissolution. Therefore, as the Town's nuisance claim accrued before GACCC's dissolution, this claim, to the extent that it seeks equitable relief against GACCC, may proceed. As noted above, however, the Town's nuisance claim, to the extent that it seeks consequential damages related to the disposal of hazardous substances at the landfill, is barred by the three-year statute of limitations. Although it may be an academic exercise to permit a claim for equitable relief to proceed against a dead and buried corporation, such a result appears to be conceptually correct under controlling New York precedent.

[*211] As to the unjust enrichment and contribution claims, since they did not accrue until well after GACCC was dissolved, they may not be maintained. *See Quinn v. Spitale*, 203 A.D.2d 674, 675, 610 N.Y.S.2d 370, 371 (3d Dep't 1994) ("A cause of action for contribution arises not on the date of injury for which the party seeking contribution may be held liable, but [**87] at the time that payment is made on the underlying claim."); *Congregation Yetev Lev D'Satmar*, 192 A.D.2d at 503 (holding that cause of action for unjust enrich-

ment accrues upon payment of sum giving rise to duty of restitution).

As to G.A. Corrugated, which was dissolved under Delaware law, the controlling statute is title 8, § 278 of the Delaware Code, which provides that "all corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution ... for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them." Although not technically a statute of limitations, this section has been held to be "a clear expression of a legislative policy normally prohibiting the commencement of actions by or against dissolved corporations more than three years after their dissolution." *Smith-Johnson Steamship Corp. v. United States*, 231 F. Supp. 184, 186 (D. Del. 1964). Courts have consistently concluded that upon expiration of the three-year period, the corporation ceases to exist as a legal entity and no claims may be asserted [**88] against it. *See In re RegO Co.*, 623 A.2d 92, 96 (Del. Ch. 1992); *In re Citadel Indus.* 423 A.2d 500, 506-507 (Del. Ch. 1980); *see also State of New York v. Panex Indus., Inc.*, 1997 U.S. Dist. LEXIS 15860, 1997 WL 627635 at *3 (W.D.N.Y. Oct. 6, 1997); *Corcoran v. New York Power Auth.*, 935 F. Supp. 376, 391-392 (S.D.N.Y. 1996). As the complaint in this case was filed in 1994, almost thirteen years after G.A. Corrugated was dissolved, the Town's assertion of state law claims against

G.A. Corrugated is prohibited by Delaware law.

C. The Liability of the Lin Pac Defendants under State Law

For the reasons set forth in respect to the Lin Pac defendants' motion for summary judgment dismissing the CERCLA claims, their motion for dismissal of the state law claims is also granted, as the factors discussed with regard to the CERCLA claims also apply to the Town's state law claims. *See Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 451 N.E.2d 195, 464 N.Y.S.2d 437 (1983); *see also Heights v. U.S. Elec. Tool Co.*, 138 A.D.2d 369, 370, 525 N.Y.S.2d 653 (2d Dep't 1988).

CONCLUSION

Based upon the foregoing, the four pending motions are resolved as follows:

1. The Town's motion [**89] for summary judgment is granted to the extent that summary judgment is awarded on the Town's third claim for relief against Occidental, Marmon, Grumman, GACCC and GAI on the issue of CERCLA liability only, but is denied to the extent that the Town seeks a determination that the defendants are jointly and severally liable pursuant to its first and second claims for relief;

2. Defendants' motion for summary judgment is decided as follows: (1) the Town's first and second claims for relief which seek the imposition of joint and several liability against the defendants,

are dismissed; (2) the Town's fourth claim for relief insofar as it seeks damages related to the Town's remediation of the landfill, is dismissed as time-barred; and (3) the motion is otherwise denied;

3. The Great American defendants' motion for summary judgment is granted to the extent that the fourth, fifth and sixth claims for relief are dismissed as against G.A. Corrugated, and the fifth and sixth claims for relief are dismissed as against GACCC, and is otherwise denied;

4. The Lin Pac defendants' motion for summary judgment is granted and the complaint dismissed against these defendants.

SO ORDERED.

[**90] FREDERIC BLOCK

United States District Judge

Dated: Brooklyn, New York

December 5, 1997



2 of 2 DOCUMENTS

In re FLASHCOM, INC., Debtor. CAROLYN A. DYE, Liquidating Trustee, Plaintiff, vs. ANDRA SACHS; COMMUNICATIONS VENTURES III, LP; COMMUNICATIONS VENTURES III CEO & ENTREPRENEURS' FUNDS LP; MAYFIELD IX; MAYFIELD ASSOCIATES FUNDS IV; DAVID HELFICH; TODD BROOKS; BRADFORD SACHS; RICHARD RASMUS; and KEVIN FONG, Defendants.

Case No. SA 00-19215 JR, Adv. No. SA 02-1620 JR, Chapter 11

UNITED STATES BANKRUPTCY COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

308 B.R. 485; 2004 Bankr. LEXIS 515; 42 Bankr. Ct. Dec. 264

**April 16, 2004, Decided
April 16, 2004, Filed**

SUBSEQUENT HISTORY: Adversary proceeding at, Summary judgment denied by *Dye v. Sachs (In re Flashcom, Inc.)*, 2007 Bankr. LEXIS 484 (Bankr. C.D. Cal., Feb. 5, 2007)

DISPOSITION: Findings of fact and conclusions of law on Defendants' motion for partial summary judgment. Movants entitled to judgment on the

Fifth, Seventh, Tenth, Eleventh, and Twelfth Claim in the complaint.

COUNSEL: [**1] For Debtor: RICHARD H. GOLUBOW, Winthrop Couchot, NEWPORT BEACH, CA.

JUDGES: JOHN E. RYAN, United States Bankruptcy Judge.

OPINION BY: JOHN E. RYAN

OPINION

[*486] MEMORANDUM OPINION

Date: April 8, 2004

Time: 9:30 A.M.

Courtroom: 5A

I. INTRODUCTION

After filing a chapter 11 petition, Flashcom, Inc. ("Debtor") filed a plan of reorganization that was confirmed on December 11, 2001. Debtor's plan made Carolyn Dye ("Trustee") liquidating trustee for Debtor's estate.

1 Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, *11 U.S.C. §§ 101-1330* and to the *Federal Rules of Bankruptcy Procedure, Rules 1001-9036*.

On July 11, 2002, Trustee filed a complaint (the "Complaint") against the defendants listed above ("Defendants"). Defendants filed a motion for partial summary judgment (the "Motion"), asserting that the California Corporations Code ("CCC") does not apply to the claims asserted in [*2] the Complaint as a matter of law. Trustee opposed the Motion. After the hearing on April 8, 2004, I took the matter under submission.

II. JURISDICTION

I have jurisdiction over this matter under *28 U.S.C. § 157(b)(1)*. This is a core proceeding under the Bankruptcy Code, as defined in *28 U.S.C. § 157(b)(2)(A),(F),(H)* and *(O)*.

III. STATEMENT OF FACTS

The Complaint alleges the following: Defendants either orchestrated or participated in certain unauthorized, improper, or otherwise avoidable agreements and transfers (the "Agreements and Transfers") with Debtor between September 1999 and February 2000. Most significantly, Debtor improperly redeemed stock held by Andra Sachs for \$ 9 million (the "Stock Redemption") on February 23, 2000.

Also, David Helfrich, Todd Brooks, Bradford Sachs, Andra Sachs, Richard Rasmus, and Kevin Fong were members of Debtor's board of directors. Communications Ventures III, LP and Communications Ventures III CEO & Entrepreneurs Fund LP (the "CV Defendants") were shareholders of Debtor and were controlled by Helfrich. Mayfield IX and Mayfield Associates Funds (the "Mayfield Defendants") were shareholders [*3] of Debtor and were controlled by Brooks and Fong.

The Complaint includes claims for (1) avoidance and recovery of unauthorized corporate agreements and payments under *CCC § 310*, Delaware law, and other applicable [*487] non-bankruptcy law (the "Fifth Claim"); (2) avoidance and recovery of improper corporate

agreements and payments under CCC §§ 501-503, 506, and 2115 (the "Seventh Claim"); (3) breach of fiduciary duty by Debtor's directors and officers under CCC §§ 315-317 and 2115-2116, and Delaware law (the "Tenth Claim"); (4) negligence and corporate waste under CCC §§ 315-317 and 2115-2116, and Delaware law (the "Eleventh Claim"); and (5) liability for unlawful dividends, purchase, or redemption under CCC §§ 316 and 2115-2116, and Delaware law (the "Twelfth Claim").

The CV Defendants, the Mayfield Defendants, Helfrich, Brooks and Fong ("Movants") seek partial summary judgment, arguing that the CCC did not apply to Debtor at the time the Agreements and Transfers occurred. Movants argue that CCC § 2115, which makes certain provisions of California law² applicable to foreign corporations if certain requirements³ are met over a specified period of time,⁴ was not triggered by Debtor⁵ until January 1, 2001, after the Agreements and Transfer took place. Accordingly, Movants contend that they are entitled to partial judgment on those claims in the Complaint that are based on CCC § 2115.

² The CCC sections listed under CCC § 2115(b) include: § 316 (liability of directors for unlawful distributions), § 317 (indemnification of directors, officers, and others), §§ 500 to 505 inclusive (limitations on corporate distributions in cash or property), and § 506 (liabil-

ity of shareholder who receives unlawful distribution). See *Cal. Corp. Code* § 2115(b).

³ In general terms, the requirements measure the extent of a foreign corporation's activity in California. This "three-factor formula" includes a property factor, a payroll factor, and a sales factor, as those terms are defined in the California Revenue and Taxation Code. See *Cal. Corp. Code* § 2115(a).

⁴ Under CCC § 2115(a), the three-factor formula must be met for a "full income year." *Subdivision (d)* then provides a trigger date for the application of the CCC sections specified in *subdivision (b)*. See *Cal. Corp. Code* § 2115(a).

[**5] Additionally, Movants assert that as a Delaware corporation, the doctrine of internal affairs requires the application of Delaware law to issues of Debtor's internal affairs, including the Agreements and Transfers. Therefore, Movants argue that CCC §§ 310 and 315 do not apply to Debtor and that summary judgment on those claims is appropriate. Andra Sachs joins the Motion.

In opposition, Trustee argues that the trigger date for the application of CCC § 2115 to Debtor was January 1, 2000, prior to the Stock Redemption. Trustee also asserts that the internal affairs doctrine does not apply under these circumstances given Debtor's extensive activities in California. Accordingly, Trustee

argues that her claims based on California law should stand.

The following facts are undisputed:

1) Debtor was first incorporated in Nevada on May 19, 1998;

2) Debtor was reincorporated in Delaware on January 20, 1999;

3) Debtor was operating as a foreign corporation in California at all relevant times;

4) Debtor's fiscal year is set as the calendar year; and

5) Just for the Motion, Debtor's activity in California satisfied the three-factor formula under 2115(a) at all relevant [**6] times.

IV. DISCUSSION

1. *The Application of CCC § 2115*

CCC § 2115 provides in relevant part:

[*488] (a) A foreign corporation . . . is subject to the requirements of subdivision (b) commencing on the date specified in subdivision (d) and continuing until the date specified in subdivision (e) if:

(1) the average of the property factor, the payroll factor, and the sales factor (as defined in Sections 25129, 25132, and 25134 of the Revenue and Taxation Code) with respect to it is more than 50 percent during its **latest full income year** and

(2) more than one-half of its outstanding voting securities are held of record by persons having addresses in this state appearing on the books of the corporation on the record date for the latest meeting of shareholders held during its latest full income year or, if no meeting was held during that year, on the last day of the latest full income year. The property factor, payroll factor, and sales factor shall be those used in computing the portion of its income allocable to this state in its franchise tax return or, with respect to corporations the allocation of whose income is governed by special formulas or that [**7] are not required to file separate or any tax returns, which would have been so used if they were governed by this three-factor formula.

...

(d) For purposes of subdivision (a), the requirements of

subdivision (b) shall become applicable to a foreign corporation only upon the first day of the first income year of the corporation (1) commencing on or after the 135th day of the income year immediately following the latest income year with respect to which the tests referred to in subdivision (a) have been met or (2) commencing on or after the entry of a final order by a court of competent jurisdiction declaring that those tests have been met.

Cal. Corp. Code § 2115 (emphasis added). Here, the only issue pertaining to the application of *CCC § 2115* is when the trigger date under *subsection (d)* occurred. The statute is clear that the three-factor formula under *subdivision (a)* must be met for a "full income year" before the trigger date can be determined under *subdivision (d)*.

Movants argue that the term "full income year" means a full calendar or fiscal year. Under this interpretation, Debtor satisfied *subdivision (a)* in 1999, causing the 135-day [**8] count to begin on January 1, 2000, thereby making January 1, 2001 the trigger date under *subdivision (d)*.

5 Although Debtor began its operations in May 1998, Debtor's fiscal year was set as the calendar

year, making the period from May to December 1998 less than a full calendar or fiscal year. Therefore, Debtor's first full fiscal year was 1999.

Trustee argues that the term "income year" under *subdivision (d)* does not require a full fiscal or calendar year. Rather, Trustee asserts that the income year requirement is met by the period from May 19, 1998 to December 31, 1998, or by the period from May 19, 1998 to May 19, 1999. In either case, the trigger date under *subdivision (d)* would then be January 1, 2000, prior to the Stock Redemption on February 23, 2000.

