MODIFIED BY THE COURT

1 Gatehall Drive, Suite 100
Parsippany, New Jersey 07054
Telephone: (201) 712-1616
Facsimile: (201) 712-9444
Steven C. DePalma, Esq. Bar No.: #013352004
SDePalma@ogcsolutions.com
Attorneys for Defendants,
Mitsui Foods, Inc., Shuichi Matsuzawa,
Tomoharu Kure and Masatoshi Hidaka

J AND B REALTY, L.L.C. and 35 MAPLE STREET HOLDINGS, L.L.C., limited liability companies organized and existing under the laws of the State of New Jersey, Plaintiffs, vs. MITSUI FOODS, INC., a Corporation organized under the laws of the State of New Jersey, SHUICHI MATSUZAWA, TOMOHARU KURE and MASATOSHI HIDAKA, each in their capacity as Directors of Mitsui Foods, Inc., and JOHN DOES 1-10 (fictitious parties, the proper identities of which are presently unknown to Plaintiffs), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY Docket No.: BER-L-6543-24 Civil Action CBLP Action **ORDER**

THIS MATTER having been opened to the Court by the law firm OGC Solutions LLP, attorneys for defendants, Mitsui Foods, Inc., Shuichi Matsuzawa, Tomoharu Kure and Masatoshi Hidaka (the "Defendants"), upon notice to all parties, for entry of an Order the dismissing Plaintiffs' Complaint with prejudice; and for such other and further relief that the Court deems just

and equitable, and it appearing that the defendants and all interested parties were duly give proper service and notice of the application, and the Court having reviewed opposing papers, if any, and having heard argument by the parties, if any, and determined that good cause has been shown,

IT IS on this 12th day of November, 2025

ORDERED that Defendant's Motion for Summary Judgment be and is hereby DENIED for the reasons set forth in the attached Rider ~~granted in its entirety~~; it is further

~~**ORDERED** that Plaintiffs' Complaint is hereby dismissed with prejudice; and it is further~~

ORDERED that a case management conference shall be held on December 10th, 2025, at 9am via Zoom videoconference; and it is further

ORDERED the Court is providing a copy of this Order to all counsel of record via eCourts Civil. Movant is directed to serve a copy of this Order within seven (7) days of the date hereof to all parties not served electronically.

HON. WILLIAM C. SOUKAS, J.S.C.

R. 1:6-2 (a): The matter was:

___X__ Opposed

_____ Unopposed

RIDER

I. Introduction

This matter comes before the Court on the pre-Answer motion filed by Defendants Mitsui Foods, Inc. ("Mitsui"), Shuichi Matsuzawa, Tomoharu Kure and Masatoshi Hidaka (collectively, "Defendants") under R. 4:6-2(e) requesting summary judgment dismissing the Complaint filed by the plaintiffs J and B Realty ("JB") and 35 Maple Street Holdings, L.L.C. ("35 Maple")(collectively, "Plaintiffs"). Because the moving papers addressed matters outside the pleadings, the Court converted the motion to one for summary judgment as permitted under R. 4:6-2.

Plaintiffs filed opposing papers, Defendants filed a reply brief and oral argument was held.

For the reasons that follow, Defendants' motion is DENIED.

II. Factual Background

For purposes of this motion, and based on the record presented, the Court finds the following facts appear:

Plaintiffs' Complaint was filed November 12, 2024, and arises out of the plaintiffs' purchase of real property owned by Mitsui. The real property is located at, and is commonly known as, 35 Maple Street, Norwood, New Jersey, identified

as Lot 2, Block 80 on the tax maps of the municipality (the "Property") (Goodman Aff.[1], Ex. A at 1)

A. Overview of the Complaint

Plaintiffs' Complaint asserts claims of breach of contract (Count I), fraud in the inducement (Count II), breach of the implied covenant of good faith and fair dealing (Count III), and improper distributions by Mitsui and individual "Director Defendants" in dissolution (Count IV). (DePalma Cert.[2], Ex. A). The Plaintiffs allege that Chestnut St. Realty, LLC. ("Chestnut" or "Chestnut St."), a neighboring landowner, held an adverse ownership interest in an area of the Property that was materially inconsistent with Mitsui's representations in the Agreement and in documents executed in connection with the Closing that Mitsui had good and marketable title to the Property.

Plaintiffs' Complaint seeks recovery of damages (including property damage), lost opportunity costs from being denied access to the disputed area of the Property as a result of a fence being constructed by Chestnut St., together with costs and expenses incurred in investigating, litigating and resolving the Chancery Action, and other costs and expenses alleged to arise out of Mitsui's conduct. (Goodman

[1] "Goodman Aff." refers to the Affidavit of William Goodman filed in opposition to Defendants' motion for summary judgment in lieu of Answer.
[2] "DePalma Cert." refers to the Certification of Steven C. DePalma, Esq. dated January 11, 2025, submitted in support of Defendants' motion.

Aff., ¶45).

B. The Parties' Agreement of Sale and Purchase

On September 25, 2020, JB and Mitsui, as Buyer and Seller, respectively, entered into an Agreement of Sale and Purchase of the Property for the purchase price of $5.5 million (the "Agreement"). (SUMF[3] Par. 1; DePalma Cert., Ex. B; Goodman Aff., ¶ 5). The Agreement was assigned to Plaintiff 35 Maple on the day of the closing, March 31, 2021 (the "Closing"). (Goodman Aff., ¶7-8 and Ex. D)

The metes and bounds description of the Property was included in Exhibit 1 of the Agreement, which provided, in pertinent part, that the Property consisted of the parcel of land:

> more particularly described in that certain survey prepared by Thomas G. Stearns III, New Jersey Professional Engineer & Land Surveyor (License Number GB 40959) GB Engineering, LLC dated November 21, 2018. . . ("2008 Survey"). The metes and bounds description of the property as set forth in the 2008 Survey is incorporated herein by reference as if set forth at length.

The Property, as defined by the Agreement, also included an office warehouse/building of approximately 42,000 s.f. in area together with certain other improvements and personal property identified in Exhibit 2 of the Agreement. (Goodman Aff., ¶5 and Ex. A). The 2008 Survey was prepared for, and certified to, defendant Mitsui. (Goodman Aff., ¶5 and Ex. B).

