DEFENSE ACQUISITION PROGRAM ADMINISTRATION, REPUBLIC OF KOREA,

Plaintiff/Respondent,

vs.

DECK WON KANG A/K/A BRYANT KANG, JOO HEE KIM A/K/A LAUREN KIM, BRYANT KANG, WILLIAM KANG, GMB (USA), INC. A/K/A GMB USA, INC., HACKENCO, INC., PRIMACY ENGINEERING, INC., DBNJW, INC., 78 ROBERTS ROAD, LLC,

Defendants/Appellants,

and

RECOVCO MORTGAGE MANAGEMENT, LLC D/B/A SPROUT MORTGAGE, AND ABC CORPORATIONS (THESE NAMES BEING FICTITIOUS AS THEIR PRESENT IDENTITIES ARE UNKNOWN),

Defendants.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

DOCKET NO.: A-3728-23
A-3753-23
(Consolidated)

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY

SAT BELOW:
MICHAEL N. BEUKAS, J.S.C.
DOCKET NO.: BER-L-6733-19

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PRELIMINARY STATEMENT

In this appeal from Plaintiff's efforts to impose liability based on alleged fraudulent transfers and to obtain the extraordinary relief of piercing the veil of corporate entities, Defendants focus on two aspects of error by the trial court. Each area of error resulted in substantive deviation from established law and procedure, causing a failure of justice for Defendants that necessitates reversal of the judgments under review.

First, having failed twice before to pierce the corporate veil in two separate arbitrations in Korea, Plaintiff impermissibly raised the same veil piercing argument for a third time before the trial court. These veil-piercing claims—which involve the same parties and the same dispute—failed twice and should have been barred by collateral estoppel. The trial court erred by permitting Plaintiff to re-litigate the issue for a third time and erroneously held Defendants Deck Won Kang ("Kang") and Joo Hee Kim ("Kim") liable for two judgments totaling more than $70 million entered in favor of Plaintiff Defense Acquisition Programs Administration, Republic of Korea ("DAPA") against Defendants GMB (USA), Inc. ("GMB") and Hackenco, Inc. ("Hackenco"). DAPA was not required to raise the veil piercing claim before the Korean Commercial Arbitration Board ("KCAB"), but chose to do so. The trial court should have recognized the prior decisions by the KCAB on this issue, as it did

with regard to other rulings by the KCAB in the arbitration, and barred DAPA's third attempt to pierce the corporate veil.

Second, the trial court granted DAPA summary judgment on certain fraudulent transfer claims when those claims were barred by the statute of limitations. Defendants' statute of limitations defense with respect to transfers that occurred prior to September 2015 was improperly rejected by the trial court, which adopted a strained definition of "discovery" that is contrary to the law in this State and would allow Plaintiffs to extend the statute of limitations indefinitely. Under the New Jersey Uniform Fraudulent Transfer Act (the "UFTA"), a fraudulent transfer claim is timely if it is brought within four years after the transfer or, if later, within one year after the transfer was discovered by the plaintiff. Here, DAPA was in possession of the facts necessary to raise its fraudulent transfer claim well over a year before it commenced this action on September 23, 2019. Accordingly, its fraudulent transfer claims arising before September 23, 2015, and any claims arising from the retransfer of any funds originally transferred before that date, should have been dismissed.

The trial court's summary judgment rulings were incorrectly decided for other reasons as well. With regard to DAPA's veil piercing claim, beyond failing to adhere to principles of collateral estoppel, the trial court erred in short-circuiting, through summary judgment, the fair adjudication of this fact-

dependent equitable claim. First, a reasonable trier of fact could have found that GMB and Hackenco were not "so dominated" by Kang that they had no separate existence from Kang but were "merely a conduit" for Kang. Second, a genuine dispute of fact also exists as to whether Kang abused GMB and Hackenco's corporate form and that piercing GMB and Hackenco's corporate veils is necessary to prevent a fraud or injustice, as the evidence supports a reasonable inference that GMB and Hackenco engaged in independent businesses rather than simply performing a service for Kang. Finally, the equitable remedy of veil-piercing is inappropriate in this case because DAPA has an adequate remedy at law in the form of fraudulent transfer claims.

Likewise, with regard to DAPA's fraudulent transfer claims, setting aside the fact that these claims were time-barred, summary judgment in DAPA's favor on those claims was improper. As a preliminary matter, the trial court failed to provide any findings of fact and conclusions of law as required by Rule 4:46-2(c). Moreover, based on the evidence in the summary judgment record, a genuine dispute of fact existed as to whether the transfers in question—some of which occurred long before any dispute between DAPA and Hackenco or GMB arose—were made with actual intent to defraud a creditor.

Accordingly, and as discussed in further detail below, the trial court's judgment should be reversed.

FACTUAL BACKGROUND

A. DAPA's Contracts with GMB and Hackenco

DAPA is a Korean government agency charged with defense procurement. Da1113. On December 2, 2009 and December 28, 2010, DAPA entered into two contracts with Hackenco to purchase certain military equipment from Hackenco. Da1114. On December 28, 2010, May 31, 2011 and June 2, 2011, DAPA entered into three contracts with GMB to purchase certain military equipment from GMB. Da1114, 1491. GMB and Hackenco are New Jersey corporations owned by Kang and his wife, Joo Hee Kim. GMB and Hackenco's business involved engineering and assistance integration, as well as importing and exporting. Da336.

Pursuant to the parties' contracts, through 2014, GMB and Hackenco delivered equipment to DAPA, and DAPA made over $90 million in payments to GMB and Hackenco. Da503. Notably, in 2011 and 2012, DAPA paid GMB and Hackenco approximately $16 million. Da288.

B. Korean Arbitration Proceedings

Disputes arose between DAPA and Hackenco and GMB over Hackenco and GMB's performance under the parties' contracts. These disputes resulted in three separate arbitrations before the KCAB.

On December 14, 2014, Hackenco commenced an arbitration against

DAPA before the KCAB, seeking a declaration that the Hackenco Contracts were valid and effective (the "Hackenco Arbitration"). Da416, 1119. Later that month, DAPA notified Hackenco of termination of the contracts with Hackenco. Da416. In March, 2015, DAPA submitted a counterclaim against Hackenco in the arbitration, seeking to recover amounts paid to Hackenco under the Hackenco Contracts. Da411. DAPA also asserted a counterclaim against Deck Won Kang and Lauren Kim to pierce Hackenco's corporate veil. Da411, 422. DAPA contended that Kang and Kim "co-managed [Hackenco] as if [Hackenco] were a one-man company, and as they have assets of 5 to 6 billion Won while the [Hackenco] has none, [Kang and Kim] are, according to the principles of piercing-the-corporate-veil or abuse-of-corporate-entity," liable to DAPA. Da422–3.

On June 6, 2016, the KCAB issued an award in favor DAPA and against Hackenco in the amount of ₩ 4,382,504,582. Da430, 1119. In the award, the KCAB observed that the parties "confirmed that they had sufficient and fair opportunities for arguments." Da412. The KCAB dismissed the counterclaim against Deck Won Kang and Lauren Kim on the grounds that they had no agreement to arbitrate with DAPA. Da421–2.

In April 2015, DAPA notified GMB that it was terminating the GMB Contracts. Da477. Thereafter, on September 8, 2015, GMB commenced an

arbitration against DAPA before the KCAB (the "GMB Arbitration"). Da461. As in the Hackenco Arbitration, DAPA counterclaimed against GMB, seeking return of the purchase price, but did not assert counterclaims against Kang and Kim. Da471. On December 26, 2016, the KCAB issued an award in favor of DAPA and against GMB in the amount of $32,416,494.56. Da469.

Finally, GMB commenced a separate arbitration against DAPA in September 2015, also before the KCAB, seeking payment of an installment under one of the parties' three contracts for the delivery of certain equipment (the "ROV Arbitration"). Da1493–4. DAPA asserted a counterclaim, alleging that GMB and Hackenco "have separate corporate veils superficially, but in reality, Deck Won Kang … operates both businesses like his own, and therefore, both the Claimant's and Hackenco's corporate veils" should be pierced. Da1513.

On March 6, 2016, the KCAB entered an award in favor of GMB in the amount of $6,924,100 and denied DAPA's counterclaim. Da1488–1519. The KCAB's decision reflects that the parties had multiple opportunities to submit evidence and that the parties confirmed that they "had fair opportunities for sufficient arguments." Da1492–3. In rejecting DAPA's veil-piercing claim, the KCAB explained that the standard for piercing the corporate veil considers whether the "the company should be a shell company with only a name but, in reality, it is just a personal business by determining whether the company and

the personal and business assets are blended," whether "shareholders and directors' meetings are not held," whether laws or by-laws are "followed in decision making," whether the company lacks capital, the "scale of the business and number of employees," whether the shareholder abuses the corporate form, and whether the shareholder "is in a position to control the company as he pleases." Da1513. The KCAB ruled that DAPA failed to satisfy this standard, as it presented no evidence that when the contract at issue was executed Kang was "blending the assets or the business between the Claimant and himself, laws or by-laws were not observed to hold board meetings, or in decision-making processes, lack of company's capital, scale of the business or the number of employees." Da1514. The KCAB also observed that DAPA presented "no evidence … to show that Deck Won Kang abused the corporate veil to avoid his financial obligation at the timing of the contract in this matter was executed." Id.

In January 2019, DAPA filed actions in New Jersey Superior Court, Law Division, to confirm the awards against GMB and Hackenco, which by that point had been dissolved. Da1126. On March 15, 2019, the Superior Court entered orders confirming the awards and entered judgment against GMB and Hackenco in the amount of $37,987,224.07 and $37,519,835.29, respectively. Da1127.

C. Alleged Fraudulent Transfers

DAPA seeks in this action to impose liability on Defendants other than GMB and Hackenco based on allegedly fraudulent transfers and re-transfers ultimately originating from GMB and Hackenco. The original transfers were made long before any dispute arose under GMB or Hackenco's contracts with DAPA. On December 18, 2012 and December 28, 2012, GMB transferred $600,000 and $3.4 million to the escrow account of Kang's attorney. Da1116. On December 28, 2012, Hackenco transferred $1.3 million to the same account. Id. These funds were used to purchase of residential property in Alpine, New Jersey (the "Alpine Property") by Defendant DBNJW, a New Jersey corporation that was owned by Kang's children, for $5,242,911.00. Da1113, 1116. The Kangs resided in this property until it was sold in September 2015 for $7.9 million. Da1118. The proceeds of the sale were distributed to Kang and his children. Da1118, 1137. DAPA's summary judgment proofs included a report from Ryan C. Pak, CPA ("Pak"), which traced the sale proceeds through various investment accounts. Da551, 554, 557, 563–4. Pak stated that over a period of time, $3.1 million eventually was transferred from those investment accounts to Defendant Primacy Engineering, Inc. ("Primacy"). Pak's report included a demonstrative chart entitled "Flow of Investments into Primacy Engineering Inc." to summarize the re-transfers to Primacy. Da563–4.

On April 4, 2018, Defendant 78 Roberts Road, LLC ("78 Roberts Road")

purchased a property in Englewood Cliffs, New Jersey (the "Englewood Property"). Da1118–9. In May 2019, 78 Roberts Road obtained a $2 million loan from Defendant Recovco Mortgage Management LLC ("Recovco"), secured by a mortgage on the Englewood Property. Da1119. Some of the proceeds of the mortgage were placed in an account owned by Defendant Bryant Kang, while the remainder was used to pay various expenses. Da1119–20.

Between 2011 and 2015, Hackenco and GMB transferred a net $3,544,000 to an entity called D.W. Inc. Da1121. In addition, between 2013 and 2014, Hackenco and GMB transferred a net $100,000 to an entity called Golden Pig, Inc. Da1122. Neither D.W. Inc. nor Golden Pig, Inc. is a party to this action.

Finally, between 2016 and 2018, Defendants Kang, Kim, GMB, DBNJW, and Kim, as custodian for UTMA accounts held in the name of Kang and Kim's children, transferred approximately $3.5 million to Defendant Primacy. Da1124.

D. DAPA's Investigation of Defendants' Assets

In or around 2015, DAPA began efforts to collect on the arbitration awards. On or about April 23, 2015, DAPA obtained a report from the law firm Holland & Knight LLP, summarizing the results of an investigation into the assets of Hackenco, GMB, Kang and Kim. This report revealed that DBNJW, a New Jersey corporation that was formed in November 2012, purchased the Alpine Property on December 18, 2012 for $5.2 million. Da1308, 1318.

In January 2016, DAPA received a memorandum from the Mintz Group, an international investigative firm, "summarizing our findings to date in our asset investigation of" GMB, Hackenco, DBNJW., Kang, and Kim. Da1323. From this report, DAPA learned that Kang and Kim resided in the Alpine residence. Da1325–6. DAPA also learned that, in November 2015, DBNJW sold the Alpine Property for $7.9 million, and "entered into dissolution/withdrawal proceedings" the following month. Da1324–5, 1328.

PROCEDURAL HISTORY[1]

On September 23, 2019, DAPA commenced this action against Deck Won Kang, Joo Hee Kim, Bryant Kang, William Kang, GMB, Hackenco, Primacy, and DBNJW. Da1–11. On November 1, 2019, DAPA filed its Amended Complaint, which added 78 Roberts Road and Recovco as parties. Da12–25. In June 2020, Recovco was voluntarily dismissed from the action without prejudice. Da61–2.

Count One of the Amended Complaint sought to hold "Kim, Kang, Bryant,

[1] Pursuant to R. 2:6-8, the transcripts in this matter are numbered as follows: Vol. 1: 5/8/2020; Vol. 2: 7/10/2020; Vol. 3: 12/21/2020; Vol. 4: 4/1/2021; Vol. 5: 7/9/2021; Vol. 6: 12/8/2021; Vol. 7: 2/23/2022; Vol. 8: 9/9/2022; Vol. 9: 10/6/2022; Vol. 10: 12/8/2022; Vol. 11: 1/13/2023; Vol. 12: 2/27/2023; Vol. 13: 3/31/2023; Vol. 14: 4/12/2023; Vol. 15: 7/19/2023; Vol. 16: 9/7/2023; Vol. 17: 10/12/2023; Vol. 18: 4/9/2024; Vol. 19: 5/22/2024; Vol. 20: 5/28/2024; Vol. 21: 5/29/2024; Vol. 22: 5/30/2024; Vol. 23: 5/31/2024; Vol. 24: 6/3/2024; Vol. 25: 6/4/2024; Vol. 26: 7/5/2024.

DBNJW, Primacy, and 78 Roberts Road LLC … liable for" the GMB and Hackenco Judgments under a veil-piercing theory. Da20–1. Count Two sought relief under the New Jersey Uniform Fraudulent Transfer Act in connection with transfers made by GMB, Hackenco, and the other Defendants. Da21–2. Count Three sought to hold Primacy liable for the debts of GMB and Hackenco under a theory of successor liability.

GMB asserted a counterclaim seeking confirmation of the March 6, 2016 Award, and GMB and Hackenco asserted a claim for unjust enrichment alleging that DAPA was unjustly enriched through its retention of (1) the amount recovered under various performance bonds and letters of credit and (2) the equipment that GMB and Hackenco delivered under the Contracts. Da58–60.

In July 2022, DAPA filed a motion for summary judgment, specifically seeking summary judgment on its veil-piercing and successor liability claims, Defendants' counterclaims, and its fraudulent transfer claims relating to (1) the transfers of $4 million from GMB to DBNJW and $1.3 million from Hackenco to DBNJW; (2) subsequent transfers relating to the $5.3 million in transfers to DBNJW; (3) $3.544 million in net transfers from GMB and Hackenco to non-party D.W. Inc.; and (4) $100,000 in net transfers from Hackenco to non-party Golden Pig, Inc. Da105–7. Defendants filed cross-motions for summary judgment seeking judgment as a matter of law that (1) DAPA's fraudulent

transfer claims arising from transfers made before September 2015 are time-barred and (2) DAPA's claims arising from the retransfer of funds transferred prior to September 2015 fail.

The trial court held a hearing on the cross-motions for summary judgment on October 6, 2022. On DAPA's veil-piercing claim, the court "f[ou]nd that DAPA is entitled to pierce the corporate veil as to Deck Won Kang and Joohee Kim." 9T26. The court found that Kang and Kim "utilized the corporations, GMB and Hackenco, as their own individual funds" and "siphoned the funds of the corporations." 9T26. The court added that Kang and Kim sought to "protect the funds and place them in the name of others to preclude reaching those funds," including by "put[ting] [their] house[] in the names of their minor children." 9T26-27.

The court's oral decision included no findings of fact or conclusions of law regarding DAPA's fraudulent transfer claims, and it deferred determination on Defendants' statute of limitations defense. However, DAPA submitted a proposed order which included an award of summary judgment for Plaintiff with respect to DAPA's fraudulent transfer claim in connection with the DBNJW transfers and retransfers, the D.W. Inc. transfers, and the Golden Pig, Inc. transfers, pending resolution of Defendants' statute of limitations defense. Da1265–9. Defendants objected to DAPA's proposed form of order, but the

Court entered the order as submitted by DAPA. Da1270–1, 1274–7.

Defendants' counterclaims, on which DAPA had sought summary judgment, were not addressed at the hearing and were not mentioned in the proposed order that DAPA submitted and the Court entered after the hearing. 9T; Da65–9. DAPA subsequently filed a motion seeking to strike Defendants' jury trial demand, attaching a proposed order that also granted DAPA summary judgment on Defendants' counterclaims. Da1278–81. On January 27, 2023, the Court granted DAPA's motion for summary judgment on the counterclaims, despite having never addressed those claims in either an oral or written opinion; it otherwise denied DAPA's motion. Da1282.

In February 2023, Defendants filed motions seeking summary judgment on (1) the statute of limitations issue that the Court reserved in its prior order and (2) DAPA's veil piercing claims, which Defendants contended were barred by res judicata and/or collateral estoppel. Da1284–8. Defendants also sought reconsideration of the Court's award of summary judgment to DAPA on the veil-piercing claim and on Defendants' counterclaims. Id. DAPA opposed Defendants' motion and cross-moved for summary judgment on the fraudulent transfer claims that were the subject of Defendants' statute of limitations defense. Da1345–9.

