NOT TO BE PUBLISHED WITHOUT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

SUPERIOR COURT OF NEW JERSEY
MIDDLESEX COUNTY
LAW DIVISION
DOCKET NO. L-1508-14

SATNARINE BABULAL and BIBI HAKH, Husband and Wife,
Plaintiffs,

v.

DYNAMIC METALS PROCESSING, INC., SHEMZA BACHUS, GARY MACHINERY, LLC, GARY STEEL PRODUCTS CORP., GSP-1931, LLC, GARY METAL MANUFACTURING, LLC, GARY STEEL PRODUCTS CORP. OF INDIANA 1-10, DYNAMIT NOBEL, BUD BALARNI, substituted for ELECTRICAL CONTRACTORS #1, UMAREX USA, substituted for BUSINESS ENTITY #3, JOHN DOES ABC BUSINESS ENTITIES 1-10, BUSINESS ENTITIES 1-10 and ELECTRICAL CONTRACTORS #1

Defendants.

Decided: August 22, 2018

Shelley L. Stangler, attorney for plaintiff (Shelley L. Stangler, P.C.).

James P. Ricciardi, Jr., attorney for defendants Gary Metal Manufacturing, L.L.C. & Gary Machinery, L.L.C. (Fleischner Potash Cardali Chernow Coogler Greisman Stark Stewart, L.L.P.).

VIGNUOLO, J.S.C.

This is a motion for summary judgment by defendants Gary Metal Manufacturing, L.L.C. ("Gary Metal") and Gary Machinery, L.L.C. ("Gary Machinery"), seeking to dismiss plaintiff's Complaint brought against them under the successor liability doctrine. The moving defendants argue they cannot be held liable as successor corporations based on the test outlined in the seminal case Ramirez v. Amsted Indus., Inc., 86 N.J. 332 (1981). Ramirez held a successor corporation may be liable for a defective product sold by its predecessor if (1) the successor corporation acquires substantially all the assets of the predecessor corporation, and (2) the successor corporation continues essentially the same manufacturing operation as the predecessor corporation. Id. at 335, 349, 358. Because this court is convinced that an issue of material fact exists as to Gary Machinery, this Motion is denied. This Motion is granted as to Gary Metal.

I. **Facts**

a. The Accident

Plaintiff, Satnurine Babulal ("Plaintiff"), alleges he was injured on March 16, 2012 while operating a steel straightening machine manufactured by Gary Steel Products Corp. of Indiana ("GSP-Indiana") in 1980.[1] See Exhibit B, at paras. 14-24.

[1] Plaintiff disputes this fact, believing Gary Steel Products Corp. manufactured the subject straightener because it is listed on the purchase

Plaintiff's hand was caught in the moving rollers of the steel straightening machine, resulting in the loss of several fingers. See Exhibit B, at paras. 23-24.

The specific machine that injured Plaintiff was on the premises of Plaintiff's employer, Dynamic Metals Processing, Inc. Ibid. The specific machine was a Model 4600-48, Serial No. 147 Straightener (the "Subject Straightener"). See Exhibit C, at 148:1-16. The Subject Straightener was part of a system of steel processing equipment known as a "Cut-to-Length" system. See Exhibit C, at 33:9-19; 37:17-23; Plaintiff's Opposition, Exhibits Q-R. See also infra Part I(a)(i) (for a description of the Cut-to-Length system).

b. "Gary" Related Entities

There are several different related entities involved in this matter, all of which contain the name "Gary." An outline of each is necessary for the determination of this motion.

i. GSP and GSP-Indiana

Defendants, Gary Steel Products Corp. ("GSP") and GSP-Indiana were owned by Theodore Primich and George Primich. See Exhibit K. Both companies ceased their corporate existence in 2006. See Exhibit C, at 23:1-10; Exhibit K.

---

order. See Exhibit G. This disputed fact is not a material one for the determination of the instant Motion.

GSP was in the business of manufacturing and selling pipe, fittings, and ductwork for the HVAC Industry. See Exhibit C, at 171:4-20.