[3] "SUMF" refers to the Statement of Undisputed Facts filed on behalf of the Defendants.

Section 3.1(c) of the Agreement includes, as part of the "Due Diligence" materials to be delivered by Mitsui to JB, "[c]opies of all other documents identified in Schedule D . . .which are within Seller's Possession or Reasonable Control," including "[a]ll correspondence to/from Chestnut St. Realty LLC." (Goodman Aff., ¶¶10-11 and Ex. A (Schedule D)).

The plaintiffs, in their Complaint, take issue with the non-disclosure of a letter dated August 9, 2016, and the substance of the letter, from Mitsui to its then-neighbor, Chestnut St., who owned the real property commonly known as 380 Chestnut Street, Norwood, New Jersey adjoining the Property on its northern border. The August 9, 2016, letter was between Anne Murphy, Vice President, Human Resources for Mitsui and Chestnut St. Realty (hereinafter, the "Parking Letter"). (Goodman Aff., Par. 13).

The Parking Letter referred to Mitsui's use of a portion of Chestnut's property for parking (the "Disputed Area") and, also included Mitsui's thanks for Chestnut's allowing the continued use of Chestnut's property. (DePalma Certification, Ex. E).

Plaintiffs contend that the Parking Letter was not disclosed to them until Chestnut filed a Counterclaim in a subsequent action to quiet title to the Property filed by 35 Maple's title insurer. (Goodman Aff., ¶39). Plaintiffs contend that Mitsui failed to disclose the Parking Letter because, in it, Mitsui admits it had no ownership over the Disputed Area and acknowledges that Chestnut claimed an adverse

ownership interest with respect to the Disputed Area. As such, the plaintiffs argue, Mitsui's failure to disclose the Parking Letter was intentional and in bad faith. The plaintiffs seek to hold Mitsui liable for its fraudulent misrepresentations and material misrepresentation of the actual status of title to the Property, on which plaintiffs claim they detrimentally relied.

The Defendants, on the other hand, argue that the other documents disclosed in due diligence provided sufficient notice to the plaintiffs of the existence of the issue involving the Disputed Area. The defendants contend that the plaintiffs were made aware of the boundary line issue and Mitsui's attempt to license the Disputed Area because it was disclosed in documents provided as due diligence.

The defendants also contend that the delivery of the Parking Letter constitutes an express "post-contractual" obligation and that the plaintiff's attempt to frame the non-delivery of the Parking Letter as fraud in the inducement fundamentally misapplies the Economic Loss Doctrine, which should be applied to bar any fraud claim under these circumstances. Moreover, the defendants argue, under the Doctrine of Merger, only the Deed itself and surviving representations survive and that the failure to deliver the Parking Letter does not constitute a breach of any surviving representation or warranty under Section 7 of the Agreement.

The court finds, and it is undisputed, that the Parking Letter was not provided to the plaintiffs during the parties' negotiation of the agreement, due diligence

activities, or at the time of the closing.

Section 17.4(b) of the Agreement provides that the representations and warranties provided by Mitsui as set forth in Section 7 of the Agreement shall survive for a period of 12 months after the Closing except in the event Buyer provides seller with written notice of any claims prior to the end of such 12 month period, in which case Seller's liability would continue until adjudicated by a court in a final non-appealable judgment, or the claims are settled in a written agreement, or tolled by the applicable statute(s) of limitations. (Goodman Aff., Ex. A at Section 17.4).

The causes of action asserted in the Complaint primarily rely on provisions in Section 7 of the Agreement which, plaintiff argues, survive the closing of title. Section 7.1 of the Agreement includes Mitsui's representation and warrantee and provides, in pertinent part, that:

> Seller has made all filings necessary in the State of New Jersey to own and operate the Property Seller has the full right, power and authority to enter into this Agreement and all documents contemplated hereby, and consummate the transaction contemplated by this Agreement. that it had authority to enter into and consummate the transaction. All requisite action has been taken by seller in connection with entering into this Agreement, and will be taken by Seller prior to the Closing in connection with the execution and delivery of the instruments referenced herein, and the consummation of the transaction contemplated hereby.
>
> (Goodman Aff., Par. 17, Ex. A).

Under Section 7.2 of the Agreement, Mitsui agreed that, on the date of closing,

the performance of the Agreement would not be in violation of any other agreement, corporate documents, deed of trust, order or law. (Goodman Aff., Ex. A at Section 7.2).

Section 7.3 of the Agreement provides, in pertinent part, that:

> No approval is required from any person . . . for Seller to execute, delivery or perform this Agreement or the other instruments contemplated hereby, or for Seller to consummate the transaction contemplated hereby. This Agreement and all documents required hereby to be executed by Seller are and shall be valid, legally binding obligations of and enforceable against Seller in accordance with their terms.
>
> (Goodman Aff., Ex. A).

Under Section 7.5(b), Mitsui represented, warranted and covenanted that there were no parties in possession of any part of the Property as defined by the Agreement and the property description attached to the same, except for Mitsui's tenant. (Goodman Aff., Par. 20 and Ex. A, Section 7.5).

Section 7.6 represents that there are no claims pending, to Seller's knowledge, contemplated or threatened with respect to the Property or the Seller's ability to consummate the transaction. (Goodman Aff., Ex. A, Section 7.6). Section 7.6 also provides as follows:

> Seller has not received written notice of any violations of any Laws affecting or applicable to any or all of the Property. There are no real estate tax appeals filed or pending with respect to the Property.
>
> (Goodman Aff., Ex. A).

C. Due Diligence Under the Agreement

On September 29, 2020, four (4) days after the Agreement was signed, Mitsui's attorney forwarded to plaintiff's counsel for the transaction three (3) communications as "Due Diligence Materials" (SUMF Par. 9; DePalma Cert, Ex. G). The communications consisted of the following:

- A letter dated June 30, 2016, from Chestnut's attorney, Gerald Klein, Esq., to Mitsui notifying Mitsui that a portion of its property improvements at Block 80, Lot 2 encroaches on the adjoining parcel owned by Chestnut. The letter was accompanied by a survey of Chestnut's property. (SUMF Par. 9; DePalma Cert., Ex.C);
- An email dated August 9, 2016, from Odalys Perez Dines, General Counsel and Chief Compliance Officer for Mitsui, which thanked Chestnut for allowing the continued use of the area, and attached a draft Use and Occupancy License Agreement (SUMF Par. 9; DePalma Cert., Ex. D).
- An email dated August 11, 2016, from Chestnut St. Realty attorney Gerald Klein to Odalys Dines, advising that Chestnut rejected the license and easement agreement proposed by Mitsui and refused to be bound by any time frame for continued use. In his email, Mr. Klein expressed that Chestnut permitted Mitsui's continued use, "for the time

being," in exchange for Mitsui's indemnification and evidence of insurance naming Chestnut as an additional insured. (SUMF Par. 9; DePalma Cert., Exhibit F).

