
Superior Court of New Jersey
Appellate Division

No. A-006974-03T1

INTELNET INTERNATIONAL CORP. f/k/a)	CIVIL ACTION
INTELNET SERVICES OF NORTH AMERICA,)	
INC.,)	ON APPEAL FROM THE
)	SUPERIOR COURT OF
Plaintiff-Appellant,)	NEW JERSEY,
)	LAW DIVISION:
v.)	CAMDEN COUNTY
)	
ITT CORPORATION, ITT SHERATON)	Sat Below:
CORPORATION, and STARWOOD LODGING)	
CORPORATION,)	HON. JOHN A. FRATTO,
)	P.J. CV.
Defendants-Respondents-)	
Cross-Appellants.)	
)	

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[We adopt plaintiff's numbering system.]

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1T	10/14/02 (P. Donnelly EBT)*	21T	04/12/04
2T	2/17/02 (D. Van Kalsbeek EBT)*	22T	04/15/04
3T	12/23/02 (B. Sloane EBT)*	23T	04/20/04
4T	02/26/03 (W. K. Griffith EBT)*	24T	04/21/04
5T	03/24/03 (R. Jaluria EBT)*	25T	04/22/04
6T	06/04/03 (F. Simoneau EBT)*	26T	04/23/04
7T	07/16/03 (S. Van Essche EBT)*	27T	04/26/03
8T	09/22/03 (S. Benfield EBT)*	28T	04/27/04
9T	09/29/03 (G. Alex EBT)*	29T	04/28/04
10T	08/01/03	30T	05/03/04
11T	10/23/03	31T	05/04/04
12T	12/18/03	32T	05/05/04
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15T	03/16/04	35T	05/10/04
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17T	03/18/04	37T	05/17/04
18T	03/29/04	38T	05/20/04
19T	03/31/04	39T	06/18/04
20T	04/01/04		

* Transcripts 1T through 9T are transcripts of deposition testimony that were admitted into evidence at the trial concerning the validity of the RMPA.

INTRODUCTION

Plaintiff-Appellant Intelnet International Corporation ("Intelnet") asserted contract and tort claims against ITT Corporation ("ITT"), ITT Sheraton Corporation ("Sheraton"), and Starwood Hotels & Resorts Worldwide, Inc. ("Starwood"). Intelnet's claims were predicated on the defendants' alleged breach of two contracts that Intelnet claims gave it exclusive rights to provide telecommunications services to hundreds of hotels, offices, and casinos owned or controlled by the defendants.

The first contract at issue in this lawsuit is the Concierge Plus Operating Agreement ("C+ Agreement"), a July 1996 operating agreement for a joint venture between Intelnet and a wholly-owned subsidiary of ITT called ITT Intelnet Investment Corporation ("ITT Intelnet"). The trial court dismissed Intelnet's claims under the C+ Agreement upon ruling as a matter of law that the contract was merely an operating agreement for the joint venture and did not bind any defendant to purchase Intelnet's services.

The second contract relied upon by Intelnet was the Amended and Restated Master Promotion Agreement ("RMPA"), which allegedly was executed by Intelnet and ITT on or about October 1, 1996, and which purported to impose extensive purchase obligations on the defendants. After a bench trial, the court found that the second contract had been fraudulently executed without ITT's authorization, more than a year after its purported date, and thus *after* the supposedly breaching event had occurred.

Accordingly, the court dismissed Intelnet's claims relating to the RMPA and entered judgment for the defendants. There are no grounds for reversing the court's carefully considered rulings.

PROCEDURAL HISTORY

Intelnet filed this action in the Superior Court of New Jersey, Law Division: Camden County, on December 12, 1997. Pa34-54. Intelnet contended that on October 1, 1996, ITT and Intelnet entered into the RMPA, a contract which, it was alleged, gave Intelnet the exclusive right to provide certain telecommunications services to the office buildings and hotels owned by ITT, Sheraton, and ITT's subsidiary Caesar's World, Inc. ("Caesar's). Pa39-40. Intelnet contended that the defendants breached the RMPA when, on November 6, 1997, Sheraton issued a press release announcing the formation of Sheraton.net, a program to provide high speed Internet and video on demand television services to Sheraton's hotel guests in Asia. Pa44. Intelnet sought damages and specific performance based on breach of the RMPA (Pa46-50); it also asserted claims of breach of the covenant of good faith and fair dealing and intentional interference with contract. Pa50-53. The defendants answered and filed counterclaims in February 1998. Pa234-259. In the answer, defendants, having no reason at the time to believe otherwise, admitted the allegation that the RMPA was executed on or about October 1, 1996. Pa236.

In November 1998, Intelnet filed its First Amended Complaint, adding Starwood, which had purchased ITT, as a

defendant. Pa260-298. That Complaint also included a new claim that ITT and Sheraton had breached the C+ Agreement. Pa289-291. Intelnet claimed that it was entitled to specific performance of the C+ Agreement, but sought no damages for the alleged breach of that contract. Pa290. The First Amended Complaint also raised claims for breach of good faith and fair dealing, breach of fiduciary duty and interference with existing and prospective business relations. Pa286-294.

