NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

RUSSO MEADOWLANDS PARK, LLC, Plaintiff, v. HENKEL CORPORATION, a Delaware Corporation; COGNIS USA LLC, a Delaware Corporation (as successor to COGNIS CORPORATION); NEW JERSEY TRANSIT CORPORATION, an instrumentality of the State of New Jersey; and the BOROUGH OF CARLSTADT, a municipality of the State of New Jersey, Defendants.	SUPERIOR COURT OF NEW JERSEY BERGEN COUNTY-CHANCERY DIVISION GENERAL EQUITY PART DOCKET NO. C-117-16 Civil Action OPINION

Decided: June 8, 2017[1]

Robert L. Ritter, Esq. and John M. Losinger, Esq. (Saiber LLC) representing Plaintiff, Russo Meadowlands Park, LLC

Paul H. Schneider, Esq. (Giordano, Halleran & Ciesla) representing Defendant Henkel Corporation

Keith P. McManus, Esq. (Bressler, Amery & Ross) representing Defendant Cognis USA LLC

Christopher S. Porrino, Esq. and Michael J. Gonnella, Esq. (Attorney General of New Jersey) representing Defendant New Jersey Transit Corporation

Joseph R. Donahue, Esq. (Brickfield & Donahue) representing Defendant Borough of Carlstadt

[1] The court acknowledges the extended period between the date on which oral argument for these summary judgment motions took place, March 17, 2017, and the date of the court's decision, June 8, 2017. The number of parties and issues before the court, along with the significant complexity of those issues, occasioned three hours of oral argument, and accounts for the lengthy opinion that follows.

MENELAOS W. TOSKOS, J.S.C.

Before the court are the summary judgment motions of defendants Cognis USA LLC ("Cognis"), New Jersey Transit Corporation ("NJ Transit"), and the Borough of Carlstadt ("Carlstadt") against plaintiff Russo Meadowlands Park, LLC ("Russo"), the partial summary judgment motion of defendant Henkel Corporation ("Henkel") against Russo, and the partial summary judgment motions of Russo against Cognis and Henkel.

I. Factual Background

On August 29, 1986, the New Jersey Department of Environmental Protection ("the DEP") entered an Administrative Consent Order ("the ACO") with Diamond Shamrock Company ("Diamond Shamrock") pursuant to the Industrial Site Remediation Act ("the ISRA"). N.J.S.A. 13:1K-6 to -18. The purpose of the ACO was to oversee remediation of the property located at 651 12th Street, Carlstadt, New Jersey ("the Property"). The Property consists of a 19.95 acre parcel of land adjacent to 12th Street and a New Jersey Transit rail line ("the Main Parcel") and a narrow area to the east that protrudes into Berry's Creek ("the Peninsula"). On April 2, 1987, Diamond Shamrock sold the Property to Henkel Process Chemical Inc. ("Henkel PCI"), which later merged into Henkel. Henkel operated a chemical manufacturing facility at the Property until 1991. Henkel has been responsible for the remediation of environmental contamination at the Property since purchasing it in 1987. Henkel's obligation under the ACO included the remediation of any contamination that migrated from the Property to adjacent properties, including property owned by NJ Transit and Carlstadt.

In 1990, Henkel began remediating the contamination at the Property. In 1994, Henkel's environmental consultant submitted to the DEP on behalf of Henkel a Final Remediation Action Report ("the 1994 RAR") stating that the contamination at the Property "had been remediated

through a combination of remedial technologies." The 1994 RAR referenced the Property's former employee parking lot, known as AOC I, and stated that it was "not remediated due to the limited nature and extent of the contamination found in this area." In response, the DEP requested that AOC I be further addressed. On July 8, 1999, Henkel submitted a report stating that an asphalt cap had been extended over a section of AOC I, with another portion of AOC I remaining uncapped ("the uncapped portion of AOC I").

The Property remained in Henkel's hands until December 29, 1999, when it was transferred to Cognis Corporation (Defendant Cognis's predecessor), a company affiliated with Henkel. In 2001, Henkel's parent company, Henkel KGaA, sold Cognis to a third party. The terms of the sale were set forth in a Share Purchase Agreement ("the SPA") among various Henkel-related entities and various Cognis-related entities. Pursuant to the SPA, Cognis retained title to the Property. The SPA also provided that Henkel KGaA indemnified Cognis for the environmental conditions at the Property, and that Henkel KGaA remained responsible for continuing and completing the remediation, which would continue to be performed by Henkel. Nonetheless, Exhibit 11.4 of the SPA provides that onsite soil remediation at the Property had been completed.[2] Cognis agreed to pay for ten percent of the costs of the remediation. Cognis never conducted any operations on the Property, and never discharged any hazardous substances there.

Section 15.5 of the SPA specified that Cognis needed permission from Henkel KGaA to assign its rights under the SPA ("the Assignment Provision"). Section 15.6 of the SPA stated that the SPA was not intended to give rights to third parties ("the No Third Party Beneficiaries Provision"). Section 15.12 provided that rights under the SPA were governed by German law,

---

[2] See Certification of Keith P. McManus, Esq., Exhibit A: "Soil and groundwater contamination: Onsite soil remediation completed. Groundwater containment and remediation equipment completed pursuant to a Consent Order issued by the State. Onsite groundwater remediation is ongoing. Offsite soil sampling and analysis are ongoing. Offsite remediation may be required."

could not be pursued in New Jersey State court, and were subject to binding arbitration in Dusseldorf, Germany ("the Arbitration Provision").

Later, Russo, an experienced redeveloper of contaminated properties, and Cognis began negotiations on the sale of the Property. On August 7, 2002, Cognis's real estate broker for the Property, Binswanger/Klatskin, sent a letter to Edward Russo of Russo Development that set forth the general terms upon which Cognis would be willing to sell the Property. Paragraph 10 of the August 7, 2002 letter, titled "As-Is Sale," reads as follows: "Buyer acknowledges and agrees that it is purchasing the Property in its "as is" condition and that Buyer's decision to purchase the property is based solely on the results of its investigation during the Due Diligence Period."

In May 2004, Russo entered into a contract to purchase the Property from Cognis for $3,500,000 ("the Sale Contract"). Section 10 of the Sale Contract, titled "Physical Condition of the Property," begins with the following statement: "(a) Except as otherwise set forth herein: (i) the Property is being sold "as is" and (ii) the Seller does not make any claims or promises about the condition or value of any of the property included in this sale." Section 10(b) continues:

> The Buyer acknowledges, based upon disclosure by the Seller, that there have been past Discharges of Contaminants by persons other than the Buyer. Henkel has been Remediating the Property under ISRA Case No. 86334 (the "ISRA Case"). Pursuant to and in accordance with the Relevant Seller/Predecessor Contract Provisions and the Access Agreement, Henkel shall continue to Remediate the Contamination…

Exhibit B of the Sale Contract included soil sampling data for the Property that indicated that stabilized soils in many areas of the Property contained polychlorinated biphenyl compounds ("PCBs") at concentrations exceeding the applicable standard.