It is undisputed that the Parking Letter was not included in, or provided with, the Due Diligence materials. The Parking Letter, dated August 9, 2016, was written on Mitsui Foods letterhead and provided as follows:

> To Whom It May Concern,
>
> It was recently brought to our attention that Mitsui Foods has been utilizing a portion of your property for parking. We were not aware this section of property was not a part of Mitsui Foods parcel for the past 20 years since we acquired our property.
>
> We would like to take this opportunity to thank you for allowing us the continued use of the area for parking. It is greatly appreciated.
>
> Sincerely,
> Ann M. Murphy
> Vice President
> Human Resources
>
> (Goodman Aff., ¶13; DePalma Cert., Ex. E).

Anne Murphy, the signatory on the Parking Letter, was identified in the Agreement as one of two (2) individuals whose knowledge was included within the defined term "Seller's Knowledge." (Goodman Aff., Ex. A at Section 7.14).

The Plaintiffs contend that, had Mitsui provided the Parking Letter, with Mitsui's admission that Chestnut held an ownership interest in the disputed area that was part of the Property, the plaintiffs would not have proceeded with the closing or

paid the purchase price to Matsui. (Goodman Aff., ¶¶31-32).

D. The Alleged Encroachment and Title Issues

Between September 25, 2020, and the date of the closing for the transaction, March 31, 2021, counsel for the parties discussed the issue involving the Disputed Area and the survey of Chestnut's property. (RSUMF[4] Par. 12). The Plaintiffs acknowledge that the discussions included the allegedly nonconforming metes and bounds description of the Chestnut property. The defendants contend, on the other hand, that those discussions confirmed that the Disputed Area was owned by Mitsui, not Chestnut, and acknowledge that exhaustive discussion and analysis regarding Chestnut's June 30, 2016, letter to Mitsui took place between the attorneys during this time. (SUMF, Par. 12).

On December 10, 2020, plaintiffs' title company, First Jersey Title Services, Inc. ("First Jersey") identified a potential encroachment/boundary line issue in its title commitment, reflected in Amendment #5. (SUMF Par. 10; DePalma Cert., Ex. H). Specifically, First Jersey notified J&B that it was amending its title commitment as follows:

> **SCHEDULE B – SECTION II**
>
> **Item No. (16): We have been supplied with a 2016 survey of adjoining Tax Lot 5 showing an encroachment/boundary line issue with the rear line of our subject premises (Tax Lot 2).**

[4] "RSUMF" refers to the Response of Plaintiffs to Defendants' Statement of Undisputed Material Facts.

> **Possible rights of adjoining owner in connection with same. We reserve the right to raise further requirements or exceptions until said encroachment/boundary line issue is satisfactorily resolved.**

The letter was copied to the attorneys of both JB and Mitsui (DePalma Cert., Ex. H).

On January 15, 2021, First Jersey notified JB that it was omitting the exception from the title commitment. (SUMF Par. 11, Ex. I).

On March 26, 2021, in response to First Jersey's requirement in connection with the issuance of title insurance, the parties cooperated in the filing of a corrective deed from the prior owner of the Property, Bauer Publishing Company, L.P. ("Bauer") to Mitsui. (DePalma Cert, Par. 12; SUMF/RSUMF Par. 13; Goodman Aff., Ex. E).

E. The Closing

The Closing on the Property took place on March 31, 2021. The Deed dated March 30, 2021 provided, in pertinent part, as follows:

> Promises by Grantor. The Grantor promises that the Grantor has done no act to encumber the property conveyed hereby. This promise is called a "covenant as to grantor's acts" (N.J.S. 46:4-6). This promise means that the Grantor has not allowed anyone to obtain any legal rights which affect the property (such as by making a mortgage or allowing a judgment to be entered against the Grantor).
>
> (Goodman Aff., ¶27 and Ex. C at ¶4).

At the time of Closing, Mitsui delivered to 35 Maple, as the Assignee of JB, a "Closing Certificate" executed by Mitsui Senior Vice President and Chief

Financial Officer Joseph Bellitto which, in part, confirms the truth an accuracy of the representations made by Seller in Section 7 of the Agreement as of the closing date, except with respect to taxes[5]. (Goodman Aff., ¶25 and Ex. F).

Mitsui also executed and delivered an Affidavit of Title providing that "no one has questioned [Mitsui's] right to possession or ownership other than as set forth in Section 9. (Goodman Aff., ¶26 and Ex. G). Section 9 of the Affidavit of Title acknowledges the Chestnut encroachment/boundary line issue at the rear line of the Property, identifies that the issue was identified in the title Commitment Amendment #5 but was later omitted in title commitment Amendment #7. Id.

The plaintiffs argue that Mitsui's acknowledgment in the Parking Letter that Chestnut held an adverse ownership interest in the Disputed Area was materially inconsistent with Mitsui's representation in both the Agreement and Closing documents that Mitsui had good and marketable title to the Property, and, thus, threatened 35 Maple's ability to use the Property for their intended purposes.. (Goodman Aff., ¶33).

F. Events Occurring After the Closing

On or around July 24-26, 2021, almost three (3) months after the closing took

[5] The Closing Certificate also represented that debts would be addressed at Closing to Purchaser's satisfaction, and that the Contract List provided at Closin was a true, correct and complete list of all known contracts ("management, service, supply, repair and maintenance agreements, equipment leases and all other contracts and agreements (excluding the IR Lease)") with respect to or affecting the Property, including those Contracts being Terminated under Section 9.2 of the Agreement.

place, representatives of Chestnut unilaterally constructed a metal fence running approximately three hundred (300) feet parallel to the Property's boundary line in or at the Disputed Area. (Goodman Aff., ¶34). Plaintiffs contend that the fence impaired their rights in, and ability to use, the Property. (Goodman Aff., ¶35).