In November 1998, the defendants moved to compel arbitration of Intelnet's claims under the arbitration provision in the C+ Agreement. In February 1999, the court denied the motion, apparently concluding that Intelnet's claims principally related to the RMPA, which did not contain an arbitration clause. Da16-17; *see also* Da28-29.

After discovery began in earnest in late 2002, defendants obtained admissions from former ITT and Intelnet employees that the RMPA had been signed, without authorization by ITT, in late 1997 - **after** the event that Intelnet alleged constituted the breach. *See* Pa1414-1415, Pa1075-1077.

In September 2003, the court denied Intelnet's motion to amend its complaint to add a claim for damages under the C+ Agreement. Pa11-13. In October 2003, the court granted the defendants' motion to strike Intelnet's jury demand (Pa14-15), noting that the RMPA expressly waived the parties' jury trial rights and that Intelnet's claims under the C+ Agreement were primarily equitable (Da55-57).

In January 2004, the court granted defendants' motion for leave to amend their answers to correct their erroneous admissions that the RMPA had been executed on October 1, 1996. Pa16. Defendants also amended their interrogatory responses and withdrew their counterclaims, which were based on the erroneous belief that the RMPA had been executed with ITT's authorization in October 1996. See Pa337-381.

In March 2004, the court granted defendants' motion for summary judgment with respect to Intelnet's claims under the C+ Agreement (Pa6-8), ruling that defendants, who were not parties to the contract, were not bound by the agreement. Da60-62.

Citing the evidence that the RMPA had been fraudulently signed, without authorization, after the event that allegedly breached it, defendants also sought summary judgment with respect to Intelnet's claims under the RMPA. The court denied the summary judgment motion, but granted defendants' alternative request under N.J. Rule 4:46-3(b) for an immediate trial on the issue of whether the RMPA had been fraudulently executed. Pa8. After an extended bench trial regarding that subject, the court found that Intelnet had failed to prove that the RMPA was a valid contract in existence prior to its alleged breach. Da99.

The court accordingly granted defendants' motion to dismiss Intelnet's claims under the RMPA. Pa9-10. Because Intelnet's remaining claims depended on contentions that the defendants had breached obligations under the C+ Agreement and/or the RMPA, the

court dismissed those claims and entered final judgment for defendants. Pa4; see also Da117.

This case was consolidated below with the complaint in *Intelnet Int'l Corp. v. Boardwalk Regency Corp.*, No. L-4163-99, a separate action filed by Intelnet against Boardwalk Regency Corporation and other defendants (the "BRC Action"). The BRC Action was severed from this case and dismissed without prejudice by stipulation following the court's entry of judgment in the main action. See Da121; see also Stipulation of Dismissal, *Intelnet Int'l Corp. v. Boardwalk Regency Corp.*, No. L-4163-99 (Aug. 24, 2004) (Da18-22). Accordingly, matters pertaining to the BRC Action are not before this Court.

COUNTERSTATEMENT OF FACTS

1. Intelnet and ITT Corporation. At the time the complaint was filed, Intelnet was in the business of providing telecommunications services under contracts with the hotel and hospitality industry. Pa34-35. ITT was engaged in the hospitality, gaming, and entertainment businesses through its subsidiaries, which included Sheraton and Caesars. Pa35-36.

In February 1996, ITT and an Intelnet affiliate, Intelnet Services of North America, Inc. ("ISNA"), entered into a contract known as the Master Promotion Agreement ("MPA"). Pa409-425. The MPA was a non-exclusive promotional agreement that gave ITT financial incentives to market Intelnet's telephone services to its employees and customers. *Id.* The MPA was signed by Dominic Dalia, President and CEO of Intelnet, and Jon Danski, Controller

and Senior Vice President of ITT. Pa421. Subsequently, Intelnet entered into similar promotional agreements with other ITT subsidiaries. See Pa426-483. None of them imposed duties of purchase on the signatories.

2. The C+ Agreement. In July 1996, Intelnet and ITT Intelnet entered into the C+ Agreement. Pa55-96.¹ The C+ Agreement provided for the creation and operation of a limited liability corporation, to be called "Concierge Plus," through which the parties contemplated sharing future profits accruing from the sale of Intelnet's telecommunications and media services. *Id.*

Paragraph 3 of the C+ Agreement's Preliminary Statement states that the parties entered into it "for the purpose of forming a limited liability company to jointly develop and market [the Concierge Plus package of services] to [ITT Intelnet's] customers and employees and to exploit such products and services to those persons and industries as more particularly set forth herein." Pa55. Paragraph 2.4 states that the purpose of the LLC to be formed under the agreement was "to develop and promote the Project on a worldwide basis, and to collect and to distribute revenues generated and collected from this Project in accordance with the terms and conditions of this Agreement." Pa61.