Section 11 of the Sale Contract provided Russo the right to conduct a due diligence investigation concerning the Property, including the right to examine, among other things, the environmental condition of the Property, the geotechnical condition of the soil, and the general economic viability of the Property for development. Section 11 also allowed Russo to perform environmental studies at the Property, including the collection of soil and groundwater samples. Additionally, Section 11 stated, "The Buyer may terminate this Contract at any time during the Due Diligence Period if Buyer is not satisfied with the results of its Inspection, for any reason whatsoever, in its sole and absolute discretion."

Prior to closing, Cognis and Russo modified Section 6(b) of the Sale Contract to provide that Cognis shall:

> use all commercially reasonable efforts to obtain from Henkel Corporation ("Henkel"), Seller's predecessor in interest and the responsible party for the remediation of the Property permission to disclose to, and provide to Buyer a copy of, all provisions of...[the SPA]...that relate to or concern, directly or indirectly, the Remediation of the Property, the ISRA Case..., the [No Further Action letter]...and/or the rights and obligations of the Seller, Henkel and any other entities with respect thereto ("the Relevant Seller/Predecessor Contract Provisions").

As a result of Cognis's efforts, Henkel KGaA agreed to release to Russo provisions of the SPA relating to the remediation, the ISRA case, and the No Further Action letter subject to a confidentiality agreement.

Russo engaged in over two years of due diligence regarding the Property. Russo retained EcolSciences, Inc. ("EcolSciences"), an environmental consulting firm it had worked with in the past, to conduct an investigation. Included in its task was a visit by representatives of EcolSciences to Cognis's facility in Ambler, Pennsylvania, on June 23, 2005, to review environmental documents. This visit was the second time an employee of EcolSciences had reviewed environmental documents at the Cognis facility. On July 22, 2005, EcolSciences released a report entitled "Phase I Environmental Assessment/Preliminary Assessment" ("the Phase I Report") to Russo discussing the findings of its investigation.

The Phase I Report stated that "[a]s part of due diligence, EcolSciences, Inc., reviewed key documents relating to...previous investigations and remedial efforts at the former Henkel/Cognis facility." The Phase I Report explained that "[t]he review was supplemented by a number of site visits with personnel from Henkel and Cognis to assess the current conditions on the property and to gain a better understanding of the previous and on-going remedial efforts."

Regarding AOC I, the Phase I Report addressed a particular parking area and found that "[n]o remediation was proposed for this area and the proposal was approved by the NJDEP. The area was historically used for parking and plant offices with limited potential contamination from facility operation or from disposal of waste material from manufacturing processes." EcolSciences also addressed a location known as Area XII: "This included a variety of storage and maintenance buildings with concrete foundations and paved surroundings. No production or storage of liquids

had ever been done in this area; therefore, it was considered a low environmental priority and NJDEP did not require sampling in this area."

The Phase I Report included cautionary language as well. Section 7.2, entitled "Recommendations," noted that Russo's "re-development will; however, require disruption of the existing capping system...." Section 9, entitled "Limitations," offered the following caveat:

> Findings of a Phase I Environmental Site Assessment are based on the conditions existing at the site on the date of inspection...No soil, water, or air sampling was conducted on the subject property as part of this Phase I Environmental Site Assessment. ***It is possible that past contamination will remain undiscovered. The recommendations provided in the Phase I [Report] do not guarantee that additional problems will not arise in the future.*** (Emphasis added).

Satisfied with the investigation, Russo's extensive due diligence finally culminated in the closing of title on October 30, 2006.

On that same date, Russo and Cognis executed an access agreement ("the Russo-Cognis Access Agreement"). In the Russo-Cognis Access Agreement, Cognis agreed to make reasonable efforts to have Henkel remediate the Property with reasonable diligence. Section 14 of the Russo-Cognis Access Agreement ("Section 14") further provides that Cognis shall indemnify Russo for damages suffered by Russo as a result of the remediation of the Property. Section 14 limited that indemnification, however, to the amount that Cognis can recover from Henkel from its indemnification under the SPA.

Following closing of title, on September 10, 2009, Russo and Henkel entered into their own access agreement ("the Russo-Henkel Access Agreement"). It allowed Henkel access to continue remediating the site. The Russo-Henkel Access Agreement obligated Henkel to "provide Russo with copies of any and all sampling/analytical data reports and recommendations for further action generated as a result of work completed on or associated with the premises within ten business days after receipt of same."

In November 2009, Henkel conducted soil sampling around MW-17 and in the uncapped portion of AOC I ("the November 2009 test"). In his original draft 2011 budgetary forecast, Henkel's environmental consultant, Edward Rashak ("Rashak"), stated that this sampling showed "detections of PCB, Arcolor-1248, Benzanthracene and zinc above NJDEP residential and nonresidential cleanup standards." In a letter to Henkel's manager of Safety, Health and Environmental Assurance, Jonathan Blaine ("Blaine"), Rashak wrote the following:

> These exceedances may require reporting of the affected soils in the employee parking lot in conjunction with the site-wide deed notice. Due to the sale of the property to Russo Development, a decision was made to delay reporting of analytical results or performing any remedial action in this area.

Rashak eventually submitted a final report that did not include this additional text.

Meanwhile, Russo began working to develop the Property. In the summer of 2010, Russo was in the process of obtaining approvals for this work from the New Jersey Meadowlands Commission. During this period, Russo prepared a Remedial Action Workplan Addendum ("the RAWA") that it submitted to Henkel on August 3, 2010. The RAWA set forth Russo's plan for

redevelopment which included the installation of underground drainage pipes in the uncapped portion of AOC I.

In December 2010, Henkel submitted to the DEP its 2010 Area of Monitoring Well MW-17 Remedial Action Report ("the 2010 MW-17 RAR"). The 2010 MW-17 RAR referenced the November 2009 soil samplings taken in the area of MW-17, and this report was made available to Russo. In September 2012, Rashak on behalf of Henkel performed more soil sampling in the uncapped portion of AOC I. These samples showed high levels of PCBs.

By letter dated October 27, 2012, Russo notified Henkel that it intended to commence work on the replacement of the groundwater treatment system at the Property. Russo began the work: it hired contractors, deposited fill on the site, and attempted to negotiate deals for the Property. On July 17, 2013, EcolSciences, on behalf of Russo, submitted an Application for a Risk Based Cleanup Approval ("the Cleanup Approval Application") to the United States Environmental Protection Agency ("the USEPA"). The purpose of the Cleanup Approval Application was to present the details of a planned redevelopment by Russo. The application stated redevelopment would "involve disturbance of the existing cap, and relocation of some stabilized material with elevated PCB concentrations as part of site regrading and interim capping during site work."