On November 1, 2021, in response to Chestnut's construction of the fence, Plaintiffs' title insurer filed an action on behalf of 35 Maple Street against Chestnut, in the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-262-21 seeking judgment quieting of title to the Disputed Area, ejecting Chestnut from the area, and awarding damages on account of Chestnut's trespass onto the Disputed Area (the "Chancery Action"). (Goodman Aff., ¶36).

On March 29, 2022, the plaintiffs provided written notice to Mitsui of plaintiff's claims for breach of the terms, conditions, representations, and warranties in the Agreement and closing documents. (Goodman Aff., ¶40 and Ex. J)[6].

On May 9, 2022, Mitsui served upon plaintiff's counsel a Notice of Dissolution of Mitsui and Notice to Creditors dated April 28, 2022 ("Notice of

[6] The letter provided notice of plaintiff's claims for breach of the Agreement, "[b]ased on the existence of the August 9, 2016 [Parking] Letter and the failure to disclose its existence to [the plaintiffs]," specifically as to Sections 3.1(c), 7.1, 7.2, 7.3, 7.6, 10.1(b), 13.2(a). (Goodman Aff., Ex. J). The letter also provides notice of potential breach of the implied covenant of good faith and fair dealing and bad faith in the performance of Mitsui's express and implied obligations to plaintiffs for the same reasons (Goodman Aff., Ex. J).

Dissolution"). (Goodman Aff., ¶¶ 41-42 and Ex. K). On or about October 24, 2022, Plaintiffs served upon the registered agent for Matsui a Notice of Claim in response to the Notice of Dissolution. (Goodman Aff., ¶43 and Ex. M).

The plaintiffs state that, on January 13, 2023, the Chancery Action was resolved in 35 Maple Street's favor pursuant to a Final Judgment by Consent, stating that 35 Maple Street was the owner of fee simple title to the Disputed Property and that Chestnut St. Realty had no legal, equitable, and/or possessory claim, right, title, and/or interest in and/or to the Property. (Goodman Aff., ¶44).

III. SUMMARY JUDGMENT STANDARD

New Jersey's standard for summary judgment as set forth in R. 4:46-2(c). In addressing the standard, the Supreme Court in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), stated that "a motion for summary judgment must be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact challenged." Id. at 540.

Summary judgment is "designed to provide a prompt, businesslike and inexpensive method" of resolving any cause of action for which a "discriminating search" of the pleadings, the record and the affidavits submitted on the motion "clearly show" that there is no genuine issue of material fact requiring disposition at trial. Ledley v. William Penn Life Ins. Co., 138 N.J. 627 (1995).

A determination of whether there exists a "genuine issue" of material fact precluding 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. Brill, 142 N.J. at 540.

A non-moving party cannot defeat a summary judgment motion simply by pointing to any fact in dispute. Id. If the non-moving party "points only to disputed issues of fact that are of an insubstantial nature, the proper disposition is summary judgment." Brill, 142 N.J. at 529. Bare conclusions in the pleadings without factual support in affidavits will not defeat a motion for summary judgment. Brae Asset Fund, L.P. v. Newman, 327 N.J. Super 129, 134 (App. Div. 1999). Summary judgment should be granted only where the evidence is "so one-sided" that reasonable minds cannot differ as to the result. Brill, 142 N.J. at 536, citing, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)).

IV. ANALYSIS

The Court limits its analysis to the arguments presented by the parties in connection with the defendants' motion.

A. Defendants' Argument as to the Doctrine of Merger as to Count I (Breach of Contract) and Count III (Breach of Implied Covenant).

The defendant argues that, because the plaintiff's breach of contract and breach of implied covenant of good faith and fair dealing claims in Counts I and III

are predicated on the non-disclosure of the Parking Letter, they are barred under the doctrine of merger. According to the defendants, the requirement that Mitsui provide all correspondence to/from Chestnut is a pre-closing obligation that does not survive closing because it was not expressly incorporated into the surviving representations and warranties.

"The traditional doctrine of merger holds that in real estate transactions, all warranties and representations made in connection with a sale, unless specifically reserved to hold over after passage of title, are merged into the deed." Andreychak v. Lent, 257 N.J. Super. 69, 72 (App. Div. 1992). The Andreychak Court further observed:

> It is generally recognized that the acceptance of a deed for lands is to be deemed prima facie full execution of an executory contract to convey, unless the contract contains a covenant collateral to the deed. (Citations omitted). This rule of merger satisfies and extinguishes all previous covenants which relate to or are connected with the title, possession, quantity or emblements of the land. Contemporaneously, those covenants in the antecedent contract which are not intended by the parties to be incorporated in the deed, or which are not necessarily satisfied by the execution and delivery of the deed, are collateral agreements and are preserved from merger. (Citations omitted). The test . . . is whether the alleged collateral agreement is connected with the title, possession, quantity, or emblements of the land which is the subject of the contract.
>
> Andreychak, 257 N.J. Super. at 72 (citations omitted).

Under the Doctrine, the purchaser's acceptance of the deed from the seller terminates the parties' contractual relationship and their respective rights and

liabilities "are thereafter determined solely by the deed and not by the contract of sale[.]" Id.

Plaintiff argues that the motion is premature as discovery has not yet been sought or completed, and the Court is without a full record to make the required dispositive determinations requested in the defendants' motion. JB claims that, in the Parking Letter, Mitsui admitted Chestnut's adverse ownership interest in the disputed area of the property and, as such, evidence exists that Plaintiff was aware that it did not have title over a portion of the disputed area.

As such, the plaintiffs argue that its claims pertain to Mitsui's fraudulent misrepresentations and other fraudulent misconduct related to Mitsui's actual ability to convey good, marketable fee simple title to the Property, or the lack thereof, and related material breaches of the Agreement and closing documents arising from Mitsui's withholding and concealment of documents and information regarding Chestnut's adverse ownership claims, as evidenced by the Parking Letter.