GSP-Indiana manufactured steel coil processing machines, such as straighteners, slitters, uncoilers, conveyer tables, and stackers. See Exhibit C, at 175:7-176:3, 177:3-18, 183:25-184:9. The objective of a steel straightening machine is simple: it flattens coiled steel so that it can be processed. See Exhibit C, at 94:1-7.

GSP-Indiana also put together a steel processing system known as a "Gary Cut-to-Length." See Exhibit C, at 200:24-202:15. The Cut-to-Length system consists of several steel processing machines, including a straightener, slitter, uncoiler, stacker, and shearer. See Exhibit C, at 33:23-34:8. When manufacturing a Cut-to-Length system for a client, GSP-Indiana would build from scratch each piece of machinery, except for a shearer. See Exhibit C, at 202:7-12.

ii. Gary Metal and Atco-Gary

Defendant, Gary Metal is an active business, owned by David Strilich, Frank Zudoch, Mike Strilich, Dale Cobble, Brian Cobble, and Dean Cobble. See Exhibit C, at 67:9-19.

Gary Metal was primarily engaged in the business of manufacturing sheet metal products for the HVAC industry. See Exhibit C, at 67:2-69:1; Exhibit L. Gary Metal has never

manufactured steel processing machinery, such as straighteners, slitters, or shearers. See Exhibit C, at 75:6-12. However, a sales catalog of Gary Metal lists the "Cut-to-Length" system as a product for sale under the subsection "Specialty Products" (the "Sales Catalog"). See Plaintiff's Opposition, Exhibit H. David Strilich ("Mr. Strilich"), a managing partner of Gary Metal and majority owner of Gary Machinery, explained that they offered the Cut-to-Length system to clients, but would not build the separate machines involved in it (e.g., the straightener, slitter, shearer, etc.). See Exhibit C, at 76:22-80:21. Rather, Gary Metal (or Gary Machinery) would purchase the specific machines from other businesses, arrange the machines to create the Cut-to-Length system, and supply such to their clients.[2] Id.

In 2012, Gary Metal entered into a joint venture with an individual, Ramesh Bahita, and formed the entity Atco-Gary Technologies, L.L.C. ("Atco-Gary"). See Exhibit C, at 19:5-11, 21:7-9. Since the joint venture, Gary Metal ceased manufacturing its own products. See Exhibit C, at 29:15-18, 60:5-23. It now only acts as a holding company, owning 49% of Atco-Gary, while Mr. Bahita owns the other 51%. Id. 19:5-11, 29:15-18. Atco-Gary has maintained the same line of business as

[2] Although the Cut-to-Length system only appears in Gary Metal's catalog, it is not clear from Mr. Strilich's testimony if he is referring to Gary Metal or Gary Machinery when describing how the Cut-to-Length system would be put together.

Gary Metal did prior to the joint venture. See Exhibit C, at 73:8-20. Atco-Gary is not a party to the instant matter. See Exhibits A-B.

iii. Gary Machinery

Defendant, Gary Machinery is a standalone company, owned by Mr. Strilich and Mike Golec. See Exhibit C, at 24:21-25:3, 28:14-22.

Gary Machinery is primarily engaged in the business of manufacturing slitter machines. See Exhibit C, at 88:7-11, 97:2-5. A slitter is a piece of steel processing equipment used to cut steel sheets into smaller sheets. See Exhibit C, at 97:2-13.

Mr. Strilich stated several times during his deposition that Gary Machinery only manufactures slitters. See Exhibit C, at 50:15-20, 61:9-24, 78:22-23, 80:8-14, 101:18-22. However, on Gary Machinery's website, under the subject heading "A Few of Our Current Projects," several other types of equipment can be found, including a "Straightening/Corrugating machine to stiffen copper" (the "Copper Straightener/Corrugator"). See Plaintiff's Opposition, Exhibit L.

Aside from selling slitters, Mr. Strilich testified that Gary Machinery has sold one straightener in the past ten years. See Exhibit C, at 99:18-100:11. The straightener sold was not a part of the "GARY" product line. Ibid. Gary Machinery

purchased it from another manufacturer and then resold it to the client. Ibid.