On April 12, 2023, the trial court ruled on the second set of cross-motions

for summary judgment. In its oral decision, the court recognized that, under the UFTA, DAPA's claims relating to the pre-September 2015 transfers were barred if not brought within one year after the transfers were discovered. 14T11, 14. The court concluded that this standard required "actual knowledge" of the transfer, and that DAPA did not have such actual knowledge despite the information it had gathered in asset searches prior to 2018. 14T19-20. The trial court rejected Defendants' collateral estoppel argument on the grounds that the March 6, 2016 decision of the KCAB rejecting DAPA's veil-piercing claim on its merits "focused on a time frame up to and including June 2011 and nothing thereafter." 14T24.

A jury trial was conducted between May 30, 2024 and June 3, 2024 on DAPA's successor liability claim against Primacy and DAPA's fraudulent transfer claims relating to (1) transfers from DBNJW to Primacy; (2) transfers from Kang and Kim to Primacy; (3) transfers from GMB to Primacy; (4) a transfer from Kim, as custodian for William Kang's UTMA account, to Primacy. 24T66–68.[2] Following the jury trial and based on the jury's verdict, on June 17, 2024, the Court entered judgment finding that Primacy was GMB's successor and entered judgment on fraudulent transfer claims as follows: (a) $2,000

[2] Defendants withdrew their counterclaim, to the extent it remained in the case, without prejudice to pursuing it before the KCAB. 23T7.

against DBNJW; (b) $356,144.53 against Kang and Kim; (c) $2,219,198.49 against GMB; (d) $810,000 against Kim, as custodian for Bryant Kang's UTMA account; (e) $100,000 against Kim, as custodian for William Kang's UTMA account. On July 26, 2024, the Court entered a judgment that incorporated the June 17, 2024 judgment as well as the claims resolved on summary judgment.

On July 30, 2024, Defendants Kang, Kim, Bryant Kang, William Kang, GMB, Hackenco, DBNJW noticed their appeal. See Da1582–6. Defendant 78 Roberts Road, LLC was added to this appeal in an amended notice of appeal dated August 1, 2024. See Da1594–8. On July 31, 2024, Defendant Primacy Engineering, Inc. filed its notice of appeal. See Da1587–93. On October 28, 2024, this Court consolidated the two appeals (A-003728-23 and A-003753-23). See Order dated Oct. 28, 2024, A-003728-23.

ARGUMENT

POINT I: DAPA's Veil-Piercing Claims are Barred by Collateral Estoppel Since DAPA Litigated—and Lost—The Same Claim Twice In Two Separate Arbitrations (Da1573–4, 14T)

DAPA's veil-piercing claim is barred by issue preclusion since DAPA litigated and lost -– not once, but twice—on the same issue on which the trial court awarded DAPA summary judgment. After having raised its veil-piercing claim two times in connection with two separate arbitrations in Korea, and having lost on the same arguments raised before the trial court, DAPA should

not have been permitted to raise the same claim for a third time in the hope of obtaining a different outcome.

DAPA's claims with regard to veil piercing were thoroughly litigated before two arbitration panels in Korea. In both the Hackenco and ROV Arbitrations, DAPA had the opportunity to submit evidence in support of its claims and confirmed that it had a fair opportunity for sufficient argument. Da411–12, 1492–93. Although DAPA was not obligated to raise this claim, it chose to do so. In rejecting DAPA's claim of veil-piercing, one of the arbitration panels wrote:

> There has been no evidence submitted to prove that … the Claimant, Deck Won Kang, was blending the assets or the business between the Claimant and himself, laws or by-laws were not observed to hold board meetings, or in decision-making processes, lack of company's capital, scale of the business or the number of employees. Also there has been no evidence submitted to show that Deck Won Kang abused the corporate veil to avoid his financial obligation at the timing of the contract in this was executed.

The trial court's grant of summary judgment to DAPA on its veil-piercing claims was therefore in error, and the trial court instead should have awarded summary judgment to Defendants.

Under New Jersey law, a party asserting collateral estoppel or issue preclusion must demonstrate the following elements:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final

> judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005).

It is undisputed that DAPA, the party against which GMB and Hackenco sought to assert issue preclusion in this action, is the same party that sought to pierce GMB and Hackenco's corporate veils in the arbitration.[3] It is also undisputed that, in the ROV Arbitration, whether GMB and Hackenco's corporate veils should be pierced was actually litigated, and the KCAB rejected DAPA's claim against Kang seeking to treat Kang, GMB, and Hackenco as one and the same. Da1513. And the trial court's ruling on that issue was necessary to resolve DAPA's affirmative defense in the arbitration that it is entitled to a setoff of any amounts that GMB and Hackenco owed to DAPA. Da1503–04.

[3] The fact that the contract disputes were resolved in an arbitration before the KCAB rather than a judicial tribunal does not deprive them of preclusive effect. Under New Jersey law, an arbitration award may be entitled to preclusive effect in a subsequent litigation "in appropriate circumstances." Nogue v. Estate of Santiago, 224 N.J.Super. 383 (App.Div.1988); see also Restatement (Second) of Judgments § 84. "The key factor is the opportunity once to be heard fully." Habick v. Liberty Mut. Fire Ins. Co., 320 N.J. Super. 244, 255 (App. Div. 1999). DAPA does not dispute that it had the opportunity to be heard fully in the KCAB arbitrations, Da1363, and it has itself relied on issue preclusion arising from those arbitrations in this very litigation, Da1126–7.

In determining whether issues in two separate proceedings are identical, a court considers

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the material facts alleged are the same.

Culver v. Ins. Co. of N. Am., 115 N.J. 451, 461 (1989). See also First Union Nat. Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 353 (2007) ("In deciding the similarity of issues for issue preclusion purposes, a court should consider whether there is substantial overlap of evidence or argument in the second proceeding; whether the evidence involves application of the same rule of law; whether discovery in the first proceeding could have encompassed discovery in the second; and whether the claims asserted in the two actions are closely related."). Application of these factors conclusively demonstrates that the issues between the ROV Arbitration and this action are identical with respect to whether GMB and Hackenco's corporate veils should be pierced.

The relief DAPA has demanded in this litigation and the relief it demanded in the ROV arbitration are essentially the same. Here, DAPA is seeking to hold Kang and Kim liable for GMB and Hackenco's debts. Da1–11. In the arbitration, DAPA sought to hold GMB liable for Hackenco's debts by requesting the set off

its liability to GMB against Hackenco's liability to DAPA. And DAPA relies in this action on the same conduct that DAPA relied on in the arbitration—Kang's domination and control over the two LLCs.

The theory of recovery is also analogous. In the arbitration, DAPA sought to invoke veil-piercing and abuse of the corporate form to impose Hackenco's debts on GMB. Here, DAPA seeks to hold the shareholders of both entities liable for the entities' debts. In both disputes, DAPA has contended that GMB and Hackenco's corporate veils should be pierced because GMB and Hackenco are dominated by Kang and Kang abused the corporate form. Da 1–11, 1513. DAPA's core argument in the arbitration—that Hackenco and GMB, while "superficially" separate, are "in reality" controlled by Kang, who engaged in an "abuse [of] the corporate form"—is the same basic argument in this proceeding.

Indeed, aside from the KCAB's focus on the date of entry into the relevant contracts as the time relevant to the analysis, the KCAB's analysis under Korean law and the analysis required under New Jersey law for a veil-piercing claim parallel each other. As the KCAB explained in its March 2016 decision analyzing a veil-piercing claim, Korean courts consider "whether the company and the personal and business assets are blended, shareholders and directors' meetings are not held, [are] laws and bylaws followed in decision making, lack of the company capital, scale of the business and number of employees."

Da1513. These factors match the factors that New Jersey courts use in analyzing the first element of a veil-piercing claim; namely, excessive shareholder domination and control over the corporation. In addition, the KCAB observed that veil-piercing under Korean law requires an abuse of the corporate form. Da1513 (veil piercing requires that the "person behind the company could take responsibility for the company's conduct by abusing the corporate veil," and that "abusive conduct in the corporation is required"). Likewise, the second element of veil-piercing under New Jersey law focuses on abuse of the corporate form.

Finally, given the analogousness of legal analysis under Korean and New Jersey law, the same evidence supporting DAPA's veil-piercing claim before the KCAB would have supported DAPA's claim in this action.

The trial court's rejection of issue preclusion turned on "the ***timing*** of the claim by plaintiff seeking to pierce the corporate veil of GMB and Hackenco as to assets obtained by Deck Won Kang and his family." 14T24 (emphasis added). The court reasoned that in the litigation,

> [DAPA] seek[s] to assert corporate veil piercing claims based upon assets and activities that postdate June 2011. Such claims were never considered in the ROV arbitration and as such, cannot be banned herein.

14T24-25.

However, contrary to the trial court's findings, DAPA presented evidence before the KCAB ***post-dating*** the date of entry into the contract. The KCAB's

decision—which does not cite every piece of evidence the parties presented to the panel—expressly cites a credit report for Hackenco from 2013. Da1514. Moreover, DAPA argued in the arbitration that Kang had been siphoning funds from the LLCs by contending that Kang's assets were much more substantial than GMB's or Hackenco's, which is the same basis on which the trial court pierced the corporate veil in its summary judgment decision. But the KCAB rejected this DAPA argument, reasoning that veil-piercing could not be sustained by comparing the assets of Kang and the LLCs. Da1514.

The trial court's decision to reject the KCAB's rulings with regard to veil piercing is especially puzzling since the trial court expressly relied on other portions of the arbitration award to decide other aspects of the case. Based on DAPA's own arguments, the trial court relied on the arbitration awards, and a subsequent Korean court decision relying on the arbitration awards, in ruling on other issues. 14T25-27. While DAPA was not required to raise its veil-piercing claims before the KCAB, it chose to do so. Having pursued that argument and lost, it should not now be permitted to raise the same legal argument but seek a different result in a different forum. Accordingly, the trial court's summary judgment award in DAPA's favor on the issue of veil-piercing should be reversed.

POINT II: DAPA's Claim Arising From the Original Transfers to DBNJW is Time-Barred, and, as such, It Cannot Recover on that Claim from

DBNJW or Any Subsequent Transferee (Da1573–4, 14T)

A. Under the Discovery Rule, as modified by N.J.S.A. 25:2-31(a), DAPA's claims arising from 2012 transfers to DBNJW are time-barred because DAPA "discovered" them more than one year before it filed its claim

The trial court erred in granting DAPA summary judgment on its fraudulent transfer claim arising from 2012 transfers of funds from Hackenco and GMB to DBNJW not only because DAPA failed to establish that these transfers were fraudulent as a matter of law, See infra § IV, but as a threshold matter because it is barred by the limitations period set forth in the UFTA. The summary judgment record clearly shows that DAPA knew of the basis for its fraudulent transfer claim against DBNJW by March 2018—if not earlier, yet waited until September 2019 to bring their claim. In finding that the statute of limitations did not bar DAPA's claim, the trial court erred by improperly beginning the accrual period for the statute of limitations as the time when a plaintiff has obtained direct evidence. New Jersey law does not construe "discovery" in that way. The trial court misstated the law in this State that defines "discovery" as when a plaintiff learns "***of the basis for a cause of action*** against an identifiable defendant," and does not require direct evidence of fraud, such as actual checks or wire transfers.

Under the UFTA, a claim based on an actually fraudulent transfer must be

filed "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was discovered by the claimant." Since the 2012 transfers from GMB and Hackenco were made more than six years before DAPA filed its Complaint on September 23, 2019, DAPA's claim based on these transfers is timely only if DAPA "discover[ed]" the transfers on or after September 23, 2018.

Based on the evidence presented below, there is no genuine dispute that, by 2017 at the latest, DAPA knew the facts necessary to bring its fraudulent transfer claim against DBNJW. Under long-settled discovery rule jurisprudence in this State, Hackenco's awareness of the existence of its claim constitutes the "discovery" necessary to start the one-year clock in N.J.S.A. 25:2-31(a).[4]

The discovery rule, as applied by New Jersey courts, provides that "a cause of action accrues when a plaintiff knows, or through the exercise of reasonable diligence, should know of the basis for a cause of action against an identifiable defendant." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 116 (2019) (internal quotation marks

[4] At a bare minimum, the question of when DAPA discovered its cause of action should have been submitted to a Lopez hearing. Lopez v. Sawyer, 62 N.J. 267 (1973); see, e.g., Ben-Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123, 142 (2017) (remanding for Lopez hearing due to improper entry of summary judgment).

omitted). Section 25:2-31(a), in its current iteration, implements a modified version of the discovery rule which removes any inquiry into what a diligent person in the plaintiff's position would reasonably have discovered—in other words, the one-year savings period runs from the date that the plaintiff "knows … of the basis for a cause of action against an identifiable defendant." Dimitrakopoulos, 237 N.J. at 116.

In SASCO 1997 NI, LLC v. Zudkewich, 166 N.J. 579 (2001), the New Jersey Supreme Court has expressly linked the UFTA's savings provision to the common law discovery rule. Prior to 2002, N.J.S.A. 25:2-31(a) required a plaintiff to sue "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was *or* could reasonably have been discovered by the claimant." Id. at 588. The Court concluded that, with this language, "the Legislature intended to incorporate the discovery rule jurisprudence applicable to fraud actions into the tolling provision of N.J.S.A. 25:2-31(a)." Id. at 590. Thus, whether a creditor could benefit from the one-year provision turned on "when a reasonable commercial creditor would have known about the transfer." Id.

In 2002, the year after SASCO was decided, the legislature amended N.J.S.A. 25:2-31(a) to remove the language "or could reasonably have been," such that a claim for an actually fraudulent transfer would be timely if brought

"within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was discovered by the claimant." L.2002 c. 100. The effect of this amendment was simply that the one-year savings period would run only from discovery—i.e., when plaintiff learns "***of the basis for a cause of action*** against an identifiable defendant," not from when the plaintiff "through the exercise of reasonable diligence, ***should know*** of the basis for [the] cause of action," Dimitrakopoulos, 237 N.J. at 116. (emphasis added). Nothing in the 2002 amendment evinces any intent to alter what "discovery" itself means in N.J.S.A. 25:2-31(a).

Reading N.J.S.A. 25:2-31(a) to incorporate the relevant part of the common law discovery rule is consistent with how courts in other jurisdictions have interpreted similar statutes. For example, federal courts applying a provision of the federal Employee Retirement and Income Security Act ("ERISA") that requires a plaintiff to bring a claim for breach of fiduciary duty within three years of "actual knowledge of the breach or violation" have construed that language to require "actual knowledge of ***all material facts necessary to understand that some claim exists***." Maher v. Strachan Shipping Co., 68 F.3d 951, 954 (5th Cir. 1995) (quoting Gluck v. Unisys Corp., 960 F.2d 1168, 1177 (3d Cir.1992)) (emphasis added).

The legislative history of the 2002 amendment further supports

interpreting N.J.S.A. 25:2-31(a) to incorporate the common-law understanding of what constitutes "discovery." As multiple courts have recognized, the 2002 amendment to the UFTA was adopted "in response to" the New Jersey Supreme Court's decision in SASCO. See, e.g., In re Tzanides, 574 B.R. 489, 514 (Bankr. D.N.J. 2017); In re NJ Affordable Homes Corp., No. 05-60442 (DHS), 2013 WL 6048836, at *31 (Bankr. D.N.J. Nov. 8, 2013). In amending the UFTA, the New Jersey Legislature had a very specific problem in mind. The sponsor's statement for this bill, which was also incorporated into the Assembly and Senate committee reports, explained the bill as follows:

> This bill provides that the one year of statute of limitations for certain fraudulent transfers runs from the time a creditor actually discovers a fraudulent conveyance, rather than when a creditor "could reasonably" have discovered the fraudulent conveyance, and thus eliminates the need to conduct unnecessary annual asset searches during the term of every loan that goes into default.

See Assembly Committee Statement, A.B. 2298 (May 16, 2002); Senate Committee Statement, A.B. 2298 (Sept. 19, 2002).

In SASCO, the plaintiff made two large commercial loans which an individual guarantor personally guaranteed. Id. at 583. A few months after he personally guaranteed the loan, in May 1990, the guarantor transferred his interest in his marital residence to his wife for $1.00. Id. at 584.

About four years after the loans were extended, the debtor defaulted on the loans and the plaintiff sued the debtor, which later declared bankruptcy, and

the defendant guarantor. Id. at 583. In 1997, shortly before obtaining a $1.3 million judgment against the guarantor, the plaintiff ran an asset search on the guarantor, which disclosed the 1990 transfer. Id. at 584. The plaintiff thereafter brought a fraudulent transfer claim against the guarantor's wife.

Applying the common law discovery rule, as incorporated by the UFTA, to the facts of SASCO, the Court concluded that "[a] reasonable commercial creditor would have conducted an asset search" on the guarantor when the loan went into default in 1994." Id. at 592. Accordingly, the Court concluded that SASCO's fraudulent transfer claim was untimely. Id. The Court specifically addressed the concerns of amici associated with the banking industry that the rule it adopted would require commercial creditors to conduct asset searches, at substantial expenses "on every guarantor every four years, regardless of whether the loans are in default." Id. at 592. The Court explained:

> Although we do not foresee the banking apocalypse proffered by amici, our conclusion is sensitive to those concerns. Commercial creditors will have to perform asset searches only when a debtor defaults on a loan, rather than on every guarantor every four years, assuaging the fears of amici concerning the burden on commercial creditors.

Id. As the sponsor and committee statements demonstrate, the New Jersey Legislature enacted the 2002 amendment specifically to eliminate the need for regular asset searches ***regardless*** of whether or not a loan is in default.

However, nothing in the language of the 2002 amendment, nor its

legislative history, supports the inference that the Legislature intended to change the ***meaning*** of the statutory term "discover[]" from knowledge "of the ***basis for a cause of action*** against an identifiable defendant" to ***possession of direct evidence*** of a specific transfer. (emphasis added). The Legislature was not authorizing a putative fraudulent transfer Plaintiff to bury its head in the sand when the basis for a cause of action was known. Rather, the effect of the amendment simply relieved commercial creditors from being "expected to conduct a pre-judgment asset search" once a loan goes into default, as they were under the prior version of the statute applied by the Supreme Court in SASCO. NJ Affordable Homes Corp., 2013 WL 6048836, at *31.

Here, the summary judgment record shows that DAPA clearly ***knew*** of the basis for its fraudulent transfer claim against DBNJW by March 2018, if not earlier, yet waited until September 2019 to bring their claim. It is undisputed that in 2011 and 2012, prior to the formation of DBNJW, DAPA paid GMB and Hackenco approximately $16 million. Da288. An April 23, 2015 report from an asset search conducted on behalf of DAPA's counsel revealed that DBNJW purchased the Alpine residence on December 18, 2012 for $5.2 million. Da1308, 1318. This purchase occurred (as the 2015 asset search likewise disclosed) less than a month after DBNJW was incorporated. Id. Subsequently, DAPA learned by January 2016 that Kang and Kim lived in the Alpine Property until DBNJW

sold it in November 2015, and that a month after the sale, DBNJW dissolved. Da1325–6. DAPA also knew no later than January 2016 that Hackenco had "initiated dissolution proceedings in New Jersey" in December 2015. Da1325.