No reported cases discuss the meaning of "full income year" as used in *CCC § 2115*. However, the three-factor formula under *subdivision (a)* is based on data "used in computing the portion of [the foreign corporation's] income allocable to this state [**9] in its franchise tax return" *Cal. Corp. Code 2115(a)(2)*. *Section 2115(a)(1)* also states that the three factors are defined in the California Revenue and Taxation Code. For the purposes of calculating franchise taxes, the term "income year" is defined as "the calendar year or [*489] the fiscal year upon the basis of which the net income is computed." *Cal. Rev. & Tax. Code § 23042*.

Indeed, the only workable definition of "full income year" as used in *CCC § 2115* is a full calendar or fiscal year. A foreign corporation must apply the

three-factor formula to its activities in California using data from its franchise tax return. Franchise taxes are payable for every "taxable year," which is also defined as a calendar year or fiscal year. *Id.* § 23041. Therefore, a foreign corporation cannot determine whether its activity in California satisfies the three-factor formula for a full income year without data from a full fiscal or calendar year.

6 The limited secondary authority interpreting *CCC* § 2115 has also found that the term "income year" refers to the calendar year or fiscal year upon which a foreign corporation computes its net income and franchise taxes. *See* 2 Marsh, Marsh's California Corporation Law, § 26.04[c], 26-86 (4th ed. 2000); *see also* Ballantine & Sterling, California Corporation Laws, § 393.04 (2003).

[**10] The California Court of Appeal has explained:

In construing statutory language, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If there is no ambiguity, then we presume the lawmakers meant what

they said, and the plain meaning of the language governs.

People v. Connor, 115 Cal. App. 4th 669, 678, 9 Cal. Rptr. 3d 521 (2004); *see also* *Great Lakes Props., Inc. v. City of El Segundo*, 19 Cal. 3d 152, 155, 137 Cal. Rptr. 154, 561 P.2d 244 (1977) (stating that unless a term is specifically defined by statute, or it is clearly shown that a different meaning was intended, the plain meaning governs). Here, "calendar year" is not defined under the CCC or the California Revenue and Taxation Code. However, "the literal meaning of the term 'calendar year' is the period of twelve months between January 1 and December 31." *Jensen v. Johnson County Youth Baseball League*, 838 F. Supp. 1437, 1441 (D. Kan. 1993) (citing *Bonray Oil Co. v. Dep't of Energy*, 472 F. Supp. 899, 902 (D. Okla. 1978)). [**11] Accordingly, the term "full income year" as used in *CCC* § 2115 means a full fiscal year or twelve-month period from January 1 to December 31.

Here, Debtor's fiscal year was set as the calendar year. Therefore, Debtor's first full fiscal year, or first "full income year," was 1999. For purposes of the Motion, the parties agree that Debtor's activity in California in 1999 satisfied the three-factor formula. Under *subdivision (d)*, the 135-day period began to run on January 1, 2000 and expired on May 13, 2000, making January 1, 2001 "the first day of the first income year . . .

commencing on or after the 135th day" Therefore, January 1, 2001 was the trigger date for the application of CCC § 2115 to Debtor.

The Agreements and Transfers took place no later than February 2000. Therefore, Debtor was not subject to the provisions of the CCC listed under CCC § 2115(b) at the time the Agreements and Transfers occurred. Accordingly, Movants are entitled to judgment on the Seventh, Tenth, Eleventh, and Twelfth Claims, to the extent brought under CCC § 2115.

2. *The Internal Affairs Doctrine*

A California court describes the internal affairs doctrine as:

[A] conflict [**12] of laws principle which recognizes that only one State should have the authority to regulate a corporation's [*490] internal affairs-matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders-because otherwise a corporation could be faced with conflicting demands. States normally look to the State of a business' incorporation for the law that provides the relevant corporate governance general standard of care.

State Farm Mut. Auto. Ins. Co. v. Superior Court, 114 Cal. App. 4th 434, 442, 8 Cal. Rptr. 3d 56 (2003) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982) and *Atherton v. FDIC*, 519 U.S. 213, 224, 136 L. Ed. 2d 656, 117 S. Ct. 666 (1997)). "In general, courts in California follow this rule and apply the law of the state of incorporation in considering claims relating to internal corporate affairs." *In re Sagent Tech., Inc.*, 278 F. Supp 2d 1079, 1087 (N.D. Cal. 2003). Indeed, the internal affairs doctrine, as applied to director liability, has been codified in California. *See Cal. Corp. Code* § 2116.

This does not mean that California [**13] has no role in governing the conduct of foreign corporations. Clearly, California law applies to conduct unrelated to the internal affairs of a foreign corporation. *See Valtz v. Penta Inv. Corp.*, 139 Cal. App. 3d 803, 807, 188 Cal. Rptr. 922 (1983) (applying California law to a shareholder's demand to inspect a foreign corporation's records and noting that such activity is not an internal corporate affair); *Western Air Lines, Inc. v. Sobieski*, 191 Cal. App. 2d 399, 409-10, 12 Cal. Rptr. 719 (1961) (holding that a foreign corporation must comply with California securities laws when entering into stock transactions with California residents and noting that such activity is not an internal affair). Additionally, California law may apply to the internal affairs of a foreign corporation under a specific statute. *See Havlicek v.*

Coast-to-Coast Analytical Servs., Inc., 39 Cal. App. 4th 1844, 46 Cal. Rptr. 2d 696 (1995) (applying California law to a director's right to inspect a foreign corporation's records under CCC § 1602); *Wilson v. Louisiana-Pacific Res., Inc.*, 138 Cal. App. 3d 216, 187 Cal. Rptr. 852 (1982) (rejecting a constitutional challenge [**14] to CCC § 2115 as applied to a foreign corporation).

Here, Debtor is a foreign corporation incorporated in Delaware. Trustee does not dispute that the Agreements and Transfers involve the internal affairs of Debtor. Additionally, as discussed above, the trigger date under CCC § 2115(d) occurred after the Agreements and Transfers took place. Finally, Trustee has not identified any other specific statute in the Complaint applying the CCC to the conduct of a foreign corporation. Therefore, Delaware law governs the Agreements and Transfers, and Movants are entitled to judgment on the Fifth, Seventh, Tenth, Eleventh, and Twelfth Claim, to the extent brought under the CCC.

V. CONCLUSION

The plain language and practical application of CCC § 2115 show that the term "full income year" as used in *subdivision (a)* means a full fiscal year or twelve-month period from January 1 to December 31. Debtor's first full fiscal year was 1999, making January 1, 2001 the trigger date under *subdivision (d)*.

With several statutory exceptions, including CCC § 2115, the law of the state of incorporation governs the internal affairs of a corporation. Here, Debtor was incorporated in Delaware and operated [**15] as a foreign corporation in California. Additionally, CCC § 2115 and the provisions listed therein did not apply to Debtor until after the Agreements and Transfers took place. Therefore, Delaware law governs the internal affairs of Debtor during the [*491] relevant period, and partial summary judgment on the Fifth, Seventh, Tenth, Eleventh, and Twelfth Claims, to the extent brought under the CCC, is appropriate.

This memorandum opinion shall constitute my findings of fact and conclusions of law.

Dated: April 16, 2004

JOHN E. RYAN

United States Bankruptcy Judge



LEXSEE 2007 DEL.CH. LEXIS 68

**IN THE MATTER OF TRANSAMERICA AIRLINES,
INC.; HARRY A. AKANDE, Petitioner/Plaintiff, v.
TRANSAMERICA AIRLINES, INC., a Delaware corpora-
tion, f/k/a, TRANS-INTERNATIONAL AIRLINES, INC., a
Delaware corporation, BURTON E. BROOME, SHIRLEY
H. BUCCIERI, EDGAR H. GRUBB, and TRANS-
AMERICA CORPORATION, a Delaware Corporation.,
Respondents/Defendants.**

Civil Action No. 1039-VCP

**COURT OF CHANCERY OF DELAWARE, NEW CAS-
TLE**

2007 Del. Ch. LEXIS 68

**February 2, 2007, Submitted
May 25, 2007, Decided**

NOTICE:

THIS OPINION HAS NOT BEEN
RELEASED FOR PUBLICATION.
UNTIL RELEASED, IT IS SUBJECT
TO REVISION OR WITHDRAWAL.

SUBSEQUENT HISTORY: Motion
denied by, Motion to strike denied by
Akande v. Transamerica Airlines, Inc.
(*In re Transamerica Airlines, Inc.*), 2008
Del. Ch. LEXIS 27 (Del. Ch., Feb. 25,
2008)

Affirmed by *Transamerica Airlines, Inc.*
v. Akande, 2010 *Del. LEXIS 96 (Del.,*
Mar. 5, 2010)

PRIOR HISTORY: *Akande v. Trans-*
america Airlines, Inc. (In re Trans-
america Airlines, Inc.), 2006 *Del. Ch.*
LEXIS 47 (Del. Ch., Feb. 28, 2006)

COUNSEL: [*1] James S. Green, Es-
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John G. Harris, Esquire, RILEY RIPER HOLLIN & COLAGRECO, Wilmington, Delaware; Bernard P. Simons, Esquire, REED SMITH LLP, Los Angeles, California, Attorneys for Defendants.

OPINION

MEMORANDUM OPINION

PARSONS, Vice Chancellor.

Plaintiff, Harry A. Akande, has petitioned this Court to recognize and enforce a money judgment rendered in Nigeria in 1999. The judgment is a final judgment rendered on a suit for breach of contract brought by Akande in 1976. One of the defendants in the Nigerian action and this action is TIA. Throughout the Nigerian proceedings until TIA's dissolution in 1998, TIA was a wholly owned subsidiary of another defendant in this action, Transamerica Corporation ("Transamerica").

After nearly 23 years of litigation, which included numerous delays, postponements and two complete trials on the merits, Akande received a final money judgment that, with pre and post-judgment interest, he claims now totals approximately \$ 17 million. Defendants in this action vigorously have opposed Akande's attempt to have the judgment [*2] recognized.

The parties have cross-moved for summary judgment and, pursuant to Court of Chancery Rule 56(h), the case is ripe for decision on the merits on the record submitted in connection with those motions. This opinion contains the Court's findings of facts and conclusions law. For the reasons set forth herein, I find that Delaware law provides for recognition of Akande's judgment for breach of a commission agreement for 1976 and that the various defenses raised by Defendants do not bar the judgment's recognition in this state.

I. BACKGROUND AND FACTS

A. The Parties

Plaintiff, Harry A. Akande, is a citizen of the Federal Republic of Nigeria. He was at all relevant times a principal and 50% shareholder of the New Africa Technical and Electrical Company, Ltd. ("NAFTECH"), a Nigerian company incorporated on May 5, 1973.¹

1 Opening Br. in Supp. of Pl.'s Mot. for Summ. J. ("POB") App. A1, A110.

Defendant Transamerica Airlines, Inc., formerly known as Trans-International Airlines, Inc. (referred to throughout this opinion as "TIA"), was incorporated in Delaware on November 13, 1967 and dissolved on December 14, 1998.² TIA was at all times relevant to these proceedings a wholly owned subsidiary [*3] of Defendant Transamerica Corporation, a Delaware corporation.

Transamerica is the successor in interest to TIA.³

2 Third Am. Compl. ("Compl.") P 29; POB App. A331-37.

3 Compl. P 6; Defs.' Answer and Aff. Defenses ("Answer") P 6.

Defendants Burton E. Broome, Shirley H. Buccieri and Edgar H. Grubb were, at all times relevant to these proceedings, directors and officers of TIA (collectively, the "Individual Defendants").⁴

4 Compl. PP 3-5; Answer PP 3-5; Opening Br. in Supp. of Defs.' Suppl. Mot. for Summ. J. ("DOB") at 7.

B. Facts

1. The Nigerian proceedings

Most of the facts pertinent to this case are recounted in this Section B. The Court discusses some disputed details, however, in later sections where their relevance to the parties' arguments is more immediate.

In 1975, the Nigerian Pilgrims Board, a governmental agency, awarded a contract to TIA to transport pilgrims between Kano, Nigeria and Jeddah, Saudi Arabia for the Hadji Movement (the "Charter Agreement").⁵ During the period that TIA conducted these operations, it housed its employees at the Bagauda Lake and Daula Hotels in the state of Kano, Nigeria.⁶ During 1975 and

1976, TIA retained NAFTECH as its agent for securing pilgrims [*4] for transport, and in 1975 TIA paid NAFTECH a 5% commission for the services it rendered (the "Commission Agreement").⁷ In 1976, NAFTECH's other 50% shareholder, Michael A. Omisade, falsely represented to TIA that NAFTECH was being dissolved.⁸ Omisade then contracted to have his newly formed company, New Africa Development Company ("NADCO"), perform the services NAFTECH had been performing for TIA.⁹

5 POB App. A372.

6 *Id.* at A316. Affidavit of Walter J. McCauley P 7. Pursuant to Ct. Ch. R. 56(e), Defendants moved to strike several paragraphs in the McCauley affidavit, as well as paragraphs in the affidavits of Malam Mohammed Isyaku and Malam Nisidi Abubakar, on the grounds that the challenged averments are not based on the personal knowledge of the affiants and are therefore inadmissible. Because the Court has not relied upon any of the contested paragraphs of the McCauley and Isyaku affidavits, Defendants' motions to strike those affidavits are denied as moot. As to the Abubakar affidavit, Defendants object to paragraphs 7 and 8. The Court agrees that paragraph 7 and the opening phrase of paragraph 8, "[t]hat upon this service on the Assistant Manager," are inadmissible

hearsay. Thus, [*5] I hereby strike those portions of the Abubakar affidavit, but otherwise deny Defendants' motion.