Gary Machinery also sells its used equipment. See Exhibit C, at 80:22-81:1. As recently as 2016, Gary Machinery had two (2) straighteners for sale on its website: a 36" Gary Straightener, Model 4650-36, and a 48" Gary Straightener, Model 4650-38. See Plaintiff's Opposition, Exhibit K. Gary Machinery has not sold this equipment. See Exhibit C, at 82:5-7. Additionally, Mr. Strilich estimated that Gary Machinery has sold three (3) used levelers in the past decade. See Exhibit C, at 101:18-102-8. According to the parties' witnesses, levelers perform a similar, if not the same, function as a straightener. See Exhibit C, at 100:16-101:3; Plaintiff's Opposition, Exhibit A, at 21:3-8; Exhibit C, at 36:4-11. Mr. Strilich described a leveler as a "sophisticated straightener" and claimed that levelers have largely supplanted straighteners. See Exhibit C, at 21:10-12, 28:11:13, 100:16-17, 109:4-21.

Gary Machinery also sells spare parts for levelers. See Exhibit C, at 102:12-105:24. Mr. Strilich estimated that Gary Machinery has supplied about 50 customers with spare parts for levelers over the past decade. See Exhibit C, at 105:16-24.

c. The Asset Purchase Agreement

On January 22, 2002, Gary Metal entered into an "Agreement for Sale of Business Assets" with GSP and GSP-Indiana (the

"Agreement"). See Exhibit J. Pursuant to the Agreement, Gary Metal agreed to purchase substantially all the assets of GSP and GSP-Indiana, including, but not limited to, machinery, inventory, various real estate, pending contracts, trademark rights, copyrights, patents, know-how, designs, and goodwill. Id. at Section 3. Mr. Strilich, who signed the Agreement on behalf of Gary Metal, agreed at his deposition that it was "critical" that Gary Metal receive the "GARY" related trademarks and goodwill. See Exhibit C, 190:22-191:23.

The Agreement contains the following provision:

> Debt and Liabilities. . . . The parties further agree that any causes of action, liabilities, or claims of any sort arising from or related to events which occurred prior to closing related to the business of Seller or the Property, whether known or unknown, will be the responsibility of Seller.
>
> [See Exhibit J, at Section 16(b).]

The Agreement also references and incorporates a restrictive covenant whereby Geraldine M. Pigott, the president of GSP and GSP-Indiana, agreed not to compete with the businesses of Gary Metal and Gary Machinery (the "Restrictive Covenant"). See Exhibit J, at Section 22, Exhibit F to the Agreement.[3] Although Gary Machinery is not directly a party to

[3] The Restrictive Covenant provided in the parties' exhibits is unsigned, however, Mr. Strilich testified that he "believed" it was eventually signed. See Exhibit C, at 56:12-57:16.

the Agreement, it and Gary Metal are collectively defined as the "Purchaser" in the Restrictive Covenant. Id. Mr. Strilich was unable to explain why Gary Machinery was named a Purchaser on the Restrictive Covenant. See Exhibit C, at 55:21-58:2, 61:25-62:3, 63:8-23.

d. Sale of the Used Straighteners

As part of the Agreement, Gary Metal obtained two (2) straighteners to be used in manufacturing its own products. See Exhibit C, at 81:8-24, 82:16-83:14. These straighteners were previously mentioned and are listed for sale as used machinery on Gary Machinery's website. See Plaintiff's Opposition, Exhibit K. See also supra Part I(b)(iii).

Atco-Gary no longer utilizes the used straighteners. Id. Atco-Gary requested that Gary Machinery advertise the used straighteners on Gary Machinery's website on a consignment basis. See Exhibit C, at 81:25-82:4. As mentioned above, these straighteners were listed for sale on Gary Machinery's website as recently as 2016. See Plaintiff's Opposition, Exhibit K.

e. Expert Report

Produced with Plaintiff's Opposition is the expert report of Donald R. Phillips. See Plaintiff's Opposition, Exhibit O. Mr. Phillips opined that the used straighteners for sale on Gary Machinery's website are "similar" to the Subject Straightener. Id. at para. 6(C).

Additionally, Mr. Phillips' report concludes that the Copper Straightener/Corrugator produced by Gary Machinery is "similar in use and function to the [Subject Straightener] as its purpose is to straighten coiled copper sheet before it is corrugated." Id. at para. 6(E).