Acknowledging the general nature of the doctrine of merger, the plaintiffs focus on the reservation of rights held over after and surviving the passage of title and argue that the doctrine is "simply a rule of presumed intention," specifically where contractual clauses indicate an intention that warranties should survive the transfer of rights from contract to deed. Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super 134, 143 (App. Div. 1960). It is consistent with Deerhurst Estates, the

plaintiffs argue, that the court should give effect to the intention of the parties that certain terms and warranties survive closing as set forth in Section 17.4.

To that extent, the Court finds that Section 17.4 of the Agreement, entitled "Survival of Representations and Warranties" provides that the parties' respective representations and warranties in Sections 7 and 8 of the Agreement, and the provisions of Section 16, "shall survive the delivery of the Deed and the Closing and shall not be deemed merged into any instrument of conveyance delivered at Closing." (Goodman Aff., Ex. A at 11, ¶17.4).

An exception to Section 17.4 of the Agreement exists in subsection 17.4(b) which provides that the representations and warranties set forth in Section 7 shall survive for a 12 month period after Closing "except in the event Buyer provides Seller with written notice of any claims prior to the end of such 12-month period, in which event Seller's liability hereunder shall continue with respect to such claims" until the claims are adjudicated in a final, non-appealable judgment by a court of competent jurisdiction, have been settled in a written settlement agreement, or tolled by the applicable statute of limitations. Id. at ¶17.4(b). Moreover, Section 17.4(b) provides a cap on Seller's liability of $40,000 except for fraud or intentional misrepresentation by Seller. Id.

Defendants concede at page 8 of their moving brief that Sections 7.1, 7.2, 7.3, 7.5(b) and 7.6 of the Agreement survive the closing, referring to the provisions

collectively as "surviving representations and warranties," but argue that the plaintiffs' claims lack merit and should fail as a matter of law because Mitsui disclosed the issue regarding the disputed area and Mitsui's failure to provide the Parking Letter added no further information than was already known to JB. (Defense Brief at 8).

When interpreting a contract, "we first examine the plain language of the [contract] and, if the terms are clear, they 'are to be given their plain, ordinary meaning.'" Pizzullo v. New Jersey Mfrs. Ins. Co., 196 N.J. 251, 270 (2008) (quoting Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001)). "We do not supply terms to contracts that are plain and unambiguous, nor do we make a better contract for either of the parties than the one which the parties themselves have created." Maglies v. Estate of Guy, 193 N.J. 108, 143 (2007). Where the terms of a contract are clear and unambiguous, there is no room for interpretation, and the Courts must enforce the terms of the contract as written. Levinson v. Weintraub, 215 N.J. Super. 273, 276 (App. Div. 1987).

The Court finds that the language used in Section 17.4 of the Agreement is clear and unambiguous and, as such, that the parties intended to provide for survival of the representations and warranties set forth in Section 7 of the Agreement, post-closing, subject to the notice provisions of Section 17.4. The Court also finds that the Buyer, JB, provided Matsui with timely written notice of its claims under the

Agreement on March 29, 2022, prior to the end of the 12-month period following the closing, as required by Section 17.4(b) of the Agreement. (Goodman Aff., Ex. J).

As such, based on the defendants' concession in the moving papers as to the survivability of provisions in Section 7 of the Agreement, and viewing the evidence in the record in the light most favorable to the non-moving party, the Court finds that the doctrine of merger does not preclude plaintiff's breach of contract claim in Count I and claim for Breach of the Implied Covenant of Good Faith and Fair Dealing in Count III to the extent those claims relate to representations, warranties and provisions surviving closing under the parties' Agreement, and in documents exchanged at closing.

Moreover, the court finds that genuine issues of material fact exist relating to the plaintiff's claims for breach under Counts I and III, as the parties had not engaged in discovery as of the filing of this motion. As such, the court DENIES the portion of Defendants' motion seeking summary judgment as to Counts I and III of the Complaint.

B. Defendant's Argument that Plaintiff Cannot Establish Breach of Surviving Representations and Warranties.

1. Plaintiff's Claim for Breach of Contract Based on Section 7.1

Section 7 of the Agreement is entitled and addresses "Seller's Representations and Warranties." (Goodman Aff., Ex. A at ¶7). Section 7.1, detailed above, provides

in relevant part that Seller has "full right, power and authority to enter into this Agreement and all documents contemplated hereby, and consummate the transaction contemplated by this Agreement," that all required action has been taken by Seller in connection with entering into the Agreement and will be taken prior to Closing, and that all persons and entities have the "legal right, power and authority to bind Seller." Id.

The Defendants argue, without citing applicable case law, that this Section relates solely to Mitsui's corporate capacity and authorization to enter the sale, which plaintiff argues Mitsui possessed. The Defendants also contend that Section 7.1 does not address the disclosure of specific communications such as the Parking Letter.

The plaintiffs explain that their position is not limited to the non-disclosure of the Parking letter alone. Rather, Count I alleges breach of contract based on the representations set forth in, among other provisions, Sections 7.1, 7.2, 7.3, 7.5(b), and 7.6 as raised in the defendants' motion. Plaintiffs contend that the Deed, Affidavit of Title and Closing Certificate, all delivered at the closing, all suffered from the same defects arising out of Mitsui's misrepresentations about and non-disclosure of the Parking Letter.

The Court finds, as a matter of law, that whether conduct is found to be a material breach of an agreement is "ordinarily a question reserved for disposition by

the [trier of fact.]" Chance v. McCann, 405 N.J. Super. 547, 566 (App. Div. 2009) (citing, Lo Re v. Tel-Air Commc'ns, Inc., 200 N.J. Super. 59, 72-73 (App. Div. 1985). "Materiality" involves the evaluation of factors such as the extent to which the breach defeats the purpose of the contract and the likelihood of recurrence. Magnet Resources, Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 286 (App. Div. 1998). New Jersey courts have found that whether a breach is sufficiently material to justify treating the entire contract as "broken" is typically a jury question unless the facts are so clear that the Court can decide as a matter of law. E.I. Dupont De Nemours Powder Co. v. United Zinc & Chemical Co., 85 N.J.L. 416, 419 (1914).