Paragraph 2.5 of the C+ Agreement designates Intelnet's subsidiary ISNA as "the exclusive provider, manager, and

¹ The copy of the C+ Agreement that is reproduced in Intelnet's Appendix includes an Exhibit C which lists the hotels owned and managed by Sheraton. Pa91-96. Intelnet has "stipulated . . . that Exhibit C wasn't part of the C+ Agreement" executed by the parties. 16T615; see also 25T2873-2874 (Wilkins).

management company" for the services to be provided by the LLC.

Id. It also states that

[ITT Intelnet], on behalf of itself and its Affiliates, agrees that during the term of this Agreement it will not market or promote services to customers which compete directly with the services provided by the LLC **to the extent such services are provided by the LLC.** Notwithstanding the foregoing and except as otherwise specifically set forth in this Agreement, [ITT Intelnet] and Intelnet agree that any existing arrangements that either has that may compete with the Project may continue in their present scope.

Id. (emphasis added).

In Paragraph 6.3 of the C+ Agreement, entitled "Covenants of [ITT Intelnet]," ITT Intelnet agrees to use "**reasonable efforts**" to promote the services to be provided by the LLC to the employees of ITT Corporation residing within the United States, including by delivering "a marketing package promoting the project." Pa68 (emphasis added). The same paragraph provides:

Subject to the terms and conditions of this Agreement, [ITT Intelnet] and its Affiliates agree that they will not sell to, promote or endorse to their respective customers any other long distance, cellular, local telephone service program or power, media or cable services.

Id. (emphasis added).

Intelnet contended that Paragraphs 2.5 and 6.3 of the C+ Agreement gave it exclusive rights to provide telecommunications services to all hotels, office buildings, and other properties owned by ITT, Sheraton, or Caesars. See, e.g., Da724. The trial court rejected that construction of the Agreement, holding that the C+ Agreement "was not a guarantee that Intelnet would be given" any particular service contract. Da60. As the court

explained, "[t]he document is an operating agreement, . . . not a service agreement. It lacks price, quantity, [and] other necessary terms. Separate contracts were needed with all of the customers including the owned or managed hotels, potential customers." *Id.*²

During the four months of negotiations leading to the execution of the C+ Agreement, ITT's representatives consistently made it clear that ITT Corporation was unwilling to become a party to the contract, and that any joint venture agreement would instead be signed only by a wholly-owned subsidiary of ITT created for that specific purpose. For example, when Intelnet proposed an initial draft of the C+ Agreement that named ITT Corporation as a party (see Pa555 (4/17/96 draft of C+ Agreement)), ITT responded with a draft in which ITT Intelnet replaced ITT as the party. Pa580-606 (5/10/96 facsimile transmission from J. Danski to D. Dalia, enclosing revised draft of C+ Agreement). In response, Intelnet proposed to add a signature line for ITT Corporation and to include certain express "[r]epresentations and [w]arranties of the * * * ITT Parent." See Pa607-640 (5/15/96 letter from D. Dalia to J. Danski enclosing redlined draft of C+ Agreement). In-house lawyers for both ITT

² The Superior Court judge who initially handled the case had the same understanding of the C+ Agreement. In denying defendants' motion to compel arbitration under the C+ Agreement's arbitration clause, he noted that the C+ Agreement merely "establishes certain rights and powers and privileges with respect to the sharing of the profits" (Da43) while the RMPA "grants exclusive rights to Intelnet" (Da32).

and Intelnet testified that ITT unequivocally rejected that proposal. See Pa518-32; Pa535-41; Pa552-553. Similarly, ITT refused Intelnet's requests that it guarantee ITT Intelnet's obligations under the C+ Agreement through a proposed amendment to the MPA. See 1T271-272; Pa727-743 (5/29/96 letter from M. Vogt to J. Danski attaching draft Second Addendum to the MPA, providing that ITT "shall hereinafter serve as a guarantor of any and all of ITT Intelnet's duties, responsibilities, and obligations arising from the [C+ Agreement]"); Da126-129 (5/30/96 fax from P. Donnelly to M. Vogt attaching draft Second Addendum to MPA that eliminated the requested guarantee).

3. The Draft RMPA. After the C+ Agreement was executed on July 3, 1996, Intelnet continued to propose contracts that would (1) bind ITT to the obligations in the C+ Agreement and (2) require ITT and its subsidiaries to use Intelnet's services. See, e.g., 20T1592-1593 (Vogt). Intelnet proposed a Second Addendum to the MPA that contained such commitments, but no such contract was ever signed. See Da178-192 (7/29/96 letter from S. Wilkins to J. Danski attaching proposed Second Addendum to MPA that includes ITT's guarantee of C+ Agreement); Da216-222 (8/23/96 fax from P. Donnelly to M. Vogt attaching handwritten comments on Second Addendum to MPA striking guarantee); Da714-715 (9/3/96 letter from M. Vogt to P. Donnelly attaching proposed Second Addendum to MPA that includes provision granting Intelnet the exclusive right to provide services).