II. Summary Judgment Standard

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, 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). The Supreme Court outlined the standard to apply in Brill v. Guardian Life Ins. Co. of Am.:

> [A] determination of whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to 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.
>
> [142 N.J. 520, 540 (1995).]

Accordingly, "[o]nly if there exists a single, unavoidable resolution of the alleged disputed issue of fact, [should] that . . . issue be considered insufficient to constitute a 'genuine' issue of material fact for the purposes of R. 4:6-2(c)." Saez

v. S&S Corrugated Paper Mach. Co., 302 N.J. Super. 545, 551 (App. Div. 1997) (quoting Brill, 142 N.J. at 540).

III. Product Liability

We turn now to the substance of Gary Metal and Gary Machinery's Motion. The issue is whether the defendants may be held liable under the successor liability doctrine despite the undisputed fact that neither entity manufactured the Subject Straightener, nor does either entity continue to manufacture the Subject Straightener.

The New Jersey Product Liability Act (hereinafter the "NJPLA") imposes liability on a manufacturer or seller of a product if the product "(a) deviate[s] from the design specifications, formulae, or performance standards of the manufacturer . . . , or (b) fail[s] to contain adequate warnings or instructions, or (c) [is] designed in a defective manner." N.J.S.A. 2A:58C-2. Under all three theories, as under common law, a plaintiff must prove that (1) the product was defective; (2) the defect existed when the product left the hands of the defendant; and (3) the defect caused the injury to plaintiff, a reasonably foreseeable user. See O'Brien v. Muskin Corp., 94 N.J. 169, 179 (1983); Jurado v. Western Gear Works, 131 N.J. 375, 385 (1993); Coffman v. Keene Corp., 133 N.J. 581, 593 (1993).

The doctrine of strict liability applies to the seller of a defective product if, among other things, the seller is "engaged in the business" of selling such product. 2 Restatement (Second) of Torts § 402A (Am. Law. Inst. 1965).

Here, it is undisputed that Gary Metal and Gary Machinery did not manufacture or sell the Subject Straightener. Thus, pursuant to the express language of the NJPLA, neither party can be liable as the seller of the Subject Straightener. For Plaintiff's claims to survive summary judgment, he must establish that the defendants qualify as successor corporations.

IV. Successor Liability

Generally, "where one company sells or otherwise transfers all its assets to another company the latter is not liable for the debts and liabilities of the transferor, including those arising out of the latter's tortious conduct." Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 340 (1981) (quoting Menacho v. Adamson United Co., 420 F. Supp. 128, 131 (D.N.J. 1976) (applying New Jersey law)). However, traditionally four exceptions to the general rule of successor liability have been applied, which exposed the purchasing corporation to the liabilities of the selling corporation:

> (1) the purchasing corporation expressly or impliedly agreed to assume such debts and liabilities, (2) the transaction amounts to a consolidation or merger of the seller and purchaser, (3) the purchasing corporation is

> merely a continuation of the selling corporation, or (4) the transaction is entered into fraudulently in order to escape responsibility for such debts and liabilities.
>
> [Ramirez, 86 N.J. at 340-41 (citing McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 561 (Law Div. 1970), aff'd 118 N.J. Super. 480 (App. Div. 1972)).]

In Ramirez, the Supreme Court analyzed the appropriateness of the traditional approach and determined that it is "inconsistent with the developing principles of strict products liability and unresponsive to the interest of persons injured by defective products in the stream of commerce." 86 N.J. at 341-42. The Court reasoned the traditional approach "was developed not in response to the interests of parties to product liability actions, but rather to protect the rights of commercial creditors and dissenting shareholders following corporate acquisitions." Id. at 341(citations omitted).

Further, the traditional approach has been narrowly applied, placing an unjustified amount of emphasis on the form of the corporate transaction, rather than its practical effect. Id. at 341-42 (citing Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977); Shannon v. Samuel Langston Co., 379 F. Supp. 797, 801 (W.D. Mich. 1974); Freeman v. White Way Sign & Maint. Co., 403 N.E.2d 495, 502 (Ill. App. Ct. 1980)).