The court finds that genuine issues of material fact exist precluding summary judgment as to plaintiff's claim for breach of contract under Section 7.1 of the Agreement, regarding whether Defendants' alleged breach is material in nature, based on the existence of the Parking Letter or the alleged non-disclosure of information regarding the nature of Chestnut's claim over the Disputed Area and the defendants' alleged acknowledgment of the claim. The court finds that general issues of material fact also exist regarding whether the defendants had the "full right, power and authority" to enter into the Agreement, and the documents related to the same, and to bind the Seller, and whether all required action was taken by Seller such that the defendants were able to deliver the property, free of encumbrances, as agreed. See, Hodes v. Dunsky, 5 N.J. Super. 333, 338 (App. Div. 1949) (in action on contract

for sale of real estate, "[s]ummary judgment should be granted only if it is obvious that there is no genuine issue and that, as a matter of law, the moving party should have judgment.").

Discovery had not yet commenced as of the filing of this motion. The Court finds, among other reasons, that the lack of a fully developed factual record requires the denial of the defendants' pre-Answer motion at this time. The Court finds the claim as to the alleged breach of this contractual provision raises issues of witness credibility and genuine issues of material fact for the trier of fact regarding the issue of material breach who will consider whether the non-disclosure of the Parking Letter and Chestnut's claim to the Disputed Area was a material breach of the Agreement as well as the nature of any agreement and communications between Mitsui and Chestnut regarding the Disputed Area . Viewing the evidence presented in the record of this motion in the light most favorable to the non-moving party, the court DENIES the portion of Defendant's motion for summary judgment as to Section 7.1 of the Agreement.

2. Plaintiff's Claim for Breach of Contract Based on Section 7.2

Section 7.2 of the Agreement generally provides that the execution, delivery and performance by Seller of the Agreement will not conflict with or result in a breach of, violate any term or provision of, or constitute a default, under, among other things, any operating agreement, indenture, contract, agreement or Law to

which the Seller or any portion of the Property is bound. (Goodman Aff., Ex. A at ¶7.2).

The defendants contend that plaintiff's claim fails as a matter of law as the alleged failure of Mitsui's to provide the Parking Letter does not constitute a breach under Section 7.2, as Section 7.2 pertains only to conflicts with existing agreements, organizational documents or laws. Defendants also argue that Section 7.2 does not address disclosure of communications with third parties regarding boundary disputes but, rather, is intended to prevent the sale from violating existing legal obligations.

The plaintiffs contend that Mitsui's misrepresentations, as evidenced by the Parking Letter and the failure of Mitsui to disclose the Parking Letter to the plaintiffs, resulted in the Mitsui's Closing Certificate provided at Closing to be materially false and misleading, constituting a breach under Section 7.2 of the Agreement.

As set forth above, the Court finds, as a matter of law, that whether conduct is found to be a material breach of an agreement is "ordinarily a question reserved for disposition by the [trier of fact.]" Chance v. McCann, 405 N.J. Super. 547, 566 (App. Div. 2009) (citing, Lo Re v. Tel-Air Commc'ns, Inc., 200 N.J. Super. 59, 72-73 (App. Div. 1985).

The Court finds, considering the competent evidence in the record in the light most favorable to the non-moving party, that genuine issues of material fact exist precluding summary judgment as to plaintiff's claim for breach of contract under

Section 7.2 of the Agreement as it pertains to the alleged false and misleading Closing Certificate, Chestnut's claim over the Disputed Area, and the alleged failure of Mitsui to disclose the same to the plaintiffs, the materiality of the alleged breach, and whether the transaction conflicts with any agreement (with Chestnut, or otherwise) relating to the Seller or Property.

The Court also finds that these questions should be considered by the trier of fact who will have the opportunity to consider witness testimony and evaluate witness credibility regarding the issue. The Court also finds that the defendants' motion in this regard is premature, as the parties had not initiated discovery at the time of the filing of this motion. Therefore, the portion of Defendants' motion for summary judgment as to Section 7.2 of the parties' Agreement is DENIED.

3. Plaintiff's Claim for Breach of Contract based on Section 7.3

The Court finds that Section 7.3 of the Agreement provides that "no approval or consent is required from any person . . . for [Mitsui] to execute, deliver or perform this Agreement or the other instruments contemplated hereby or for Seller to consummate the Transaction contemplated hereby." The Defendants argue that omission of the Parking letter does not constitute a breach of contract under Section 7.3 which pertains to the validity and enforceability of the Agreement, not to disclosure of communications with third parties. The defendants argue that Section 7.3 does not create a warranty about disclosure of every correspondence relating to

the history of the Property, but rather, only warrants that Mitsui is legally bound by the terms of the Agreement and ancillary documents.

The plaintiffs argue that the existence of the Parking Letter, and Matsui's failure to disclose the same and the substance of the same, constitutes a material breach of the warranties and representations set forth in Section 7.3 of the Agreement. Plaintiffs contend that the Deed, Affidavit of Title and Closing Certificate did not merge and suffered from the same defects arising from Mitsui's misrepresentations, as evidenced by the Parking Letter, and non-disclosure of the Parking Letter.

Viewing the arguments in the light most favorable to the non-moving party, the court finds that genuine issues of material fact exist regarding the question of the defendants' breach of Section 7.3 of the contract as it relates to Mitsui's claim over the Disputed Area, and the alleged failure of Mitsui to disclose the same to the plaintiffs. The Court finds that these questions should be considered by the trier of fact who will have the opportunity to consider witness testimony and evaluate witness credibility regarding the issue. To that end, the Court finds that the defendants' motion in this regard is premature, as the parties had engaged in discovery at the time of the filing of this motion. Therefore, the portion of Defendants' summary judgment motion as to Section 7.3 of the Agreement is DENIED.

4. Plaintiff's' Claim for Breach of Contract Based on Section 7.5(b)

The Court finds that, under Section 7.5, the Seller warrants that there are no parties in possession of the Property under any Tenant leases, and there are no other "leases, subleases, occupancies or tenancies or parties in possession of any part of the Property." (Goodman Aff., Ex. A, ¶7.5(b)). This provision also provides that seller "has not granted any party any option, rights of first refusal, license or other similar agreement with respect to the [transaction.]" Id.

The defendants argue that the plaintiffs' claim under Section 7.5 "fundamentally misconstrues" the plain language and purpose of the contractual section which, also, fails to make mention of disclosure of communications with third parties and did not create a general disclosure obligation for every communication, and that the boundary line issue was disclosed by Mitsui in the due diligence phase of the Agreement as well as in obtaining a title commitment.