In October 2013, Henkel provided the soil sample results performed by Rashak in the Uncapped Area of AOC I to Russo. On October 31, 2014, Russo initiated this litigation by filing a complaint in the Superior Court of New Jersey, Bergen County, Chancery Division, against Henkel, Cognis, and adjacent property owners. The action was removed to U.S. District Court and then remanded to the New Jersey Superior Court. On April 5, 2016, Russo notified the USEPA that it was abandoning its Cleanup Approval Application.

Russo subsequently filed an Amended Complaint containing the following counts: Count I for mutual mistake of fact as to Cognis;[3] Count II for fraud as to Cognis and Henkel; Count III for negligent misrepresentation as to Cognis and Henkel; Count IV for breach of contract by Cognis; Count V for breach of contract by Henkel; Count VI for violation of the New Jersey Spill Compensation and Control Act against Cognis and Henkel; and Count VII for "Breach of Common Law Obligations," which implicated Cognis and Henkel, as well as NJ Transit and the Borough of Carlstadt.

II. Summary Judgment Standard

Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In determining whether summary judgment is precluded by the existence of a "genuine issue" of material fact, a motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995).

As an initial matter, our Supreme Court has noted the significance of the procedural requirements set forth in R. 4:46-2(b). "Summary Judgment requirements...are not optional." Lyons v. Twp. of Wayne, 185 N.J. 426, 435 (2005). Rule 4:46-2(b) in pertinent part provides:

[3] In this count as well as in Counts II and III of its Amended Complaint, Russo seeks rescission of the sale of the Property from Cognis to Russo and restoration of Russo's purchase price and all expenditures made by Russo to carry the Property or that have benefitted the property since the closing. Since rescission is a remedy, not a cause of action, the court refers to the cause of action in Count I as mutual mistake of fact.

> . . . all material facts in the movant's statement which are sufficiently supported will be deemed admitted for the purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact.

Stated differently, as the Court in Lyons found, while the moving party is initially "responsible for showing the absence of disputed, material facts..." the opposing party "must file a responding statement either admitting or disputing each of the facts in the movant's statement." Id.

Furthermore, R. 4:46-5(a) in pertinent part provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth material facts showing there is no genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition.

While the court must view evidence in the light most favorable to the non-movant, "it is evidence that must be relied upon to establish a genuine issue of fact. 'Competent opposition requires competent evidential material beyond mere speculation and fanciful arguments.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Hoffman v. Asseenontv.Com,

Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009) (citation omitted)), certif. denied, 220 N.J. 269 (2015).

III. Count I: Mutual Mistake of Fact as to Cognis

In Count One of its Amended Complaint, Russo alleges that Russo and Cognis entered into the Sale Contract under a mutual mistake of fact regarding the environmental condition of the Property, the status of the remediation of the Main Parcel, and the redevelopment potential of the Property.

The doctrine of mutual mistake is applicable when a "mistake was mutual in that both parties were laboring under the same misapprehension as to [a] particular, essential fact." Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 608 (1989) (quoting Beachcomber Coins, Inc. v. Boskett, 166 N.J. Super. 442, 446 (App. Div. 1979)). Where the mutual mistake has a material effect on the contract, the adversely affected party may void it. Ibid. (citing Restatement (Second) of Contracts § 152(1) (1981)).

To illustrate the doctrine by way of example, seller and buyer enter into a contract of sale for a painting that they both believe is an original Van Gogh. The sale is executed, but subsequently, seller and buyer discover that the painting is a forgery. Since both seller and buyer believed that an essential component of the sale, the painting's validity as the work of Van Gogh himself, was true when it was not, a mutual mistake of fact has occurred.

In this case, Russo claims that at the time of the sale, Russo and Cognis were laboring under the mistaken belief that soil remediation at the Property had been completed. This belief stemmed from Exhibit 11.4 of the SPA, which states, "[o]nsite soil remediation [was] completed at the Property." It was later discovered that PCBs not fully delineated and not under the existing cap were located at the former employee parking lot. Also, Henkel is now required to perform

additional sampling in another portion of the Property, known as Area XII. According to Russo, these revelations demonstrate that Russo and Cognis were both under the mistaken impression that soil remediation had been completed at the time of the sale.

However, the Sale Contract itself belies Russo's contention that Cognis was under the mistaken belief that soil remediation had been completed. The Sale Contract is clear that Cognis made no representation as to the condition of the Property. Section 10 of the Sale Contract provides: "(a) Except as otherwise set forth herein: (i) the Property is being sold "as is" and (ii) the Seller does not make any claims or promises about the condition or value of any of the property included in this sale." Section 11 of the Sale Contract is even more illuminating as to the understanding of the parties. It provides Russo with a broad power to conduct a comprehensive due diligence investigation of not only the environmental condition but also the viability of the Property for development. It also permitted Russo to terminate the Sale Contract if Russo, in its sole discretion, was not satisfied with the results of its inspection.

The terms of the Sale Contract are consistent with the position taken by Cognis from the inception of negotiations two years earlier. The August 7, 2002 correspondence from the real estate broker reflects the terms the parties agreed would be in the Sale Contract. It clearly states the sale is "as is" and that Russo acknowledges any decision to purchase is based solely on its due diligence investigation.

When these provisions are read together it is clear that Cognis made no representation as to the environmental condition of the property, status of the remediation, or development capabilities. Instead, Cognis provided information, including, to the extent Henkel KGaA agreed, portions of the SPA, and also access to the Property. Cognis never said it had a "Van Gogh," and

there is no evidence that Cognis believed as much either. Therefore, no mutual mistake of fact existed.

For these reasons, Count I for rescission due to mutual mistake against Cognis is dismissed with prejudice.

IV. Count II: Fraud as to Cognis and Henkel

To succeed on a cause of action for common law fraud, a plaintiff must establish the following five elements: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Kaufman v. I-Stat Corp., 165 N.J. 94, 109 (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)). The plaintiff must demonstrate fraud by clear and convincing evidence. Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388, 395 (App Div. 1989).

a. Cognis

Russo argues that Cognis committed fraud by affirmatively misrepresenting to Russo that it had provided Russo with all the Relevant Seller/Predecessor Contract Provisions. Russo claims that Cognis knowingly withheld three provisions of the SPA that would have caused Russo to reject the deal. The three provisions that Russo alleges Cognis concealed are: (1) the Non-Assignment Provision; (2) the No Third Party Beneficiaries Provision; and (3) the Arbitration Provision.