After analyzing the approaches of multiple other jurisdictions, the Ramirez Court decided to adopt the product line exception for successor corporation liability. 86 N.J. at 347-48. The product line exception "completely abandons the traditional rule and its exceptions."[4] Id. at 347-48, 358 (citing Ray v. Alad Corp., 19 Cal. 3d 22 (1977)).

The product line exception provides that a successor corporation will be held strictly liable for the product liability claims of its predecessor if two requirements are met: (1) the successor corporation acquires all or substantially all the assets of the predecessor corporation; and (2) the successor corporation continues essentially the same manufacturing

[4] Despite the clarity of the Ramirez Court's decision to adopt the product line exception and abandon the traditional approach, there remains ambiguity regarding the viability of the traditional approach. Compare Ramirez, 86 N.J. at 358 ("Under today's approach the [traditional] approach is no longer the standard to be applied in determining the liability of a successor corporation"); Mettinger v. Globe Slicing Mach. Co., 153 N.J. 371, 380 (1997) ("In Ramirez . . . this Court abandoned the traditional approach in the products liability context and adopted the 'product-line exception' to successor corporation liability"); Lefever v. K.P. Hovnanian Enters., Inc., 160 N.J. 307, 314-15 (1997) ("After analyzing the differences between the continuity exception . . . and the product-line exception . . . the *Ramirez* Court adopted the [product-line exception] with its focus on the product causing the injury"); with Potwora ex rel. Gray v. Grip, 319 N.J. Super. 386, 402-03, 407 (App. Div. 1999) ("In Ramirez[], our Supreme Court largely abandoned [the] traditional rule in products liability cases") (emphasis added); Arevalo v. Saginaw Mach. Sys., Inc., 344 N.J. Super. 490, 503 (App. Div. 2001) ("where none of the other five [traditional] exceptions [are] sufficient for imposing liability on the purchasing corporation, the Ramirez Court determined it [is] nevertheless fair to impose corporate successor liability as well in the circumstance of 'continuity in the manufacturing of the . . . product line'") (emphasis added); Woodrick v. Jack J. Burke Real Estate, Inc., 306 N.J Super. 61, 73 (App. Div. 1997) (stating Ramirez adopted "[a] fifth exception . . . in products liability cases where the successor corporation undertakes to manufacture essentially the same products as the predecessor") (emphasis added).

operation as the predecessor corporation. Ramirez, 86 N.J. at 335, 349, 358. The plaintiff bears the burden of establishing these requirements. Potwora ex rel. Gray v. Grip, 319 N.J. Super. 386, 406 (App. Div. 1999).

The policy considerations justifying the product line exception are three-fold:

> (1) The virtual destruction of the plaintiff's remedies against the original manufacturer caused by successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk spreading role, and (3) the fairness of requiring the successor to assume a responsibility of defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business.
>
> [Ramirez, 86 N.J. at 349 (quoting Ray, 19 Cal. 3d at 31).]

Ultimately, the product line exception "presents a mixed question of law and fact to a trial judge, and if the factual component of the issue is subject to a bona fide issue of material fact, the resolution of the question must await a trial." Saez, 302 N.J. Super. at 553-55 (denying a summary judgment motion where the president of the successor claimed it purchased the predecessor's "know-how" and was determining how best to implement features of the predecessor's product into its own).

a. Ramirez Test: Factor One

First, the Court must determine whether Gary Machinery acquired all or substantially all the assets of GSP and GSP-Indiana. Gary Metal has conceded that it satisfies the first part of the product line exception.

Viewing the evidence in the light most favorable to Plaintiff, the court finds that a dispute of material fact exists as to whether Gary Machinery purchased substantially all the assets of GSP and GSP-Indiana. The Restrictive Covenant collectively defines Gary Metal and Gary Machinery as the "Purchaser." Additionally, the first paragraph of the Restrictive Covenant provides that it is being entered into pursuant to the Agreement.

Based on these facts, a reasonable fact-finder could determine that Gary Machinery was a purchaser of GSP-Indiana and GSP's assets under the Agreement. Further evidencing the uncertainty surrounding this fact is Mr. Strilich's own testimony. When asked at his deposition, Mr. Strilich was unable to explain the reason for Gary Machinery's inclusion as a "Purchaser" in the Restrictive Covenant.

b. Ramirez Test: Factor Two

Moving on to the second part of the product line exception, both moving defendants argue they are entitled to summary judgment because there is no evidence that they continue to

manufacture the Subject Straightener, let alone any steel straightener.