The Court finds that Section 7.5(b) of the Agreement provides, in pertinent part, that there are no other "occupancies or tenancies or parties in possession of any part of the Property" and that Seller "has not granted to any party any option. . . license or similar agreement with respect to a purchase or a sale of the Property or any portion thereof or any interest therein."

Plaintiff alleges that Mitsui's concealment of the Parking Letter, and the substance of the Letter evidencing Mitsui's knowledge of Chestnut's interest in the

Property, constitutes a breach of the Purchase Agreement and "Closing Documents" and that material questions of fact exist precluding summary judgment at this early point in the litigation.

The court finds, providing the plaintiff with the benefit of all favorable inferences, that genuine issues of material fact exist regarding the nature of Chestnut's claim over the Disputed Area and whether the defendants' conduct and alleged failure to disclose their apparent knowledge of Chestnut's claim to the Disputed Area, and alleged constitutes a material breach of the Agreement and of Section 7.5(b) of the Agreement. The court also finds that these questions of fact should be considered by the trier of fact who will consider witness testimony and credibility regarding the same. Additionally, the court finds that defendants' motion is premature to the extent discovery had not been initiated at the time of the motion filing. Therefore, the portion of Defendants' motion as to Section 7.5(b) is DENIED.

5. Plaintiff's Claim of Breach of Contract Under Section 7.6

The Court finds that Section 7.6 of the Agreement provides, in pertinent part, that no "actions, suits, proceedings or claims" are pending or to Seller's knowledge contemplated or threatened before any court or other body with respect to the Property.

Defendants argue that the failure to disclose the Parking Letter does not constitute a breach of the contract, there were no pending actions, suits or

proceedings within the meaning and intent of Section 7.6, and that, to Defendants' knowledge, there were no contemplated or threatened actions, suits or proceedings. Defendants also contend that the boundary line issue was fully disclosed to JB/35 Maple.

The court finds that the record presented includes no evidence of any suits or actions pending at the time that the parties entered into the Agreement. The court is unable to conclude that summary judgment dismissing this portion of the Complaint should be granted, however, to the extent that it finds that genuine issues of material fact exist regarding the existence of contemplated or threatened actions or proceedings relating to the Property, or a portion thereof, particularly in light of the communications between Chestnut and Mitsui and Chestnut's post-closing construction of a fence in the Disputed Area following the Closing. The court also finds that material questions of fact exist regarding the nature of Chestnut's claim over the Disputed Area, and whether the defendants' conduct and alleged failure to disclose their knowledge of Chestnut's claim to the Disputed Area constitutes a material breach of the Agreement.

The court also finds that these questions of fact should be considered by the trier of fact who will consider witness testimony and credibility regarding the same. Additionally, the court finds that defendants' motion is premature to the extent discovery had not been initiated at the time of the motion filing. For those reasons,

the portion of Defendants' motion for summary judgment as to Section 7.6 of the Agreement is DENIED.

C. Defendant's Argument that Count II (Fraud) is Barred by the Economic Loss Doctrine.

The economic loss doctrine "defines the boundary between the overlapping theories of tort law and contract law by barring the recovery of purely economic loss in tort[.]" Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 244 (3d Cir. 2010); see also, Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 317 (2002) ("a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law."). The doctrine "bars tort remedies in strict liability or negligence when the only claim is for "economic loss, as opposed to physical injury or property damage. Dean v. Barrett Homes, Inc., 204 N.J. 286, 295 (2010).

New Jersey Courts have distinguished between claims for fraud in the performance of a contract, finding such claims to be "intrinsic" to the contract, and claims for fraud in the inducement, finding such claims to be "extrinsic" to the contract. Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co., 226 F. Supp. 2d. 557 (D.N.J. 2002). In Bracco Diagnostics, the court stated "the pattern that has emerged in the New Jersey decisional law is that claims for fraud in the performance of a contract as opposed to fraud in the inducement of a contract, are not cognizable under New Jersey law." Id. at 563-64 (citations omitted).

The defendants argue that a claim for fraud is in the nature of a tort claim and, as such, should be barred by the Economic Loss Doctrine. Because the parties are in direct privity as the parties to a sophisticated commercial real estate transaction, the defendants argue that the alleged damages are purely economic in nature such that plaintiff's tort claim for fraud should not be permitted to stand.

To state a cause of action for common law fraud, plaintiff must allege facts that, if proven, would establish: (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. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)(citation omitted).

The court finds that the plaintiffs have asserted claims for fraud in the inducement which, as a matter of law, are not barred by the Economic Loss Doctrine. In the Second Count of the Complaint, the plaintiffs allege that, at the time the Agreement was signed, the defendants were aware that they could not convey good and marketable fee simple title to the Property. The plaintiffs further allege that, at the time the Agreement was signed as well as at the Closing, Mitsui knew that its representations, covenants and warranties were false and materially misleading, that the plaintiffs would reasonably and detrimentally rely on the same, that the plaintiffs in fact did rely in good faith on the same and, as a result, the plaintiffs suffered

damage.

Our courts acknowledge that fraud must be proven through clear and convincing evidence and that factual disputes are central to the determination of fraud claims. Stoecker v. Echevarria, 408 N.J. Super. 597, 617-18 (App. Div. 2009). Our courts have found that issues of intent, willfulness, or good faith, as related to fraud claims, are generally not suitable for summary judgment and should be resolved by the trier of fact. Lopez v. Swyer, 115 N.J. Super. 237, 252 (App. Div. 1971). Issues of credibility, similarly, are ordinarily for the trier of fact, not for the judge in determining a motion for summary judgment. Id. at 241.

At the time this motion was filed, discovery had not yet been conducted. Therefore, the Court finds that genuine issues of material fact exist regarding the facts underlying the criteria to prove a claim for common law fraud, and that the motion is premature at this time. For those reasons, viewing the arguments in the light most favorable to the non-moving party, the defendants' motion for summary judgment as to Count II of the Complaint alleging Fraud is DENIED.