In the Summer of 1996, the parties also began exchanging drafts of the RMPA, the alleged contract between ITT and Intelnet that became the centerpiece of this action. The parties negotiated over the terms of the draft RMPA between August and December of 1996. See, e.g., Da193-215 (8/13/96 letter from M. Vogt to P. Donnelly attaching draft RMPA); Pa7622-7669 (12/18/96 facsimile transmission from P. Donnelly to S. Wilkins attaching blacklined draft of RMPA together with proposed Amended and Restated C+ Agreement). Neither proposed agreement was signed, and no further negotiations ensued.

An early draft of the RMPA included ITT's guarantee of ITT Intelnet's obligations under the C+ Agreement. See Da197. Subsequent drafts (including the draft that Intelnet contends was executed by the parties in April 1997) did not include such a guarantee, but did include an express provision giving Intelnet "the exclusive right to construct and provide" specified telecommunications services to the office building and hotels owned and operated by ITT, Sheraton, and Caesars. Pa7653.

4. Intelnet's Efforts To Obtain Financing. In 1997, Intelnet began seeking high-yield debt financing to fund the development and implementation of its services. 3T58-60 (Sloane). Intelnet unsuccessfully sought financing from Smith Barney and Lehman Brothers. See 20T1566-1568 (Vogt); Da226-307, Da356-363. In an effort to satisfy Lehman's concerns regarding the strength of Intelnet's relationship with ITT (28T3637, 30T3927 (Dalia)), Intelnet asked ITT to sign an amendment to the C+ Agreement that

expressly imposed exclusive purchase obligations on ITT. See 3T77, 3T92-93, 3T114 (Sloane); Da370-380 (8/27/97 memo from Intelnet's counsel to Lehman Brothers and Simpson Thatcher attaching draft First Amendment to C+ Agreement with signature line for ITT); Da388-398 (9/4/97 letter from D. Dalia to J. Danski attaching draft First Amendment to C+ Agreement); Da399-409 (9/8/97 letter from D. Dalia to W. Oates attaching Draft First Amendment to C+ Agreement). ITT refused. See 1T373-374 (Donnelly); 20T1562 (Vogt); 29T3765 (Dalia).

In the Fall of 1997, Prudential Securities, Inc. ("Prudential") agreed to assist Intelnet in obtaining financing. Prudential gave Intelnet a \$15 million bridge loan to be used pending the completion of a \$100 million junk bond offering. See 27T3291-3292 (Dalia); Da381-385. With Intelnet's assistance, Prudential prepared an offering memorandum that was provided to investors as part of a "road show" in connection with the junk bond offering, which commenced in early November 1997. See Da484-569 (Preliminary offering memorandum dated 11/7/97); 27T3307 (Dalia).

5. The Starwood Takeover and Sheraton.Net. Throughout 1997, ITT was fighting a hostile takeover attempt by Hilton Hotels. 17T1044-1045 (Danski). In the fall of 1997, Starwood emerged as a "white knight" in the takeover battle. 17T1047 (Danski). In November 1997, ITT's shareholders voted to reject the Hilton takeover bid, thus paving the way for Starwood's takeover of ITT in February 1998. 1T60 (Donnelly).

On November 6, 1997, during the takeover battle and while Intelnet and Prudential representatives were conducting the road show, Sheraton issued a press release announcing a joint venture named Sheraton.Net. Da478-483. The press release described Sheraton.Net as a partnership between Sheraton, Asia Connect, and other technology companies that would develop and provide high-speed Internet and video-on-demand television services to Sheraton hotels in Asia and the Pacific. *Id.*

Upon learning of the Sheraton.Net press release, Prudential suspended the road show and informed Intelnet that it could not proceed with the junk bond offering. See 8T117 (Benfield); 9T153-156 (Alex); 15T446-447 (Tantillo). Prudential required written confirmation of ITT's intent to purchase services from Intelnet in order to restart the road show. See 9T161-162 (Alex) (Prudential wanted "a piece of paper that said yes . . . Intelnet has the right to . . . this contract, the ability to provide telephone services, and the associated enhanced services, so that we could get back on the road"). See also 8T145 (Tantillo); 3T23 (Sloane); 9T356 (Alex); 8T145 (Benfield). Accordingly, Intelnet began working with Prudential's outside counsel on a proposed amendment to the C+ Agreement that would bind ITT directly, but this draft was never presented to ITT. See Da588-598 (11/17/97 fax from M. Vogt to S. Benfield attaching unsigned draft of First Amendment to C+ Agreement); Da599-606 (11/20/97 fax from C. Serfilippi to K. Griffith attaching draft First Amendment to C+

Agreement with handwritten edits); 15T449 (Tantillo); 9T371-372 (Alex).

6. Intelnet "Discovers" A Signed RMPA. Intelnet's in-house counsel, Margaret Vogt, was personally and substantially involved in the negotiations between ITT and Intelnet regarding the RMPA. See 20T1583 (Vogt). Although Dominic Dalia had assigned Vogt the task of obtaining a signed RMPA from ITT, Vogt never was able to do so. *Id.*

In early December 1997 - after Prudential had suspended the road show - Dominic Dalia's secretary told Vogt that a signed RMPA had been "found" by Intelnet employee Tim Tantillo. 20T1580 (Vogt). Tantillo, who had previously worked for ITT, had recently been hired by Dominic Dalia to work at Intelnet, for compensation that included generous stock options. 15T437-439 (Tantillo).