Plaintiff offers several theories to show the defendants satisfy the second part of the product line exception. First, Plaintiff argues that Gary Metal and Gary Machinery continued GSP-Indiana's operation because they sell used steel straighteners. Second, Plaintiff points to the Sales Catalog as evidence that the defendants manufacture the "Cut-to-Length" system, which incorporates steel straighteners. Last, Plaintiff contends the Copper Straightener/Corrugator manufactured by Gary Machinery is similar to the Subject Straightener. The court shall address each of Plaintiff's theses in turn.

i. Used Straighteners

The fact that Gary Machinery and Gary Metal have offered for sale two (2) used straighteners—which Plaintiff's expert concluded are similar to the Subject Straightener—does not satisfy the second requirement of the product line exception.

In evaluating successor liability, the Ramirez Court stated the most important thing to consider is the "continuity in the manufacturing of the [predecessor corporation's] product line throughout the history of these asset acquisitions." Bussell v. Dewalt Prods. Corp., 259 N.J. Super. 499, 519 (App. Div. 1992) (quoting Ramirez, 86 N.J. at 350). Here, GSP-Indiana was in the business of, among other things, manufacturing and selling steel

straighteners. As for Gary Metal and Gary Machinery, the record shows an individual attempted sale of used machinery. This machinery was not part of the defendants' inventory, but was actually utilized by the defendants to manufacture their own separate products. It cannot be suggested that the offering for sale of two (2) used steel straighteners, which were not manufactured by the defendants, is similar to GSP-Indiana's practice of manufacturing and selling new steel straighteners.

This type of sale is analogous to the sale in Santiago v. E.W. Bliss Div., Gulf & Western Mfg. Co., 201 N.J. Super. 205 (App. Div. 1985).[5] In Santiago, the defendant purchased a punch press to be used as part of its operation to produce telephone equipment and related parts. Id. at 210, 212-13. The defendant also designed a safety guard to be put on the punch press. Id. at 211. After 23 years of use, the defendant sold the machinery to an unidentified purchaser. Ibid. The machinery eventually ended up at the plaintiff's place of employment, without any safety guard. Ibid. The court held that the defendant was not liable for the plaintiff's injury because it was not primarily engaged in the business of designing and/or selling punch presses, nor their safety guards. Id. at 222. Similarly, here, Gary Metal purchased the steel straighteners as part of the Agreement, utilized the machines for several years in order to

[5] The court is aware that Santiago is not a successor liability action.

manufacture their own products, and then, after their useful life ran out, decided to sell the used machinery.

Even if the Court were to consider Mr. Strilich's testimony that Gary Machinery sold one (1) straightener and three (3) used levelers in the past decade in conjunction with the used straighteners, this would still not constitute "essentially the same manufacturing operation" as GSP-Indiana.[6] The undisputed testimony is that neither defendants manufactured any steel straightener or leveler—they were all purchased from other manufacturers. Further distinguishing this business practice is the fact that the majority of the machines sold were originally purchased to be used in the defendants' manufacturing operation. Whereas GSP-Indiana manufactured the steel straighteners to be sold, the defendants were consumers, purchasing the machines to manufacture their own products.

The court is mindful that the business operation need not be identical, Bussell, 259 N.J. Super. at 518, however, the sale of three (3) steel straighteners and three (3) levelers, none of which were manufactured by the defendants, over a ten-year

[6] Based on both parties' submissions, the court finds that a dispute of material fact exists as to whether a leveler is an updated straightener and will consider such to be a straightener for purposes of this argument. Importantly, Mr. Strilich, who is a part owner of both moving defendants, described the leveler as a "sophisticated straightener" and claimed it has supplanted straighteners in the industry. See Bussell, 259 N.J. Super. at 518 (finding continuity in manufacturing even though the successor corporation changed the predecessor's product by adding technological updates to it).

period is not similar to GSP-Indiana's business of manufacturing and selling steel straighteners.

ii. Sales Catalog

Next, Plaintiff argues that the Sales Catalog is evidence that the moving defendants manufacture steel straighteners. However, this argument fails for similar reasons as above.