DAPA was thus well aware of the financial condition of Hackenco and GMB. Indeed, as DAPA itself maintained in the ROV Arbitration, Kang and Kim had "assets of 5 to 6 billion Won while [Hackenco] has none." Da422–3

This case is ***not*** about a creditor failing to conduct regular asset searches on a debtor. Rather, it is one where a creditor, on notice of the facts necessary to support a fraudulent transfer claim, delayed rather than promptly filing suit. DAPA conducted an asset search each year over a four-year period before it filed this suit, including searches that covered not only GMB and Hackenco, but Kang, Kim, and other entities owned by them, including DBNJW. Those searches provided DAPA with the facts it needed to bring fraudulent transfer claims. It was obligated to move forward or be barred.

Instead Plaintiff advanced, and the court below appears to have adopted, an interpretation of N.J.S.A. 25:2-31(a) that requires direct evidence of a fraudulent transfer to start the one-year clock on the UFTA's savings provision. New Jersey's discovery rule jurisprudence nowhere supports the notion that "knowledge" of a cause of action requires ***direct evidence*** of each of the elements of a claim. Were that the case, no creditor would ever actually

"discover" a fraudulent transfer unless and until the actual check or wire transfer in question was obtained. Rather, knowledge of a transfer, like knowledge of any other fact, may be proven by direct evidence or reasonably inferred from other facts. Courts in this state routinely instruct juries that they may infer knowledge from circumstantial evidence.[5] For example, it is well established that, in a criminal prosecution for possession of stolen property—where the state bears the burden of proving the defendant's guilt beyond a reasonable doubt—the jury may infer from the defendant's possession of stolen goods within a limited time from their theft that the defendant knew that the goods were stolen. State v. Cannara, 53 N.J. 388, 390 (1969).

To borrow an example from our state's model jury charges, consider a person who wakes up in the morning to find a coating of snow on the ground where, when she went to sleep the evening before, there was none. Cf. Model Civ. Jury Charge 1.12; Model Crim. Jury Charge, Circumstantial Evidence (both using the snow example to illustrate the difference between direct and circumstantial evidence). An ordinary speaker of English would not quarrel with

[5] See, e.g., Model Crim. Jury Charge, Leaving the Scene of an Accident Resulting in Death (N.J.S.A. 2C:11-5.1); Model Crim. Jury Charge, Kidnapping (N.J.S.A. 2C:13-1a); Model Crim. Jury Charge, Possession of Altered Motor Vehicle (N.J.S.A. 2C:17-6b); Model Crim. Jury Charge, Possession (N.J.S.A. 2C:2-1) (all providing some version of the following: "Knowledge is a condition of the mind. It cannot be seen. It can only be determined by inference from conduct, words or acts.").

her claim that she "knew" that it snowed during the night, or that she "discovered" this fact when she awoke and looked out her window.

That example is particularly relevant here. More than a year before DAPA filed this suit, DAPA knew that: (1) in 2011 and 2012 it transferred $16 million to Hackenco and GMB; (2) in November 2012, DBNJW was formed; (3) in December 2012, DBNJW purchased the Kang's residence (i.e. the Alpine property); (4) in November 2015, DBNJW sold the Alpine property; (5) in December 2015, DBNJW dissolved; and (6) Hackenco and GMB had no assets. Based on these facts, DAPA knew that the Hackenco and GMB had transferred those funds, or at least a portion of them, to DBNJW. At a minimum, a reasonable factfinder could reach that conclusion.

Accordingly, the trial court's decision awarding summary judgment to DAPA on its fraudulent transfer claim against DBNJW arising from 2012 transfers should be reversed. At a minimum, the Court should remand for a hearing on this disputed factual issue.

B. Because DAPA's claim arising from 2012 transfers to DBNJW fail as a matter of law, it cannot recover on those claims from any subsequent transferees

The failure of DAPA's claim against DBNJW for the 2012 transfers precludes recovery from any subsequent transferees. The UFTA authorizes entry of judgment against an "immediate or mediate" (i.e., subsequent) transferee only

if the original transfer is "voidable in an action by a creditor under" N.J.S.A. 25:2-29(a)(1). Thus, whether a creditor may recover from a subsequent transferee when a claim based on the original transfer is time-barred turns on whether the original transfer is "voidable in an action by a creditor" under the UFTA. The answer to that question is no.

N.J.S.A. 25:2-31 provides that "[a] claim for relief with respect to a transfer or obligation under this article is extinguished unless action is brought" within the statutory period. Put another way, the limitations period set forth in the UFTA is a statute of repose, in that "lapse of the statutory periods prescribed by the [UFTA] bars the right and not merely the remedy." Uniform Fraudulent Transfer Act § 9, cmt. 1. Once the statutory period expires, the original transfer is no longer "voidable in an action by a creditor" under the UFTA, and nobody—not the initial transferee, and not any subsequent transferee—is liable. The comments to UFTA § 9 further confirm that the time bar set forth in that section "apply … whether the action is brought against the original transferee or subsequent transferee." Uniform Fraudulent Transfer Act § 9, cmt. 2.

A plaintiff cannot avoid this outcome by characterizing subsequent transfers as independent fraudulent transfers that restart the statutory period. The UFTA "does not create an independent claim against subsequent transferees, but merely allows relief from subsequent transferees under those conditions if the

plaintiff prevails on a claim created under the act." Americorp Fin. Grp., Inc. v. Powerhouse Licensing, L.L.C., No. 271189, 2007 WL 189374, at *5 (Mich. Ct. App. Jan. 25, 2007). In other words, "the right to recover against transferees and subsequent transferees does not relabel those defendants as debtors for application of the statute in the first instance." Francisco A. Mateo MD, Inc. v. Proia, 227 N.E.3d 389, 410 (Ohio App. 2023).

Thus, DAPA has no viable claim for the re-transfers of the same funds among the Defendants, and the judgment below must be reversed.

POINT III: The Trial Court Applied the Incorrect Standard When It Granted DAPA's Veil-Piercing Claim on Summary Judgment (Da1274–77, 9T)

New Jersey recognizes "the fundamental propositions that a corporation is a separate entity from its shareholders, and that a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." State Dep't of Env't Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983) (citation omitted). Veil-piercing requires a plaintiff to prove "that the parent was dominated by the subsidiary, and … that adherence to the fiction of separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law." Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199–200 (App. Div. 2006) (citing Ventron, 94 N.J. at 500–01).

"In determining whether the first element has been satisfied, courts

consider whether 'the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent.'" Id. at 200 (quoting Ventron, 94 N.J. at 501). This element requires "fact-specific inquiry considering whether the subsidiary was grossly undercapitalized, the day-to-day involvement of the parent's directors, officers and personnel, and whether the subsidiary fails to observe corporate formalities, pays no dividends, is insolvent, lacks corporate records, or is merely a façade." Id.; see also FDASmart, Inc. v. Dishman Pharms. & Chem. Ltd., 448 N.J. Super. 195, 204 (App. Div. 2016) ("In considering the level of dominance exercised by the parent over the subsidiary, the court will consider factors such as 'common ownership, financial dependency, interference with a subsidiary's selection of personnel, disregard of corporate formalities, and control over a subsidiary's marketing and operational policies.'" (quoting Pfundstein v. Omnicom Grp., 285 N.J.Super. 245, 253–54 (App. Div. 1995))).

"Even in the presence of corporate domination, liability generally is imposed only when the parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise circumvent the law." Ventron, 94 N.J. at 501. "[T]he court must also find that the 'parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law.'" OTR Assocs. v. IBC Servs., Inc., 353 N.J. Super. 48, 52 (App. Div. 2002) (quoting Ventron, 94 N.J.

at 201). "[T]he hallmarks of that abuse are typically the engagement of the subsidiary in no independent business of its own but exclusively the performance of a service for the parent and, even more importantly, the undercapitalization of the subsidiary rendering it judgment-proof." Id. (citing Ventron, 94 N.J. at 201); accord Ten W. Condo. Owners' Ass'n, Inc. v. LRG Realty, LLC, No. A-1991-15T1, 2017 WL 3013092, at *6 (N.J. Super. Ct. App. Div. July 17, 2017) ("To establish a fraud, an injustice, or other circumvention of the law, the party seeking to pierce the corporate veil must show the entity had "no independent business of its own," and the owner deliberately undercapitalized the entity, thereby rendering it judgment-proof.")

Finally, "[t]he issue of piercing the corporate veil is submitted to the factfinder, unless there is no evidence sufficient to justify disregard of the corporate form." Verni, 387 N.J. Super. at 199 (App. Div. 2006).

A. Viewing the evidence in the light most favorable to Defendants, as the trial court must in a summary judgment setting, a reasonable fact-finder could decline to pierce the veils of GMB and Hackenco

Applying these principles to the summary judgment record, a genuine dispute of fact exists as to both prongs of the veil-piercing inquiry. First, a reasonable trier of fact could find that GMB and Hackenco were not "so dominated" by Kang that they had no separate existence from Kang but were "merely a conduit" for Kang. Verni, 387 N.J. Super. at 199–200. "Even the

exercise of significant control" by a controlling shareholder "will not suffice to pierce the corporate veil" under New Jersey law. Mills v. Ethicon, Inc., 406 F. Supp. 3d 363, 393 (D.N.J. 2019) (quoting Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 150 (3d Cir. 1988)); see also Nat'l Precast Crypt Co. v. Dy-Core of Pa., Inc., 785 F. Supp. 1186, 1192 (W.D. Pa. 1992) ("[T]he fact that one shareholder controls a closely held corporation is not enough to support piercing the corporate veil."); KLM Indus., Inc. v. Tylutki, 815 A.2d 688, 693 (Conn. App. 2003) (no veil piercing where president and spouse of sole shareholder "exercised no more control over [the corporation] than that of any president of a closely held corporation").

In pursuing their summary judgment motion, DAPA argued that GMB and Hackenco failed to observe corporate formalities. As many courts have observed, it is hardly unusual for closely-held corporations to fail to adhere to corporate formalities. Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 18 (2d Cir. 1996); Middle States Drywall, Inc. v. DMS Properties-First, Inc., No. CIV.A 95L-01-041 SCD, 1996 WL 453418, at *16 (Del. Super. Ct. May 28, 1996), aff'd, 692 A.2d 412 (Del. 1997). Thus, in the context of closely-held corporations, courts have afforded less weight to the lack of formalities. Zubik v. Zubik, 384 F.2d 267, 271 (3d Cir. 1967) ("In the context of an attempt by an outside party to pierce the corporate veil of such a closely-

held corporation, the informalities are considered of little consequence."); Bridgestone/Firestone, 98 F.3d at 18 ("[C]ourts recognize that with respect to small, privately-held corporations, the trappings of sophisticated corporate life are rarely present, and we must avoid an over-rigid preoccupation with questions of structure, financial and accounting sophistication or dividend policy or history." (internal quotation marks omitted)); Trustees of Nat. Elevator Indus. Pension v. Lutyk, 140 F. Supp. 2d 447, 460 (E.D. Pa. 2001) ("Although courts often do not hold closely-held corporations to strict standards with respect to corporate formalities, disregard of corporate formalities remains a factor of some significance even where the corporation is closely held."). The extent to which Hackenco and GMB failed to observe corporate formalities, while relevant to the veil-piercing inquiry, is insufficient to carry DAPA's burden on its veil-piercing claim, particularly on DAPA's motion for summary judgment.

DAPA's argument with regard to undercapitalization likewise fails to support piercing GMB or Hackenco's corporate veil. First, the summary judgment record contains no evidence that either GMB or Hackenco was undercapitalized at its inception. See Canter v. Lakewood of Voorhees, 420 N.J. Super. 508, 522 (App. Div. 2011) ("There is no evidence that SHI dominated Lakewood and used Lakewood to perpetuate a fraud or injustice, or otherwise circumvent the law. To the contrary, it is clear that Lakewood was sufficiently

capitalized at its inception and has a separate existence from SHI."). Moreover, undercapitalization "is most relevant for the inference it provides into whether the corporation was established to defraud its creditors or other improper purpose such as avoiding the risks known to be attendant to a type of business." Verni, 387 N.J. Super. at 200. DAPA cannot point to any evidence that GMB or Hackenco was "established to defraud its creditors" or to avoid "any risks known to be attendant to" their type of business.

The trial court, in its opinion, also relied on its finding that Kang and Kim "siphoned the funds of the corporations"—a factor that neither this Court nor the Supreme Court has expressly adopted in any published opinion. But Kang and Kim's withdrawal of a relatively small amount of money from GMB and Hackenco compared to the payments that GMB and Hackenco received does not demonstrate that GMB and Hackenco had no separate existence from Kang but were "merely a conduit" for Kang. Verni, 387 N.J. Super. at 199–200.

When the evidence is viewed in the light most favorable to the Defendants, DAPA has not shown as a matter of law that Kang abused GMB and Hackenco's corporate form and that piercing GMB and Hackenco's corporate veils is necessary to prevent a fraud or injustice. As this court explained in OTR Associates, the "hallmarks" of an abuse of limited liability are the engagement of the entity "in no independent business of its own but exclusively the

performance of a service for the [shareholder]." 353 N.J. Super. at 52. DAPA has not shown that GMB and Hackenco did not each engage in an independent business and served simply as a conduit for Kang. Moreover, DAPA did not argue that GMB and Hackenco were created for the "sole purpose of insulating [Kang and Kim] from liability," Verni, 387 N.J. Super at 203, and there is no evidence in the record to support that proposition. A reasonable jury, viewing the facts in the light most favorable to Kang and Kim, could unquestionably conclude that GMB and Hackenco were not "incorporated … for an unlawful purpose." Ventron, 94 N.J. at 501. If at issue, it is for only a jury to decide.

To be sure, Defendants do not argue that they are entitled to summary judgment on DAPA's veil-piercing claims. Rather, those claims turn on the factfinder's resolution of factual disputes and on what inferences the fact-finder chooses to draw from those facts. They cannot properly be resolved ***except*** in the crucible of a trial. Accordingly, the trial court's summary judgment piercing GMB and Hackenco's corporate veils should be reversed.

B. Veil-piercing was improper because DAPA failed to demonstrate lack of an adequate remedy at law

Finally, reversal of summary judgment on veil-piercing is warranted because DAPA had an adequate remedy at law. Equitable remedies "are available only to the party who cannot have a full measure of relief at law." Wood v. New Jersey Mfrs. Ins. Co., 206 N.J. 562, 578 (2011). Because veil-piercing is an

equitable remedy, it should be imposed "only in the absence of adequate remedies at law." Comm'r of Env't Prot. v. State Five Indus. Park, Inc., 37 A.3d 724, 733 (Conn. 2012); see also M.J. v. Wisan, 371 P.3d 21, 35 (Utah 2016) (citations and internal quotation marks omitted) ("[B]ecause veil-piercing is an equitable remedy it is available only where it is in the interest of justice, a standard that takes into account the availability of an adequate remedy at law to prevent irreparable harm to the plaintiff, and the potential for adverse impacts on third parties."); Acree v. McMahan, 585 S.E.2d 873, 875 (Ga. 2003); Amfac Foods, Inc. v. Int'l Sys. & Controls Corp., 654 P.2d 1092, 1098 (Or. 1982) ("The disregard of a legally established corporate entity is an extraordinary remedy which exists as a last resort, where there is no other adequate and available remedy to repair the plaintiff's injury."); Luma Enters., L.L.C. v. Hunter Homes & Remodeling, L.L.C., No. A-6094-11T3, 2013 WL 3284130, at *7 (N.J. Super. Ct. App. Div. July 1, 2013) (noting, in reversing summary judgment for defendant on veil-piercing claim, that "[a]bsent a piercing of the corporate veil, [the plaintiff] lacks an adequate remedy at law").

Here, DAPA has not only failed to demonstrate absence of an adequate remedy at law, it pursued such a remedy in this action in the form of its fraudulent transfer claims. DAPA successfully sought to void scores of transfers, from GMB, Hackenco, and subsequent transferors. Da1578–81. Because DAPA

has not shown that (timely) fraudulent conveyance claims would not have adequately redressed the harms it suffered as a result of the alleged fraudulent transfers from GMB and Hackenco and any retransfers of those funds, the trial court erred in granting summary judgment on DAPA's veil-piercing claim.

POINT IV: The Trial Court Erred in Granting Summary Judgment to DAPA on Certain Fraudulent Transfer Claims (Da1274–77)

The trial court also erred in granting summary judgment to DAPA on several fraudulent transfer claims—a decision it made without providing any findings of fact and conclusions of law as required by Rule 4:46-2(c). As with veil-piercing, DAPA has failed to uphold its burden of establishing the elements of its fraudulent transfer claim by clear and convincing evidence with respect to each of the claims on which the Court granted summary judgment.

A transfer can be "fraudulent" under the UFTA in two ways. First, a transfer is fraudulent if made "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." N.J.S.A. 25:2-25(a); see also Wells Fargo Fin. Leasing, Inc. v. Misook Kim, No. A-3693-13T1, 2015 WL 1442825, at *2 (N.J. Super. Ct. App. Div. Apr. 1, 2015) (citing State Dep't of Env't Prot. v. Caldeira, 171 N.J. 404, 409 (2002))). Second, a transfer can be fraudulent "through constructive fraud, where the debtor had no actual intent to commit fraud." Wells

Fargo, 2016 WL 1442825, at *2 (citing Caldeira, 171 N.J. at 409)).[6]

DAPA sought summary judgment solely on the grounds that the transfers in question were actually fraudulent. DAPA's moving brief in the trial court focused on the eleven factors set forth in N.J.S.A. 25:2-26, DAPA MSJ Br. 28–31, which are "commonly referred to as 'badges of fraud'" Gilchinsky v. Nat'l Westminster Bank N.J., 159 N.J. 463, 476 (1999). As the Supreme Court explained in Gilchinsky, "[b]adges of fraud represent circumstances that so frequently accompany fraudulent transfers that their presence gives rise to an inference of intent." Id. Section 25:2-26 enumerates the badges of fraud:

> In determining actual intent under [N.J.S.A. 25:2-25(a)], consideration may be given, among other factors, to whether:
>
> a. The transfer or obligation was to an insider;
>
> b. The debtor retained possession or control of the property transferred after the transfer;
>
> c. The transfer or obligation was disclosed or concealed;
>
> d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> e. The transfer was of substantially all the debtor's assets;

[6] Under the UFTA, a transfer is constructively fraudulent if it the debtor did not receive "a reasonably equivalent value in exchange for the transfer or obligation," and the debtor either "(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they become due." N.J.S.A. 25:2-25(b).