Vogt was "very surprised" to learn of the existence of a signed RMPA (20T1581) because she had never heard that such a document existed, despite the fact that obtaining a signed RMPA was her responsibility (20T1583). Accordingly, Vogt immediately went to Tantillo's office and repeatedly questioned him about the source of the document. 20T1582 (Vogt); 15T463 (Tantillo). He would say only that he "found" the RMPA "in his files." 20T1581-1583 (Vogt); 15T460 (Tantillo). Vogt was "disappointed" and "confused"; she concluded that Tantillo was not being truthful about the circumstances surrounding the appearance of the RMPA. 20T1582-1583 (Vogt).

Vogt then asked Intelnet's President, Dominic Dalia, for an explanation of the appearance of the RMPA. 20T1584 (Vogt). Dalia simply laughed and said that Tantillo found it in his files. *Id.*

On December 3, 1997, Tantillo forwarded a copy of the signed RMPA to Kutak Rock, Intelnet's outside counsel on the Prudential deal. Da651-666. Tantillo's December 3, 1997 fax constitutes the earliest documentary evidence that Intelnet possessed a signed copy of the RMPA. The very next day, Kutak Rock faxed the signed RMPA to Chadbourne & Parke, attorneys for Prudential. Da682-697. Shortly thereafter, Tantillo met with litigation attorneys at Kutak Rock to discuss a possible lawsuit against defendants. 15T475-476. At the meeting, Tantillo repeated the story that he had found the RMPA in his files. *Id.* Ultimately, the Kutak Rock firm did not associate itself with this litigation.

7. The Litigation. On December 12, 1997, Intelnet filed the complaint in this action, contending that ITT and Starwood had violated the exclusivity provisions of the RMPA. Pa34-54. A copy of the RMPA, which was alleged to have been signed by Dalia and Danski on or about October 1, 1996, was attached to the complaint. Pa119-135. Having at the time no basis to doubt the legitimacy of the signatures on the agreement, defendants admitted in their answers that the RMPA had been signed on or about October 1, 1996. Pa236.

Discovery in the case did not begin in earnest until the middle of 2001, with depositions commencing in September of 2002. In January 2003, defendants deposed Margaret Vogt, who recounted

the suspicious circumstances surrounding Tim Tantillo's "discovery" of the RMPA in December 1997. Pa5837-38; Pa5841-42; Pa5849-51. Defendants also learned through discovery that, in the Fall of 1997, Dominic Dalia secretly had offered Danski a job at one of Intelnet's affiliates. See Pa1372 (letter from Intelnet's outside counsel attaching draft employment agreement for Jon Danski).

In a November 2002 deposition, Tim Tantillo had claimed that he had been aware of a signed RMPA before he moved from ITT to Intelnet in the summer of 1997. See Pa5814, Pa5821-23. After the Vogt deposition, defendants confronted Tantillo with their suspicions. Pa1145. In June 2003, Tantillo recanted his deposition testimony and executed a certification stating that Dalia had provided him with a copy of a signed RMPA in late 1997 and had instructed him to say that he found the executed RMPA in his files. Pa1414-1415. Tantillo was represented by his own counsel when he gave this recantation. Pa1404.

Defendants then confronted Danski with Tantillo's admission. Pa1170. In July 2003, Danski recanted his prior deposition testimony and signed an affidavit stating that Dalia induced him to sign the RMPA, without ITT's authorization, after Prudential suspended the road show. Pa1075-1077. Danski, whose tenure with ITT was to end with the Starwood takeover, admitted that he was influenced by the prospect of substantial financial rewards from Dalia's promises of an equity position in his companies. Pa1077,

Pa1061-062. Danski was represented by his own counsel when he gave this recantation. Pa1078.

In October 2003, both Tantillo and Danski gave deposition testimony confirming the statements in their certification and affidavit, respectively. Pa1049-54 (Danski); Pa1167-83 (Tantillo). Defendants sought and obtained court approval to amend their answers and interrogatory responses (Pa16-17); they also dismissed their counterclaims, which had presumed the existence of a validly executed RMPA. Pa337-380.

7. The Summary Judgment Rulings. In December 2003, defendants moved for summary judgment with respect to Intelnet's claims under the C+ Agreement. The court granted that motion, holding that the agreement "is not binding upon ITT parent or any of the other ITT affiliates except to the signatory corporation." 13T22. According to the court:

It is clear and unambiguous that ITT, the parent, was not a party to the C-Plus agreement, and did not intend to be a party, or to be bound by it. There was no misleading. There was no fraud in the drafting, or redrafting of this agreement, and therefore there was no basis for piercing the corporate veil, nor any basis for an agency analysis.