7 POB App. A372.

8 *Id.* at A367-69.

9 *Id.*

When confronted with Akande's allegations of deception by Omisade, TIA responded by informing Akande that they would continue to use and pay commissions to Omisade and NADCO and that Akande and Omisade would have to settle the dispute between themselves.¹⁰ On October 13, 1976, Akande filed suit in the High Court of Lagos State against Omisade, NADCO, TIA and NAFTECH (as a nominal defendant) for breach of contract, among other claims.¹¹ On January 18, 1977, the Honorable L.J. Dosunmu issued a decision denying Akande's claims against Omisade and NADCO, but granting them with regard to TIA.¹² Judge Dosunmu awarded Akande 10,000 Naira (the Nigerian currency) in damages. Akande then appealed to the Federal Court of Appeal the lower court's finding in favor of Omisade and NADCO. On March 28, 1978, TIA cross-appealed on the following grounds:

1. That the learned Trial Judge erred in Law and on the facts in entering judgment against the 3<rd> Defendant [TIA] for the sum of 10,000 or at all when there was no

Contract between Plaintiff and the 3<rd> Defendant.

2. [*6] That the learned Trial Judge erred in the Law by not dismissing Plaintiff's claims insofar as the claim was one for the benefit of the Incorporated Company and Plaintiff would not and had not been authorized to sue on behalf of the Company.

3. That the learned Trial Judge misdirected himself in Law and the facts as to the ground for entering judgment against the 3<rd> Defendant.¹³

10 *Id.* at A369.

11 Compl. P 24; Answer P 24.

12 POB App. A1-8.

13 *Id.* at A13; Compl. P 32; Answer P 32.

On May 4, 1983, the Federal Court of Appeal affirmed the lower court's judgment that Akande properly brought suit on behalf of NAFTECH and reversed the dismissal of Akande's claims against Omisade and NADCO.¹⁴ The Federal Court of Appeal also found that TIA had failed to pursue, and hence abandoned, its cross-appeal.¹⁵

14 POB App. A15-30.

15 *Id.* at A18.

On June 3, 1983, Omisade and NADCO appealed to the Supreme Court of Nigeria. ¹⁶ On April 10, 1987, the Supreme Court held that the original action should have been brought in the Federal High Court of Lagos, rather than the High Court of Lagos State, and ordered the action remanded to the Federal High Court Holden at Lagos for trial *de novo*.

16 *Id.* at A31-32.

The Nigerian [*7] litigation then experienced numerous delays and adjournments for a variety of reasons and ultimately lasted 12 more years. Finally, on October 20, 1999, 23 years after Akande first filed suit, he obtained a judgment against all of the defendants, including TIA (the "Judgment" or the "Nigerian Judgment"). ¹⁷

17 *Id.* at A110-23.

a. The Riley Affidavit

At all times relevant to the Nigerian proceedings, John F. Riley, Jr. was TIA's Vice President and General Counsel. ¹⁸ On April 10, 1984, Riley executed an affidavit in support of NADCO and Omisade's appeal to the Supreme Court of Nigeria (the "Riley Affidavit"). ¹⁹ A draft of the Riley Affidavit was first prepared by Omisade's attorney and sent to Riley via Omisade. After editing paragraphs 13 and 14, Riley executed the document and sent it back to Omisade on February 9, 1984. ²⁰ According to the Affidavit, Riley had the authority of the 3rd Defendant, TIA, to

execute the document. ²¹ Both sides in this case rely on various portions of the Riley Affidavit as evidence that TIA did, or did not, submit to the personal jurisdiction of the Nigerian courts.

18 Defs.' Answering Br. In Opp'n to Pl.'s Mot. for Summ. J. ("DAB") Ex. 1.D (Aff. of John F. [*8] Riley (cited as "Riley Aff. P ")).

19 DAB Ex. 1.D.

20 *Id.* Ex. 1.C.

21 Riley Aff. P 2.

The following are among the averments most relevant to this case that Riley made in his Affidavit to the Supreme Court of Nigeria:

That I verily believe that if the writ of Summons and the Statement of Claim were served on [TIA] we would have vigorously contested the jurisdiction of any Nigerian Court of Law over [TIA] and, if required, and without accepting, conceding or admitting such jurisdiction, would have filed a valid defense to the action;

That [TIA is] willing and ready to contest the jurisdiction of any Nigerian Court of Law over [TIA] and, if required, to defend the action.

* * * *

That it would be in the interest of justice if [TIA were]

given the opportunity of being heard by ordering that the case should be sent back to the Lower Court for a rehearing wherein [TIA] will have the opportunity of stating our case²²

The Riley Affidavit is discussed more fully in Section II.C which addresses Defendants' arguments that they did not receive timely notice of the Nigerian proceedings.

22 *Id.* PP 13, 14, 16.

2. Akande's efforts to enforce the Nigerian Judgment

After finally obtaining the Judgment in 1999, [*9] Akande first tried to collect against the defendants remaining in Nigeria.²³ That group did not include TIA. Unsuccessful in Nigeria, Akande, through his attorney, contacted TIA in March 2002 and demanded payment of the Judgment.²⁴ Thereafter, Akande and Transamerica's counsel exchanged several letters regarding the Judgment, with Transamerica repeatedly asking for more information, including a certified copy of the Judgment, copies of the Commission Agreement, proofs of service, etc.²⁵ After these collection efforts failed, Akande hired a Michigan lawyer who filed suit in New York in October 2003 to enforce the Judgment. In the Spring of 2004, however, Akande voluntarily dis-

missed that suit because his new attorney could not practice in New York.²⁶

23 POB App. A134-35.

24 *Id.* at A195.

25 *Id.* at A195-200.

26 *Id.* at A155.

C. Procedural History of this Action

On January 21, 2005, Akande filed this Delaware action to have the Nigerian Judgment recognized and enforced. On February 17, 2005, he filed an Amended Petition and Complaint. In addition, before any defendant filed a responsive pleading, Akande filed a Second Amended Petition and Complaint on April 21, 2005.

On June 15, 2005, Defendants [*10] moved to dismiss the Second Amended Complaint. In response, Akande sought leave to file a further amendment. Defendants opposed that request. On February 28, 2006, the Court issued an opinion granting in part the motion to dismiss, but allowing Akande to amend his complaint. Among other things, the Court permitted Akande to take discovery on his claims for recognition and enforcement of the Judgment under Delaware's Uniform Foreign Money-Judgments Recognition Act ("UFMJRA" or the "Act").²⁷ Akande filed his Third Amended Complaint on April 17, 2006 (the "Complaint"). Defendants filed their Answer and Affirmative Defenses on May 12, 2006 ("Answer").

27 10 Del. C. §§ 4801-4808.

Several months later, the parties cross-moved for summary judgment. After extensive briefing, the Court heard argument on those motions on January 17, 2007. On February 2, 2007, the parties submitted limited supplemental briefing letters addressing certain concerns raised at argument.²⁸

28 Letter to the Court from George H. Seitz, Esq., dated February 2, 2007; Defendants' Supplemental Letter Brief dated February 2, 2007. Akande objected that Defendants' letter exceeded the scope of the Court's authorization of supplemental [*11] briefing and urged the Court to strike the Third, Fourth and Fifth numbered items in it. Defendants' Third numbered item discusses issues that were within the scope of my instructions or of questions I raised at argument, so I deny the request to strike that item. Similarly, I find that the first paragraph of Defendants' Fourth item, standing alone, is a fair comment on questions the Court raised at argument, but my ruling on the merits is not inconsistent with Defendants' position in that paragraph. Otherwise, however, I agree that Defendants' Fourth and Fifth numbered items go beyond the limited scope of the leave given at argument, and therefore strike those items.

Moreover, in the Fourth and Fifth items, Defendants attempt to bolster their arguments by relying on the Revised Uniform Foreign-Country Money Judgments Recognition Act. Although the National Conference of Commissioners on Uniform State Laws ("NCCUSL") approved this Revised Uniform Act in July 2005, and Defendants did not file their pending motion for summary judgment until more than a year later, they never mentioned this Revised Act even once in the extensive briefing on the parties' cross motions or at argument. Moreover, [*12] it does not appear that Delaware has adopted the Revised Act. For these reasons, I hold that Defendants have waived any argument they might have made based on that document.

Regrettably, the combined litigation in this dispute, from Lagos, Nigeria in 1976 to Delaware in 2007 has spanned an entire generation. As the Nigerian

court that rendered the Judgment stated early in its 1999 ruling, "[i]t is perhaps appropriate at this stage to make a few comments about the tortuous history of this case which started in the High Court of Lagos State since [sic] 1976."²⁹ When analyzing the parties' disputes, it is helpful to segment this tortured history into smaller intervals. Temporally, the first phase of the Nigerian proceedings began with the filing of the suit in the High Court of Lagos State in 1976 and ended with the judgment of the Supreme Court of Nigeria in 1987 ordering a trial *de novo* (the "State Proceedings"). The other major phase of the Nigerian proceedings extended from the filing of the second petition in the Federal High Court at Lagos in 1987 to the rendering of the Judgment in 1999 (the "Federal Proceedings"). In addition, for convenience, I refer to the period from the date [*13] of the 1999 Judgment to the commencement of these Delaware proceedings in 2005 as the "Interim Period."

29 POB App. A113.

II. ANALYSIS

A. Standard

Court of Chancery Rule 56(h) provides that:

Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact

material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

The usual standard of drawing reasonable inferences in favor of the non-moving party does not apply when deciding a case under Rule 56(h).³⁰ The parties in this case essentially agreed that their cross-motions for summary judgment should be treated as a stipulation for decision on the record submitted.³¹ In any event, they failed to present argument that there is an issue of fact material to the disposition of either motion, which supports adopting that approach.³²

30 *Am. Legacy Found V. Lorillard Tobacco Co.*, 886 A.2d 1, 18 (Del. Ch. 2005).

31 Transcript of Argument held on January 17, 2007 ("Tr.") at 23-24, 69-70; *see* Letter to Court from John G. Harris dated Feb. 2, 2007, at [*14] 1.

32 *See* Ct. Ch. R. 56(h).

The UFMJRA provides for the recognition of "foreign judgments," meaning judgments granting or denying recovery of a sum of money rendered in a jurisdiction outside the United States and its territories.³³ The Act has been adopted in over 30 states.³⁴ As adopted

in Delaware, the Act "applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." ³⁵ *Section 4803* of the Act provides that:

Except as provided in § 4804 of this title, a foreign judgment meeting the requirements of § 4802 of this title is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. *The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.* ³⁶

³³ 10 *Del. C. § 4801*. The UFMJRA is a codification of common laws of comity. *See* Jay M. Zitter, *Construction and Application of Uniform Foreign Money-Judgments Recognition Act*, 88 *A.L.R. 5th* 545, at *2 (2001); *Enron (Thrace) Explor. & Prod. BV v. Clapp*, 378 *N.J. Super.* 8, 874 *A.2d* 561, 564 (*N.J. Super. Ct. App. Div.* 2005).

³⁴ Website of Uniform Law Commissioners, [*15] http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-

ufmjra.asp (last visited May 25, 2007).

³⁵ 10 *Del. C. § 4802*.

³⁶ 10 *Del. C. § 4803* (emphasis added).

A properly authenticated judgment of another state is entitled to full faith and credit in Delaware to the same extent it would receive in the state in which it was entered. ³⁷ Apart from Defendants' argument that the Nigerian proceedings are null and void due to a defect related to the original writ of summons, none of the parties in this action disputes that the Nigerian Judgment is final and grants a recovery of a sum of money, at least for the commissions that were due under the Commission Agreement for 1976. ³⁸

³⁷ *U.S. Const. art. 4, § 1; Guayaquil & Quito Ry. Co. v. Suydam Holding Corp.*, 50 *Del.* 424, 11 *Terry* 424, 132 *A.2d* 60, 66 (*Del.* 1957).

³⁸ Defendants argue that Akande is not entitled to the relief, including damages, he seeks for post-1976 commissions because the Nigerian courts did not fully determine the amount of damages to which Akande would be entitled for that period. This argument is addressed in Section II.G, *infra*.

Section 4804(a) of the UFMJRA provides that a foreign judgment is not conclusive if:

(1) The judgment was rendered under [*16] a system

which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) The foreign court did not have personal jurisdiction over the defendant; or

(3) The foreign court did not have jurisdiction over the subject matter.

In addition, *Section 4804(b)* sets forth discretionary reasons why a court may refuse to recognize a judgment. These include:

(1) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable the defendant to defend; [or]

* * * *

(5) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court....

In certain circumstances that plainly would satisfy a minimum contacts jurisdictional requirement, " the UFMJRA authorizes recognition of foreign judg-

ments even if the foreign court technically may have lacked personal jurisdiction over the defendant according to its own law. Certainly, under the laws of Delaware, the existence of the circumstances identified in *Section 4805* of the Act would support the exercise of personal jurisdiction over a defendant. [*17] Specifically, *Section 4805* provides:

(a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if:

(1) The defendant was served personally in the foreign state;

(2) The defendant voluntarily appeared in the proceedings other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over the defendant;

* * * *

(5) The defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or

(6) The defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such operation.