> f. The debtor absconded;
>
> g. The debtor removed or concealed assets;
>
> h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> i. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> j. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

As the statutory language suggests, the badges of fraud are factors for determining "actual intent under" N.J.S.A. 25:2-25(a). Courts in other jurisdictions have recognized that "the 'badges of fraud' apply only when considering a claim of actual fraud…, not constructive fraud." In re Harlin, 321 B.R. 836, 844 (E.D. Mich. 2005); see also In re Crescent Communities, Inc., 359 B.R. 357, at *6 (B.A.P. 6th Cir. 2007) (holding that "the bankruptcy court erred in analyzing the facts under the badges of fraud section of the Ohio [UFTA], which refers only to actual fraud, then concluding that the transfer was fraudulent under the constructive fraud section of the statute"); In re Wright, 611 B.R. 319, 324 (Bankr. W.D. Mo. 2019) ("To determine actual fraud, courts consider the badges of fraud, whereas to determine constructive fraud, courts consider the "underlying economic circumstances to determine whether a

particular transfer is injurious to a creditor." (quoting Higgins v. Ferrari, 474 S.W.3d 630, 636–40 (Mo. Ct. App. 2015)).

While some of the factors set forth in § 25:2-26 may have been present with respect to the transfers in question, many were either genuinely disputed or undisputedly not present. DAPA did not argue that any debtor "absconded," N.J.S.A. 25:2-26(f), or that any debtor "transferred the essential assets of [a] business to a lienor who transferred the assets to an insider of the debtor," N.J.S.A. 25:2-26(k). Moreover, it is undisputed that several of the transfers were made before DAPA brought any claim or threatened to bring any claim against GMB or Hackenco, see N.J.S.A. 25:2-26(d). DAPA MSJ Br. 29.[7] Likewise, at least with respect to the pre-arbitration transfers, DAPA cites no evidence supporting the proposition that any of the transfers were of "substantially all" of any of the transferor's assets, N.J.S.A. 25:2-26(e), that debtor "was insolvent or became insolvent shortly after the transfer was made," N.J.S.A. 25:2-26(i), or that the "[t]he transfer occurred shortly before or shortly after a substantial debt was incurred," N.J.S.A. 25:2-26(j).

DAPA also argued in the trial court that "Kang retained possession of the

[7] "DAPA MSJ Br." refers to DAPA's Brief in Support of its Motion for Summary Judgment, dated July 8, 2022. Consistent with R. 2:6-1(a)(2), Defendants have omitted this brief from their appendix, aside from the Statement of Undisputed Material Facts, which was included in the brief rather than filed separately in contravention of R. 4:46-2(a).

funds" because he transferred them to entities that he controlled. DAPA MSJ Br. 29; see N.J.S.A. 25:2-26(b). But Kang is not the debtor, GMB and Hackenco are. [Arb. Awards, Judgments]. And DAPA cites no evidence that GMB and Hackenco retained control over the funds post-transfer. Similarly, DAPA cited no factual support for the proposition that "Kang did not disclose the transaction to anyone." DAPA MSJ Br. 29; see N.J.S.A. 25:2-26(c).

More critically, evidence of one or more badges of fraud does not make a transfer fraudulent as a matter of law. Rather, in all instances, "[t]he person seeking to set aside [a] conveyance" as actually fraudulent "bears the burden of proving actual intent" to defraud. Jecker v. Hidden Valley, Inc., 422 N.J. Super. 155, 164 (App. Div. 2011). While the existence of some "badges of fraud" can support an inference of actual intent to defraud, they do not compel such an inference. O'Connor v. Lewis, 776 P.2d 1228, 1233 (Mont. 1989) (applying Montana's UFTA); see also Cont'l Cas. Co. v. Symons, 817 F.3d 979, 988 (7th Cir. 2016) (under Indiana's UFTA, "no particular badge constitutes fraudulent intent per se" (internal quotation marks omitted)). The statutory factors relevant to the question of actual intent "[are] meant to provide guidance to the trial court, not compel a finding one way or another." Filip v. Bucurenciu, 129 Cal.App.4th 825, 834 (2005). Moreover, "[r]egardless of the ability of courts to infer actual fraudulent intent from the presence of 'badges of fraud,' actual fraudulent intent

requires a subjective evaluation of the debtor's motive." In re Jeffrey Bigelow Design Grp., Inc., 956 F.2d 479, 484 (4th Cir. 1992).[8] And whether a transfer is made with actual intent to defraud involves "fact-specific determinations that must be resolved on a case-by-case basis." Gilchinsky, 159 N.J. at 476; accord Kelley as Tr. for PCI Liquidating Tr. v. Boosalis, 974 F.3d 884, 891 (8th Cir. 2020) (holding that, under Minnesota's UFTA, each fraudulent transfer claim must "'be determined in light of the facts and circumstances of each case on a 'transfer-by-transfer' basis" (quoting Finn v. Alliance Bank, 860 N.W.2d 638, 647 (Minn. 2015))); Doyle v. Kontemporary Builders, Inc., 370 S.W.3d 448, 453 (Tex. App. 2012) ("It is the creditor's burden to offer evidence addressing the elements of fraudulent transfer as to each transfer.").

[8] Bigelow applies the fraudulent transfer section of the bankruptcy code, 11 U.S.C. § 548(a), which, at the time of that decision, allowed the bankruptcy trustee to "avoid any transfer of an interest of the debtor in property … that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily … made such transfer … with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation incurred, indebted." Like state and federal courts applying state UFTAs, federal courts applying this section rely on "badges of fraud" to determine intent. In re Trib. Co. Fraudulent Conv. Litig., 10 F.4th 147, 160 (2d Cir. 2021). In Tribune Company, the Second Circuit described the "badges of fraud" in terms that almost exactly track our Supreme Court's description of the UFTA badges of fraud in Gilchinsky: namely, as "circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent." Id.

For a plaintiff to prevail at the summary judgment stage, a UFTA claim alleging an actually fraudulent transfer—whether there are no badges of fraud, one badge of fraud, or many—the plaintiff must demonstrate that ***the only reasonable inference*** from the admissible record evidence is that the transfer was made "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." Moreover, in conducting a summary judgment analysis, the "court must be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a "genuine" issue of material fact. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 533–34 (1995) (adopting as New Jersey law the holding in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254–56 (1986)). Here, that standard is clear and convincing evidence. Jecker, 422 N.J. Super. at 164.[9]

The trial court's decision contains no fact-intensive examination of GMB and Hackenco's actual intent for each of the transfers on which DAPA sought summary judgment. Indeed, the trial court's decision contains no discussion of intent at all. DAPA's brief adds little in this regard—while it is long on

[9] A 2021 amendment to the UFTA reduced the burden of proof from clear and convincing evidence to preponderance of the evidence. L.2021 c. 92. Because the amendment is not retroactive, see id. § 29, the clear-and-convincing standard of proof governs DAPA's claims.

discussion of the "badges of fraud," it does not explain why actual intent of fraud is the only reasonable inference that a trier of fact could make from the summary judgment record. Indeed, the word "intent" appears only once in DAPA's entire brief—and then only in a passage quoting the UFTA. DAPA MSJ Br. 26

Moreover, in its summary judgment papers, DAPA treated all of the transfers—which date from 2011 to 2019—as a monolith, see *id*. at 30 ("The analysis is identical for subsequent transfers…."), ignoring the significant and material extent to which the relevant facts and circumstances changed during that period. In December 2011—when the first transfer on which DAPA sought summary judgment occurred—there was no dispute, much less an arbitration, over the contracts, and there would not be for another three years. In May 2019, DAPA had obtained eight-figure arbitration awards against both GMB and Hackenco, and would within six months commence proceedings in this court to reduce those awards to judgment.

Notably, DAPA has conceded—as it must—that many of the transfers on which it sought summary judgment were made before arbitration proceedings commenced. DAPA MSJ Br. 29. This is a problem for DAPA because an inference that GMB and Hackenco intended to conceal assets from creditors is much weaker—and certainly not inevitable—if GMB and Hackenco were not aware of any creditors from whom to conceal assets. See, e.g., State Dep't of

Pub. Welfare v. Thibert, 279 N.W.2d 53, 57 (Minn. 1979) (relying on transferor's lack of notice of unmatured claim in finding no intent to defraud). DAPA attempts to avoid this problem by asserting that, "at the time the transfers were made, Kang understood that there was a substantial likelihood that the [Korean] government would seek to recover as a result of the fact that the Contracts were awarded through bribes to entities that could not perform the Contracts." DAPA MSJ Br. 30; see also id. (asserting, this time without citation, that Kang knew that GMB and Hackenco "could not perform" the contracts with DAPA).[10] As "evidence" of this assertion, DAPA cites (1) the arbitration decisions, which were issued in 2016, and documents from the U.S. criminal proceeding against Kang dating to 2020. DAPA MSJ Br. 30.[11] None of these documents establish

[10] Notably, DAPA's Statement of Material Facts nowhere includes any assertion that Hackenco or GMB knew, as early as 2011, that it was likely, or even probable, that DAPA would bring a breach of contract claim against them, or that Hackenco and GMB were incapable of performing the contracts with DAPA. Under the Rules of Court, a party moving for summary judgment is required to serve a statement of material facts "set[ting] forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted." R. 4:46-2(a).

[11] DAPA's broad citation to five lengthy exhibits to support the assertions in this paragraph is improper and cannot sustain its burden of establishing the absence of a genuine dispute of fact. Under Rule 4:46-2(a), DAPA was required to not only identify the documents that support its factual assertions, but must also "specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on."

that Kang (or GMB and Hackenco) knew that there was a "substantial likelihood," or indeed any likelihood, that DAPA would assert breach of contract claims against Kang. Nor, for that matter, do they establish that GMB and Hackenco were incapable of performing the contract, much less that Kang knew that GMB and Hackenco were incapable of performing the contract.

As the moving party, DAPA was required to establish that no reasonable jury could find that Hackenco and GMB lacked actual intent to defraud when the transfers for which it sought summary judgment were made. DAPA failed to make this showing—indeed, it didn't even try to. Instead, it focused on the "badges of fraud," which while helpful to the intent analysis, are not a substitute for it. Particularly with respect to transfers made prior to the arbitration proceedings before the KCAB, a reasonable juror could find that DAPA has failed to meet its burden of proving actual intent by clear and convincing evidence. Accordingly, the trial court's award of summary judgment on DAPA's fraudulent transfer claims should be reversed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the judgment of the trial court be reversed.

Dated: January 9, 2025

Respectfully submitted,

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DEFENSE ACQUISITION PROGRAM ADMINISTRATION, REPUBLIC OF KOREA, Plaintiff-Respondent, v. DECK WON KANG A/K/A BRYANT KANG, JOO HEE KIM A/K/A LAUREN KIM, BRYANT KANG, WILLIAM KANG, GMB (USA), INC. A/K/A GMB USA, INC., HACKENCO, INC., PRIMACY ENGINEERING, INC., DBNJW, INC., 78 ROBERTS ROAD, LLC, Defendants-Appellants; and RECOVCO MORTGAGE MANAGEMENT, LLC D/B/A SPROUT MORTGAGE, and ABC CORPORATIONS (THESE NAMES BEING FICTITIOUS AS THEIR PRESENT IDENTITIES ARE UNKNOWN), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NOS. A-3728-23 & A-3753-23 (CONSOLIDATED) On Appeal from Superior Court of New Jersey, Law Division, Bergen County Docket No. BER-L-6733-19 Hon. John D. O'Dwyer, P.J. Civ. Hon. Judge Michael N. Beukas, J.S.C. Sat below Civil Action

PLAINTIFF/RESPONDENT DEFENSE ACQUISITION PROGRAM ADMINISTRATION, REPUBLIC OF KOREA'S BRIEF

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PRELIMINARY STATEMENT

This matter centered around the use of two New Jersey corporate defense contractors to effectuate an international bribery scheme and to fraudulently transfer the proceeds of these crimes. The corporations were used to pay bribes to Korean Navy procurement officers to secure the contracts and then hide the proceeds of the contracts through a series of fraudulent transfers. This criminal conduct resulted in a criminal conviction in the Republic of Korea and a guilty plea in the United States of America by the mastermind of the scheme: Kang.

Arbitration awards in the amount of approximately $75 million were obtained against the crooked defense contractors and domesticated in the Superior Court of New Jersey. Through post-judgment discovery, millions of dollars of fraudulent transfers and commingling of assets and were discovered. The post-judgment discovery revealed that once the contracts were obtained and started to flow cash, Defendants hid millions of dollars disbursed from the Korean government to the New Jersey defense contractors by, *inter alia*, transferring $5.3 million to a corporation owned by their minor children. Defendants moved millions of dollars back and forth between the New Jersey defense contractors and other entities, as if they were their personal checkbooks. Defendants dissolved GMB and Hackenco, and also created a successor

company into which millions of additional dollars were fraudulently transferred by GMB and other accounts controlled by the Kang family.

As a result, veil piercing, fraudulent transfer and successor liability claims were instituted in the trial court. Defendants never factually disputed the above facts. The trial court granted summary judgment on the veil piercing claims and a number of the fraudulent transfer claims. The remaining fraudulent transfer claims and the successor liability claim were tried to verdict before a Bergen County jury, which verdict was unanimous in favor of the Plaintiff.

On appeal, Defendants do not join issue with the jury verdict, do not dispute that the defense contractors were used to further a criminal enterprise, do not dispute the material facts, and instead claim that the Plaintiff is collaterally estopped from pursuing the veil piercing claim because arbitrators rejected "this" claim years earlier for lack of jurisdiction because the shareholders of the corporate defense contractors were not parties to the arbitration agreement. The trial court correctly rejected this argument, as collateral estoppel is only applicable to claims that are fully litigated.

Defendants next claim that the fraudulent transfer claims were time-barred despite Plaintiff's lack of knowledge of the fraudulent transfers until it discovered them during post-judgment discovery. The trial court rejected this

argument by correctly concluding that because Plaintiff did not have actual knowledge of the transfers, the statute of limitations was not triggered.

Finally, Defendants claim that the veil piercing and fraudulent transfer claims that were decided by way of summary judgment should have been submitted to the jury even through there were no facts in dispute. The trial court again correctly rejected this argument.

FACTUAL BACKGROUND & PROCEDURAL HISTORY[1]

I. THE PARTIES

Defense Acquisition Program Administration, Republic of Korea ("DAPA") is part of the executive branch of the South Korean government, and is charged with, *inter alia*, improving Korea's defense capabilities. Da1113. Deck Won Kang ("Kang") and his wife, Joo Hee Kim ("Kim") were the sole shareholders of GMB (USA), Inc. ("GMB") and Hackenco, Inc. ("Hackenco"). Id. GMB and Hackenco were New Jersey defense contractor corporations formed by Kang. Id.

Kang and Kim reside at 78 Roberts Road, Englewood Cliffs, New Jersey 07632 (the "Englewood Property"), a property owned by 78 Roberts Road, LLC

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[1] Because the Facts and Procedural History are intertwined, for the convenience of the court, DAPA is submitting a Combined Procedural History and Statement of Facts. "Defendants" is used to collectively refer to Kang, Kim, Bryant, William, GMB, Hackenco, DBNJW, 78 LLC and Primacy.

("78 LLC"). Da1113. 78 LLC is a limited liability company formed in February of 2018 and owned by Bryant Kang ("Bryant"), Kang and Kim's eldest son, at all relevant times, while he was a minor child. Id.

DBNJW, Inc. ("DBNJW") is a limited liability company formed in 2012 to purchase residential real estate in Alpine, New Jersey, where the Kang family would thereafter reside until sold (the "Alpine Property"). Da1113; Da1116-1117. The company was owned by Bryant and William Kang ("William"), who were both minors at the time of the company's formation. Da1113a.

Primacy Engineering, Inc. ("Primacy") is a corporation that was formed in 2015 and purchased the assets of GMB through an asset purchase agreement, dated January 2, 2017, for $200,000, leaving GMB insolvent. Da240 ("WHEREAS, the Buyer [Primacy] and Seller [GMB] agree to terms whereby Seller agrees to sell and deliver to Buyer *all of Seller's assets*, vehicles, office, equipment, furniture, fixtures, intangibles, name, customer lists, vendor lists, phone numbers, email addresses, trade names, trade secrets, goodwill and *any and all other assets related to the operation of the Business*...") (emphasis added), Da296 (Q: "So wouldn't you agree that this contract says that GMB sold to Primacy all of its business assets used in its business? ... A: "It is possible, yes."), Da1113-Da1114.

II. KANG OBTAINED CONTRACTS WITH DAPA ON BEHALF OF GMB AND HACKENCO THROUGH BRIBERY

On December 2, 2009, and December 28, 2010, DAPA entered into two contracts to purchase military equipment from Hackenco. Da1114. On December 28, 2010, and May 31, 2011, DAPA entered into two contracts to purchase military equipment from GMB (all four contracts are referred to as the "Contracts"). Id. DAPA also entered into a third contract with GMB on June 2, 2011 (the "ROV Contract"), but that contract is not the subject of the arbitration awards that were later confirmed as judgments in New Jersey. Da12-Da25, Da1490-Da1491.

Kang obtained the Contracts with DAPA through a bribery scheme, wherein he used GMB and Hackenco to secure contracts with DAPA by promising Korean Navy procurement officers' compensation in exchange for the award of the Contracts. Da1114-Da1115, Da381-Da402. In furtherance of the criminal scheme, after the Contracts were awarded between 2009 and 2011, Kang caused GMB to remit a series of payments to its affiliates (GMB Asia Pacific and J&J Australia) in, *inter alia*, Australia, totaling $220,075.00. Id.

According to the Information filed by the United States Department of Justice, Criminal Division, Fraud Section, Kang then caused GMB Asia Pacific to send seven (7) payments of $10,000 and one payment of $30,000 to the Korean Navy officer between April 30, 2012 and February 28, 2013. Da381-

Da402. Pursuant to the Guilty Plea Agreement, Kang agreed to plead guilty to violations of the Foreign Corrupt Practices Act, later did plead guilty and was fined $1.5 million by a Judge of the United States District Court for the District of New Jersey. Id. Kang also was previously found guilty in Korea of crimes involving other bribes made to secure the Contracts and spent two years in a Korean jail. See id.; Da267-Da268.