The Sales Catalog lists "Cut-to-Length" series as a product that Gary Metal offers for sale to clients. As previously mentioned, the Cut-to-Length is a system of machines, which includes products such as a straightener, slitter, and shearer. At his deposition, Mr. Strilich explained that the Sales Catalog did offer this product to clients, but if a client requested a Cut-to-Length, the defendants would not manufacture any aspect of it. Rather, Gary Metal and/or Gary Machinery would purchase the specific machines from manufacturers and then put the Cut-to-Length system together for the client. This is completely antithetical to GSP-Indiana's business practice. GSP-Indiana would manufacture every aspect of the Cut-to-Length system from scratch, except for the shearer. These divergent business operations cannot qualify as "essentially the same manufacturing operation."

Moreover, if Gary Metal or Gary Machinery supplied a Cut-to-Length system, Mr. Strilich explained that the machinery going in would not be a "GARY" product, but come from a

different manufacturer. One of the policy justifications of the product line exception observed in Ramirez is that a successor corporation should not be allowed to avoid liability, while also enjoying the goodwill "in the continued operation of the business." 86 N.J. at 349. Here, there is no use of the "GARY" trademark or goodwill associated with any Cut-to-Length system offered by Gary Metal or Gary Machinery.

iii. Copper Straightener/Corrugator

Last, Plaintiff argues that Gary Machinery satisfies the second part of the product line exception because it manufactures the Copper Straightener/Corrugator, which is similar to the Subject Straightener. This court finds that Gary Machinery's manufacturing of the Copper Straightener/Corrugator creates a dispute of material fact.

In Potwora, a plaintiff was injured by a helmet known as the "RG-4" and manufactured by the predecessor corporation, Land Tool. 319 N.J Super. at 390. The assets of Land Tool eventually ended up with the corporation Vector Sports. Id. at 392-94. Although Vector Sports manufactured some helmets originally made by Land Tool, the court granted Vector Sports summary judgment because the "plaintiff failed to present competent evidence that Vector Sports continued to manufacture the RG-4 helmet and thus undertake 'essentially the same manufacturing operation as the selling corporation.'" Id. at

406 (quoting Ramirez, 86 N.J. at 347-48). The plaintiff submitted a certification from its attorney attesting to the fact that the RG-4 model is similar to a model manufactured by Vector Sports, however, the court was not convinced. Ibid. The court dismissed plaintiff's attorney's certification as "mere speculation" and noted that "[e]xpert testimony is needed in this area." Ibid.

This matter is distinguishable from Potwora because Plaintiff has submitted an expert report opining that the Copper Straightener/Corrugator is similar to the Subject Straightener.[7] Gary Machinery may argue that the difference between the two "straighteners" is immediately recognizable by their names: (1) one is used for copper, the other for steel, and (2) one performs the additional function of corrugating the metal. More important than these differences is their alleged similar "use and function," which Plaintiff has set forth by Mr. Phillips' expert report. This type of additional evidence was expressly contemplated by the Appellate Division in Potwora. Based on

[7] Although this expert report has been submitted late, this court has decided to consider it for purposes of the instant Motion. A trial judge has discretion to permit supplemental affidavits to be submitted on summary judgment motions. W. Point Island Civic Ass'n v. Twp. Comm. of Dover, 93 N.J. Super. 206, 211 (App.Div. 1966), certif. denied 48 N.J. 576 (1967). This discretion should be exercised to increase, not limit, the likelihood that the information before the court reflects the facts that could be adduced at trial. Sholtis v. Am. Cyanamid Co., 238 N.J. Super. 8, 17 (App. Div. 1989). See Vassalo v. Am. Coding & Marking Ink Co., 345 N.J. Super. 207 (App. Div. 2001) (determining on a motion to reconsider a motion for summary judgment, the trial court should have considered a late expert report).

this expert report, Plaintiff has submitted evidence that raises a factual question as to whether Gary Machinery is continuing "essentially the same manufacturing operation as [GSP-Indiana]." Ramirez, 86 N.J. at 347-48.