"The purpose of the UFMJRA is to make it more likely that judgments rendered in a state that adopted the Act will be recognized abroad, since in a large number of civil-law countries, the granting of conclusive effect to money judgments from foreign courts is made dependent on reciprocity."⁴⁰

39 See *Kam-Tech Sys. Ltd v. Yardeni*, 340 N.J. Super. 414, 774 A.2d 644, 652 (N.J. Super. Ct. App. Div. 2001).

40 Zitter, *supra* note 33, at *2.

B. [*18] The Parties' Contentions

Count I of Plaintiff's Complaint seeks *recognition* of the Nigerian Judgment. Count II asks the Court to *enforce* the Judgment. The enforcement of judgments is addressed only obliquely by the Act. For example, the official comment to *Section 3* of the model UFMJRA, 10 *Del. C. § 4803* as enacted in Delaware, says that "[t]he method of enforcement will be that of the Uniform Enforcement of Foreign Judgments Act of 1948 ("UEFJA") in a state having enacted that Act." Delaware has adopted the UEFJA to govern the enforcement of foreign judgments that are entitled to full faith

and credit in this State.⁴¹ The UEFJA provides that a judgment of a court of the United States or of a court entitled to full faith and credit may be filed with any prothonotary and should be treated the same as a judgment rendered by the Superior Court of this State.⁴² Upon the filing of a qualifying foreign judgment, the UEFJA provides for notice to the judgment debtor and provides the judgment creditor with various means for collecting on the judgment, including the execution of a lien on real or personal property. Moreover, *Section 4786 of the UEFJA* makes clear that the act does not impair [*19] a judgment creditor's right to bring an action to enforce a judgment.⁴³

41 10 *Del. C. §§ 4781-4787*.

42 10 *Del. C. § 4782*.

43 *Enron (Thrace) Explor. & Prod. BV v. Clapp*, 378 N.J. Super. 8, 874 A.2d 561, 565-66 (N.J. Super. Ct. App. Div. 2005).

Thus, although Akande's Complaint includes a distinct claim for enforcement, for purposes of this action, the critical questions relate to whether the Nigerian Judgment is "final and conclusive and enforceable where rendered" and whether the Judgment should be recognized in Delaware.⁴⁴ If the Court answers these questions in the affirmative, the Judgment will be enforceable under the UEFJA in the same manner as a judgment of the Superior Court.

44 Delaware's version of the UFMJRA does not contain specific procedures for registering and recognizing judgments pursuant to the Act.

Defendants advance several arguments for why this Court should not recognize the Judgment. They argue that Akande's petition for recognition and enforcement is time-barred by the applicable statute of limitations, or, alternatively, the equitable doctrine of laches. Defendants also contend that even if Akande's claims are not time-barred, the Judgment should not be recognized because it fails to [*20] meet the requirements of the UFMJRA. Pursuant to this line of defense, Defendants argue that TIA did not receive notice of, was not represented at and did not participate in, the Nigerian proceedings and that Akande failed to give TIA timely notice of the Judgment. Defendants also assert several other arguments for nonrecognition, including lack of personal jurisdiction and lack of subject matter jurisdiction. These defenses are addressed in the sections that follow. I begin with Defendants' arguments that the Judgment should not be recognized because TIA did not have notice of the Nigerian proceedings and the Nigerian courts lacked personal jurisdiction over TIA.

C. Notice and Personal Jurisdiction

Defendants argue that they did not receive timely or sufficient notice of the Nigerian proceedings or copies of the complaint. They contend that the defects

of process and service of process in the Nigerian proceedings render the Judgment unrecognizable because the proceedings failed to afford TIA due process of law. Similarly, Defendants urge this Court to decline to recognize the Judgment pursuant to *Section 4804(b)(1)* of the Act because TIA did not receive notice of the foreign claim in [*21] time to adequately defend itself. Additionally, Defendants argue that because Akande never properly effected service on TIA, the Nigerian courts lacked personal jurisdiction over TIA.

This Court knows of only one Delaware case interpreting the UFMJRA, *Abd Alwakhad v. Awad Amin*, a case that dealt, in part, with issues of notice.⁴⁵ In *Awad Amin*, the plaintiff sought to have the court recognize an Israeli judgment entered by default by a Jerusalem court against a co-defendant wife on a promissory note executed by the wife's co-defendant husband. There was no evidence that the wife signed or knew of the \$ 130,000 promissory note.⁴⁶ The "service" that the wife received was an unofficial English translation of a Hebrew document, translated by the husband's domestic relations attorney and supposedly delivered by the couple's minor son. The document did not say that the wife was required to respond to the complaint or face a default judgment in the underlying action.⁴⁷ Moreover, the plaintiff in the Delaware action did not present any evidence of Israeli law on the issues of what constitutes appropriate service on a nonresident of Israel or

whether a husband could obligate a wife in such [*22] circumstances.⁴⁸ The Delaware court declined to recognize the judgment because the "notice" the wife received did not comport with the requirements of due process or provide a sufficient basis for the Jerusalem court to exercise personal jurisdiction over the wife.

45 2005 Del. Super. LEXIS 320 (Sept. 14, 2005).

46 *Id.* at *7.

47 *Id.* at *6-7.

48 *Id.* at *8.

The court in *Awad Amin* also expressed concern that the Israeli judgment may have been obtained by fraud. Among many problems with the purported judgment, the court observed that the note was not signed by the wife and that the only evidence arguably connecting the wife to the note was a number on the loan documents which, according to the husband, was he and his wife's marriage identification number.⁴⁹ The court also expressed skepticism about the foreign court's apparent entry of judgment on the note at issue before it was fully due by its own terms. Moreover, the court found the husband "wholly unbelievable" when he testified that unbeknownst to customs officials, airport security, and even his own wife, he had carried \$ 130,000 to the United States in cash in a bag that he carried onto the plane.⁵⁰

49 *Id.* at *1-2.

50 *Id.* at *9-10.

This case [*23] is distinguishable from *Awad Amin* in several respects. Defendants in this case have made no specific allegations of fraud. Nor have Defendants disputed the existence of the contract underlying the action for breach that led to the Nigerian Judgment. Furthermore, the putative service of process, although Defendants contest its adequacy, was made on TIA in Nigeria and in English.⁵¹ And importantly, as discussed below and unlike the judgment debtor (wife) in *Awad Amin*, TIA had notice of the Nigerian proceedings.

51 POB App. A321-25.

1. Did TIA receive timely and sufficient notice of the Nigerian proceedings?

I first note that Defendants' due process argument mostly pertains to issues of service of process and notice; *i.e.*, they urge this Court to refuse to recognize the Judgment pursuant to § 4804(b)(1).⁵² Defendants have not argued or briefed any challenge to recognition based on § 4804(a)(1) which involves the broader proposition that the Judgment "was rendered under a *system* which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."⁵³ Thus, I take as undisputed that the Nigerian system does provide impartial tribunals and due process [*24] sufficient to meet the prescription of § 4804(a)(1). This conclusion is bolstered by the facts that Nigeria has an

English common law system with reported precedent and that the State and Federal Proceedings against TIA in Nigeria, although long and exasperating, generally followed an orderly, logical, and reasonably well documented progression.⁵⁴

52 Defendants' arguments that the Judgment should not be recognized pursuant to §§ 4804(a)(2) and (a)(3) are addressed in Sections II.C and II.E, respectively.

53 *10 Del. C. § 4804(a)(1)* (emphasis added); *Society of Lloyd's v. Ashenden*, 233 F.3d 473, 477-78 (7th Cir. 2000) (applying Illinois law) (Posner, J.) (discussing the distinction between arguing that a system of law does not afford due process and arguing that particular proceedings within a system of law did not afford due process).

54 *Hilton v. Guyot*, 159 U.S. 113, 205-06, 16 S. Ct. 139, 40 L. Ed. 95 (1895); *Canadian Imperial Bank of Commerce v. Saxony Carpet Co.*, 899 F. Supp. 1248, 1252 (S.D.N.Y. 1995) ("New York case law dictates that the exceptions involving jurisdictional defects or procedural unfairness be construed especially narrowly when the alien jurisdiction is, like Canada, a sister common law jurisdiction [*25] with procedures akin to our own." (quotations omitted)) There is some lack of uniformity in case law from other jurisdictions regarding who

has the burden of proof on the factors specified in § 4804(a)(1). This issue theoretically could be important in that the grounds for nonrecognition listed in § 4804(a) are mandatory, while those listed in § 4804(b) are discretionary. In *S.C. Chimexim S.A. v. Velco Enter. Ltd.*, 36 F. Supp. 2d 206 (S.D.N.Y. 1999), the Court held that the plaintiff judgment creditor bore the burden of proving each of §§ 4804(a)(1)-(a)(3). Most courts, however, treat § 4804(a)(1) as a defense for which defendants bear the burden of proof. I consider the latter view more persuasive. In *Kingsland Holdings Inc. v. Bracco*, 1996 Del. Ch. LEXIS 28, at *13-14 (Mar. 6, 1996), the fact that a judgment was rendered in a system of justice based upon the English common law system bolstered the court's presumption of validity for purposes of sequestering stock. Nevertheless, for purposes of this opinion, I need not decide this issue because, even if Akande did bear the burden of proof as to the applicability of § 4804(a)(1), I am convinced that he has met it in the circumstances [*26] of this case.

In contrast, Defendants do contend that the Nigerian Judgment is not conclusive under § 4804(a)(2) because the Nigerian court did not have personal jurisdiction over TIA. In a related vein, Defendants also argue that the Judgment need not be recognized under §

4804(b)(1). The question that must be asked under § 4804(b)(1) of the UFMJRA is whether TIA had notice of the Nigerian proceedings in sufficient time to allow it to defend itself. I find that it did.

The parties rely upon the affidavits of Nigerian lawyers to support their respective positions on Nigerian law. Plaintiff submitted the affidavits of retired Justice E.O. Sanyaolu.⁵⁵ Defendants submitted the affidavit of Uzoma Azikiwe, a lawyer and Senior Advocate of Nigeria, a title indicating his senior position within the Nigerian legal community.⁵⁶ Pursuant to Court of Chancery Rule 44.1, this Court "in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law."

55 POB App. A231-311 (Affidavit of The Honorable Justice E.O. Sanyaolu (RTD) dated [*27] Mar. 27, 2006 (cited as "Sanyaolu Aff. 3/27/06 P ")), and Further Affidavit of the Honorable Justice E.O. Sanyaolu (RTD) dated Sept. 22, 2006 (cited as "Sanyaolu Aff. 9/22/06 P ")).

56 DOB Ex. 3 (Affidavit of Uzoma Azikiwe dated Aug. 22, 2006 (cited as "Azikiwe Aff. 8/22/06 P ")); DAB Ex. 3 (Affidavit of Uzoma Azikiwe dated Sept. 25, 2006 (cited as "Azikiwe

Aff. 9/25/06 P ")), and Reply Affidavit of Uzoma Azikiwe dated Oct. 27, 2006 ("cited as Azikiwe Aff. 10/27/06 P ")).

Defendants' expert, Azikiwe, opines that the deficiencies of service in this case have rendered all 23 years of the Nigerian proceedings a nullity. Sanyaolu disagrees with Azikiwe on most substantive points. For present purposes, however, the key issue is whether the Judgment is enforceable where rendered, *i.e.*, in Nigeria. Both Azikiwe and Sanyaolu seem to agree that the Judgment is enforceable in Nigeria, at least until it is re-opened and reargued there.⁵⁷ Beyond that, Azikiwe's affidavits consist almost entirely of an extended argument that if the question were presented to a Nigerian court now, that court would invalidate the Nigerian Judgment because of various procedural irregularities.

57 Sanyaolu [*28] Aff. 9/22/06 P 3; Azikiwe Aff. 8/22/06 P 5. Azikiwe suggests that the Judgment could be nullified in further proceedings in Nigeria based on certain technical deficiencies that render the original writ of summons void in his view.

In his affidavit, Azikiwe reasons that the Judgment is unenforceable in Nigeria because the entire action was void *ab initio* because Akande did not obtain leave of the court before serving the original writ of summons out of jurisdiction.⁵⁸ Sanyaolu, on the other hand, avers that the defects in the writ of

summons render the Judgment voidable rather than void. ⁵⁹ I find Sanyaolu's position more persuasive.

58 Akande filed his first complaint in the High Court of Lagos State. The writ of summons was served on TIA in another state of the Nigerian Federation, Kano.

59 Sanyaolu Aff. 9/22/06 PP 13-45.

Azikiwe bases his opinion on a number of Nigerian cases he cites in, and provides as exhibits to, his affidavit. The Court concludes that those cases do not support Azikiwe's position. For example, to support his assertion that under Nigerian law a defect in a writ of summons renders the entire action void, Azikiwe relies upon *Jadcom Ltd. v. Oguns Electricals*, decided [*29] in the Court of Appeal (Abuja Division) on May 15, 2003. ⁶⁰ In that case, the court says that failure to obtain the leave of a court or judge before serving process out of jurisdiction effects the jurisdiction of the court and that in some older decisions such failure rendered the entire action null and void. Nevertheless, the court qualifies its statement by adding:

This is only applicable in a situation where the defendant has timeously [sic] raised a protest against the manner of the issuance and or service of the writ of summons out of jurisdiction. But where, in spite of such glaring irregu-

larities, the Defendant decided to waive his right of protest by taking steps in the proceedings after service, then he cannot be heard to complain of noncompliance. ⁶¹

60 Azikiwe Aff. 9/25/06 Ex. UHA 6.

61 *Id.* at 112.