During 2012 and 2013, GMB and Hackenco received approximately $16 million in payments under the Contracts from DAPA. Da600-Da602, Da287-Da288. For example: (1) on April 10, 2012, DAPA sent GMB $6,000,000; (2) on May 28, 2013, DAPA sent GMB $4,959,930; and (3) on December 27 and 31, 2013, DAPA sent GMB $970,000 and $485,962, respectively. Da600-Da602. Funds from DAPA under the Contracts were used to pay the bribes. Da287-Da288.

III. THE KOREAN ARBITRATION PROCEEDINGS INVOLVING DAPA, GMB AND HACKENCO

GMB and Hackenco failed to perform under the Contracts. Da1126. The Contracts contained arbitration provisions, pursuant to which the parties agreed to arbitrate any disputes between them before the Korean Commercial Arbitration Board (the "KCAB"). Id. On December 24, 2014 and September 8, 2015, Hackenco and GMB filed arbitration claims with the KCAB, respectively. Da411, Da471. DAPA asserted counterclaims against Hackenco and GMB on

March 12, 2015, and October 30, 2015, seeking recovery of the money that it had paid them under the Contracts. Id.

In the Hackenco Arbitration, among its counterclaims was DAPA's assertion that the KCAB should pierce Hackenco's corporate veil and hold Kang and Kim personally liable. Da422-Da423. The KCAB declined to consider DAPA's veil piercing claim on jurisdictional grounds in light of the fact Kang and Kim were not parties to the Contracts and therefore the arbitration provisions contained therein. Id. The KCAB therefore dismissed DAPA's corporate veil claim, holding that "[e]ven considering the admitted facts, [DAPA's] assertion, the exhibits submitted, and the entire purport of pleadings it cannot be admitted that there exists a separate arbitration between [DAPA] and [Kang and Kim], and thus, **this Arbitration Panel does not have the authority to decide** on [DAPA's] counterclaim...." Id.

On December 13, 2016, the KCAB issued a decision and award in favor of DAPA and against GMB in the amount of $32,416,494.56, plus interested at the rate of 6% per year on $31,378,337.53, until GMB paid off the entire amount awarded (the "GMB Arbitration" or "GMB Award"). Da467-Da468, Da499. And on May 30, 2016, the KCAB issued a decision and award in favor of DAPA and against Hackenco in the amount of $26,237,340, plus 6% annual interest, $48,061,38, plus 6% annual interest, and ₩4,382,504,582, plus 6% annual

interest until the entire amounts were paid (the "Hackenco Arbitration" or "Hackenco Award"). Da407-Da409, Da431. The arbitration awards were based upon the arbitration panel's conclusion that GMB and Hackenco failed to perform under the Contracts (which Kang had secured through bribery). Da406-Da431, Da466-Da499, Da1114, Da381-Da402.

On March 22, 2016, the KCAB issued its decision in the ROV Arbitration in favor of GMB. Da1518. In the ROV Arbitration, DAPA filed a counterclaim in which it sought to pierce GMB's corporate veil to hold Kang personally liable. Da1513. As was the case with the prior contracts with Hackenco, the KCAB did not move past the fact that the Kangs were not parties to an arbitration agreement. Da1513-1514. The KCAB did not allow the issue to be fully litigated, as it only considered evidence that predated the ROV Contract (which contained the arbitration clause):

> There has been no evidence submitted to prove that, as of June of 2011, when the contract [containing the arbitration clause] in this matter was executed, [Kang] was blending the assets or businesses [of GMB]....

Da1514.

The Kangs were not parties to the ROV Contract and therefore the arbitration clauses. Id. The KCAB decided that because there was no evidence presented that supported veil piercing as of the date the ROV Contract was signed, the KCAB declined to pierce GMB's corporate veil. See id.

IV. THIS LITIGATION AND DAPA'S POST-JUDGMENT DISCOVERY

In 2015, DAPA hired counsel, who in turn hired investigators to conduct "a limited" asset search of GMB, Hackenco, Kang and Kim (the "2015 Memo"). Da1307-1321. In 2016, DAPA again hired counsel to conduct an asset investigation into GMB, Hackenco, DBNJW, Kang and Kim (the "2016 Memo").[2] Da1323-1340. The 2015 and 2016 Memos contained information found from public records, regarding multi-million homes the Kang family resided in that were title in the names of a corporation and limited liability company owned by Mr. and Mrs. Kang's children. See, generally, Da1307-1321, Da1323-1340.

DAPA instituted summary proceedings against GMB and Hackenco in the Superior Court of New Jersey in January 2019 to confirm the KCAB GMB and Hackenco Awards and, on March 15, 2019, the trial court issued Orders confirming them and entering Final Judgment in the amounts of $37,987,224.07 and $37,519,835.29, respectively (the "GMB Judgment" and "Hackenco Judgment"). Pa1-Pa15, Da1127. Neither defendant appeared nor otherwise opposed the relief sought. Id.

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[2] The trial court ordered the 2015 and 2016 Memos produced in connection with a motion to compel discovery filed by the Defendants. Da1305.

After the arbitration awards were confirmed in 2019, DAPA undertook discovery in aid of execution. This consisted of issuing subpoenas to banks and conducting depositions, including of Kang. See Da263, Da292, Da766-767. The discovery disclosed numerous fraudulent transfers by GMB and Hackenco, commingling of assets and the creation of a successor company, Primacy. See Da1116-Da1126.

Thus, on September 23, 2019, DAPA filed the instant litigation in the Superior Court of New Jersey, Law Division, and on November 1, 2019, DAPA filed a First Amended Complaint. Da1-D25. GMB and Hackenco filed counterclaims seeking to confirm the ROV Award and for unjust enrichment, which was later amended. Da38-D60 and Da79-D101.

V. DEFENDANTS' FRAUDULENT TRANSFERS

Through post-judgment discovery, after the arbitration awards were confirmed, DAPA discovered substantial bank transfers made by GMB and Hackenco of the funds they had just received from DAPA in payment under the Contracts. See Da1116-Da1126, Da287-Da288. These transfers took place shortly after DAPA began remitting payments to GMB and Hackenco under the Contracts. Id.

By way of example, in July of 2012, Hackenco transferred to the Kangs' personal account sums totaling $770,000. Da579. On December 18, 2012, GMB

transferred $600,000 and then on December 28, 2012, $3.4 million to the escrow account of the Kangs' attorney. Da1116, Da287-Da288. On December 28, 2012, Hackenco transferred $1.3 million to the same attorney's escrow account. Id.

On December 28, 2012, DBNJW purchased the Kang family home located at 899 Closter Dock Road, Alpine, New Jersey (the "Alpine Property") for $5,242,911.00. Da1116-Da1117. The Alpine Property was placed in the name of DBNJW, a real estate holding company that the Kang set up and caused to be owned by their two minor children. Id. Kang admitted that the $5,242,911 purchase price came from the Contract payments made by DAPA to GMB and Hackenco, and overlapped with the bribe payments made to the compromised Korean procurement officer. Da1117, Da381-Da402. Kang had no explanation as to why $5.3 million of GMB and Hackenco funds that were obtained from DAPA were used to purchase his family's personal residence during the same period of time that he was bribing a Korean naval procurement officer in exchange for the award of the Contracts from which the $5.3 million was secured. Da611-Da614, Da622.

On September 25, 2015, the Alpine Property was sold for $7.9 million. Da1118. The proceeds from the sale were not placed in DBNJW's operating bank account. Id. Rather, the proceeds of the sale were moved in and out a series of investment accounts and an irrevocable trust for Mr. and Mrs. Kang's

children, as summarized in more detail on page 8 of DAPA's expert report submitted by Ryan C. Pak, CPA. Da548-Da575.

DBNJW was dissolved on December 31, 2015. Da1118. On April 4, 2018, Kang, with funds from the above-described investment accounts, purchased the Englewood Property for $4 million. Id. Title to the property was placed in the name of 78 LLC, owned by Bryant who was 20 years old at the time. Id. The Kang family resides at this property. Id.

The purchase monies for the Englewood Property came from the proceeds of the sale of the Alpine Property, which, as noted above, were tracked by DAPA's forensic accounting expert through a series of investment accounts and irrevocable trust created by Kang with the proceeds from the Alpine Property. Da225, Da548-Da575. On May 6, 2019, 78 LLC obtained a $2 million mortgage from Recovco Mortgage Management LLC ("Recovco"). Da1119. $1.5 million of the $2 million in mortgage proceeds went into Kang's son Bryant's, Chase bank account. Id.

Between 2011 and 2017, Kang caused GMB and Hackenco to transfer $23,630,440.00 to the following Korean companies: Hackenco Korea, Co., Ltd., D.W. Inc., NDEC Korea, GMC Inc. and Golden Pig Inc. Da1120. By way of example, Kang caused GMB and Hackenco to transfer a total of $3,544,000 to D.W. Inc. between 2012 and 2015. Da1120-Da1121. At his deposition, Kang

testified that he was unaware of what D.W. Inc. was; then claimed he knew what it was and might have owned an interest in it, but had no explanation as to why millions of dollars were transferred from GMB and Hackenco to D.W. Inc. Da271, Da293-Da294, Da622-Da623. In fact, D.W. Inc. was owned by Kang. Da1121.

Kang commingled the assets of GMB, Hackenco and their affiliates, through checks written out as loans by and between the entities, as well as Primacy and 78 LLC, whenever he needed money. Da273 ("...so probably if I didn't have enough of fund in one account, money was transferred from the other account."), Da302-Da309. Kang also treated GMB and Hackenco as one and the same when writing checks. Da567 (check written from account of "GMB (USA) Inc. d/b/a Hackenco c/o Deck W. Kang"). Defendants never introduced any evidence rebutting the commingling evidence and fraudulent transfers. See Da1116-Da1126.

In 2015, Primacy was formed by an elderly retired engineer from Chicago, Illinois, named Jaewan Lee, while Kang was serving a jail sentence in Korea for bribery and at the Kangs' insistence. Da652-Da654, Da1124-Da1125. With funds traced from the original payments to GMB and Hackenco under the Contracts, Kang deposited $3.1 million in Primacy's account which were identified as notes payable in Primacy's 2018 tax return. Da1125. Kang caused

GMB's remaining assets to be transferred to Primacy through an asset purchase agreement, dated January 2, 2017, for $200,000. Da240, Da296, Da1113-Da1114. Kang managed Primacy and in bank records used to open accounts for Primacy, Kang represented that he owned 100% of Primacy and that he is its President. Da1125, Da776-Da780. In unrelated legal proceedings, Primacy had represented to various courts that it is a GMB successor entity. Da701-Da702, Da704, Da706.

VI. SUMMARY JUDGMENT, JURY TRIAL AND THIS APPEAL

On July 8, 2022, DAPA filed for summary judgment as to all of its claims. Da103-Da104. On August 15, 2022, Primacy and the remaining Defendants cross-moved for summary judgment, arguing that DAPA's Uniform Fraudulent Transfer Act ("UFTA") claims were time barred. Da1056-Da1060, Da1108-Da1111. On September 9, 2022, the trial court asked the parties to submit supplemental papers briefing the statute of limitations issues. 8T30:1-31:13.

On October 6, 2022, the trial court granted DAPA summary judgment as to its DAPA's piercing claims, holding that:

> [T]he undisputed facts clearly demonstrate that [Kang and Kim] utilized the corporations, GMB and Hackenco, as their own individual funds. ... [T]here's no doubt about it. They fit squarely within the case law that talks about what you need to show and it's clearly been demonstrated here that they siphoned the funds of the corporations.

> And, I mean, going further than that, it certainly appears that they took steps to not only siphon[] the funds, but to protect the funds and place them in the name of others to preclude reaching those funds.
>
> I mean, that's undisputed here. ... [T]here's no basis for people to put houses in the names of their minor children and such. But when you look in the context of this case, there's clearly a reason to do it.
>
> So I clearly find that there's no disputed issues of fact which would preclude piercing the corporate veil as to these individuals.

9T26:13-27:13.

In response to Defendants claims that DAPA's corporate veil claim should be barred by collateral estoppel, the trial court stated:

> [DAPA] didn't lose. Sometimes you win, sometimes you lose, sometimes you get rained out. They got rained out. Because I read the ruling --- actually, I have it here. It says here there was no arbitration agreement between Lauren Kim and Deck Won Kang that – whatever this arbitration agreement was, could not consider it. So [the KCAB] didn't decide it because they're not a party to the arbitration. ... So in that sense, I don't think they – they didn't lose on it, so I don't think there's – I don't think res judicata applies. Let me make that clear.

9T22:25-23:13.

As to Defendants' statute of limitation arguments, the trial court held that the Defendants were not entitled to summary judgment because they "ha[d] not conclusively established undisputed material fact[] that DAPA was aware of the transfer of assets at the time of the arbitration proceeding in Korea, which resulted in the awards in 2016." 9T28:17-23. The trial court held that although

DAPA asserted that Kang and Kim co-managed Hackenco as a one-man company that had no assets while they had 5 to 6 billion Won, such assertions themselves did not "demonstrate that DAPA had knowledge of specific transfers" and the "proofs [were] insufficient to entitle the defendant[s] to summary judgment on those claims." 9T29:6-30:1. He further held that, "it's certainly not clear from here that DAPA, as an entity, or individuals within DAPA, knew of specific transfers which would then put them on the clock, so to speak." 9T30:5-8.

The trial court held that there were no factual disputes that Defendants' transfers occurred, and ultimately found them to be fraudulent given its findings that the Kangs siphoned funds that were intended to be hidden from creditors. 9T26:13-27:13, 9T32:14-33:23. Following oral argument, on October 25, 2022, the trial court entered its first summary judgment order as set forth above. Da1274-1277.

On February 27, 2023, Defendants filed a motion for summary judgment on DAPA's UFTA claims, asserting they were time-barred, and for reconsideration of the trial court's grant of summary judgment in favor of DAPA on its veil piercing claim and the dismissal of the counterclaims. Da1284-1344. DAPA cross-moved for summary judgment on the statute of limitation issue, also seeking to void Defendants' fraudulent transfers. Da1345-1568.

On April 12, 2023, the trial court placed its second set of summary judgment decisions on the record, making findings of fact and conclusions of law. See 14T. The trial court found that DAPA's complaint alleged "that wire fraud transfers occurred from [GMB and Hackenco] in 2012, which led to the purchase of the Alpine property in 2020." 14T6:25-7:3. And that "DAPA discovered the wire transfer themselves when they subpoenaed the bank records and unveiled copied of the transfers in 2019. [DAPA] filed a complaint in 2019." 14T7:8-15. The trial court stated that "[i]t is undisputed that neither [the 2015 or 2016 Memos] contained information regarding two wire transfers that occurred in 2012 for the purchase of the Alpine property." 14T9:7-10.

In analyzing the UFTA, the trial court stated as follows:

> The amended phraseology of the statute has been interpreted by at least one decision of the U.S. Bankruptcy Court, Wolff v. Tzanides, ... 574 B.R. 489 (2017) which states, "To hold that the statute amended alters the tolling provision to provide a one-year limitation upon action discovery." ... "As reflected in the Assembly Notes, the legislature made a conscious choice in eliminating the constructive discovery rule."
>
> The legislature, excuse me, stated, quote, "This bill provides that the one-year statute of limitations for certain fraudulent transfers runs from the time the creditor actually discovers the fraudulent conveyance rather than when the creditor could reasonably have discovered the fraudulent conveyance." And that's in the legislative issued statement to number 2298 on November 18, ... 2002.

14T12:3-25.

The trial court went on to explore the specificity required in asserting claims involving fraud, e.g., UFTA claims:

> In viewing fraud generally the Court turn to Catena v. Raytheon Co., 447 N.J. Super. 43 (App. Div. 2016). Catena addresses the discovery rule and sets forth the standard three. Catena states that, "The date of discovery is when the plaintiff learns or reasonably should learn the existence of that state of facts which may equate in law with the cause of action."
>
> Catena stated that the claim accrues once plaintiff is aware of facts that would alert a reasonable person to the possibility of an actual claim. ... Catena went so far as to consider New York law [and] was persuaded to adopt the analysis so the plaintiff could reasonably have inferred the fraud from knowledge there was a high probability of fraud.
>
> However, our analysis differs from Catena in that the language of the statute was specifically amended in 2002 to remove the language "or could reasonably have been" discover[ed]. Thus the toll of the statute would begin the saving provision of the one year the plaintiff must actually discover the transfer. ...
>
> Defendant asserts the 2000 amendment was for the purpose of avoiding the need to conduct unnecessary asset searches between – during the term that [e]very loan goes into default. If we look at the legislative statement as to the time of the statute of limitations to certain fraudulent transfers runs from the time the creditor actually discovers the fraudulent conveyance, rather than when a creditor could reasonably have, and that's the language from the legislature.
>
> Thus, eliminating asset searches was the articulated goal. Changing the statute as to discovery was specifically intended.

14T16:1-17:18. Because it was clear from the Memos that DAPA did not have actual knowledge of the transfers, the trial court denied Defendants' motion for

summary judgment and granted DAPA's cross-motion that its UFTA claims were not time barred. 14T19:6-20:6.

The trial court next considered Defendants' motion to reconsider the piercing of GMB and Hackenco's corporate veils, finding that it was proper to pierce the veils based on the facts of the case. 14T20:7-11. The trial court addressed the three arbitration proceedings, two of which DAPA sought to assert piercing claims. 14T20:17-25. As to the Hackenco Arbitration, the trial court held:

> The quoted portion above indicates quite clearly, quote "This arbitration panel does not have the authority to decide..." end/quote, and then it goes on. Such language clearly convinces the decision by the panel to not decide the issue. Lacking a decision on the merits, the defendants cannot cogently argue in this case that insofar as these arbitration proceedings are concerned there was a decision on the merits.

14T22:13-22. As to the ROV Arbitration, the trial court found that "[t]here is no doubt that the ROV arbitration panel considered the issue of piercing of the corporate veil." 14T23:1-3. However, the trial court recognized that:

> It needs to be noted the decision and the time frame associated with it. In that proceeding the arbitration panel stated in paragraph 58 as follows, and, again, I'll quote, "There has been no evidence submitted to prove that, **as of June of 2011, when the contract in this matter was executed**, the claimant, Deck Won Kang, was blending the assets or the business between the claimant and himself, laws or by-laws were not observed to hold board meetings, or in decision-making processes, lack of company's capital, scale of the business or the number of employees. Also, there has been no evidence submitted to show that Deck Won Kang abused the

> corporate veil to avoid his financial obligations **at the time that the contract in this matter was executed."**
>
> From the above quoted portion of the ROV arbitration, it is clear that the arbitration panel focused on a time frame up to and including June 2011 and nothing thereafter.