The facts do not support this allegation. Section 6(b) of the Sale Contract required Cognis to "...use all commercially reasonable efforts..." to get permission from Henkel to disclose relevant provisions of the SPA to Russo. In accord with this obligation, Cognis requested from Henkel permission to disclose and provide Russo with a copy of the SPA. Cognis even provided

Henkel with the language of Section 6(b) to impress upon Henkel the full extent of its obligation to Russo. Nonetheless, Henkel KGaA agreed only to release to Russo the environmental provisions of the SPA, that is, those provisions relating to the remediation, the ISRA case, and the No Further Action letter. Henkel KGaA's unwillingness to make other components of the SPA available to Russo does not constitute a material misrepresentation by Cognis of a presently existing or past fact. To the extent permitted by Henkel, Cognis complied with its obligation under the Sale Contract concerning the environmental provisions of the SPA. There are no credible facts to support either a material misrepresentation or fraud by Cognis.

In its Amended Complaint, Russo also claims that Cognis provided false information to Russo and concealed other information from Russo regarding the environmental conditions of the Property. To the contrary, Cognis stated unequivocally in the Sale Contract that Cognis was selling the Property "as is" without making any promises as to the condition of the Property. It is undisputed that Cognis explicitly stated that it was making no representations. Russo has offered no credible evidence that suggests otherwise.

Accordingly, Russo cannot demonstrate that Cognis made a material misrepresentation of fact intending that Russo rely on it. Therefore Count II for fraud against Cognis is dismissed with prejudice. Additionally, as will be discussed further in this opinion, there is no credible evidence that Russo relied on a representation by Cognis. To the contrary, the record reflects that Russo relied on the results of its due diligence investigation.

b. Henkel

Russo's accusations of fraud as to Henkel emanate from the environmental condition of the Property and the government agencies overseeing the remediation. According to Russo, through express representations and through the non-disclosure of material information, Henkel

led Russo to believe that the prior PCB contamination on the Main Parcel had been satisfactorily remediated and that only limited and defined soil remediation needed to be completed. Additionally, Russo alleges that Henkel represented that it had obtained express approval from the USEPA that the DEP would act as lead agency in the remediation of the Property. The Amended Complaint further states that Russo relied on these representations and non-disclosures by Henkel in closing title on the Property. Subsequent to closing, Russo argues that Henkel's representations and non-disclosures, in particular the non-disclosure of the November 2009 test, caused Russo to invest substantial time, money, and effort to carry and benefit the Property and to move forward with the redevelopment.

With respect to Russo's claim that it relied on Henkel's representations and non-disclosures in closing the purchase of the Property, the facts before the court when viewed in the light most favorable to Russo fail to clearly and convincingly establish a cause of action for fraud against Henkel. The first element of fraud requires a material misrepresentation of a presently existing or past fact. There is no evidence that Henkel made misrepresentations in connection with Russo's purchasing the Property from Cognis. Russo maintains that in buying the Property from Cognis, Russo should have been made aware of communications between Henkel, the Property's previous owner, and Rashak, Henkel's environmental consultant. But Russo offers no authority for the requirement that two non-parties to a contract must disclose their communications between each other to a buyer of land under the contract. For purposes of fraud, the communications of non-parties to a contract cannot be construed as "material misrepresentations."

Russo's fraud claim is also deficient with regard to the third element of fraud. Plaintiff must establish that the defendant intended that the plaintiff rely on the material misrepresentations at issue. Accordingly, a defendant's putative misrepresentations to third parties cannot satisfy this

element of fraud because they were not made to the plaintiff. So it is that any representations made by Henkel to Cognis, the USEPA, or the DEP, regardless of their accuracy, were not made to Russo with the intent that Russo rely on them. Similarly, representations made by third parties, such as Henkel's environmental consultant, to Henkel cannot have been made with the intent that Russo rely on them because they were made to Henkel. For much the same reason, Russo's cause of action for fraud is inadequate as to the fourth element, that is, reasonable reliance on the supposed misrepresentations.

The absence of representations by Henkel to Russo is not the only deficiency in Russo's attempt to establish fraud as it relates to the closing and the lead agency issue. Russo cannot establish reasonable reliance on Henkel's representations because Russo relied on the thorough and years-long independent investigation of EcolSciences. Regarding the reasonable reliance element in a cause of action for fraud when plaintiff has completed an independent investigation as Russo has here, our Appellate Division has held as follows:

> [T]he law governing independent investigations seems clearly to have settled the principle that when one undertakes to make an independent investigation and relies upon it, he is presumed to have been guided by it and be bound accordingly. One cannot secure redress for fraud when he acted in reliance upon his own knowledge or judgment based upon an independent investigation. A false representation made to a person who knows it to be false is not in legal estimation a fraud...The question is whether [the party] relied upon its own investigation or to an appreciable degree on the false

representation of the [other party]. [Golden v. NW. Mut. Life Ins. Co., 229 N.J. Super. 405, 415 (App. Div. 1988).]

Edward Russo himself unequivocally confirmed his company's reliance on EcolSciences' work concerning the environmental issues at the Property. Edward Russo said, "When [EcolSciences] told us they were satisfied, we relied on them....Absent them conveying their level of comfort to us we would not have proceeded." This testimony demonstrates that Russo was not relying on Henkel's purported representations in deciding to close; rather, Russo was relying on the advice of EcolSciences. "In instances in which a party undertakes an independent investigation and relies on it, there can be no reliance." Byrne v. Weichert Realtors, 290 N.J. Super. 126, 137 (App. Div. 1996) (citing Golden, supra, 229 N.J. Super. at 415).

Similarly, Russo relied on EcolSciences' independent investigation concerning the lead agency issue. No credible evidence been presented that either Cognis or Henkel made a representation to Russo that the DEP was the lead agency at the Property. In fact, EcolSciences recommended that Russo address concerns regarding the PCB issue to assess compliance with USEPA rules in 2003. Ecolsciences' 2003 recommendation was the result of its review of documents relating to the long history of government oversight of the Property. Later, during a telephone conference on March 3, 2005, EcolSciences advised Ed Russo and Berger that PCBs remained in the soil at levels above USEPA High Occupancy limits, and that while the DEP may approve the final remediation of the Property, the USEPA may still need to be petitioned for a waiver. Additionally, King Moy ("Moy") of EcolSciences admitted that he was aware in 2005 that the Toxic Substances Control Act ("the TSCA"), which applies to PCB contamination, is not a program that can be delegated by the USEPA. These facts demonstrate that Russo was alerted to

and aware of the involvement of USEPA oversight. Again Russo's reliance was placed on the independent investigation of EcolSciences and the information it provided.