The court distinguished the older opinions which had held that such irregularities in service could render an action null and void, by noting that, unlike the situation in *Jadcom*, those older cases did not involve a waiver. Where there is a waiver, according to the court in *Jadcom*, such defects in the writ or service merely render the action voidable, not void. ⁶² The other cases provided [*30] by Azikiwe do not contradict the court's ruling in *Jadcom*. ⁶³

62 *Id.* at 173.

63 *See id.* Exs. UHA 5 and UHA 7. Azikiwe's predilection to draw questionable inferences in favor of Defendants is also evident in Azikiwe's statement that TIA was *never* at the Bagauda Hotel, Kano. He infers this because service could not be made on TIA at that hotel in 1988. Azikiwe Aff. 8/22/06 P 12, Exs. UHA 11 and UHA 12. The fact that TIA could not be served at the Bagauda Hotel

in 1988, however, does not support Azikiwe's claim that TIA was never at the hotel.

Furthermore, the evidence shows that TIA had notice of the State Proceedings at least as early as March 28, 1978, when TIA appealed the judgment of the High Court of Lagos to the Federal Court of Appeal. ⁶⁴ This shows actual notice of the Nigerian proceedings more than 21 years before the Judgment was rendered. TIA also had notice as of April 10, 1984, when its Vice President, John F. Riley, made out an affidavit on TIA's behalf for submission to the Supreme Court of Nigeria in the State Proceedings. Defendants admitted this during argument. ⁶⁵ I also conclude that TIA, having appealed from the High Court of Lagos State in 1978 and participated in later [*31] proceedings via the Riley Affidavit, more likely than not had notice of the subsequent and resultant Federal Proceedings. Riley averred that TIA wanted a fair chance to be heard in a new trial. ⁶⁶ On April 10, 1987, the Supreme Court granted Defendants, including TIA, a trial *de novo*. Based on my review of the evidence, I find that it is reasonable to infer, and I do infer, that TIA, whose agent Riley executed an affidavit in April, 1984 in support of a request for a new trial, was aware that the court had granted this request. TIA admits that its co-defendant Omisade kept them informed of the Nigerian proceedings, and I infer that TIA knew about the Federal Proceedings that began in September 1988. ⁶⁷

64 Defendants admit TIA's President may have received a courtesy copy of the Summons and Statement of Claim in or around the end of 1976. *See* Compl. P 25; Answer P 25.

65 Tr. at 37, 53-54.

66 Riley Aff. P 16.

67 POB App. A113, A432.

Defendants' primary arguments regarding notice focus more on the sufficiency of process and service of process than on denying that TIA had notice of the Nigerian proceedings. I find that Akande's difficulties in serving process on TIA were due in part to TIA's own [*32] actions. TIA did not inform Akande or the Nigerian courts that it was going to be dissolved by its parent, Transamerica, or that Transamerica would assume TIA's liabilities, nor did TIA give any of the parties involved in the Nigerian action notice that it was going to wind up its affairs or information on how to contact TIA. Thus, TIA did not inform Akande or the Nigerian courts that it no longer had a corporate address at the Oakland Airport, where Akande directed service to TIA via courier. ⁶⁸ Having had notice of the proceedings, TIA appears to have strategically avoided service of process. In these circumstances, I find that TIA did receive notice of the Nigerian proceedings in sufficient time to enable it to defend itself. Thus, Defendants have not shown the requirements for discretionary non-recognition of the Judgment under §

4804(b)(1). Nor do the facts of this case provide any other grounds for this Court, in the exercise of its discretion, to deny recognition of the Nigerian Judgment.

68 POB App. A87-92; Sanyaolu Aff. 3/27/06 P 24, Exs. G1-G5.

This conclusion comports with developing case law on the UFMJRA in other states. For example, in *Farrow Mortgage Services Proprietary* [*33] *Ltd. v. Singh*,⁶⁹ the plaintiff petitioned a Massachusetts court to recognize an Australian judgment. The defendant argued that the judgment should not be recognized because defects in the plaintiff's service of process deprived the defendant of sufficient notice to defend itself. The court held that "[t]he issue of whether service of process was defective is immaterial where defendant had sufficient notice to present a defense and did, in fact, do so."⁷⁰ The *Farrow* court found it important that, as in the present case, the defendant had sworn to an affidavit that clearly indicated that he was a defendant in the Australian action.⁷¹

69 1995 Mass. Super. LEXIS 495 (Mar. 30, 1995), *aff'd*, 42 Mass. App. Ct. 1103, 675 N.E.2d 445 (1997).

70 *Id.* at *6-7.

71 *Id.* at *7.

The defendant in *Farrow* answered the plaintiff's complaint and appeared through counsel on several more occasions. Defendants in this action have argued repeatedly that they did not attend

or otherwise participate in the Federal Proceedings. The question is what to make of their absence. A complete lack of participation could indicate that a defendant was unaware of a suit in a foreign jurisdiction. As the record shows, however, that was not the case [*34] with TIA. Rather, TIA had notice of both the State and Federal Proceedings. Under these circumstances, Defendants may not now use their choice not to appear in those proceedings as evidence that they were unaware of them. The fact that TIA chose not to participate in the Nigerian proceedings reflects a strategic decision, not ignorance of the action.

2. Did the Nigerian court have personal jurisdiction over TIA?

Defendants argue that the Nigerian Judgment is not conclusive because the Nigerian courts did not have personal jurisdiction over TIA. *Section 4805* of the Act sets forth statutorily determined conditions that limit a Court's inquiry into issues of personal jurisdiction such that, if one of the six enumerated conditions is met, "[t]he foreign judgment shall not be refused recognition for lack of personal jurisdiction." Because I have found that TIA was personally served at the Daula Hotel in Kano, Nigeria in 1976, the first such condition exists here. Thus, under *10 Del. C. § 4805(a)(1)*, the Court cannot now refuse to recognize the Judgment for lack of personal jurisdiction.⁷²

72 Defendants argue that the Court should not credit the 30-year old affidavit of service executed by [*35] Rabo Yabuku. Some of these objections go to the merits of the affidavit under Nigerian law. As to those objections, I rely upon Plaintiff's expert, Sanyaolu, who avers that the affidavit conforms to Nigerian law. Sanyaolu Aff. 9/22/06 PP 46-48. I consider the Defendants' other arguments against the affidavit of service without merit, and I credit it as showing that TIA was personally served in Nigeria.

Section 4805(a)(2) provides that another such condition exists if: "[t]he defendant voluntarily appeared in the proceedings other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over the defendant." I find that TIA voluntarily appeared in the Nigerian proceedings for purposes other than to contest personal jurisdiction or protect seized property (or property threatened to be seized).

TIA participated in the first appeal in the State Proceedings, from the High Court of Lagos to the Federal Court of Appeal. Among the asserted grounds for TIA's appeal was that the trial court erred as a matter of fact and law in awarding damages because there was no contract between Akande and TIA.⁷³ TIA also [*36] argued that the trial court erred in not dismissing the suit because Akande was not authorized to sue

on behalf of NAFTECH.⁷⁴ These grounds for appeal go to the *merits* of Akande's suit and his standing to sue. Thus, under *Section 4805(a)(2)*, this Court may not refuse to recognize the Judgment for lack of personal jurisdiction, which I understand to include challenges to the sufficiency of process and to service of process. Instead, the UFMJRA creates a conclusive presumption that the Nigerian courts validly exercised personal jurisdiction over TIA.

73 POB App. A13.

74 *Id.*

Section 4805(a)(5) provides another basis for this Court to refuse to entertain a challenge to the Nigerian courts' personal jurisdiction over TIA. That section applies whenever, "[t]he defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state." Although Defendants contend otherwise, I find that the evidence shows that TIA had a business office in the Daula Hotel in Kano, Nigeria in 1976 and for some time thereafter, perhaps into the early 1980's. During at least parts of [*37] this period, TIA housed a number of employees at the Daula Hotel. Defendants have emphasized, in their briefs and papers, that they never had a *permanent* business office in Nigeria. In so doing, Defendants seem to interpret § 4805(a)(5) as requiring that TIA have had a permanent business office in Nige-

ria in order to come within that provision or for the Nigerian courts to exercise personal jurisdiction over it. This misconstrues the Act. Although the statute does not define the term "business office," there is nothing in *Section 4805(a)(5)* that suggests that the defendant must have had a *permanent* place of business in the foreign state. The statute only requires that the defendant have had a business office in the country and that the cause of action have arisen out of business done by the defendant through that office.

Other courts have reached a similar conclusion. In *Canadian Imperial Bank of Commerce v. Saxony Carpet Co.*,⁷⁵ the defendant received notice of a Montreal complaint in New York. Saxony's counsel replied with a letter asserting that the defendant was not subject to personal or subject matter jurisdiction in the Canadian action, but Saxony took no further action in the [*38] Canadian proceedings. Saxony did not have an office in, or regularly go to, Canada. After obtaining a default judgment, the Canadian judgment creditor sought to enforce its judgment against the defendants in New York. The court applied common law principles of comity akin to those expressed in *Section 4805(a)(5)* of the UFMJRA and recognized the judgment. It held that the cause of action in the Canadian litigation, collection on an account receivable, arose from a contract for the delivery of carpet manufactured in Canada and shipped to New York. The court concluded that the contract be-

tween Canadian and New York businesses, involving significant performance in Canada in the form of the carpet manufacturing, along with the defendants' occasional visits to Quebec, were sufficient for the Canadian court to exercise personal jurisdiction over Saxony.

75 899 F. Supp. 1248 (S.D.N.Y. 1995), *aff'd*, 104 F.3d 352 (2d Cir. 1996) (applying New York law); *see also Farrow*, 1995 Mass. Super. LEXIS 495, at *5-6; *Kam-Tech Sys. Ltd. v. Yardeni*, 340 N.J. Super. 414, 774 A.2d 644, 652-53 (N.J. Super. Ct. App. Div. 2001).

In the present case, TIA conducted air charter operations in Nigeria in 1976. It housed employees at the Daula [*39] Hotel in Kano and used that hotel as a base of operations. The Commission Agreement was executed and at least partly performed in Nigeria and concerned the business operation of transporting pilgrims between Kano, Nigeria and Jeddah, Saudi Arabia. TIA purposefully availed itself of business opportunities in Nigeria, executed a contract in Nigeria, and had what I find constituted a business office at the Daula Hotel. Therefore, under § 4805(a)(5), TIA cannot avoid recognition of the Judgment by challenging the personal jurisdiction of the Nigerian courts.

Many of these issues involving notice, appeals, foreign offices, and personal jurisdiction are similar to those in *S.C. Chimexim S.A. v. Velco Enterprises Ltd.*⁷⁶ In *Velco*, the plaintiff foreign

company petitioned a New York Federal District Court to recognize a Romanian judgment stemming from a suit for breach of contract. The defendant, Velco, had conducted limited operations in Romania through a "representative office," similar to a small branch office. The plaintiff served Velco at its representative office by posting a summons to the office door. Velco denied that it had been properly served or that it had received the summons [*40] and did not appear before the tribunal.⁷⁶ The Romanian court entered judgment against Velco, and Velco appealed. Velco lost its first appeal, and while the second appeal was pending in Romania's Superior Court, the plaintiff filed suit in the Southern District of New York to have the Romanian judgment recognized. Applying New York law, the district court recognized the Romanian judgment, despite the pending appeal.

76 36 *F. Supp. 2d* 206 (S.D.N.Y. 1999).

77 *Id.* at 210.

The court held that under New York's version of *Section 4805(a)(2)* of the UFMJRA, the court could not refuse to recognize the judgment on the ground of lack of personal jurisdiction.⁷⁸ Similar to TIA in this case, Velco voluntarily appeared in the Romanian proceedings by appealing the judgment, and in its appeal raised arguments going to the merits of the underlying dispute. This was sufficient to preclude nonrecognition for lack of personal jurisdiction.⁷⁹

78 *Id.* at 215.

79 *Id.*

In another parallel to this case, the *Velco* court held that personal jurisdiction was proper because Velco had an office in Romania and the cause of action, breach of a chemical supply contract, arose from business done by Velco through that office. [*41] Thus, under New York's version of *Section 4805(a)(5)*, the court held the Romanian judgment could not be challenged for lack of personal jurisdiction.⁸⁰

80 *Id.* at 215-16.

Additionally, the district court found unpersuasive Velco's arguments that it did not receive notice of the Romanian action in time to allow it to defend itself. The court held that even if Velco did not receive the initial summons, it had mounted a vigorous defense on appeal and had lost that appeal on the merits. This satisfied the district court that Velco had sufficient notice of the Romanian proceedings.⁸¹

81 *Id.* at 216.

In summary, in *Velco* as in this case, a foreign court found the defendant judgment debtor liable for breach of a contract stemming from business conducted through an office located in the foreign country. The defendant participated in the foreign proceedings by arguing the merits of the case on appeal but, as in this case, protested that it had

received inadequate notice of the proceedings. For reasons similar to those determinative in this case, the *Velco* court rejected the defendant's arguments relating to lack of notice and of personal jurisdiction and recognized the Romanian judgment.