14T23:4-24:4 (emphasis added). The trial court therefore found that because DAPA asserted a corporate veil piercing claim based on assets and activities that post-dated June 2011, "such claims were never considered in the ROV arbitration and, as such, cannot be banned herein." 14T24:23-25:2. The trial court thereafter entered an Order reflecting its decisions. Da1573-1574.

The issues that thus remained for a jury trial were (1) whether Primacy was GMB's successor; (2) whether the $3.1 million in payments to Primacy were fraudulent transfers; and (3) whether DAPA was unjustly enriched. On May 28, 2024, the parties commenced a jury trial that lasted one week, until June 4, 2024. Da1575-1577. GMB and Hackenco voluntarily dismissed their sole surviving counterclaim. See 25T23:16-24. The seven-member jury unanimously entered a verdict, after about an hour of deliberations, in favor of DAPA on every issue, finding that Primacy is GMB's successor and that the Defendants made scores of fraudulent transfers. See 25T71-72, 25T73-86:16. Based on the jury's verdict, the trial court entered a judgment which incorporated all of the trial court's decisions on summary judgment and the jury's verdict. Da1575-1581.

On June 17 and July 26, 2024, Final Judgment was entered. Da1575-Da1581. At this point, GMB and Hackenco had been dissolved and assetless for years. See Da240, Da296, Da746-Da747, Da749-Da752. In July and August of 2024, the Defendants filed notices of appeal. Da1582-1599.

ARGUMENT

I. THE TRIAL COURT PROPERLY PIERCED THE CORPORATE VEILS OF GMB AND HACKENCO (DA1274-DA1277, DA1573-DA1574, 9T, 14T)

Defendants ignore most of the condemning facts presented to the trial court below that resulted in the trial court's findings that the corporate veils of GMB and Hackenco must be disregarded. Defendants ignore the fact that Kang used these two entities as instruments in his international bribery scheme in which they bribed foreign government officials to obtain military contracts, that Kang and Kim caused millions of dollars to be disbursed from Hackenco and GMB to a limited liability company hidden in the names of their minor children, that they moved millions of dollars back and forth between both entities, themselves and other entities as if they were their personal checkbooks, that GMB and Hackenco maintained no corporate formalities, and that Defendants created a successor company, Primacy, to take over GMB's business after the bribes came to light. Defendants also ignore in their brief the fact that they did not dispute these facts on summary judgment.

Instead of addressing the undisputed fact that GMB and Hackenco were used to further a criminal enterprise and to make scores of fraudulent transfers, Defendants claim that the KCAB's refusal to entertain veil piercing claims because the Kangs were not parties to the arbitration agreement collaterally estops DAPA from fully litigating the issue before the trial court. Db15-21. Defendants are wrong.

A. The Trial Court Properly Granted Summary Judgment in Favor of DAPA As to Its Corporate Veil Piercing Claim (Da1274-Da1277, Da1573-Da1574, 9T, 14T)

The "abuse of discretion" standard governs appellate review of a denial of a motion for reconsideration. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). In that context, "[a]n abuse of discretion arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." AC Ocean Walk, LLC v. Blue Ocean Waters, LLC, 478 N.J. Super. 515, 523 (App. Div. 2024) (quoting Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015)); Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "The magnitude of the error cited must be a game-changer for reconsideration to be appropriate." Palombi v. Palombi, 414 N.J. Super. 274, 289 (App. Div. 2010).

Here, the trial court correctly granted summary judgment in DAPA's favor and denied reconsideration of the issue because there was no dispute that GMB and Hackenco were used to commit crimes in the form of an international bribery scheme that spanned the United States, Korea and Australia and that the proceeds from these crimes were the source of dozens of fraudulent transfers.

It is well established, under New Jersey law, that courts will pierce the corporate veils of corporations that are used to defeat the ends of justice, to perpetrate fraud, to accomplish crime or otherwise to evade the law. State, Dept. of Env't Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983); Richard A. Pulaski Const. Co., Inc. v. Air Frame Hangars, Inc., 195 N.J. 457, 472 (2008).

Courts also pierce corporate veils where: (i) the corporate formalities are not observed, such as the failure to keep separate books and records; (ii) there is commingling of corporate funds and misuse of corporate funds for the benefit of the dominant shareholders; and (iii) the corporation is treated as the dominant shareholder's alter ego. Ventron, 94 N.J. at 500-501; Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199-200 (App. Div. 2006). It is not necessary to establish the existence of each of the above circumstances for piercing the corporate veil. Ibid. Veil piercing is an equitable doctrine used to combat the misuse of the corporate form. Ibid. Hence, if one of the above circumstances is strongly established, that may be sufficient to pierce the

corporate veil, particularly if the court believes that there has been a misuse of the corporate form. Ibid.

The factors used to determine whether to pierce the corporate veil include "[g]ross undercapitalization[,] ... failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of the funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a façade for the operations of the dominant stockholder or stockholders." Ramirez v. STi Prepaid LLC, 644 F. Supp. 2d 496, 507 (D.N.J. 2009); Sean Wood, LLC v. Hegarty Group, Inc., 422 N.J. Super. 500, 517 (App. Div. 2011) ("An individual may be liable for corporate obligations if he was using the corporation as his alter ego and abusing the corporate form in order to advance his personal interests."); see Jenkins v. Comm'r of Internal Revenue, Nos. 27139-11 & 28712-11, 2021 WL 1853402, at * 15-16 (U.S.T.C. May 10, 2021) (holding that the individual defendant was an alter ego of multiple corporations where he controlled the corporations' bank accounts and moved money into other accounts for no consideration, used funds for his own personal use, and also used the corporations to commit crimes such as tax evasion) (Pa48-49).

The trial court properly found sufficient evidence to pierce the corporate veils of GMB and Hackenco. 9T26:13-27:13. The trial court held that Kang and Kim utilized GMB and Hackenco as their own individual checkbooks and that they took steps not only to siphon corporate funds, but to hide such funds in the names of others to preclude DAPA from reaching those funds. Id. The trial court also recognized the lack of any basis for diverting $5.3 to a corporation whose shares were placed in the names the Kangs' minor children unless Kangs were trying to hide the funds. See id.

Significantly, Defendants do not even attempt to challenge these facts or offer an explanation for the above-described criminal and fraudulent conduct in their appellate brief. See Db33-Db41. Kang claimed a lack of knowledge during his deposition testimony, and no one was ever produced who had knowledge. See Da615-Da622.

The undisputed record demonstrated that Kang used both GMB and Hackenco for criminal purposes. First, the Contracts were secured through bribes that were paid with GMB funds received from DAPA under the Contracts. Da382-Da384, Da389, Da399-Da402. Kang transferred funds from GMB to its affiliates in Australia, which then remitted the bribe money to the Korean official. Id. The bribe money came from revenues generated by GMB and Hackenco pursuant to the Contracts. Da287a-Da288a. The bribes were paid

during the same period of time that these entities received $16 million under the Contracts. Da287-Da288, Da382-384.

At the same time that GMB and Hackenco were receiving millions of dollars from DAPA, and paying the bribes to Korean government officials, Kang caused GMB and Hackenco to transfer $5.3 million dollars to the escrow account of his attorney to purchase his personal residence, which he placed in the name of a corporation owned by his two minor children. Da287-Da288, Da382-Da384, Da611-Da614, Da622, Da1113.

When questioned at his deposition regarding why he would gift $5.3 million out of GMB and Hackenco immediately after bribing foreign government officials, and then place ownership of the property in the names of a corporation owned by his minor children, Kang had no explanation and feigned ignorance of the transaction in question. Da611-Da615, Da622-Da623.

However, Kang did not and could not dispute the bank records that substantiate his movement of money in and out of GMB and Hackenco in furtherance of his use of these corporations to commit crimes that resulted in a criminal conviction in Korea to bribery and a guilty plea in the United States to violations of the Foreign Corrupt Practices Act. Kang's guilty plea agreement in the United States to violations of the Foreign Corrupt Practices Act specifically adopts the Information document which specifies the specific

payments of between $10,000 and $30,000 that made up the $100,000 bribe. Da382-Da384, Da389. Nor did Defendants dispute the fact that the source of this money included funds received from DAPA.

In addition, during the performance period of the Contracts, Kang caused GMB and Hackenco to transfer approximately $23.6 million to affiliates in Korea, including the Golden Pig, a restaurant in Seoul Korea, and D.W. Inc., which owned Mr. and Mrs. Kang's real estate in Seoul. Da558-Da560. When questioned at his deposition regarding who the entities were or why such substantial sums of money were transferred to them, Kang feigned ignorance and claimed he was unfamiliar with these entities. Da611-Da615, Da622-Da623.

Like most criminals, Kang also hid and/or destroyed the evidence of his crimes. In addition to hiding his ill-gotten gain in entities owned by his minor children and corporations in Korea, he admitted during his deposition that he destroyed the business records of GMB and Hackenco. Da193-Da194, Da270-Da271, Da277, Da299, Da327, Da336-338. Accordingly, DAPA was constrained to issue subpoenas to GMB's and Hackenco's banks and their accountant who claimed that he did not have all of GMB's and Hackenco's records because he gave them to Kang. Da732-Da733.

Kang also used GMB's and Hackenco's bank accounts interchangeably to fund their activities. In checks that Kang wrote on behalf of the companies, he

identified GMB as "doing business as" Hackenco. Da567. Kang also testified that if one company did not have enough funds in its account, he would send money from another business's account and even had checks referring to GMB and Hackenco as one and the same. Da200, Da273, Da302-Da309, Da567 ("GMB (USA) Inc. d/b/a Hackenco c/o Deck W. Kang"). Kang used GMB and Hackenco to transfer millions of dollars in and out of the U.S. and Korea to Korean companies, including the GMB and Hackenco companies in Korea, and had no explanation for these transactions. Da577-Da583, Da585, Da587-Da598, Da600-Da602, Da611-Da615, Da622-Da623. To the extent GMB needed money, Hackenco transferred money to it and vice versa. Id.; Da273. Defendants were unable to produce any corporate records, such as resolutions or minutes that evidence the separateness of these two entities.[3]

In short, the trial court's decision to pierce GMB's and Hackenco's corporate veils was supported by an avalanche of undisputed evidence and was in no way an abuse of discretion. Kang's claim of ignorance of these crimes and

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[3] Notwithstanding Kang's spoliation of evidence and efforts to hide money pulled from GMB and Hackenco, DAPA was able to piece together information which is summarized in DAPA's detailed expert's report that was part of the summary judgment record. Da548-Da575.

fraudulent transfers and Lee's complete silence, left the trial court with no choice but to grant summary judgment as there were no factual issues to try.

B. DAPA's Claims Are Not Barred by the Doctrine of Collateral Estoppel (Da1274-Da1277, Da1573-Da1574, 9T, 14T)

After ignoring the use of GMB and Hackenco to further Kang's crimes, the scores of fraudulent transfers and the use of GMB and Hackenco as the Kang family's personal checking account, Defendants now contend that the KCAB's dismissal of veil piercing claims on grounds that the Kangs' did not sign the Contracts in their individual capacity and/or their limiting veil piercing to evidence at the time the Contracts were signed, creates an estoppel. This argument ignores the very law cited by Defendants and mischaracterizes the KCAB's decisions.

To succeed on their collateral estoppel argument, Defendants must demonstrate that:

(1) the issue to be precluded is identical to the issue decided in the prior proceeding;

(2) the issue was actually litigated in the prior proceeding;

(3) the court in the prior proceeding issued a final judgment on the merits;

(4) the determination of the issue was essential to the prior judgment; and

(5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

Adelman v. BSI Fin. Servs., Inc., 453 N.J. Super. 31, 40 (App. Div. 2018) (citing Allen v. V&A Bros., Inc., 208 N.J. 114, 137 (2011) (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521 (2006))).

A decision is made "on the merits" where "the factual issues directly involved" are "actually litigated and determined." Adelman, 453 N.J. Super. at 40. A dismissal for lack of jurisdiction is not an adjudication on the merits and does not have preclusive effect. Egg Harbor Care Ctr. v. Scheraldi, 455 N.J. Super. 343, 355-56 (App. Div. 2018).

In the context of arbitration, the Appellate Division has found that a "key factor" in determining whether an arbitration award should have preclusive effect is "the opportunity once to be heard fully." Habick v. Liberty Mut. Fire Ins. Co., 320 N.J. Super. 244, 255 (App. Div. 1999). A party may be subject to issue preclusion as to issues "which were fully and fairly litigated between them as adversaries and were essential to the award." Nogue v. Estate of Santiago, 224 N.J. Super. 383, 388 (App. Div. 1988).

Here, the trial court correctly decided that DAPA was not collaterally estopped from asserting its veil piercing claims in this litigation because the issue was not fully litigated before the KCAB. In short, although Defendants claim that veil piercing was litigated in three arbitrations, veil piercing claims

were attempted to be asserted in only two arbitrations, neither of which fully litigated the issue.

With regard to the Hackenco Arbitration, although DAPA attempted to bring corporate veil piercing claims, the KCAB determined it did not have jurisdiction over Kang and Kim because they did not sign the arbitration agreement. It therefore dismissed DAPA's corporate veil claim without reaching the merits. Da409, Da423 ("Even considering the admitted facts, [DAPA's] assertion, the exhibits submitted, and the entire purport of pleadings it cannot be admitted that there exists a separate arbitration between [DAPA] and [Mr. and Mrs. Kang], and thus, **this Arbitration Panel does not have the authority to decide** on [DAPA's] counterclaim....") (emphasis added), & Da431. Defendants thus misrepresent the record by claiming that "DAPA had the opportunity to submit evidence" and "had a fair opportunity for sufficient argument" on such claims. Db16.

The trial court carefully reviewed the KCAB's decision and language (quoted above) and correctly held that:

> such language clearly convinces the decision by the panel to not decide the issue. Lacking a decision on the merits, the defendants cannot cogently argue in this case that insofar as these arbitration proceedings are concerned there was a decision on the merits.

14T22-23. Hence, because the panel in the Hackenco Arbitration clearly stated that the veil piercing claim was dismissed for lack of jurisdiction, DAPA did not

have an opportunity to litigate its veil piercing claim. Id.; see Habick v. Liberty Mut. Fire Ins. Co., 320 N.J. Super. 244, 257 (App. Div. 1999) (stating that a party will not be precluded from litigating an issue where "he lacked full and fair opportunity to litigate the issue in the first action").

As to the GMB Arbitration, which ultimately led to an award in DAPA's favor, no veil piercing claim was ever asserted. Db6, Da469.

Finally, in the ROV Arbitration, the trial court found that the KCAB did not fully hear the veil piercing claim. 14T23:4-24:4. Rather, in a variation of the dismissal on jurisdictional grounds because the Kangs did not personally sign the arbitration agreement, the KCAB rejected veil piercing because there was no evidence to support veil piercing **at the time the contract was executed** in June of 2011. Da1514 ("There has been no evidence submitted to prove that, **as of June of 2011**, when the contract [containing the arbitration clause] in this matter was executed, [Kang] was blending the assets or businesses [of GMB]…."). In other words, the veil piercing claim was not "fully heard" or even considered on the merits as the Kangs were not found to be bound by the arbitration agreement when it was made.

The trial court correctly recognized that the KCAB did not allow the issue to be fully litigated because it only considered veil piercing evidence as of the date the contract containing the arbitration clause was signed:

> [DAPA sought to] assert corporate veil piercing claims based upon assets and activities that postdate[d] June 2011. Such claims were never considered in the ROV [A]rbitration and, as such, cannot be banned herein.

14T24:23-25:2. The trial court thus concluded that by limiting the timeframe for such claim in such a substantial way, that DAPA did not have a full opportunity to litigate the issue. Id.

Significantly, the bribes were all paid after the Contracts were signed when payments from DAPA began to flow into GMB and Hackenco. The transfers between Hackenco and GMB, that were only discovered through post judgment discovery after the arbitration awards were confirmed, all took place after the Contracts were signed. See Da1114, Da1116-Da1126, Da600-Da602, Da287-Da288. As the trial court correctly concluded, the activities here involved scores of fraudulent transfers from GMB and Hackenco after the ROV Contract was signed. 14T24:23-25:2. By way of example only, the $5.3 million fraudulently transferred from GMB and Hackenco took place in December 2012, the bribe payments through Australia were made throughout 2012 and early 2013, and the Kangs' mansions were placed in the names of a corporation and limited liability company owned by the Kangs' minor children in 2012 and 2018. Da1117-Da1118. As acknowledged in Defendants' brief, the Kangs also dissolved GMB and Hackenco as insolvent entities after the arbitrations were conducted. Db7, Da746-Da747, Da749-Da752.

Accordingly, DAPA's veil piercing claims in this litigation do not emanate from the same facts as those raised in the ROV Arbitration and were not fully litigated there. DAPA did not even discovery these transactions until after it confirmed the arbitration awards as judgments.[4] Limiting the facts to be considered to only those that predated the signing of the arbitration agreement in June of 2011amounted to a jurisdictional limitation that effectively required DAPA to establish that Kang was a party to the arbitration agreement contained in the ROV Contract at the time it was signed by reason of the fact that the veils should be pierced as of signing.

The KCAB's decision to not entertain jurisdictional claims due to there being no arbitration agreement signed by the Kangs in their personal capacity or evidence to support veil piercing at the time the arbitration agreement was signed, amounts to a jurisdictional declination on the veil piercing claim by the KCAB, that cannot create collateral estoppel. Velasquez v. Franz, 123 N.J. 498, 506 (1991) (stating that "a valid and final personal judgment for defendant does

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[4] Even if the Court were to somehow find that DAPA's corporate veil claim was fully litigated in the Hackenco and ROV Arbitrations—it was not—the Court should not apply the doctrine of equitable estoppel because it would lead to an unjust result. See Barker v. Brinegar, 346 N.J. Super. 558, 566 (App. Div. 2002) ("[T]he court must, in the exercise of its discretion, weigh economy against fairness. … Efficiency is subordinated to fairness and, … if the court is satisfied that efficiency would lead to an unjust result, [the] application [of collateral estoppel] should not be tolerated.") (internal citations omitted).

not bar another action by plaintiff on the same claim if the judgment is a dismissal for lack of jurisdiction, improper venue or non-joinder or misjoinder of parties"); Adelman, 453 N.J. Super. at 40 ("On the merits means that the factual issues directly involved must have been actually litigated and determined.").