Post closing, Russo further asserts that under the Russo-Henkel Access Agreement, Henkel was obliged to disclose, among other things, the results of the November 2009 test and Rashak's recommendations relating thereto. However, to the extent that Henkel's fraud claim derives from the Russo-Henkel Access Agreement, it is barred by the economic loss doctrine. "Under New Jersey law, the economic loss doctrine defines the boundary between the overlapping theories of tort law and contract law by barring recovery of purely economic loss in tort." Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 244 (3d Cir. 2010) (internal quotation and formatting marks omitted). "New Jersey courts have consistently held that contract law is better suited to resolve disputes where a plaintiff alleges direct and consequential losses that were within the contemplation of sophisticated business entities and that could have been the subject of their negotiations." Id. at 248. The New Jersey Supreme Court has stated that "the purpose of a tort duty of care is to protect society's interest in freedom from harm, *i.e.*, the duty arises from policy considerations formed without reference to any agreement between the parties. A contractual duty, by comparison, arises from society's interest in the performance of promises." Spring Motors Distribs. v. Ford Motor Co., 98 N.J. 555, 579 (1985).

Historically, the economic loss doctrine has often been applied to contracts for goods, and that application offers an appropriate analogy in this case. See, e.g., Spring Motors, supra, 98 N.J. at 561 (commercial buyer sued for recovery of economic losses arising from defective transmissions installed in commercial trucks); Alloway v. Gen. Marine Indus., 149 N.J. 620, 642 (1997) (buyer sued for economic losses stemming from defective boat). Here, Russo, like the buyer of a defective product, seeks recovery of economic losses for its purchase of contaminated land.

Just as the buyer of a defective product cannot sue for economic losses in tort when the seller owes the buyer a duty in contract, Russo is barred from pursuing its fraud claim against Henkel when that fraud arises under the Russo-Henkel Access Agreement. Henkel owed Russo a contractual duty under the Russo-Henkel Access Agreement to provide "copies of any and all sampling/analytical data reports and recommendations for further action generated as a result of work completed on or associated with the premises within ten business days after receipt of same." Henkel did not owe a separate tort duty to furnish this information. Nonetheless, Russo maintains this claim under its count for breach of contract by Henkel.

Therefore, Count II for fraud as to Henkel is dismissed with prejudice.

V. Count III: Negligent Misrepresentation against Cognis and Henkel

Negligent misrepresentation exists where the defendant negligently made an incorrect statement on which the plaintiff justifiably relied. Singer v. Beach Trading Co., 379 N.J. Super. 63, 74 (App. Div. 2005) (citing McClellan v. Feit, 376 N.J. Super. 305, 317 (App. Div. 2005)). Such a statement may be the basis for the recovery of damages for economic loss sustained as a result of that reliance. Id. at 74 (citations and quotations omitted). The statement must be the proximate cause of the plaintiff's damages. Karu v. Feldman, 119 N.J. 135, 147 (1990); see also Kaufman v. I-Stat Corp., 165 N.J. 94, 109 (2000).

a. Cognis

Russo's Amended Complaint alleges that Cognis committed negligent misrepresentation by providing false or inaccurate information to Russo concerning the environmental condition of the property. This count must fail as to Cognis for much the same reasons as Counts I and II. As discussed above, the property was being sold "as is." Cognis unambiguously stated in the Sale Contract that Cognis made no "claims or promises about the condition or value of ... the property,"

and that Russo had a due diligence period to investigate the condition of the Property. Russo's claim for negligent misrepresentation cannot stand given this unequivocal language disclaiming any sort of representation by Cognis.

Admittedly, the documents that Cognis provided to Russo were not authored by Cognis. Even assuming, arguendo, that these documents contained false statements, Cognis did not make those statements, nor did Cognis represent that the documents were accurate. All of the environmental documents and information Cognis gave to Russo were prepared by Henkel, Henkel's environmental consultants, or by other third parties, such as the DEP. EcolSciences was given unfettered access to the documents and property. EcolSciences conducted a two-year investigation on behalf of Russo. During that time, the Property was inspected and thousands of pages of documents were reviewed. If, in its sole discretion, Russo was not satisfied with any aspect of the investigation, Russo could have terminated the Sale Contract. Russo, a sophisticated purchaser and developer of contaminated properties, relied on its investigation and the report of its expert EcolSciences. Cognis cannot be held liable under a theory of negligent misrepresentation for misrepresentations that it did not make.

For these reasons, Count III for negligent misrepresentation against Cognis is dismissed with prejudice.

b. Henkel

Russo's claim for negligent misrepresentation against Henkel alleges that Henkel provided false information to Russo, that Henkel did not take reasonable steps to verify the truthfulness of the information it provided to Russo, and that Henkel did not disclose information to Russo about the environmental condition of the Property. These accusations fare no better when levied against Henkel.

First, in Section 10(b) of the Sale Contract, Russo acknowledged that there had been "past discharges of Contaminants" on the Property. Second, Exhibit B to the Sale Contract contained tables setting forth sampling results at the Property that revealed substantial concentrations of PCBs remaining in the soil. Third, Russo and its environmental consultant EcolSciences were given two years to independently investigate the Property with the right to cancel the deal at any time during that period. The outcome of this due diligence was Russo signing the Sale Contract. Fourth, the Property was sold "as is." Fifth, Russo is an experienced developer of contaminated sites that closed this deal with full knowledge of the meaning and consequences of the terms in the Sale Contract. These undisputed facts, when taken together, bar the possibility of justifiable reliance by Russo on any representations by Henkel as to the environmental condition of the Property prior to its purchase.

VI. Rescission against Cognis

Russo has moved for summary judgment for rescission of the Sale Contract with Cognis. An equity court's power to rescind a contract is considered exceptional in character. See Hon. William A. Dreier P.J.A.D. (ret.) & Paul A. Rowe, Esq., Guidebook to Chancery Practice in New Jersey § II at 98 (6th ed. 2005). Rescission is available only in limited circumstances. Intertech Assocs. v. City of Paterson, 255 N.J. Super. 52, 59 (App Div. 1992). Contracts may be rescinded for original invalidity, fraud, failure of consideration, material breach, or default. Center 48 Ltd. Partnership v. May Dept. Stores Co., 355 N.J. Super. 390, 411-12 (App Div. 2002) (citing Hilton Hotels Corp. v. Piper Co., 214 N.J. Super. 328, 336 (Ch. Div. 1986)). The remedy is discretionary with the court and should not be granted where there has been substantial performance of the contract. Id. at 412 (citations omitted). Nor will rescission be granted where the offended party has not acted within a reasonable time. Hilton Hotels, supra, 214 N.J. Super. at 336 (citation omitted).