D. Statute [*42] of Limitations and Laches Defenses

Defendants argue that the Nigerian Judgment is time-barred by the applicable statute of limitations and the equitable doctrine of laches. The UFMJRA does not contain a section providing a limitations period, and no Delaware case has addressed the issue of what limitations period, if any, applies to actions for recognition of a foreign judgment pursuant to the Act. Defendants urge application of the 3-year period set forth in *10 Del. C. § 8106*. Akande argues that the applicable period for actions for recognition of a foreign judgment depends on the law of the country where the judgment was rendered. Once the judgment is recognized, Plaintiff argues, either there is no statute of limitations, or the 10-year limitations period set forth in *10 Del. C. § 4711* governs enforcement of the judgment.

1. The statute of limitations and UFMJRA

Courts in other jurisdictions have held that the statute of limitations applicable to actions for recognition under the Act is that specified under the law of the country where the judgment was ren-

dered.⁸² This conclusion follows from the fact that the Act, by its own terms, applies to "any foreign judgment that is final and [*43] conclusive and *enforceable where rendered*."⁸³ In contrast, the statute of limitations applicable to enforcement of the foreign judgment is the law of the forum that recognizes it.⁸⁴ In Delaware, there is no statute of limitations as to judgments or actions on judgments. There is only a rebuttable, common law presumption of payment after 20 years.⁸⁵

82 *Nadd v. Le Credit Lyonnais, S.A.*, 804 So. 2d 1226, 1231 (Fla. 2001); *Pinilla v. Harza Eng'g Co.*, 324 Ill. App. 3d 803, 755 N.E.2d 23, 27-28, 257 Ill. Dec. 921 (Ill. App. Ct. 2001).

83 10 Del. C. § 4802 (emphasis added).

84 *Guayaquil & Quito Ry. Co. v. Suydam Holding Corp.*, 50 Del. 424, 11 Terry 424, 132 A.2d 60, 66 (Del. 1957); *Nadd*, 804 So. 2d at 1231-33; cf. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 118(2)* (1971) ("A valid judgment rendered in a State of the United States may be denied enforcement in a sister State if suit on the judgment is barred by the sister State's statute of limitations applicable to judgments").

85 *Guayaquil*, 132 A.2d at 66.

In other words, courts that have addressed the issue of the limitations period applicable to foreign judgments

recognized under UFMJRA have looked first to the law of the country where the judgment was rendered. If the judgment is not time-barred by that country's [*44] limitations period, the forum applies its limitations period for enforcement of judgments, if it has one.⁸⁶

86 *Nadd*, 804 So. 2d at 1231 (Fla. 2001); *Pinilla v. Harza Eng'g Co.*, 755 N.E.2d 23, 27-28 (Ill. App. Ct. 2001); see *Zitter*, *supra* note 33, at *26.

In *Nadd*, the Florida Supreme Court held that the trial court should have recognized a French judgment. The court concluded that the judgment was final, conclusive, and enforceable where rendered and was not time-barred by the French 30-year statute of limitations for enforcement of judgments.⁸⁷ Once the judgment was recognized by the Florida court in accordance with Florida's version of the UFMJRA, efforts to enforce that judgment were governed by Florida's 20-year statute of limitations for enforcement of judgments.⁸⁸

87 *Nadd*, 804 So. 2d at 1231.

88 *Id.* at 1232.

Defendants attempt to distinguish *Nadd* on the basis that the *Nadd* court held that Florida's 5-year statute of limitations did not apply to the acts of filing and registering a foreign judgment pursuant to Florida's version of the UFMJRA. Defendants argue that because Delaware's version of the Act con-

tains no such recordation procedures, *Nadd* is inapposite. I disagree.

The filing [*45] and registration requirements in Florida's version of the UFMJRA closely parallel Delaware's requirements for filing and recording a judgment under Delaware's UEFJA. Thus, Florida's statute makes explicit what this Court has inferred, namely, that the procedures set forth in the UEFJA govern the *enforcement* of foreign judgments. These details as to how Florida and Delaware implement the two statutes, the UFMJRA and UEFJA, are not central to the holding in *Nadd* or its application to this case. The court in *Nadd* appropriately focused on the limitations period applicable to recognition of foreign money judgments. In holding that the only limitation applicable to the recognition of a foreign money judgment is that the judgment be enforceable where rendered, the *Nadd* court stated:

This interpretation gives full effect to the legislative intent to ensure reciprocal favorable treatment of Florida judgments in foreign countries. We do not believe the Legislature wished to subject foreign judgments under the UFMJRA to the enforcement limitations set forth in *section 95.11(2)(a)* [arguably applicable under the UEFJA], since to do so would severely impede similar recognition of Florida judgments. [*46]⁸⁹

This Court's holdings as to Akande's claims give effect to the same presumed legislative intent.

89 *Nadd*, 804 So.2d at 1233.

Similarly, in *Panilla* the court held that no Illinois statute of limitations applies to recognition of foreign judgments under Illinois' version of the UFMJRA.⁹⁰ After recognition, Illinois' 7-year limitations period for enforcement of judgments applies.⁹¹

90 *Panilla*, 755 N.E.2d at 28-29.

91 *Id.* at 28-30.

Defendants argue that this Court should apply the 3-year limitation period specified in *10 Del. C. § 8106* because Akande's action seeks to recover money based on a statute, namely, the Act. Yet, the 3-year limitation period set forth in *Section 8106* is shorter, in some cases much shorter, than statutes of limitations commonly applicable to judgments.⁹² I consider it highly unlikely that the Delaware Legislature would adopt the UFMJRA, with its strong language that judgments recognized under the Act are enforceable as judgments entitled to full faith and credit, while silently intending to subject threshold efforts to obtain recognition of such judgments to the relatively short 3-year limitations period of *§ 8106*. Having such a short period of limitations is inconsistent [*47] with the language of the Act, *e.g.*, "enforceable where rendered," and would undermine

the general purpose of the UFMJRA to foster reciprocity, for most jurisdictions have longer limitations periods.

92 For example, Florida's statute of limitations period for its own judgments and judgments recognized pursuant to UFMJRA is 20 years. *Nadd*, 804 So. 2d at 1229-34. The Illinois limitations period for judgments is seven years with procedures for revival. *Panilla*, 755 N.E.2d at 27. The period for judgments in New York and Alabama is 20 years, while it is only ten years in California and North Carolina. *See N.Y. C.P.L.R. § 211* (2007); *ALA. CODE § 6-2-32* (LexisNexis 2007); *Cal. Code Civ. Proc. § 337.5.2* (Deering 2007); *N.C. GEN. STAT. § 1-47(1)* (2006).

Further, I would not characterize this action as being "based on a statute" as that phrase is used in *§ 8106*. Akande's claims are based on a judgment. Whether the Judgment is recognizable in Delaware and therefore entitled to full faith and credit depends on a statute, but unlike the multiple causes of action listed in *§ 8106*, the UFMJRA does not provide a basis for a claim independent of the Judgment. Rather, it is a codification of common laws [*48] of comity and provides for the recognition of a foreign judgment that has been rendered on some underlying cause of action.

Although Plaintiff argues that the 10-year period provided for in *10 Del. C. § 4711* might be applicable to the recogni-

tion of foreign judgments, I do not find that argument persuasive. *Section 4711* specifies the limitations period during which a judgment lien may continue upon real property. It does not appear to be a general limitations period for judgments nor has Akande cited any authority suggesting that it is. As previously discussed, Delaware has no general statute of limitations applicable to judgments, and this Court will not graft one onto the Act. If the Nigerian Judgment is enforceable where rendered, *e.g.*, not time-barred in Nigeria, and recognized in Delaware, there is a rebuttable, common law presumption of payment after 20 years.⁹³ Thus, the important question is whether the Judgment is time-barred in Nigeria.

93 The parties have not briefed, and I express no opinion on, the issue of when the limitations period would begin to run, *e.g.*, when the judgment is rendered in the foreign jurisdiction or when the foreign judgment is recognized in the forum [*49] state. Although this issue may be important in some contexts, it will not make a substantive difference in the resolution of this case.

Based on the submissions of the parties, I find that the Judgment is not time-barred by any Nigerian statute of limitations. As evidence of Nigerian law on the limitations period applicable to judgments, Akande relies on the Sanyaolu affidavits. Sanyaolu asserts that

the Judgment is valid and binding until set aside by the court that rendered the judgment, or by a higher court, and that, in his opinion, the Judgment would not be set aside.⁹⁴ He further opines that the Judgment is governed by a 6-year limitations period.⁹⁵ Hence, Akande's expert concludes, the present action for recognition is not time-barred because the Judgment was rendered on October 20, 1999, and this suit was filed January 21, 2005, less than six years later.

94 Sanyaolu Aff. 9/22/06 P 3 *et seq.*

95 *Id.* PP 55-60. Azikiwe disagrees with Sanyaolu's assertion because it seems that Sanyaolu based his opinion on the limitations period that governs the recognition of foreign judgments in Nigeria. Azikiwe Aff. 10/27/06 P 17(d). In other words, Sanyaolu seems to apply the limitations period [*50] contained in Nigeria's counterpart to the UFMJRA. Under that law, Nigerian courts will recognize a foreign judgment for up to six years after it is rendered. In my opinion, a more appropriate period to consider is the limitations period, if there is one, applicable to Akande's judgment in Nigeria. None of the parties, however, presented evidence directly addressing that issue. Nonetheless, I find Sanyaolu's answer relevant. Although Azikiwe notes the same perceived flaw in Sanyaolu's answer as the

Court has, Azikiwe does not argue that Nigeria's statute of limitations for judgments is shorter than six years. I think it highly unlikely that Nigeria would extend recognition to foreign judgments for up to six years, yet apply a shorter limitations period for judgments rendered by its own courts. Given the absence of evidence to the contrary, I therefore infer that Nigeria's limitations period for Nigerian judgments is at least six years.

Defendants' affiant on Nigerian law, Azikiwe, did not express an opinion on whether the Nigerian Judgment is time-barred in Nigeria. Azikiwe did agree, however, that in Nigeria the Judgment is presumed valid until set aside by the court that rendered it [*51] or a higher court. * Based on the evidence of record, I find that the Judgment is not time-barred by any Nigerian statute of limitations, and that in terms of the timeliness of Akande's Complaint in Delaware, the Judgment was "enforceable where rendered" when the Complaint was filed.

96 Azikiwe Aff. 8/22/06 P 5. Azikiwe avers that, for other reasons, the Judgment ultimately would be unenforceable in Nigeria.

2. Laches

Defendants argue that even if the statute of limitations does not bar recognition of the Nigerian Judgment, this Court should apply the equitable doctrine of laches to bar such recognition.

Laches may apply if a defendant has knowledge of a claim and prejudices the defendant by unreasonably delaying in bringing the claim.⁹⁷ I conclude that the circumstances of this case do not warrant the application of laches to preclude Akande's claims.

97 *Hudak v. Procek*, 806 A.2d 140, 153 (Del. 2002) (citing *Fike v. Ruger*, 752 A.2d 112, 114 (Del. 2000)).

The State Proceedings in Nigeria lasted 11 years, but this period of time, although very long, is not unheard of in the United States. Furthermore, Defendants have not shown that Akande was primarily responsible for the delay the case [*52] experienced during this period. Akande received his first judgment against TIA for 10,000 Naira in January 1978, less than two years after he filed suit. Because he did not prevail against all of the defendants in that action, Akande appealed part of the 1978 judgment, and TIA cross-appealed. TIA eventually abandoned its cross appeal, and the proceedings dragged along until the Supreme Court ordered the trial *de novo*. Defendants, however, have not shown that Akande was especially torpid in the pursuit of his claims or otherwise caused any unreasonable delay during the State Proceedings.

As to the Federal Proceedings, the opposing parties appear to have been equally responsible for the delays. Akande contributed, in part, to the length of the Federal Proceedings. As

the Federal High Court put it, "the case could not proceed normally as it was struck out on one or two occasions for want of diligent prosecution. It subsequently turned out that the plaintiff was ill and he did not fully recover until about April 3, 1996." ⁹⁸ Defendants have not shown, however, that any delays by Akande during the Federal Proceedings due to being sick were unreasonable. To the contrary, the Nigerian court [*53] appears to have found the delays excusable on that basis.

98 POB App. A113.

TIA likewise contributed, in part, to the delays in the Federal Proceedings. It had notice of the trial *de novo* in the Federal High Court of Lagos, yet based on the evidence appears to have chosen not to participate in that action. The case was adjourned, more than once, because the defendants, including TIA, were not represented by counsel and apparently refused to participate. ⁹⁹ As the Federal High Court put it, "[a]ll the 2nd, 3rd and 4th defendants gave no evidence at all even though they are fully aware of the present proceedings. In fact as can be observed from the tone of Exhibit G, the attitude of the 4th defendant [TIA] is one of utter indifference." ¹⁰⁰

99 POB App. A116-17, A122-23.

100 *Id.* at A122-23. The court's reference to Exhibit G is to a letter dated Sept. 3, 1976 between Akande and TIA's then-president, H.P. Huff. Huff informed Akande,

on behalf of TIA, that TIA would continue to use Omisade's company, NADCO, to help with Charter operations in Nigeria, and that Akande and Omisade would have to work out their differences between themselves. *See* POB App. A369 for a copy of the letter.