C. Defendants Did Not Raise Their "Adequate Remedy" Argument Below and Cannot Do So on Appeal (Issue Not Raised Below)

It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." State v. Robinson, 200 N.J. 1, 20 (2009) (citing Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973)).

Here, Defendants claim that the trial court erred in awarding DAPA summary judgment as to veil piercing because "DAPA ha[s] an adequate remedy at law" and thus DAPA is allegedly not entitled to an equitable remedy. Db39.[5] However, Defendants never made this argument before the trial court and are thus precluded from doing so on appeal.

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[5] The record cited by Defendants makes no mention of the "adequate remedy at law" argument.

DAPA moved for summary judgment as to veil piercing and Defendants, in their opposition, did not raise this argument. Even when Defendants moved for reconsideration of the trial court's grant of summary judgment as to veil piercing, and moved for partial summary judgment two years later, Defendants once again failed to raise this argument. See Da1058-D1060, D1110-D1111, D1286-D1288. Accordingly, this court should not entertain it.

D. Even if the Court Considers Defendants' "Adequate Remedy" Argument on Appeal, Such Argument Fails Because It Misstates the Law and Because DAPA Does Not Have an Adequate Remedy at Law (Issue Not Raised Below)

This court and our Supreme Court have issued numerous reported opinions on veil piercing. See, supra, pp. 22-24. None of these authorities impose a requirement of establishing the lack of an adequate remedy at law, as now claimed for the first time by defendants on appeal. See Db39-40. As a result, Defendants have not provided any binding authority for this proposition. Instead, they case law from other states, and one vague reference in an unreported New Jersey case that does not even stand for the proposition for which it is cited. See Db40 (citing Luma Enters., L.L.C. v. Hunter Homes & Remodeling, L.L.C., No. A-6094-11T3, 2013 WL 3284130, at *7 (N.J. Super. Ct. App. Div. July 1, 2013) (Da1669a)).

Under New Jersey law, DAPA was required to prove that GMB and Hackenco were used to "perpetrate fraud, to accomplish crime or otherwise to

evade the law", and that is precisely what DAPA proved below. See Ventron Corp., 94 N.J. at 500. The Defendants' contention that there should be no consequences to the use of corporations as instruments of crime if there are other remedies available ignores the policy behind veil piercing, which is to prevent the corporate form from being misused. See id. (stating the purpose of piercing the corporate veil is to "prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise evade the law"). Such a holding would be contrary to decades of legal precedent.

The record establishes that Kang used GMB and Hackenco to commit crimes and that he and Kim used the companies as shells to hide assets from DAPA and denude the companies of their assets for the Kang families' benefit. DAPA had no adequate remedy at law given the fact that Kang used GMB and Hackenco as tools to commit bribery and then drained them of their assets.

Hence, to the extent this court is inclined to consider this argument, it should be rejected.

II. THE TRIAL COURT CORRECTLY FOUND THAT DEFENDANTS MADE FRAUDULENT TRANSFERS AND THAT DAPA'S CLAIMS WERE NOT TIME-BARRED (DA1274-DA1277, DA1573-DA1574, 9T, 14T)

A. DAPA's Claims Under the Uniform Fraudulent Transfer Act Arising Out of the 2012 Transfers from GMB and Hackenco to DBNJW Are Not Time-Barred. (Da1274-Da1277, Da1573-Da1574, 9T, 14T)

This court reviews *de novo* a ruling on a motion for summary judgment, applying the same standard to the consideration of the motion as the trial court, i.e., whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013). This Court also reviews a trial court's legal conclusions *de novo*. New Gold Equities Corp. v. Jaffe Spindler Co., 453 N.J. Super. 358, 372 (App. Div. 2018).

Here, when Defendants moved for summary judgment claiming DAPA's UFTA claims were time barred, they were effectively moving for reconsideration of the trial court's prior ruling on summary judgment in favor of DAPA's UFTA claims. Thus, this court's standard of review is for an abuse of discretion (see Section I.A., supra). But regardless of whether this court applies the abuse of discretion or *de novo* standard, it is clear that the trial court ruled correctly as to DAPA's UFTA claims.

The trial court correctly ruled against the Defendants on summary judgment, finding that DAPA's fraudulent transfer claims were not time barred under the UFTA.

Pursuant to N.J.S.A. 25:2-31,[6]

> A cause of action with respect to a fraudulent transfer or obligation under this article is extinguished unless action is brought:
>
> a. Under subsection a. of R.S.25:2-25, **within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or the obligation was discovered by the claimant**;

N.J.S.A. 25:2-31 (2002) (emphasis added).

Here, Defendants focus on the fraudulent transfers in December 2012 and contend that they were outside the four-year limitations period and the one-year discovery period, and appear to concede that the subsequent transfers were not outside the limitations period. The trial court rejected this argument. It

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[6] New Jersey's Uniform Fraudulent Transfers Act was amended in 2021. The amendment is inapplicable here because the instant lawsuit was filed on 2019. Oberhand v. Director, Div. of Taxation, 193 N.J. 558, 571 (2008) ("[I]f the Legislature expresses an intent that the statute is to be applied retroactively, the statute should be so applied."); N.J. Dept. of Env't Prot. v. Occidental Chem. Corp., Nos. A-2036-17 & A-2038-17, 2021 WL 6109820, at * 12 n.4 (N.J. Super. App. Div. Dec. 27, 2021) (declining to discuss the 2021 amendment to N.J.S.A. 25:2-31 because the 2002 amendment was controlling at the time of the events given rise to the lawsuit) (Pa66, Pa71).

thoroughly considered the record, and correctly found that DAPA's UFTA claims were not time barred. 14T19:6-20:6. The trial court considered the amendment to the UFTA as well as the Assembly Notes leading to the amendment and found that because "the statute was specifically amended in 2002 to remove the language 'or could reasonably have been' discover[ed]", "the toll of the statute would begin the saving provision of the one year the plaintiff must actually discover the transfer." 14T16:1-17:18. The trial court concluded that the statute of limitations did not run until DAPA actually discovered the fraudulent transfers. 14T19:16-20:6.

Defendants appeal the award of summary judgment as to the fraudulent transfer claim against DBNJW, which the trial court granted summary judgment in the total amount of $5.3 million. Da1274-Da1277. Defendants on the one hand claim that "by 2017 at the latest, DAPA knew the facts necessary to bring its fraudulent transfer claim against DBNJW," and, on the other, claim that DAPA "knew of the basis for its fraudulent transfer claim against DBNJW by March 2018, if not earlier," relying on two asset searches DAPA conducted in 2015 and 2016. Db23, Db28. Defendants claim that the 2015 and 2016 Memos revealed that DAPA had knowledge of the fraudulent bank transfers prior to the filing of this lawsuit in 2019. Db28. This contention is flatly wrong and is contrary to the sound decision of the trial court.

First, even if the 2015 and 2016 Memos contained evidence that the purchase of the Alpine Property was the product of a fraudulent transfer, which they do not, the Memos fail to notify DAPA of the source of the funds that led to the purchase, which is what they needed to bring UFTA claims. The first fraudulent transfer was when Kang caused Hackenco to transfer $770,000 on July of 2012 to Kang's personal account, which had nothing to do with the subsequent purchase of the Alpine Property. Da579. The next fraudulent transfers were when Kang caused GMB to transfer $600,000 on December 18, 2012 and $3.4 million on December 28, 2012, to the escrow account of a real estate attorney used by Kang. Da1116, Da287-Da288. Then, on December 28, 2012, Kang caused Hackenco to transfer $1.3 million to the same attorney's escrow account. Id. The $5.3 million was used in December 2012 to purchase the Alpine Property for DBNJW. Id., Da1116-Da1117.

None of this information is contained in the 2015 and 2016 Memos. See Da1307-Da1321, Da1323-Da1340. All that DAPA's attorney's investigators discovered and disclosed in their Memos was that the Alpine Property was purchased by DBNJW and that this entity was owned by Kang's children. Da1318, Da1324. Without knowledge of the specific bank transfers from GMB and Hackenco or any evidence connecting GMB and Hackenco to the purchase of the house, DAPA had no basis to assert a claim regarding those transfers or

the subsequent transfers, let alone plead a fraud claim with specificity. The trial court properly concluded that without knowledge of the transfers, the UFTA statute of limitations did not begin to run.

Second, Defendants claim that direct evidence is not required to meet the knowledge requirement under the UFTA and that, instead, "knowledge of a transfer, like knowledge of any other fact, may be proven by direct evidence ***or reasonably inferred from other facts***." Db29-30 (emphasis added). Defendants essentially ask this Court to impose the pre-2002 amendment version of the UFTA, which included the phrase "or could have ***reasonably been discovered***" within the one-year savings provision. The version of the UFTA applicable in this case requires a showing that the "transfer . . . was discovered by the claimant", not that it "could have been discovered" or "reasonably" could have been discovered, which is what the prior version of the statute allowed. See N.J.S.A. 25:2-31 (1989).

If the Defendants' interpretation of the statute were accepted, it would render the language superfluous. The reason why the amendment was made was to prevent counsel from feeling compelled to bring fraudulent transfer claims every time there is any hint of suspicious circumstances. The better policy is for litigants to do what DAPA did here and not bring a UFTA claim based upon just suspicion, but rather, obtain proof that there was a fraudulent transfer so that

fraud can be pled with specificity. R. 4:5-8 (requiring fraud to be pled with specificity); Amato v. Cortese, No. A-5518-12T2, 2015 WL 5009664, at * 9 (N.J. Super. App. Div. Aug. 21, 2015) ("The plaintiff bears the burden of establishing a UFTA claim by the heightened standard of clear and convincing evidence.") (Pa22) (citing Jecker v. Hidden Valley, Inc., 422 N.J. Super. 155, 164 (App. Div. 2011), certif. denied, 201 N.J. 28 (2012)).

As succinctly stated by the trial court:

> when the statute was amended[,] it meant what it said – actual knowledge, not the discovery rules. ... The discovery rules are expressly amended out of the statute so, therefore, ... the language is the language[n] and the language applies here." 14T19-20.

The specific transfers, as shown through wire confirmations, checks and bank statements, were only discovered by DAPA as a result of subpoenas it issued after it confirmed the KCAB Awards. The mere fact that the Alpine Property was owned by Kang's entities does not mean that its purchase was fraudulent. The fact that DAPA was aware that a Kang entity owned these properties in 2015 and 2016 did not place DAPA on notice that they were purchased with funds that were fraudulently transferred from GMB and Hackenco, the entities that were indebted to DAPA. The fact that these transactions were not identified in the asset search memos is dispositive as to what DAPA knew or did not know.

Finally, Defendants also rely on the KCAB arbitrations, again, as a basis for summary judgment, claiming that DAPA must have known about the transfers at issue in this case when it asked the KCAB to pierce the corporate veils of GMB and Hackenco in the ROV and Hackenco Arbitrations. Again, Defendants do not explain, as the trial court recognized, what "proofs" were actually submitted to the KCAB demonstrating DAPA's knowledge at the time. This failure of proof is inexcusable given the fact that Defendants were parties to these arbitrations and have this evidence, if any.

The trial court thus correctly found that DAPA's fraudulent transfer claims against DBNJW were not time barred. Because DAPA's fraudulent transfer claims against DBNJW are not time barred, neither are its claims resulting from the subsequent transfers of the funds. See Db31-32.

B. The Court Properly Awarded Summary Judgment in DAPA's Favor as to Its Fraudulent Transfer Claims. (Da1274-Da1277, Da1573-Da1574, 9T, 14T)

Finally, contrary to Defendants' argument, the trial court correctly found in favor of DAPA as to its fraudulent transfer claims. See Db41-50, 9T26:13-27:13 ("[I]t's clearly been demonstrated here that they siphoned the funds of the corporations. And … it certainly appears that they took steps to not only siphon[] the funds, but to protect the funds and place them in the name of others to preclude reaching those funds."), 9T32:14-33:23.

Pursuant to the UFTA:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after a transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligations.
>
> a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> > (1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> >
> > (2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they become due.

N.J.S.A. 25:2-25.

The UFTA further sets forth the following non-exclusive "badges of fraud" that are to be used by the court in determining whether a fraudulent conveyance was made:

> a. The transfer or obligation was to an insider;
>
> b. The debtor retained possession or control of the property transferred after the transfer;
>
> c. The transfer or obligation was disclosed or concealed;
>
> d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> e. The transfer was of substantially all the debtor's assets;

> f. The debtor absconded;
>
> g. The debtor removed or concealed assets;
>
> h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> i. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> j. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

N.J.S.A. 25:2-26.

Here, Defendants focus on the transfers from GMB and Hackenco in December 2012 to purchase the Kangs' mansion and place title in a corporation owned by the Kang's children while Kang was bribing Korean procurement officers with GMB funds. Defendants admit that "some of the factors set forth in § 25:2-26 may have been present with respect to the transfers in question" but claim that many were allegedly "either genuinely disputed or undisputedly not present." Db44.

However, Defendants do not identify any disputed facts. Nor did the Defendants even attempt to identify legitimate explanations for why millions of dollars were skimmed from GMB and Hackenco and hidden in a corporation

owned by the Kangs children at the same time that bribes were being paid and these entities were receiving the fruits of the bribery scheme in the form of tens of millions of dollars in contract payments. Nor can Defendants actually dispute that GMB/Hackenco were insolvent after these fraudulent transactions because the companies could not, and did not, pay any of the KCAB Awards owed to DAPA. Both entities filed for dissolution. Da746-Da747, Da749-Da752.

In addition, the applicable badges of fraud were met. With respect to the $5.3 million, Kang caused GMB and Hackenco to transfer that money into the trust account of his attorney to be used to purchase a house in the name of a corporation owned by his children, while at the same time bribing officers in the Korean Navy procurement department to obtain the Contracts with the Korean Navy. This conduct, in and of itself, met almost every badge of fraud set forth above. At his deposition, Kang claimed to have no knowledge of these transactions and therefore provided no explanation. Da611-Da615, Da622-Da623. Hence, there were no facts in dispute to be tried. Defendants' argument that there needed to be a trial on Kang's intent to defraud is an empty one given the fact that the facts were undisputed, and Defendants had no witness who could provide an explanation and establish non-fraudulent intent.

As DAPA argued below, the transfers fell under all of the badges of fraud that were applicable and were not disputed. The $5.3 million transfer clearly

involved a transfer to an insider as it was to a corporation owned by Kang's minor children that Kang controlled. The transfer of funds, which led to the purchase of the Englewood Property, were to relatives and corporate insiders – GMB/Hackenco to Kang/Kim, Kang/Kim to Bryant, and Bryant to 78 LLC. N.J.S.A. 25:2-22(a); see Gilchinsky v. Nat'l Westminster Bank, 159 N.J. 463, 478 (1999) ("The unifying theme among the enumerated persons [defined as insiders] is that they stand in such close relation to the debtor as to give rise to the inference that they have the ability to influence or control the debtor's actions."); United Jersey Bank v. Vajda, 299 N.J. Super. 161, 166 (App. Div. 1997) ("Transfers made to close relatives are especially suspect.").

Kang retained possession of the funds by reason of the fact that he placed them in the name of a corporation owned by his minor children that he controlled. Da1116-Da1119, Da224-Da225, Da228, Da230-Da231. Kang and Kim, as the principals of GMB/Hackenco, still retained possession and/or controlled the Englewood Property, as they currently reside there. Da1113. Kang also manages 78 LLC which owns the property. Id.; Da224-Da225, Da228, Da230-Da231. He obviously did not disclose the transaction to anyone, and his use of a corporation owned by his minor children to hold title to the real estate was obviously designed to conceal his ownership and control. And although Kang had not, at the time of transfer, been sued, Kang was in the process of

paying bribes to a government official to obtain government Contracts that GMB and Hackenco were incapable of performing as evidenced by the significant arbitration awards against them. See Da381-Da402, Da267-Da268. Kang's elaborate efforts to disburse the money into the names of straw parties, including real estate holding companies in Korea and the United States and a company that owns a restaurant in Korea, make clear that Kang knew that he needed to hide the money as DAPA would seek to recover what was paid to GMB and Hackenco.

Kang testified under oath that he had no assets and that everything that he owns has been given to his family members. Da617-618. Moreover, GMB/Hackenco were certainly insolvent after these fraudulent transactions because they could not, and did not, pay any of the KCAB Awards owed to DAPA and dissolved. Db7, Da746-Da747, Da749-Da752. None of these facts were legitimately disputed below, which is why the trial court correctly awarded DAPA summary judgment.

Further, Defendants have not challenged the jury's findings related to the numerous fraudulent subsequent transfers that were left for the jury to consider and were found to be fraudulent.

In short, considering the timing of the transfers, the fact that they were made to a corporation owned by Kang's children that he controls, while he was

bribing a government official to obtain government contracts that his corporations could and did not perform, there is no factual dispute that the $5.3 million in transfers to DBNJW and the other transfers were fraudulent within the meaning of the UFTA. Finally and significantly, the juror had little trouble finding unanimously that the remaining transfers that survived summary judgment were all fraudulent.

CONCLUSION

For the foregoing reasons, the trial court's decisions below should be affirmed.

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DATED: February 10, 2025

DEFENSE ACQUISITION PROGRAM ADMINISTRATION, REPUBLIC OF KOREA,

Plaintiff/Respondent,

vs.

DECK WON KANG A/K/A BRYANT KANG, JOO HEE KIM A/K/A LAUREN KIM, BRYANT KANG, WILLIAM KANG, GMB (USA), INC. A/K/A GMB USA, INC., HACKENCO, INC., PRIMACY ENGINEERING, INC., DBNJW, INC., 78 ROBERTS ROAD, LLC,

Defendants/Appellants,

and

RECOVCO MORTGAGE MANAGEMENT, LLC D/B/A SPROUT MORTGAGE, AND ABC CORPORATIONS (THESE NAMES BEING FICTITIOUS AS THEIR PRESENT IDENTITIES ARE UNKNOWN),

Defendants.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

DOCKET NO.: A-3728-23
A-3753-23
(Consolidated)

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY

SAT BELOW:
MICHAEL N. BEUKAS, J.S.C.
DOCKET NO.: BER-L-6733-19

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PRELIMINARY STATEMENT

Rather than respond to the arguments raised by Defendants as to why the trial court's summary judgment awards to DAPA on DAPA's fraudulent transfer and veil-piercing claims should be reversed, DAPA merely recycles the arguments it made in the trial court. Contrary to DAPA's conclusory response, the veil piercing argument was raised and decided on the merits by the Korean arbitration panel, and the fraudulent transfer claims were known to DAPA for years before it decided to bring the underlying action and were brought outside of the statute of limitations. The trial court also erred in its summary judgment rulings in favor of DAPA by failing to view the evidence in the light most favorable to Defendants and drawing all reasonable inferences in favor of Defendants, which standard of proof Defendants are entitled as the non-moving parties. Accordingly, for the reasons set forth in Defendants' opening brief, as well as those set forth below, the judgment below should be reversed.