The definitions section of the C-Plus agreement clearly establishes the various entities and their relationship to one another. No agency relationship appears in the document or the drafting history, and the drafting history makes it clear that none was intended, nor could it have reasonably been expected by the plaintiff. We have sophisticated parties on both sides.

Da61.

Defendants also sought summary judgment with respect to Intelnet's claims under the RMPA, proffering the overwhelming

evidence that the agreement was a sham. In the alternative, defendants requested an evidentiary hearing to address the circumstances surrounding the execution of the RMPA. Invoking New Jersey Rule 4:46-3(b), the court decided to conduct an immediate trial on the issue of the RMPA's validity. Pa6-8.

9. The Trial Regarding The RMPA. The single-issue trial concerning the RMPA was conducted over 23 days. Because the RMPA contained a broad waiver of the parties' jury trial rights (Pa129), the court conducted the trial without a jury.

At the trial, Jon Danski testified that Dominic Dalia pressured him to sign the RMPA after the Sheraton.net press release, without authorization from ITT, in order to help Dalia persuade Prudential to resume the junk bond offering. 18T1121-1134, 1134-1135. Danski was susceptible to Dalia's persuasion for two reasons: he had developed a close personal relationship with Dalia, and Dalia had invited Danski to join Intelnet upon leaving ITT, with the understanding that Danski would receive a substantial equity stake in the company. 18T1035-1047.

According to Danski, Dalia persuaded him to sign the RMPA while the two men met over dinner at a restaurant in midtown Manhattan. 18T1134-1135. Danski testified:

I told him that I was not authorized to sign any new agreements with Intelnet at this time, that my hands were tied.³ Mr. Dalia then said something to the

³ Danski's understanding that he lacked authority to enter into any new agreement with Intelnet was well-founded because, among other reasons, Intelnet had not demonstrated its ability to perform. In January 1997, for example, Intelnet had been given the opportunity to prove its capabilities by demonstrating its

(cont'd)

effect, then you need to do something for me, you need to give me something to satisfy the bankers. He said, if I do not get this financing, my company could go out of business and my family is so closely tied to the business that it would be devastating to them. He then said it would also be devastating to me. I told him if I did what he was asking me to do that I could lose my job and lose everything I stood to gain from the sale of ITT. **He then said that no one but the bankers would see the document, that certainly no one from ITT would see the document.** We continued talking and eating and drinking through the evening, and at some point, I gave in to his request and agreed to sign the document.

Id. (emphasis added).

After dinner, the two men went to Danski's office, pulled the draft out of Danski's files, and signed it, making a copy thereafter. 17T930-934. Danski testified that he kept the signed original and that Dalia kept the copy (18T1122-1123) - a fact that explains why Intelnet was never able to produce a signed original of the RMPA.

Danski testified that he ended his relationship with Dalia when the signed RMPA was attached to the complaint filed in this case mere weeks after he had signed it. 18T1160-1162. Having breached his duties to ITT by impulsively signing the agreement without authority, however, Danski did not tell ITT or its attorneys the true circumstances surrounding the signing of the document. See 18T1163-1164. Among other things, Danski was afraid that he would lose the \$15 million "golden parachute" he

(... cont'd)

technology at the Sheraton New York hotel. The demonstration failed. See 17T1015-1016 (Danski); 15T425-426 (Tantillo). It is inconceivable that ITT would have given Intelnet broad exclusive rights to provide services to its properties a few months later.

was to receive upon leaving ITT if he revealed what he had done.
17T948-950.

Tim Tantillo testified at the trial that he had previously lied in stating that he had been aware of a signed RMPA while he was employed by ITT. Like Jon Danski, Tantillo had a considerable financial interest in Intelnet's success: in the Fall of 1997, he had left ITT and moved his family to southern New Jersey to join Intelnet, where he was to receive a handsome salary and a large number of stock options. 15T437-439. Tantillo testified that he had never seen or heard about a signed RMPA before December 3, 1997, when Dalia gave him a copy of the agreement and directed him to give it to Intelnet's in-house counsel, Margaret Vogt, and to say that he had found it in files he had supposedly taken with him when he left ITT. 15T458. According to Tantillo, Dalia also told him to give the signed RMPA to Kim Griffith at the law firm of Kutak Rock, which was working for Intelnet on the Prudential offering. *See id.*; Da651-666 (12/3/97 fax from T. Tantillo to K. Griffith attaching signed RMPA). Tantillo testified that he later telephoned Danski, who admitted that Dalia had just recently pressured him into signing the RMPA. 15T472.

The other evidence amply corroborated Danski's and Tantillo's testimony that the RMPA was signed without authorization after the suspension of the Prudential road show. As the court found, "no one saw a signed copy [of the RMPA] until after the road show in November of 1997. People who might in the ordinary course of business have been expected to see the

document did not." Da97. Furthermore, no documentary evidence indicated that a signed agreement existed before December 3, 1997, when Tantillo sent a copy of the agreement to Kutak Rock.