The most important [*54] questions on the issue of laches are whether Plaintiff unreasonably delayed in bringing these Delaware proceedings and whether any such delay prejudiced Defendants. On that point, Defendants argue Akande's five-year delay during the Interim Period from entry of the Judgment to the filing of this action severely prejudiced their ability to defend themselves.

Under the circumstances, I do not find Akande's delay during the Interim Period to be unreasonable. Although equity looks at the facts and circumstances when evaluating the possibility of laches, analogous statutes of limitations provide a presumption of what is reasonable. ¹⁰¹ If the Judgment had been a Delaware judgment, Akande would have at least 20 years to collect on it. This factor counsels against imposing a much shorter time period of only a few years for purposes of laches analysis. Akande needed to wait for the Federal High Court to issue a certified copy of the Judgment, which takes several months in Nigeria. ¹⁰² After receiving the certified copy, Akande understandably sought to enforce the Judgment against his former Nigerian business partner, Omisade.

When this approach failed, he hired an American lawyer to help him [*55] collect against TIA. Beginning in March, 2002, Akande exchanged several letters with TIA, through counsel, and virtually every time Defendants asked for additional documentation. Akande supplied at least some of that documentation. These efforts, however, took time. When Akande's attempts to collect on the Judgment without litigation failed, he hired a second lawyer who filed suit in New York, a jurisdiction in which the lawyer was not admitted. Akande ultimately withdrew that action. Considering these difficulties and the fact that TIA and Transamerica had notice of Akande's collection efforts since at least March 2002, I am not convinced that Akande's taking five years to file these proceedings constituted unreasonable delay.

101 *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 Del. Ch. LEXIS 188, at *22-23 (Oct. 19, 2006); *United States Cellular Inv. Co. v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996); *Wright v. Scotton*, 13 Del. Ch. 402, 121 A. 69, 73 (Del. Ch. 1923).

102 POB App. A165-70.

Moreover, I find that Transamerica is partly responsible for Akande's delay in bringing these Delaware proceedings. TIA was dissolved in December 1998. Transamerica knew that and entered into an agreement [*56] with TIA dated December 14, 1998, under which it as-

sumed TIA's liabilities (the "Assumption Agreement").¹⁰³ In a letter dated July 12, 2002, Transamerica told Akande that TIA "was legally dissolved on December 23, 1998 as a Delaware Corporation, under the laws of Delaware. Under Delaware law, [TIA] is not subject to any lawsuit, since it no longer exists."¹⁰⁴ Indeed, one of the last statements Transamerica made to Akande during this exchange of letters is, "there is no entity for your client to pursue on any October 20, 1999 Judgment."¹⁰⁵ Transamerica did not, however, tell Akande about the Assumption Agreement or otherwise inform him that Transamerica had assumed TIA's liabilities. Indeed, Defendants did not produce the Assumption Agreement to Akande until almost the end of discovery in this action. If Transamerica had informed Akande of the Assumption Agreement in 2002 and otherwise been more forthcoming, Akande probably could have commenced these proceedings earlier and prosecuted them more expeditiously. Thus, some of Akande's delay in bringing this action is attributable to Transamerica's delay in informing Akande of the Assumption Agreement. For these reasons, I find that [*57] Akande did not unreasonably delay in bringing this action.

103 POB App. A329-30.

104 DOB Ex. J.

105 *Id.* Ex. L.

Nor do I find that TIA or Transamerica has been substantially prejudiced by Akande's delay in bringing

these Delaware proceedings. Defendants argue that the "seal of death has closed the lips" of vital defense witnesses Omisade, Yakubu and Riley, but I am not persuaded that the absence of these witnesses is especially prejudicial to Defendants.

Defendants assert that Omisade is "believed to have passed away" during the Interim Period.¹⁰⁶ Assuming that is true, Defendants have not convinced me that his live testimony materially would have helped their case. Defendants argue that Omisade's absence is important because "[h]e played a prominent role in the Nigerian Action and was TIA's primary -- if not only -- point of contact with regard to those proceedings."¹⁰⁷ This is credible. Omisade's attorney prepared the initial draft of the Riley Affidavit, and Omisade kept TIA informed of some of the proceedings taking place in Nigeria. To my mind, however, this evidence simply confirms that TIA had notice of the Nigerian proceedings. TIA could have defended in Nigeria, including pressing [*58] its challenges to personal and subject matter jurisdiction there, and perhaps prevented some of the tortured history of this case. Omisade may well have had information particularly relevant to Akande's underlying cause of action for breach of contract, but that is not the issue before this Court. Thus, Defendants have not shown that Omisade's unavailability will substantially prejudice their ability to defend against Akande's claims in this

Court for recognition and enforcement of the Judgment.

106 DOB at 38. The record does not provide a precise date of death for Omisade. He apparently died before or shortly after the time the Judgment was entered. *See* DOB Ex. C at 18. The Court does not consider Akande's failure to bring suit within such a short period of time to be unreasonable.

107 Reply Br. in Further Supp. of Defs.' Mot. for Summ. J. ("DRB") at 20.

Rabo Yakubu (deceased) was the bailiff who served TIA in Kano in 1976.¹⁰⁸ As with Omisade, Defendants merely suspect (perhaps hope) that Yakubu died during the Interim Period. Again, however, Defendants have failed to show why this Court should expect that Yakubu's live testimony would have been substantially different from what he said [*59] in the affidavit of service he executed as part of his duties as a bailiff almost 30 years before the commencement of this action.¹⁰⁹ Defendants adduced no evidence to suggest that Yakubu would have recanted or otherwise substantially altered his affirmations that he in fact served process on TIA in Kano in 1976. Moreover, for the reasons discussed in Section II.C, *supra*, the materiality of any additional testimony of Yakubu is questionable because, in the circumstances of this case, the UFMJRA precludes this Court from denying recogni-

tion of the Judgment for lack of personal jurisdiction.

108 POB App. A324-25.

109 *Id.* at A321-25.

Unlike the situation with Omisade and Yakubu, the evidence clearly shows that Riley died during the Interim Period on November 11, 2001. Moreover, the Riley Affidavit is unquestionably important in this litigation, for the parties all have cited to various portions of it as supporting their respective arguments. Based on the evidence, however, I find that it is highly unlikely that Riley would have denied having notice of, at least, the Supreme Court proceedings and the Federal Proceedings. Thus, although the facts of this case might be clearer if Riley were [*60] present and able to testify, I am not convinced that his absence is materially prejudicial to Defendants.

Defendants have not shown that Akande's delay in bringing this case prejudiced them in any other way.¹¹⁰ I therefore conclude that Akande's claims are not barred by laches.

110 Based on the Court's rulings as to Counts III-V of the Complaint (*see* Section II.F, *infra*), I reject as unfounded Defendants' allegations that they are seriously prejudiced by the loss of their attorneys' documents covering TIA's dissolution and winding-up.

1. Defendants' arbitration defense

Defendants make a strained argument that the Nigerian courts lacked subject matter jurisdiction over Akande's claims. If those courts did lack subject matter jurisdiction, then according to *Section 4804(a)(3)* of the UFMJRA, the Judgment would not be conclusive and could not be recognized pursuant to the Act. The Charter Agreement between the Nigerian Pilgrims Board and TIA included an arbitration provision specifying that disputes arising from that agreement were to be arbitrated by the International Chamber of Commerce in Paris.¹¹¹ Defendants assert that the Commission Agreement, *i.e.*, the [*61] agreement between Akande and TIA, was part of, and subject to, the Charter Agreement because the commissions due to Akande stemmed from the Charter Agreement. But the Commission Agreement itself makes no reference to the Charter Agreement and contains no indication that it was meant to be subject to the terms of that agreement. All of Defendants' citations to the obligation to arbitrate refer to the Charter Agreement, yet nothing in that agreement indicates that Akande and NAFTECH submitted to its terms. Thus, the Court finds unpersuasive Defendants' contention that the Nigerian courts lacked subject matter jurisdiction due to the Commission Agreement, on which Akande based his claims, being subject to the Charter Agreement.

E. Subject Matter Jurisdiction

2. Is the Judgment void because TIA was dissolved?

Defendants argue that the Nigerian Judgment is void because TIA was dissolved before the Judgment was rendered, and supposedly, Nigerian law does not recognize the validity of a judgment rendered against a nonexistent legal entity. In support of their position, Defendants rely upon Azikiwe's affidavits. ¹¹² Azikiwe asserts that "when a company against which a proceeding in Court is pending loses [*62] its legal personality by dissolution, the action against it would automatically abate." ¹¹³ According to Akande's expert, Sanyaolu, "on the dissolution of a Company the liquidator is joined as a party to a pending action." ¹¹⁴ He also avers that the cases cited by Azikiwe are factually distinguishable from this case. ¹¹⁵

112 Azikiwe Aff. 8/22/06 PP 15-16.

113 *Id.* P 15.

114 Sanyaolu Aff. 9/22/06 PP 52-54.

115 *Id.*

I find Sanyaolu's position more persuasive and agree that the two cases cited by Azikiwe are inapposite. The first involved a writ of summons issued in 1973 against a person who died in 1949. ¹¹⁶ The deceased person in that case did not die during the proceedings, so the purported analogy to the dissolution of TIA is strained, at best. The other

case cited by Azikiwe involved the passage of a statute whose retroactive effect voided the existence of a trade union, and by that fact alone voided a judgment in favor of that trade union. ¹¹⁷ Again, the current case is distinguishable because TIA's dissolution did not represent the act of a government exercising its plenary powers, but rather the voluntary act of the judgment debtor itself. Moreover, if Nigerian law were as Azikiwe posits, [*63] a judgment-creditor corporation being sued in Nigeria could avoid an adverse judgment merely by dissolving. This runs counter to the corporation law of most jurisdictions, including Delaware. Indeed, as a legal matter, this result seems spurious. I therefore adopt Sanyaolu's position on this issue as being more credible and comporting better with commonly accepted legal principles.

116 Azikiwe Aff. 8/22/06 Ex. UHA 16.

117 *Id.* Ex. UHA 17.

Most importantly, the existence or nonexistence of a Delaware corporation is governed by Delaware law. According to *Section 278* of the Delaware General Corporation Law, a dissolved Delaware corporation continues its existence for three years after the date of dissolution to allow the company, among other things, gradually to wind up litigation. ¹¹⁸ Furthermore, "an implicit corporate existence, of indefinite duration, is imparted by the statutory directive that no action for or against the corporation shall abate

by reason of the dissolution of the corporation, the corporation's existence being extended until the execution of all judgments or decrees affecting the corporation." ¹¹⁸ Thus, under Delaware law, TIA continued in existence for at least three [*64] years after its dissolution, or until December 14, 2001. Consequently, the Judgment, rendered on October 20, 1999, was not rendered against a non-existent entity. For these reasons, I conclude that TIA's corporate dissolution did not deprive the Nigerian courts of subject matter jurisdiction or otherwise render the Nigerian Judgment void.

118 8 Del. C. § 278.

119 *Rosenbloom v. Esso V.I, Inc.*, 766 A.2d 451, 458 (Del. 2000); *City Invest. Co. Liquidating Trust v. Continental Cas. Co.*, 624 A.2d 1191, 1195 (Del. 1993).

F. The Assumption Agreement and Breach of Fiduciary Duty Claim

Count III of Plaintiff's Complaint alleges that the Individual Defendants are liable to Akande for breach of fiduciary duty. Akande contends that when the Individual Defendants dissolved TIA, they owed fiduciary duties to TIA's creditors, including him, and that they breached those duties by not adequately providing for the satisfaction of creditors' valid claims. Akande also alleges in Count V that Transamerica is liable on the Nigerian Judgment because, when TIA was dissolved, Transamerica assumed TIA's liabilities pursuant to the Assumption

Agreement. At argument, Akande agreed that if the Assumption Agreement adequately [*65] provides for TIA's liabilities under Delaware law, his claims for breach of fiduciary duty (Count III) and for a constructive trust (Count IV) are unnecessary. ¹²⁰

120 Tr. at 4, 15-16.

Under the plain language of the Assumption Agreement, Transamerica did assume responsibility for TIA's valid liabilities, including the claims of judgment creditors. Defendants presented no evidence or argument supporting a different conclusion. As Defendants themselves put it: "the record establishes, and Plaintiff does not dispute, that Transamerica assumed all of TIA's known liabilities at the time of its dissolution. And there is no evidence to suggest -- nor does Plaintiff even claim -- that Transamerica would not be able to satisfy the Judgment if required." ¹²¹ In opposing Count V of the Complaint, seeking to hold Transamerica liable on the Judgment, Defendants rely entirely on Transamerica's various arguments that the judgment is unenforceable and should not be recognized. As previously discussed, this Court has rejected those arguments. Thus, to the extent the Court recognizes the Judgment against TIA, it will constitute a liability of Transamerica as well.

121 DOB at 47-48.

In terms of the claims [*66] Akande has asserted, therefore, the Assumption

Agreement adequately provides for satisfaction of valid claims of creditors of TIA. There being no evidence that the Individual Defendants otherwise breached any fiduciary duties they may have owed to Akande, the Court will grant Defendants' motion for summary judgment on Count III. In addition, Count IV for a constructive trust is dismissed without prejudice as moot.¹²²

122 Having ruled in Defendants favor on the merits of Count III and dismissed Count IV, the Court has no need to address Defendants' further argument that those claims are time-barred. *See* DRB at 12-15.