The court must be able to return the parties to the ground on which they originally stood. Center 48, supra, 355 N.J. Super. at 412 (citation omitted). Where an adequate remedy at law exists, equity will decline to exercise its inherent power of rescission. Downs v. Jersey Central Power and Light Co., 117 N.J. Eq. 138, 140 (E. & A. 1934).

The court finds rescission would be inequitable in this case. The Sale Contract between Russo and Cognis has been substantially performed. Cognis has complied with all of its obligations under the Sale Contract, and Russo has made no allegation that Cognis has refused Russo access to the site, or that Cognis has not provided Russo with the deed. Furthermore, Russo has owned the Property for some ten years now, paying taxes on it and conducting pre-development construction work over that period. These facts render the court's ability to restore the parties to the status quo ante infeasible. Last, rescission is not appropriate in this case because Russo has an adequate remedy at law. Russo may develop the Property, sell it, and seek monetary damages where appropriate. Because the court dismisses Counts I, II, and III as to Cognis, Russo's motion for summary judgment for rescission is also denied.

VII. Count IV: Breach of Contract as to Cognis

Russo alleges that Cognis breached its contract with Russo by (1) "transmit[ing] contract provisions regarding remediation of the Property which were not truthful"; (2) not compelling Henkel and its consultants to perform remediation in accordance with all applicable laws; (3) "making documents pertaining to the remediation of the Property available to Russo that were inaccurate"; (4) misrepresenting to Russo that Cognis provided all Relevant Seller/Predecessor Contract Provisions to Russo when Cognis had not done so; and (5) failing to indemnify Russo.

The court has already addressed Russo's allegations regarding the various documents and contract provisions Cognis delivered. That analysis need not be repeated in full here, except to

state again that Cognis complied with the Sale Contract and its requirements as to providing documentation to Russo, Cognis did not author those documents, Cognis made no promises as to the content of those documents, and the Sale Contract did not require that Cognis independently verify the statements in those documents.

Russo's claim that Cognis did not compel Henkel to remediate the Property in a timely and proper fashion are also without merit. In the Russo-Cognis Access Agreement, executed by Russo at the closing in 2006, Cognis agreed to make "reasonable and diligent, good faith efforts to cause Henkel and its consultants to comply with all of the terms, conditions and provisions of this Access Agreement." The Russo-Cognis Access Agreement included the requirement that the remediation would be "completed with reasonable diligence," "in accordance with all applicable Laws." Cognis has not breached this agreement because Russo has produced no evidence that Henkel is out of compliance with the DEP's deadlines to complete the remediation of the Property. The undisputed facts show that Henkel has been remediating the Property continuously since 1990, and that Henkel has met its obligations to do so under state administrative directives throughout that time. Cognis has not had to compel Henkel to remediate the Property because Henkel has been complying with its state agency mandates.

Russo's assertion that Cognis has failed to indemnify Russo arises from Section 14 of the Russo-Cognis Access Agreement. Section 14 provides that Cognis shall indemnify Russo for damages suffered by Russo as a result of the remediation of the Property. Section 14 limits the extent of Cognis's obligation to indemnify Russo to the amount that Cognis can recover from Henkel through Cognis's own indemnification rights under the SPA. Specifically, Section 14 states that if it is impractical for Russo to assert a direct right of indemnification against Henkel, then Cognis shall indemnify Russo "to the extent and subject to the limitation" that Cognis shall not

have "liability beyond the recovery over by Cognis against Henkel" under the SPA. Cognis shall pay the indemnity amount to Russo "promptly upon recovery of such amounts."

Russo's breach of contract claim under Section 14 is flawed for two reasons. First, Russo has never tendered an indemnity claim under this provision of the Russo-Cognis Access Agreement. Cognis cannot have failed to indemnify Russo when it has never been asked to do so. Second, Cognis has not been able to recover on its indemnification claim against Henkel. Shortly after being served with the original Complaint in this matter, Cognis tendered it to Henkel for indemnification under the SPA. Henkel rejected this claim. Therefore, even if Russo had submitted an indemnification claim to Cognis, Russo would be unable to recover from Cognis because Cognis has been unable to recover from Henkel.

For these reasons, Count IV for breach of contract as to Cognis is dismissed with prejudice.

VIII. Count V: Breach of Contract as to Henkel and Contractual Indemnification by Henkel

In Count V of its Amended Complaint, Russo alleges Henkel breached the Russo-Henkel Access Agreement. Russo claims Henkel failed to provide Russo with sampling data concerning the environmental condition of the Property, failed to inform Russo of its consultant's recommendations regarding PCB remediation, and failed to advise Russo of meetings and communications with the DEP and the USEPA. According to Russo, Henkel also refused to perform actions needed to remediate the site and permit Russo's redevelopment to be approved, failed to complete PCB testing and remediation, thwarted Russo's development of the Property by taking "many actions and fail[ing] to take other actions," and failed to disclose NJ Transit's position in 2010 regarding migrated contamination. Russo seeks lost profits as damages under this

count. Henkel argues that it must be dismissed because Russo's request for the recovery of lost profits is barred by the speculative nature of any lost profits and by the new business rule.

Lost profits, "where based on sound fact and not on mere opinion evidence without factual support, [are] recognized as a proper measure of damages if 'capable of being estimated with a reasonable degree of certainty.'" Stanley Co. of Am. v. Hercules Powder Co., 16 N.J. 295, 314 (1954) (citing Rempfer v. Deerfield Packing Corp., 4 N.J. 135, 144 (1950)); see also V.A.L. Floors, Inc. v. Westminster Communities, Inc., 355 N.J. Super. 416, 425 (App. Div. 2002). "Past experience of an ongoing, successful business provides a reasonable basis for the computation of lost profits 'with a satisfactory degree of definiteness.'" V.A.L. Floors, supra, 355 N.J. Super. at 425 (quoting Weiss v. Revenue Bldg. & Loan Ass'n, 116 N.J.L. 208, 212 (E & A 1936)). However, under the new business rule, prospective profits of a new business are considered too remote and speculative to meet the legal standard of reasonable certainty. RSB Laboratory Services, Inc. v. BSI, Corp., 368 N.J. Super. 540, 556 (citation omitted). In Weiss, the Court explained the difference between ascertaining the future profits of a new business venture and one in actual operation thus:

> In [a new business], the prospective profits are too remote, contingent, and speculative to meet the legal standard of reasonable certainty; while in [a business in actual operation], the provable data furnished by actual experience provides the basis for an estimation of the quantum of such profits with a satisfactory degree of definiteness. [Weiss, supra, 116 N.J.L. at 212.]