Plaintiff attempts to argue that Potwora stands for the limited proposition that the successor corporation must manufacture the exact same product line as the predecessor. However, this is not so. Ramirez only required the successor corporation to maintain "essentially the same line of manufacturing," not the "identical" line of manufacturing. Bussell, 259 N.J. Super. at 518-19 (finding continuity in manufacturing even though the successor corporation changed the predecessor's product by adding technological updates to it) (citing Ramirez, 86 N.J. at 347-48).

The product line exception "presents a mixed question of law and fact to a trial judge, and if the factual component of the issue is subject to a bona fide issue of material fact, the resolution of the question must await a trial." Saez, 302 N.J. Super. at 553-55. If the court were to determine on this Motion that the Copper Straightener/Corrugator was different than the Subject Straightener, then the court would be improperly weighing the facts of this case. A jury should be left to consider the evidence adduced at trial and determine this issue.

Application of the policy considerations of the product line exception also support today's ruling. "Ramirez referred to these three factors as policy considerations justifying 'the imposition of potential strict liability' on a successor corporation." Bussell, 259 N.J. Super. at 519 (quoting Ramirez, 86 N.J. at 349-50).

As to the first policy consideration, Ramirez adopted the product line exception "in order to provide plaintiffs a remedy where they otherwise might not have one." Bussell, 259 N.J. Super. at 520. In the present matter, GSP-Indiana, the manufacturer of the Subject Straightener, and GSP, its parent corporation, no longer exist. In fact, they ceased their corporate existence six years prior to the subject accident. Thus, the first policy consideration favors Plaintiff.

The second consideration provides that a successor corporation is better equipped to assume the risk than its consumers because it can use its newly acquired resources to continue the predecessor's practice of providing for parties injured by product defects. Ramirez, 86 N.J. at 350. As analyzed in the prior subsection, a dispute of fact exists as to whether Gary Machinery was a party to the Agreement. Thus, at this juncture, this consideration does not favor either party.

The final policy consideration clearly favors Plaintiff. Gary Machinery benefits from the "GARY" trademark and goodwill

by using such in its corporate name and on its products. Obtaining the "GARY" trademark was so important that Mr. Strilich agreed at his deposition that it was a "critical" component of the Agreement.

Based on the foregoing, the instant Motion is granted as to Gary Metal and denied as to Gary Machinery. The disputed factual issues as to whether Gary Machinery was a party to the Agreement and whether its manufacturing of the Copper Straightener/Corrugator satisfies the second prong of the product line exception, are reserved for determination at the trial.

V. Common Law Claims

Gary Metal and Gary Machinery also seek to dismiss the following common law claims asserted by Plaintiff, arguing such are subsumed by the Product Liability Act: Count One (negligence), Count Two (gross negligence), Count Four (strict liability), Count Seven (implied warranty), Count Nine (failure to warn), and Count Ten (per quod). Additionally, Gary Metal and Gary Machinery argue Count Six (express warranties) should be dismissed because Plaintiff fails to cite any evidence supporting such a claim. Plaintiff has agreed to dismiss Counts One, Two, Six, and Seven, but believes Counts Four, Nine, and Ten should remain.

The NJPLA outlines three causes of action: design defect, manufacturing defect, defective warning. See N.J.S.A. 2A:58C-2. These are intended to be the exclusive, sole bases for recovery on a product claim against a manufacturer or seller that is subject to the other terms of the statute. Ibid. See Tirrell v. Navistar Int'l, Inc., 248 N.J. Super. 390, 398-99 (App. Div.), certif. denied 126 N.J. 390 (1991) (interpreting the statute to mean that "common law actions for negligence or breach of warranties—except express warranties—are subsumed within the new statutory cause of action," if the claim is for harm covered by the statute); DeBoard v. Wyeth, Inc., 422 N.J. Super. 360 (App. Div. 2011), certif. denied 211 N.J. 274 (2012) (holding that plaintiff's common law fraud and negligent misrepresentation claims involved harm caused by a product and thus were subsumed by the NJPLA).

As the court finds that Count Four (strict liability), Count Nine (failure to warn), and Count Ten (per quod) are addressed by the express statutory language of the NJPLA, these counts are subsumed with Plaintiff's cause of action brought under the NJPLA and accordingly shall be dismissed.