D. Defendants' Argument for Dismissal of Plaintiffs' Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

The defendants argue that Count III of the Complaint, alleging breach of the implied covenant of good faith and fair dealing, should fail because, as with the plaintiffs' claim for breach of contract, it stems from the non-disclosure of the Parking Letter is not an independent cause of action under New Jersey law and

because the obligation to disclose is a pre-closing due diligence requirement that does not survive the closing under the doctrine of merger. The plaintiffs assert that their claims revolve around Defendants' bad faith and misconduct, and fraud, in connection with the negotiation, execution, and consummation of the purchase and sale for the Property.

"[E]very contract has "an implied covenant of good faith and fair dealing" which "applies to the parties' performances and their enforcement of the contract." East Penn Sanitation, Inc. v. Grinnell Haulers, Inc., 294 N.J. Super. 158, 170 (App. Div. 1996); citing, Onderdonk v. Presbyterian Homes of N.J., 85 N.J. 171, 182 (1981) and Sons of Thunder, Inc. v. Borden, Inc., 285 N.J. Super. 27, 49 (App. Div. 1995). Although proof of "bad motive or intention" is vital to the claim, under the implied covenant, "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Palisades Props., Inc. v. Brunetti, 44 N.J. 117, 130 (1965) (citation omitted); Comprehensive Neursurgical, P.C. v. Valley Hosp., 257 N.J. 33 (2024). The implied covenant does not and cannot alter the terms of a written agreement, however. East Penn Sanitation, 294 N.J. Super. at 170. In the absence of a contract, "there can be no breach of an implied covenant of good faith and fair dealing." Noye v. Hoffmann-La Roche Inc., 238 N.J. Super. 430, 434 (App. Div. 1998).

Above, the court found that the plaintiffs' complaint arises out of alleged

misrepresentations of the Defendants as to the nature of title to the Property as evidenced by the substance of the Parking Letter. The court believes that the Defendants' argument that the Complaint as being based solely upon the Defendants' failure to provide the Parking Letter is inaccurate. The plaintiffs' claim does not end with the defendants' failure to produce the Parking Letter during due diligence. Rather, the plaintiffs' claim largely revolves around the allegation that the Parking Letter reflects that the defendants were aware that Chestnut had a claim to a portion of the Property and that Defendants knew they lacked good and clear title to the Property but represented the opposite to the plaintiffs.

To the extent that Count III asserting violation of the implied covenant of good faith and fair dealing relates to the defendants' conduct, negotiations, and misrepresentations relating to the Property and status of title, which the plaintiffs claim deprived them of, destroyed, or injured their right to receive the fruits of the contract, the court finds that genuine issues of material fact exist relating to those claims and allegations. At this time, the court also finds that summary judgment as to Count III is premature based on the incomplete factual record presented to the court. For those reasons, the portion of Defendant's motion for summary judgment seeking dismissal of Count III is DENIED.

E. As to Defendant's Argument that Count IV for Wrongful Distributions Fails as a Matter of Law.

In Count IV of the Complaint, the plaintiffs allege that, upon filing the Notice

of Dissolution, the Defendants were required, under the law, to hold the property and assets of Mitsui, as a dissolved corporation, as a "trust fund" for the benefit of creditors. To that end, the plaintiffs allege, if it is determined that Mitsui has made post-Notice of Dissolution distributions to creditors without reserving sufficient funds to make an equal prorate distribution to plaintiffs, or to equity interest holders, plaintiffs may recover as permitted under the law.

The defendants argue that the law neither requires that a "trust fund" for creditors be established, nor prohibits all distributions until all creditor claims are paid in full. Defendants also contend that the law does not require absolute certainty or resolution of all claims, such as those of the plaintiffs, before distributions can be made, and that, because the claim is derivative of the plaintiffs' underlying claims it should fail because the underlying claims fail.

N.J.S.A. 14A:12-9(1) imposes the obligation upon a dissolved corporation to continue is corporate existence but carry on no business "except for the purpose of winding up its affairs." The winding up of its affairs includes the collection of the entity's assets, the conveyance of such of its assets not to be distributed in kind to its shareholders, "paying, satisfying and discharging its debts and other liabilities," and the completion of such other acts as may be required to liquidate the business. N.J.S.A. 14A:12-9(1)(a) through (c).

The Superior Court has stated, citing to N.J.S.A. 14A:12-9(1)(c), that the

"Legislature required that a corporation in dissolution must satisfy and discharge its debts and other liabilities before it may be lawfully dissolved." ERA Advantage Realty, Inc. v. River Bend Development Co., Inc. v. River Bend Development Co., Inc., 284 N.J. Super. 92, 99 (Law Div. 1994). "In light of such statutory provisions, the shareholders, having succeeded to the assets of the corporation, were obliged to treat the proceeds of the sale of the real estate as a trust fund, to the extent necessary to satisfy plaintiff's claim, pending the outcome of the litigation." ERA Advantage Realty, 284 N.J. Super. at 99 (citations omitted). "Such funds were to be segregated from the shareholders' general fund and kept inviolate for so long as necessary." Id., citing, New Jersey Title Guarantee & Trust v. Berliner, 136 N.J. Eq. 162, 167 (Ch. 1945).

The court finds that (1) on March 29, 2022, the plaintiffs sent a letter to Mitsui providing written notice of plaintiff's claims for breach of the terms, conditions, representations, and warranties in the Agreement and closing documents; (2) on May 9, 2022, Mitsui served upon plaintiff's counsel a Notice of Dissolution of Mitsui and Notice to Creditors dated April 28, 2022; and (3) on or about October 24, 2022, Plaintiffs served upon the registered agent for Matsui a Notice of Claim in response to the Notice of Dissolution. (Goodman Aff., ¶43 and Ex. M).

However, the court finds that the record is devoid of any further proof or evidence of distributions made to non-party creditors or to equity holders, the

quantity of the same, or the manner in which Mitsui conducted the wind up of its business, and whether it discharged other debts and liabilities of the corporation. The court notes that parties had not yet exchanged discovery when the motion was initially filed.

As such, viewing the arguments of the parties in the light most favorable to the non-moving party, the court finds that summary judgment dismissing Count IV is premature at this time in light of the sparse factual record presented and, also, as the court finds that genuine issues of material fact exist with respect to Mitsui's dissolution and the handling of its wind up of its business and compliance with applicable laws regarding the same. For those reasons, the defendants' motion for summary judgment as to Count IV is DENIED.