On the basis of the report and testimony of its lost profits expert, Lawrence R. Chodor ("Chodor"), Russo contends it endured lost profits because it was unable to sell the Property to

Goodman Birtcher, and it was unable to lease the Property to Coca-Cola and ULMA.[4] An expert's opinion unsupported by factual evidence is a "net opinion." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996). The expert is required to give "the why and wherefore of his expert opinion, not just a mere conclusion." Ibid. Courts will not admit expert testimony "if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture." Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 299 (App. Div.) (quoting Clearwater Corp. v. City of Lincoln, 277 N.W.2d 236, 241 (Neb. 1979)), certif. denied, 122 N.J. 333 (1990).

Here, drawing all inferences in favor of plaintiff as to this issue, to conclude that Russo could possibly have entered into a lease or sale for a particular use, rent, or price is speculative. Russo's discussions with all three of these companies were merely preliminary. In the case of Goodman Birtcher, only a proposal had been submitted, nothing more. No agreement on material terms had been reached. Chodor admitted that he was speculating that the sale of the Property to Goodman Birtcher would take place under the terms and conditions set forth in the proposal. Chodor testified that the possible transaction with Goodman Birtcher was "a proxy to determine the value, the salable value and the profits on this property." Chodor admitted that "the focus on specifically Goodman Birtcher is just because we have an actual document here, and a potential transaction, but it doesn't mean it's the only one, and if this fell through they would never have another potential buyer." Chodor's testimony shows that there is no credible evidence that this sale would have taken place under the terms and conditions found in the proposal.

[4] The court accepts Chodor's report and testimony as credible and for the purposes of the instant motion views them in the light most favorable to plaintiff. Given the findings of Chodor's report and testimony, a motion to exclude them might have been expected. No such motion ever materialized.

Similarly, the proposed leases to Coca-Cola and ULMA had not yet ripened into contracts. Russo did not reach any agreement with respect to material terms of any lease with Coca-Cola or ULMA. Russo and Coca-Cola never entered into a Letter of Intent. Regarding ULMA, Russo had only sent a proposed Letter of Intent. Russo's claims for lost profits are speculative at best, and they cannot be proven to a reasonable degree of certainty. As the court has previously noted, competent opposition to a motion for summary judgment requires competent evidential material beyond mere speculation. Cortez, supra, 435 N.J. Super. at 605 (quotations and citations omitted). The evidence before the court of Russo's lost profits does not meet that standard.

As regards the new business rule, Russo argues that Russo is not a new business because it is an affiliate of Russo Development, LLC ("Russo Development"), whose principals own Russo. Since Russo Development is not a new business and its profits are readily ascertainable, Russo maintains, Russo's damages are not speculative. But Russo has cited no case law to support such a conclusion. The new business rule does not except entities that are owned by businesses with provable profits. Russo cannot claim the successes of its parent entity as its own. Russo was formed in 2006 for the specific purpose of acquiring title to this particular Property. No operating history for this Property exists. Russo owns no assets other than the Property, and Russo generates no income.

The undisputed facts in this case require the court to dismiss the claim for lost profits. The court does not dismiss Russo's claim under Count V for breach of contract relating to the Russo-Henkel Access Agreement and the damages Russo allegedly suffered as a result of that breach. That claim shall proceed to trial on the merits.

IX. Count VI: Violation of New Jersey Spill Compensation and Control Act against Cognis and Henkel

Count VI of Russo's Amended Complaint alleges that Cognis and Henkel violated the New Jersey Spill Compensation and Control Act ("the Spill Act") because they disposed of hazardous substances at the Property and because they owned the Property when discharges of hazardous substances occurred there. On July 30, 2015, this court dismissed Russo's Spill Act claim without prejudice holding that Russo had not incurred any investigation and remediation costs. However, Russo's Amended Complaint, filed July 12, 2016, includes the Spill Act claim. Cognis moves for summary judgment on this count, but Russo, in its opposition, states that it re-filed its complaint "with the understanding that the Spill Act Claim remained dismissed without prejudice." Cognis responded that it accepts Russo's acknowledgment that the Spill Act claim has been dismissed without prejudice and is therefore not before the court on this motion. Accordingly, this count remains dismissed without prejudice.

X. Count VII: Breach of Common Law Obligation

In Count VII, Russo alleges that Cognis and Henkel "conducted abnormally dangerous activities at the Property by their use and disposal of toxic substances resulting in the poisoning of the soils, water and other media at, in, under and migrating from the Property." According to Russo, Cognis and Henkel are therefore strictly liable to "pay for the investigation and remediation of the hazardous substances they and their predecessors in title released from the Property during their operations" there.

a. Cognis and Henkel

N.J.S.A. 2A:14-1 sets a six-year statute of limitations for common law suits for trespass to real property, for any tortious injury to real or personal property ... [or] for any tortious injury to

the rights of another [other than personal injury, libel or slander] ..." The six-year statute of limitations applies to "environmental actions based on strict liability." SC Holdings, Inc. v. A.A.A. Realty Co., 935 F.Supp. 1354, 1367 (D.N.J. 1996) (citations omitted). The statute of limitations in a cause of action for strict liability arising from an environmental tort is governed by the discovery rule. Ibid. The discovery rule tolls the running of the statutory period until a party "learns, or reasonably should learn, the existence of that *state of facts* which may equate in law with a cause of action." Hatco Corp. v. W.R. Grace & Co. – Conn., 801 F.Supp. 1309, 1323 (D.N.J. 1990) (citing Apgar v. Lederle Laboratories, 123 N.J. 450, 455 (1991) (quoting Burd v. New Jersey Telephone Co., 76 N.J. 284, 291 (1978))).

Here, the existence of substantial PCB contamination in the soil at the Property has been known to Russo for longer than six years. The Sale Contract specifically identified and described the contaminants found at the Property. Table 2 of Exhibit B to the Sale Contract listed the numerous locations at which PCBs were left behind in the soil well in excess of both residential and non-residential soil cleanup criteria. Additionally, the RAWA prepared by EcolSciences in July 2005 provided that post-excavation sampling at the Property showed PCBs at a concentration of 52mg/kg. These facts show that Russo was aware as early as 2005 that the Property was extensively polluted with PCBs and other hazardous substances, and that the pollution was the result of the actions of the predecessors-in-title at the Property. Russo filed its Complaint on October 31, 2014, at least nine years after the state of facts suggesting a cause of action for strict liability arising from an environmental tort were revealed to it. Therefore, Russo's claims under this count against Cognis and Henkel are time-barred. Count VII is dismissed with prejudice as to Cognis and Henkel.