Although the RMPA would have been an extraordinarily important agreement widely known within a small company like Intelnet, no one from Intelnet (other than Dalia) claimed to have seen the agreement until after the Prudential road show was suspended. As noted above, Intelnet's in-house counsel Margaret Vogt was stunned when, in December 1997, Tantillo and Dalia claimed that Tantillo had discovered an executed RMPA in his files. See 20T1506-1507, 20T1581-1585. Other persons associated with Intelnet, who would have been expected to know about a signed RMPA if such a document existed, but could not say that they had seen such a document before December 1997, included Intelnet's CFO Vernon Oberholtzer (21T1782), Intelnet's Director of Sales and Marketing C.J. Brunet (21T1949), Intelnet's general counsel Stuart Wilkins (23T2536-2542), and Intelnet's outside financial advisor Barry Sloane (3T45-47, 3T296-297). All of these individuals were involved in efforts to obtain financing for Intelnet and were familiar with both the MPA and the C+ Agreement, but were not aware of an executed RMPA.

The evidence at trial also established that Intelnet failed to provide the RMPA to any of the companies from which it sought financing. Intelnet never included the RMPA on the lists of contracts that it provided to potential investors, investment bankers, and their lawyers, even though the MPA and the C+

Agreement, as well as other far less important contracts were provided to them. See Da308-355 (5/1/97 Akin, Gump, Strauss, Hauer & Feld LLP "Preliminary Due Diligence Report" does not mention RMPA); Da226-307 (5/97 Smith Barney Confidential Offering Memorandum does not mention RMPA); Da364-369 (8/26/97 letter from S. Wilkins to D. Beimfohr listing material contracts provided to Lehman Brothers does not mention RMPA); Da410-477 (9/29/97 letter from S. Wilkins to S. Benfield and S. Van Esche does not include RMPA on list of material contracts provided to Prudential); Da484-569 (11/7/97 Prudential offering memorandum does not mention the RMPA); 20T1572-1574 (Intelnet's in-house counsel Margaret Vogt did not give RMPA to investment banks but would have done so if it had existed); 7T92 (Sandra Van Esche, outside counsel to Prudential, was not shown a copy of the RMPA during the due diligence review); 4T164, 4T172 (Kimball Griffith, outside counsel to Intelnet on Prudential deal, never saw or heard about a signed RMPA until December 3, 1997).

This circumstantial evidence refuting the existence of a signed RMPA was particularly telling, as both Lehman Brothers and Prudential had questioned ITT's contractual commitment to Intelnet. See 4T222-224 (Kimball Griffith testifies that Prudential would have preferred a stronger agreement between ITT and Intelnet); 8T94-96 (Prudential employee Steven Benfield testifies that he had doubts about whether ITT was contractually committed to taking services from Intelnet); Da386-387 (memorandum regarding 9/3/97 meeting states that Prudential's

outside counsel Claude Serfilippi expressed doubt about strength of the C+ Agreement, stating that "ITT Corp. does not appear to commit to buying service from Intelnet"); 15T445 (Tantillo recounts Claude Serfilippi's concern that the C+ Agreement had "no teeth"). The RMPA, if it then existed, would have assuaged those concerns.

There also was "no evidence that a signed RMPA was ever circulated to anyone at ITT." Da90. Patrick Donnelly, the ITT lawyer responsible for negotiating the agreement, testified that he "never knew [the RMPA] was signed" and was "surprised" to see a signed copy after the lawsuit was filed. 1T332 (Donnelly). The other "key people [at ITT] who should have known" about a signed RMPA were "shocked to find out" after the lawsuit was filed that such a contract existed. 33T4524 (Mandell).

In the end, only one person testified to having seen a signed RMPA prior to December 1997: Intelnet CEO Dominic Dalia. See 38T4965. Although in prior deposition testimony Dalia had been unable to remember when or under what circumstances he signed the RMPA (Pa1293-1322), he testified for the first time at the trial that he and Danski signed the RMPA (which was dated "as of" October 1, 1996) at a charity gala on May 8, 1997. Da95. Dalia's contention was in conflict with other evidence and was riddled with internal inconsistencies.

For example, on May 9, 1997 - the very next day after the RMPA supposedly was signed - Dalia met with representatives of Lehman Brothers for three-and-a-half hours without revealing the

supposedly newly-signed RMPA, even though Intelnet's contracts were discussed at the meeting (see Da706) and Dalia testified that he had transferred the agreement to his briefcase upon returning home after the Gala. See 28T3566. Dalia never disclosed the alleged agreement to Lehman Brothers during the ensuing months, even when Lehman Brothers asked Dalia to try to get an amendment to the C+ Agreement that would bind ITT Corporation. See Da96. Dalia's explanation for his failure to provide the RMPA - that the agreement "was not exactly what Lehman wanted" - was found by the court to be "not . . . credible." *Id.*

After carefully considering the evidence, the court found that the RMPA had not existed prior to December 1997 but had instead been signed following the suspension of the Prudential road show, in an attempt to save the Prudential junk bond offering. Da99. Accordingly, it dismissed Intelnet's claims under the RMPA, as well as Intelnet's related tort claims.