ARGUMENT

I. The trial court's summary judgment rulings are reviewed *de novo*

DAPA advances the wrong standard of review. The standard of review in this appeal is de novo, not abuse of discretion, as DAPA argues in its opposition brief, see Pb22; Pb38. All issues raised by Defendant on appeal were decided in a summary judgment posture, and summary judgment rulings are reviewed de novo. See DeSimone v. Springpoint Senior Living, Inc., 256 N.J. 172, 180 (2024).

Each issue—whether collateral estoppel barred DAPA's veil-piercing claim, whether DAPA's fraudulent transfer claims were time-barred, and whether DAPA had proven its veil-piercing and fraudulent transfers claims as a matter of law—was first raised to and ruled on by the Court in a summary judgment motion, some of which were filed by Plaintiff. Da103–04, 1345–46. The only issue on which Defendants moved for reconsideration presented in this appeal was the trial court's rejection of Defendants' collateral estoppel defense in connection with his grant of summary judgment on DAPA's veil-piercing claims, Da1284–1344, an issue that, again, Defendants had presented in connection with the original summary judgment motions, 9T22–23.[1]

[1] After being presented with Defendants' motion for summary judgment and reconsideration, the trial court "examined the matter de novo," considering the material submitted in connection with the motion for reconsideration. Marte v.

II. DAPA's Veil-Piercing Claims are Barred by Collateral Estoppel

Under New Jersey law, a party asserting collateral estoppel or issue preclusion must demonstrate (1) an identity of issues; (2) that the issue in question was "actually litigated in the prior proceeding"; (3) that the prior proceeding resulted in a "final judgment on the merits"; (4) that determining the issue was "essential to the prior judgment"; and (5) that the party against whom the doctrine is asserted was a party to, or in privity with a party to, the prior proceeding. Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005). DAPA does not dispute that in the ROV arbitration: (1) it raised and the KCAB decided the same issue—whether Hackenco and GMB's corporate veils could be pierced—that it pursued below; (2) the parties "actually litigated" that issue; (3) the KCAB issued a final decision and award, which addressed and rejected DAPA's veil-piercing claims; (4) the KCAB's rejection of DAPA's veil-piercing claim was essential to its resolution of the arbitration; and (5) DAPA was a party to the arbitration and this action.

DAPA's sole argument in response—that the decision in the ROV arbitration rejecting its veil-piercing claim was not "on the merits" because the

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Oliveras, 378 N.J. Super. 261, 267 (App. Div. 2005) Under similar circumstances in Marte, this Court applied de novo review, see id. at 266, but "focus[ed]" that review "on [the trial court's] decision on the reconsideration motion," rather than on its original summary judgment decision, *id.* at 267. The Court should apply the same standard here.

KCAB "did not fully hear [its] veil piercing claim," Pb32—is incorrect. The ROV arbitration decision's language states that the KCAB decided the merits of DAPA's veil-piercing claim, and that the KCAB rejected the veil-piercing claim because DAPA had not presented the "evidence" necessary to prove that claim. Da1514. Simply put, the KCAB rejected DAPA's veil piercing claim because DAPA failed to satisfy its burden of proof.

DAPA also does not, and cannot, dispute that it was "fully heard" in the ROV arbitration. DAPA had the opportunity to present the evidence and arguments that it wished to present, including evidence ***post-dating*** contract formation, *see* Da1514—and in fact confirmed as much to the KCAB. Da411–12, 1492–93.[2] DAPA offers no reason to question the fairness of the proceedings before the KCAB. Nor could it credibly do so, as this entire action arose from DAPA's efforts to collect on awards made to it by that very body, and DAPA expressly relied on other aspects of the arbitral decisions in the court below. Da1126–7.

Rather, DAPA's central grievance with the ROV arbitration decision is that it disagrees with the way the KCAB decided its veil-piercing claim by

[2] When DAPA confirmed to the KCAB that it had a sufficient and fair opportunity to present its case, DAPA had already obtained reports for the 2015 and 2016 asset searches and could have presented them to the KCAB, but chose not to. See Da411–12, 1306–40.

focusing on the evidence at the time of contract formation. In essence, DAPA argues that the ROV arbitration should be denied issue preclusive effect because it believes the KCAB got the veil-piercing issue wrong. But that is no basis to question the fairness of the KCAB proceedings or to refuse to apply collateral estoppel. See Blair v. Tax'n Div. Dir., 225 N.J. Super. 584, 586 (App. Div. 1988) (affirming application of collateral estoppel against plaintiff, where plaintiff argued "that his first case was wrongly decided"); see also Smith v. Squibb Corp., 254 N.J. Super. 69, 74 (App. Div. 1992) ("Even if our prior decision was wrong, it is fundamental that the principles of res judicata and collateral estoppel preclude any further consideration of that decision because of the need for finality as to whether a cause of action is alleged in the complaint.").

In a footnote, DAPA suggests that the Court "should not apply the doctrine of equitable [sic] estoppel," to bar DAPA's veil-piercing claim because doing so would be unfair. But holding DAPA to the consequences of its choice to litigate veil-piercing in Korea is in no way unfair or inequitable. What is inequitable is DAPA's heads-I-win, tails-you-lose approach to the KCAB arbitration awards, in which DAPA seeks to reap the benefit of—and invoke New Jersey courts' aid in enforcing—decisions in its favor, but disavows and asks this Court not to be bound by decisions that reject DAPA's positions. This Court should reject DAPA's unseemly effort to relitigate the veil-piercing issue, reverse the

judgment below, and remand for entry of judgment in favor of the Kangs on DAPA's veil-piercing claim.

II. DAPA's Claim Arising From the Original Transfers to DBNJW is Time-Barred and, as such, It Cannot Recover on that Claim from DBNJW or Any Subsequent Transferee

DAPA recognizes that, for its fraudulent transfer claims to be timely, it must have brought them "within one year after the transfer or obligation was or could reasonably have been discovered by [DAPA]." As Defendants explained in their moving brief, a creditor "discovers" a fraudulent transfer within the meaning of this section when a creditor learns of the facts necessary to understand that some claim exists. DAPA's principal response to Defendants' argument is that "discovery" of a transfer requires direct evidence of the particulars of the transfer. Pb42. DAPA contends that allowing knowledge of a transfer to be proven by circumstantial evidence would "essentially … impose the pre-2002 amendment version of the UFTA, which included the phrases 'or could reasonably have been discovered.'"[3] DAPA's argument seeks to impose a heightened standard for the running of the statute of limitations that lacks any basis in authority or reason and contravenes the basic principle, applicable in both civil and criminal cases, that knowledge can be proven by circumstantial

[3] DAPA also argues that allowing knowledge to be proven by circumstantial evidence "would render the language superfluous," without identifying what language it is referring to. Pb42.

evidence. Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 228 N.J. 596, 621 (2017); see also State v. Faucette, 439 N.J. Super. 241, 268–69 (App. Div. 2015) (affirming armed robbery conviction where "significant circumstantial evidence supported defendant's knowledge Clemons was armed").

DAPA asserts without citation that the purpose of the 2002 amendment was "to prevent counsel from feeling compelled to bring fraudulent transfer claims every time there is any hint of suspicious circumstances." Pb42. DAPA is wrong. The actual motivation behind the 2002 amendment is made crystal clear in the legislative history and in subsequent case law. Both the Assembly and Senate committee reports explain that the point of the 2002 amendment was not to make litigators' jobs easier, but to "eliminate[] the need to conduct unnecessary annual asset searches during the term of every loan that goes into default." See Assembly Committee Statement, A.B. 2298 (May 16, 2002); Senate Committee Statement, A.B. 2298 (Sept. 19, 2002). The amendment was a direct response to, and rejection of, the New Jersey Supreme Court's decision in SASCO 1997 NI, LLC v. Zudkewich, 166 N.J. 579 (2001), which imposed such an obligation on creditors. See, e.g., In re Tzanides, 574 B.R. 489, 514 (Bankr. D.N.J. 2017); In re NJ Affordable Homes Corp., No. 05-60442 (DHS), 2013 WL 6048836, at *31 (Bankr. D.N.J. Nov. 8, 2013).

Thus, while the 2002 amendments mean that DAPA was not required to conduct asset searches to preserve its fraudulent transfer claims, having conducted the asset searches it was not free to ignore what it learned. DAPA was aware of facts sufficient to support an inference that it knew of the allegedly fraudulent transfers that, in 2020, it sued to invalidate. As set forth in greater detail in Defendants' opening brief, DAPA knew that (1) in 2011 and 2012 it transferred $16 million to Hackenco and GMB, Da288; (2) in November 2012, DBNJW was formed, Da1308, 1318; (3) in December 2012, DBNJW purchased the Kang's residence (i.e., the Alpine property), Da1308, 1318; (4) in November 2015, DBNJW sold the Alpine property, Da1324–25, 1328; (5) in December 2015, DBNJW dissolved, Da1325–26; and (6) Hackenco and GMB had no assets, Da422–3, 1325. A factfinder could reasonably infer that DAPA knew that Hackenco and GMB had transferred those funds, or at least a portion of them, to DBNJW.

DAPA alternatively invokes its own perception of what is good "policy," and implies that "discovery" does not occur until the plaintiff has sufficient facts to plead a plausible fraudulent transfer claim with the particularity required by R. 4:5-8. But even under this manufactured test, DAPA still loses. Rule 4:5-8(a) requires a plaintiff alleging fraud to allege "the particulars of the wrong, with dates and items <u>if necessary</u>, shall be stated <u>insofar as practicable</u>."

(emphasis added). For example, in Gilvey v. Creative Dimensions in Education, Inc., this court held that a complaint that alleged that "in or about" a certain date, individual defendants "secretly drained substantial funds" from a corporate debtor satisfied the requirements of Rule 4:5-8(a). No. A-3217-10T1, 2012 WL 3656332, at *4 (N.J. Super. Ct. App. Div. Aug. 28, 2012). Moreover, federal courts interpreting Rule 9(b)—the analog of R. 4:5-8(a) in the Federal Rules of Civil Procedure—have held that a plaintiff need not plead the "exact date, place or time of the fraud" to satisfy Rule 9(b). Livingston v. Shore Slurry Seal, Inc., 98 F. Supp. 2d 594, 597 (D.N.J. 2000); Hill v. Morehouse Med. Assocs., Inc., No. 02-14429, 2003 WL 22019936, at *2 (11th Cir. Aug. 15, 2003). Here, for the reasons explained above and in Defendants' opening brief, DAPA had more than enough information to properly plead its claims in 2016. Accordingly, the trial court's judgment should be reversed and judgment should be entered in favor of Defendants on DAPA's fraudulent transfer claims.[4]

[4] As explained in Defendants' opening brief, if DAPA's fraudulent transfer claims arising from the original transfers from GMB and Hackenco are time barred, it cannot recover from any subsequent transferees on those claims, as any claims against subsequent transferees are also time-barred.

III. The Trial Court Erred in Granting Summary Judgment on DAPA's Veil-Piercing Claim

A. Viewing the evidence in the light most favorable to Defendants, as the trial court must in a summary judgment setting, a reasonable fact-finder could decline to pierce the veils of GMB and Hackenco

Under New Jersey law, veil-piercing requires a plaintiff to prove "that the parent was dominated by the subsidiary, and … that adherence to the fiction of separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law." Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199–200 (App. Div. 2006). Defendants' opening brief demonstrated that, when viewed in the light most favorable to Defendants, a reasonable juror could conclude that DAPA failed to carry its burden on either of the two prongs. Several of the factors relevant to the first prong of the veil-piercing inquiry were disputed. *See* Db37–38. Moreover, on the second prong, DAPA presented no evidence of the "hallmarks" of an abuse of limited liability, specifically, the engagement of the entity "in no independent business of its own but exclusively the performance of a service for the [shareholder]." OTR Assocs. v. IBC Servs., Inc., 353 N.J. Super. 48, 52 (App. Div. 2002).

DAPA makes no effort to respond to any of Defendants' arguments. Instead, in its response brief, DAPA doubles down on the trial court's improper fact-finding, arguing (or rather asserting) incorrectly that the trial court's decision is reviewable only for abuse of discretion and that the trial court

identified "sufficient" evidence to do so. Pb22, 25. As explained above, the trial court's summary judgment ruling is reviewed *de novo* on appeal, and it cannot withstand review under that standard.

B. Veil-piercing was improper because DAPA failed to demonstrate lack of an adequate remedy at law

DAPA asks this Court to refuse to consider Defendants' arguments that the existence of an adequate remedy at law in the form of a timely fraudulent transfer claim precludes DAPA from recovering on its equitable veil-piercing claim. Defendants have steadfastly contended that the amount of any recovery on a veil-piercing claim should be limited by the amount of proven fraudulent transfers. 9T17:17–18:9.

No court has ever held that a plaintiff who has an adequate remedy at law against a shareholder can nevertheless pierce the corporate veil.[5] And the conclusion that an adequate remedy at law precludes veil-piercing follows directly from binding New Jersey Supreme Court decisions. Veil-piercing is an equitable remedy. Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc., 195 N.J. 457, 472 (2008). Equitable remedies "are available only to the party who cannot have a full measure of relief at law." Wood v. New Jersey Mfrs. Ins. Co., 206 N.J. 562, 578 (2011). Therefore, veil-piercing is available only to a

[5] DAPA is thus flatly wrong to assert that Defendants' position is "contrary to decades of legal precedent." Pb37.

party that does not have an adequate remedy at law. DAPA has no answer to this basic syllogism. This is an argument that is teed up in this matter and is fully appropriate for resolution by this Court as it requires no factual development, only the consideration of a question of law.

DAPA does not dispute that it failed to demonstrate the absence of an adequate remedy at law, or that it in fact had an adequate remedy at law in the form of fraudulent transfer claims. Accordingly, the trial court's order granting summary judgment to DAPA on DAPA's veil-piercing claim should be reversed.

IV. The Trial Court Erred in Granting Summary Judgment to DAPA on Certain Fraudulent Transfer Claims

To prove its fraudulent transfer claims, DAPA was required to prove by clear and convincing evidence that the transfers it seeks to void were made with the "actual intent to hinder, delay, or defraud any creditor of the debtor.," N.J.S.A. 25:2-25(a)(1); Jecker v. Hidden Valley, Inc., 422 N.J. Super. 155, 164 (App. Div. 2011). Rather than addressing Defendants' criticisms of the judgment under review, DAPA recycles the same discussion of the "badges of fraud" that it presented in the Court below. But DAPA cannot establish an actual fraudulent transfer as a matter of law by bean-counting "badges of fraud." DAPA's brief does not even acknowledge its burden of proving actual fraudulent intent, much less show how it has proven fraudulent intent as a matter of law.

Moreover, DAPA misrepresents the evidentiary record regarding the badges of fraud themselves. DAPA never disputes that (1) several of the transfers in question were made long before DAPA threatened to pursue claims against GMB or Hackenco, N.J.S.A. 25:2-26(d), (2) none of the debtors "absconded," N.J.S.A. 25:2-26(f), (3) none of the pre-arbitration transfers "occurred shortly before or shortly after a substantial debt was incurred," N.J.S.A. 25:2-26(j), or (4) no debtor "transferred the essential assets of [a] business to a lienor who transferred the assets to an insider of the debtor," N.J.S.A. 25:2-26(k).

Also unanswered by DAPA is the fact that it provided no evidence that GMB or Hackenco did not disclose (much less concealed) the transfers, see N.J.S.A. 25:2-26(c), or that any of the pre-arbitration transfers were of "substantially all" of any of the transferor's assets, N.J.S.A. 25:2-26(e). DAPA generally contends that "GMB/Hackenco were certainly insolvent after," Pb49, the transfers in question, but does not argue that GMB or Hackenco was insolvent "shortly after" those transfers were made, N.J.S.A. 25:2-26(i) (emphasis added). Nor can it—the trial court awarded summary judgment to DAPA on transfers that occurred as early as 2012, yet DAPA does not argue that either GMB or Hackenco was insolvent until the KCAB Awards were made in 2016, Pb49. And DAPA simply parrots its argument in the trial court that "Kang

retained possession of the funds," Pb48, without even attempting to address Defendants' argument that, for purposes of the UFTA, GMB and Hackenco, not Kang, were the "debtor[s]" and that they did not retain possession of the transferred funds, N.J.S.A. 25:2-26(b).

Notably, in the face of Defendants' opening brief, DAPA backtracks from the position it took below that "almost all" of the badges of fraud supported a finding that the transfer was fraudulent. Now, DAPA merely contends, tautologically, that "the transfers fell under all of the badges of fraud that were applicable and were not disputed." Pb47. In any event, the few badges of fraud that DAPA can at least arguably rely on at the summary judgment stage are insufficient to establish fraudulent intent as a matter of law. As Defendants observed in their opening brief, whether a transfer is made with actual intent to defraud requires a "fact-specific determinations that must be resolved on a case-by-case basis." Gilchinsky, 159 N.J. at 476.

Put simply, DAPA has not met its burden, particularly with respect to transfers made prior to the arbitration proceedings.. A reasonable jury could conclude that GMB and Hackenco lacked the necessary intent to defraud creditors given that GMB and Hackenco were not aware of any creditors from whom to conceal assets. See, e.g., State Dep't of Pub. Welfare v. Thibert, 279 N.W.2d 53, 57 (Minn. 1979) (relying on transferor's lack of notice of unmatured

claim in finding no intent to defraud). DAPA has no answer to this argument, except to suggest that Defendants did not present a "witness who could provide an explanation and establish non-fraudulent intent." Opp. Br. at 47. But this argument fails for two reasons. First, it is DAPA's burden, not Defendants', to establish fraudulent intent. Second, DAPA itself identifies a non-fraudulent purpose of the 2012 transfers—namely, the Kang family wished to purchase a residence. Pb17. In sum, DAPA failed to meet its burden of proving actual intent by clear and convincing evidence as a matter of law. Accordingly, the trial court erred in granting DAPA summary judgment on its fraudulent transfer claims.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the judgment of the trial court be reversed.

Dated: March 10, 2025

Respectfully submitted,

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