Additionally, Cognis's motion seeks the dismissal of Henkel's cross-claims against Cognis. No opposition was filed by Henkel to this part of the application. Therefore, Henkel's cross-claims against Cognis are dismissed.

b. NJ Transit and Carlstadt

With respect to NJ Transit and Carlstadt, Count VII asks the court to (1) compel NJ Transit and Carlstadt to execute deed notice restrictions on their respective properties, a railroad right-of-way and a public roadway; (2) permit Cognis and Henkel to access NJ Transit and Carlstadt's property to complete the remediation to an agreed-upon standard; and (3) take such further action as the DEP may require to remediate contamination that has migrated from the Property to NJ Transit's property so that a final Remedial Action Outcome ("RAO") may be obtained.[5]

NJ Transit filed an Answer to Russo's Amended Complaint, a counterclaim against Russo, and cross-claims against Henkel and Cognis. NJ Transit admitted that it refused to accept a deed notice restriction on its property, asserted that Cognis and/or Russo were responsible for any costs to remove contamination that had migrated to its property, and sought damages under the Spill Act. In the instant motion for summary judgment, NJ Transit asks the court to dismiss Russo's Amended Complaint, NJ Transit's cross-claims against Cognis and Henkel, and its counterclaim against Russo without prejudice. NJ Transit argues that these claims are now moot due to a change in circumstances that has made the relief sought by Russo against NJ Transit and the current remediation of its railroad right-of-way unnecessary.

The basis for Russo's claim against NJ Transit is a letter dated March 11, 2010, from Henkel's environmental consultant Rashak to NJ Transit's Director of Real Estate Bernadette Gill

[5] In connection with these motions Carlstadt submitted to the court a letter stating in part the following: "Borough of Carlstadt joins in on the motion papers filed by New Jersey Transit dated February 16, 2017 and respectfully requests that all claims filed against Borough of Carlstadt in Russo Meadowland Park's Amended Complaint and the counterclaim and crossclaims filed by Borough of Carlstadt be dismissed without prejudice or costs."

("Gill"). In the letter, Rashak stated that Henkel may have been responsible for contamination present on NJ Transit's right-of-way. However, the current Licensed Site Remediation Professional ("LSRP"), Jeffrey Powley ("Powley"), filed a Preliminary Assessment/Site Investigation and Remedial Investigation Report ("the RIR") that suggests otherwise. The RIR suggests that the contamination in the soil samples Rashak referred to in his letter did not migrate from the Property. In deposition testimony, Powley stated that it was his opinion that the contamination of NJ Transit's right-of-way reflected in the soil samples referred to in Rashak's letter was not caused by Henkel.

Under the New Jersey Site Remediation and Reform Act, N.J.S.A. 58:10-1 to –29 ("the SRRA"), primary supervision for industrial site cleanup of contaminants shifted from the DEP to LSRPs. Des Champs Labs, Inc. v. Martin, 427 N.J. Super. 84, 99 (App. Div. 2012). The SRRA makes the LSRP, not the DEP, responsible for preparing the RAO for the Property, subject to DEP review. The SRRA defines a RAO as "a written determination by a [LSRP] that the contaminated site was remediated in accordance with all applicable statutes and regulations, and based upon an evaluation of the historical use of the site, or of any area of concern at that site ... there are no contaminants present at the site, or at any area of concern, at any other site to which a discharge originating at the site has migrated..." N.J.S.A. 58:10C-2. The responsible LSRP is required to file an RAO with the DEP when "in the opinion of the LSRP, the site has been remediated so that it is in compliance with all applicable statutes, rules and regulations protective of public health and safety and the environment." N.J.S.A. 58:10C-14d.

By means of the SRRA, the Legislature has conferred upon LSRPs the responsibility to supervise the work being done at the Property and the work that may need to be done on NJ Transit's property. Powley's assessment is that the contamination of the soil in NJ Transit's right-

of-way was not caused by Henkel. Powley has made this evaluation under oath, and it is also reflected in the RIR he prepared. For this reason, Russo's claim against NJ Transit and thus NJ Transit's counterclaim and cross-claims are moot: Russo needs no deed notice restriction and neither Henkel nor Cognis are required to remediate NJ Transit's property. Where a change in circumstances occurs that creates doubt concerning the immediacy of the controversy before a court, the case will ordinarily be dismissed as moot, regardless of the progress of the litigation to that point. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976).

The only controversy with respect to NJ Transit's motion for summary judgment concerns whether to dismiss the claims with or without prejudice. NJ Transit has argued that dismissal of these claims should be without prejudice, while Russo contends that dismissal should be with prejudice.[6] The one material fact at issue in NJ Transit's motion for summary judgment as well as NJ Transit and Carlstadt's counterclaims and cross-claims is whether the contamination of these defendants' properties is the result of the migration of contamination that Henkel caused from the Property. That material fact is not in dispute. It is uncontested that the LSRP has found that Henkel did not cause the contamination on NJ Transit or Carlstadt's property. Were the matter tried today, Henkel's claims as well as NJ Transit and Carlstadt's counterclaims and cross-claims would be dismissed with prejudice. Therefore, in light of the LSRP's unchallenged assessment, the court dismisses NJ Transit and Carlstadt's counterclaims and cross-claims with prejudice.

c. Cross-claims

Cognis moved for dismissal of Henkel's cross-claims against Cognis. No opposition was filed. Accordingly, Henkel's cross-claims against Cognis are dismissed with prejudice. Cognis's cross-claims seek indemnification against all co-defendants, and against Henkel for damages for

[6] Cognis, in Point VII of its supporting brief, asks the court to dismiss NJ Transit and Carlstadt's cross-claims with prejudice.

which Cognis is held liable relating to the Spill Act, Henkel's negligence, and Henkel's breach of the Russo-Henkel Access Agreement. Since the court has found that Cognis is not liable for any damages under any cause of action in this case, Cognis's cross-claims are dismissed with prejudice as well.

XI. Conclusion

For the foregoing reasons, the court grants summary judgment as follows:

- Count I for mutual mistake of fact as to Cognis is dismissed with prejudice.
- Count II for fraud against Cognis and Henkel is dismissed with prejudice as to both defendants.
- Count III for negligent misrepresentation as to Cognis and Henkel is dismissed with prejudice as to both defendants.
- Count IV for breach of contract as to Cognis is dismissed with prejudice.
- Count V for breach of contract by Henkel and contractual indemnification by Henkel is dismissed with respect to the damage claim for lost profits. Russo's claim for breach of contract arising from the Russo-Henkel Access Agreement will proceed to trial on the merits.
- Count VI for violation of the New Jersey Spill Compensation and Control Act against Cognis and Henkel remains dismissed without prejudice.
- Count VII for breach of common law obligations as to Cognis and Henkel with requested relief against NJ Transit and Carlstadt is dismissed with prejudice as to all defendants.
- NJ Transit and Carlstadt's respective counterclaims and cross-claims are dismissed with prejudice.

- Henkel's cross-claims against Cognis are dismissed with prejudice.
- Cognis's cross-claims against all parties are dismissed with prejudice.