G. Akande's Request for Additional Damages

The Judgment awards Akande eight million Naira for TIA's breach of the Commission Agreement for 1976. The Judgment also awards Akande unspecified damages for TIA's breach of the Commission Agreement for 1977 and subsequent years. As part of his request for recognition and enforcement of the Judgment, Akande has urged this Court to find that he is entitled to take additional discovery to allow him to determine the amount of damages for the post-1976 breaches of the Commission Agreement. Defendants oppose this request on several grounds, [*67] including that Akande failed to raise this request for relief in his Complaint.¹²³ But the request is clearly raised in subparagraph (f) of the Complaint's request for

relief, where Akande asks for an Order requiring Transamerica "to produce the information required by the Judgment to calculate full and complete damages for 1976, 1977 and 1978, and thereafter." The question remains, however, whether the Court can recognize a foreign judgment for damages or other costs that are not reduced to a specific sum of money.

123 DAB at 39-40.

A judgment is conclusive under the UFMJRA "to the extent that it grants or denies recovery of a sum of money."¹²⁴ In other words, the uniform act concerns the recognition of foreign *money-judgments*. The Act does not apply to a judgment to the extent that it grants undetermined costs or damages.¹²⁵ The Judgment states that Akande is entitled to relief for any breach of the Commission Agreement for "1977 and at various dates thereafter."¹²⁶ It does not, however, reduce any such amounts to a specific sum. Hence, that portion of the Judgment is not conclusive or recognizable under the UFMJRA. Akande's request for authorization from this Court to pursue discovery [*68] on those parts of the Judgment that do not award money, or only award unspecified sums, is therefore denied.

124 *10 Del. C. § 4803*.

125 *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1365 (S.D. Fla. 2003) (refusing to recognize a Dominican Republic sentence that did not award specific

amount of money); *Bianchi v. Savino Del Bene Int'l Freight Forward., Inc.*, 329 Ill. App. 3d 908, 924-25, 770 N.E.2d 684, 264 Ill. Dec. 379 (Ill. App. Ct. 2002) (refusing to recognize Italian judgment awarding unspecified damages for breach of employment contract); *Farrow Mortgage Serv. Pty. Ltd. v. Singh*, 1995 Mass. Super. LEXIS 495, at *12 (Mar. 30, 1995), *aff'd*, 42 Mass. App. Ct. 1103, 675 N.E.2d 445 (1997) (refusing to recognize Australian judgment to the extent it awarded undetermined costs stemming from the Australian litigation); *cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 108* (1971) ("A judgment for the payment of money will not be enforced in other states unless the amount to be paid has been finally determined under the local law of the state of rendition").

126 POB App. A113.

Akande further argues that this portion of the Judgment is not specific because TIA refused to participate in the Nigerian proceedings, and the resultant lack of production [*69] made calculation of the damages impossible when the Judgment was rendered. Akande has not explained, however, why he could not have obtained a default judgment for an estimated amount of the requested damages or some other appropriate sanction in Nigeria, nor why he did not pursue discovery on these damage claims in

post-Judgment proceedings in Nigeria or in this Court. At this late stage of the proceedings with their long and tortured history, Akande would, at a minimum, need to conduct further discovery on when TIA terminated operations under the Charter Agreement, the extent of any such operations between 1976 and that date, and the amount of damages NAFTECH suffered as a result of TIA's breach. Long ago and far away were the time and place to determine those issues. I will not re-open this Judgment to re-litigate these long stale matters.

Akande asserts that the sum due under the Judgment for TIA's breach of the Commission Agreement for 1976 was \$ 16,727,072.30 as of July 22, 2006.¹²⁷ In connection with the pending cross-motions for summary judgment, Defendants have not questioned whether this number accurately reflects the specific sum of damages awarded in the Judgment. Whatever [*70] the correct number is at this time, the only award of damages under the Nigerian Judgment that this Court recognizes is the amount for the breach of the Commission Agreement for 1976.

127 POB at 12 n.7.

III. CONCLUSION

For the reasons stated, the Court grants Akande's motion for summary judgment as to Count I (seeking recognition of the Judgment) and Count II (for enforcement) to the extent those Counts relate to the portion of the Judgment per-

taining to the breach of the Commission Agreement for 1976, and denies the motion as to Counts I and II in all other respects. In furtherance of this conclusion, the Court also grants summary judgment in Akande's favor on his claim in Count V that Transamerica assumed TIA's liabilities. The Court grants Defendants' motion for summary judgment on Count III of the Complaint for breach of fiduciary duties, and dismisses Count IV (seeking a constructive trust) as moot.

Plaintiff shall prepare and promptly file an appropriate form of final judgment, after notice and consultation with opposing counsel as to its form.



LEXSEE 273 U.S. 257

OKLAHOMA NATURAL GAS COMPANY v. OKLAHOMA; SAME v. SAME ET AL.

Nos. 154, 187

SUPREME COURT OF THE UNITED STATES

273 U.S. 257; 47 S. Ct. 391; 71 L. Ed. 634; 1927 U.S. LEXIS 695

**January 3, 10, 1927, Argued
February 21, 1927, Decided**

PRIOR HISTORY: ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

MOTIONS to substitute the Oklahoma Natural Gas Corporation for the plaintiff in error, the Oklahoma Natural Gas Company.

DISPOSITION: Motions denied.

LAWYERS' EDITION HEADNOTES:

Abatement -- dissolution of corporate party. --

Headnote:

The dissolution of a corporation cannot be distinguished from the death of a natural person in its effect upon litigation to which the corporation was a party, and will therefore, in the absence of statute to the contrary, abate all litigation in which the corporation appeared either as plaintiff or defendant.

Parties -- substitution -- when denied.

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Headnote:

A motion to substitute a successor for a dissolved corporation, pending litigation to determine a liability which has been assumed by the successor, will be denied, although it is sought by all parties in interest, where the statute provides for winding up the affairs of the

old corporation by trustees, and there is nothing to show why the corporation was dissolved.

SYLLABUS

1. At common law, and by the rule in the federal courts, dissolution of a corporation abates a litigation in which it is a necessary party. P. 259.

2. A motion to substitute one corporation for another on the ground that the latter has been dissolved and that its assets and obligations have devolved upon the other, should not be allowed, though consented to by the opposite party to the suit, in the absence of a full showing of the facts relating to the dissolution, its purpose and effect. P. 261.

3. Liquidating trustees, if appointed under the state statute governing the dissolution of the corporation, should appear on the motion for substitution in this court. P. 261.

COUNSEL: Mr. Lawrence H. Cake, in behalf of Mr. David A. Richardson, for the plaintiff in error, in support of the motion.

Messrs. George F. Short, Attorney General, and J. Berry King, Assistant Attorney General, for the State of Oklahoma.

Mr. E. S. Ratliff for the Corporation Commission of Oklahoma.

JUDGES: Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, Stone

OPINION BY: TAFT

OPINION

[*258] [**392] [***635] MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

These are motions for substitution of a new party appellant in each cause. The motions are joined in by the counsel of record for the defendants in error and by the plaintiff in error. They show that the Oklahoma Natural Gas Company was a corporation of the State of Oklahoma organized in the Indian Territory in October, 1906, to have existence for twenty years, and that its charter would have expired by legal limitation in October, 1926; that about September 15, 1926, after the writs of error in these cases were allowed, the Oklahoma Natural Gas Company was reorganized, the resulting corporation being named the Oklahoma Natural Gas Corporation, organized and existing under the laws of the State of Delaware; that the reorganized corporation took over all the contracts, franchises, property and assets of the Oklahoma Natural Gas Company and assumed all the debts, liabilities and obligations of that company, including the liability and obligation to make the refund to the patrons of the Oklahoma Natural Gas Company involved in this action if it should finally be held that the Oklahoma Natural Gas Company itself

had been obligated to make such refunds; that the Oklahoma Natural Gas Corporation assumed the performance of the public service theretofore performed by the Oklahoma Natural Gas Company; that the new corporation became and is the successor in law and in fact of the Oklahoma Natural Gas Company; that the latter company was by decree of the District Court of Tulsa County, Oklahoma, duly and legally dissolved as a corporation, and that, even if the decree had not been rendered, it would have been dissolved by expiration of the time limit in its charter in October, 1926. It is said that the reorganized corporation both by its assumption [*259] thereof and by law is liable for the refunds or discounts involved herein, if the order requiring them is valid, and that the State of Oklahoma looks to and will look to the reorganized corporation for the payment of the same if the order is finally affirmed. The counsel for the old company, the Attorney General of Oklahoma and the counsel for the Corporation Commission of Oklahoma, all sign the motion.

There is no specific provision in our rules for the substitution as a party litigant of a successor to a dissolved corporation. It is well settled that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. *Mumma v. Potomac Company*, 8 Pet. 281; *National Bank v. Colby*, 21

Wall. 609; *Pendleton v. Russell*, 144 U.S. 640; *Bank of United States v. McLaughlin*, Fed. Case No. 928; *Greeley v. Smith*, Fed. Cases 5748; *Walters v. Western & Atlantic Railroad Co.*, 69 Fed. 679; *Marion Phosphate Company v. Perry*, 74 Fed. 425; *Board of Councilmen of the City of Frankfort v. Deposit Bank of Frankfort*, 120 Fed. 165; *United States v. Spokane Mill Company*, 206 Fed. 999. See also *Edison Co. v. Westinghouse*, 34 Fed. 232 and *Edison Co. v. United States Lighting Co.*, 52 Fed. 300. It follows therefore that, as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law, abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice*. But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes [***636] it is necessary that there should be some statutory authority for the prolongation. The matter is [*260] really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being.

This corporation is said to have been created before Oklahoma became a state by the law of Indian Territory, so we may presume that the corporation law of

the State of Oklahoma since enacted, Oklahoma Statutes, 1921, c. 34, Article V, sec. 5361, has full application. *Shulthis v. McDougal*, 225 U.S. 561, 571-572. It provides:

"Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation, and to collect and pay debts and divide among the stockholders the property which remains after the payment of debts and necessary expenses; and for such purposes may maintain or defend actions in their own names by the style of the trustees of such corporation dissolved, naming it; and no action whereto any such corporation is a party shall abate by reason of such dissolution."

We have found no Oklahoma case that construes this provision with reference to the question now before the Court. The language of the section would seem to indicate that as [**393] there is to be no abatement the Oklahoma Natural Gas Company for litigating purposes is still in being and continues to be a party before this Court.

The showing made for the motion is that the Oklahoma Natural Gas Company was by a decree of the district court of Tulsa County, Oklahoma, duly and legally dissolved as a corporation. There is nothing to indicate why the

company was dissolved. We may assume but we do not know that it was in anticipation of its dissolution by force of law and that the proceeding was undertaken in order to transfer its assets, its obligations and its liabilities to another corporation which is averred to be a corporation [*261] of another State, to wit, of Delaware, although the seal which is attached to the consent of the Oklahoma Natural Gas Corporation by its president and secretary and accompanies the motion, shows that it was incorporated not in Delaware but in Maryland.

The motion is signed by counsel for the plaintiff in error, the Oklahoma Natural Gas Company. He does not explain how he continues to represent plaintiff in error, if in fact it has ceased to be, as he represents to this Court.

In the absence of a fuller showing as to just what the proceeding was in the district court of Tulsa County in respect to the dissolution of the old company, and in view of the provisions of the Oklahoma statute, we think it unwise to grant the motion for substitution, even though with the consent of the defendants in error. It may be that with the disclosure of all the facts and circumstances we may find that what was done with the consent of all the parties to this suit is in fact a novation which we can make effective. *United States v. City Bank*, 19 How. 385; *Ex parte Railroad*, 95 U.S. 221, 222.

We are not advised as to whether, at the time of the dissolution of the corpo-

ration by time, liquidating trustees of the old company were appointed under the statute. If they were, then they should appear in this proceeding. The motions to substitute are denied, without prejudice to a renewal on a fuller showing.

Motions denied.

PROOF OF SERVICE VIA OVERNITE EXPRESS MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 South Grand Avenue, Ninth Floor, Los Angeles, California 90017-4613.

On November 15, 2010, I served a true copy of the following document described as **RESPONDENT'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

Jack K. Clapper, Esq. Steven J. Patti, Esq. Christine A. Renken, Esq. CLAPPER, PATTI, SCHWEIZER & MASON 2330 Marinship Way, Suite 140 Sausalito, CA 94965 Telephone: (415) 332-4262 Facsimile: (415) 331-5387 Email: steve@clapperlaw.com Christine@clapperlaw.com	Ted W. Pelletier, Esq. LAW OFFICE OF TED W. PELLETIER 22 Skyline Road San Anselmo, CA 94960 Telephone: (415) 454-8783 Email: tedpelletierlaw@comcast.net
Office of the Clerk First Appellate District, Division Two 350 McAllister Street San Francisco, CA 94102-3600	Office of the Clerk San Francisco Superior Court 400 McAllister Street San Francisco, CA 94102

BY OVERNIGHT DELIVERY: I enclosed said document in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 15, 2010, at Los Angeles, California.



MARJORIE K. DEJOHNETTE

SLH29180