PRELIMINARY STATEMENT

Intelnet came into court seeking millions of dollars in damages allegedly caused by defendants' breach of exclusive purchase obligations contained in the RMPA. Later, Intelnet added a claim that defendants violated exclusive purchase obligations allegedly imposed by the C+ Agreement - an operating agreement for the C+ joint venture which no defendant had signed. The court below concluded on summary judgment that the C+ Agreement did not bind any defendant, and that Intelnet's construction of the C+ Agreement to impose purchase obligations

on ITT entities was unfounded. After a trial, the court found that the RMPA was fraudulently executed, without authorization by ITT, just a few weeks before the lawsuit was filed, and after the event that allegedly breached it.

Intelnet's unclean hands and its commission of fraud upon the court in suing under the RMPA justify dismissal of the entire action. Even disregarding Intelnet's abuse of the judicial system, however, the lower court's dismissal of Intelnet's claims clearly was correct.

1. Defendants were entitled to summary judgment with respect to Intelnet's claim for breach of the C+ Agreement. Because no defendant signed the C+ Agreement, no defendant was bound by the agreement. The unambiguous terms of the C+ Agreement further establish that it was merely an operating agreement for the Concierge Plus joint venture that did not require any ITT-related entity to purchase Intelnet's services.

The lower court was correct in rejecting Intelnet's argument that it should impose obligations on defendants not found in the contract's unambiguous language based on statements made after the contract was executed. The court also was right to conclude that Intelnet's various theories for binding the non-signatories - veil-piercing, agency, and ratification - were baseless.

The lower court's other decisions relating to the C+ Agreement - which are moot unless this Court reverses the order dismissing those claims on summary judgment - also were correct. First, Intelnet's claims related to the C+ Agreement carried no

jury trial right, both because those claims were principally equitable or were ancillary to equitable claims, and because the C+ Agreement contains an express waiver of the right to a jury trial. Second, the court did not abuse its discretion in rejecting Intelnet's request to amend its complaint to raise a damages claim for breach of the C+ Agreement. Intelnet chose to eschew a damages claim under the C+ Agreement in order to avoid the contract's arbitration clause, and it was not entitled to reverse course once it had reaped the benefits of that strategy. The court also acted within its discretion in ruling that it was too late for Intelnet to raise new tort claims.

2. The trial court's decisions relating to the RMPA also should be affirmed. First, in light of new evidence that the RMPA was fraudulently executed without authority late in 1997, the court did not abuse its discretion in allowing defendants to amend their answers in order to withdraw their prior, erroneous admissions that the RMPA was signed on or about October 1, 1996.

Second, Intelnet was not entitled to a jury determination regarding the timing and circumstances of the signing of the RMPA. The RMPA contains an express waiver of the parties' right to trial by jury, and Intelnet may not avoid that provision while seeking to enforce the other terms of the alleged contract.

Third, the court's conclusion that Intelnet did not meet its burden of demonstrating the existence of a validly-executed RMPA was amply supported by the evidence. That evidence included (1) the complete absence of any reference, in any document, to a

signed RMPA before December 3, 1997; (2) the testimony of Intelnet and ITT witnesses that they were unaware of a signed RMPA until late in 1997; (3) Intelnet's failure to disclose the RMPA to the investment banks from which it was seeking financing, even when the banks were seeking confirmation that ITT was contractually bound to purchase services from Intelnet; (4) the testimony of ITT employee Jon Danski that he signed the RMPA late in 1997 at Dominic Dalia's urging, without authorization from ITT, in order to help Intelnet revive its efforts to obtain financing; (5) the testimony of Intelnet employee Tim Tantillo that Dominic Dalia gave him the signed RMPA in early December 1997 and instructed him to give it to Intelnet's in-house lawyer Margaret Vogt with the untruthful explanation that he had found it in his files; and (6) Vogt's testimony that Tantillo's and Dalia's explanation for the sudden appearance of the signed RMPA was not credible. Indeed, the court's conclusion that the RMPA was fraudulently executed late in 1997 without any authorization from ITT is the only one supportable on this record.

3. Finally, in the event that this Court reverses the lower court's order dismissing Intelnet's claims related to the C+ Agreement, and reverses the order striking Intelnet's jury demand with respect to such claims, then defendants appeal the order denying their motion to compel arbitration. If Intelnet is permitted to raise non-equitable claims relating to the C+ Agreement on remand, then such claims should be referred for

mandatory arbitration under the C+ Agreement's broad arbitration clause.

ARGUMENT

I. THE COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS WITH RESPECT TO INTELNET'S CLAIMS UNDER THE C+ AGREEMENT

This Court reviews the trial court's grant of summary judgment *de novo*, applying the same legal standard as the trial court applied. See *Turner v. Wong*, 363 N.J. Super. 186, 198-99, (App. Div. 2003). A moving party is entitled to summary judgment if there is no genuine issue as to any material fact. See New Jersey R. 4:46-2(c). "[A] determination 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." *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995).

"[A] court should deny a summary judgment motion *only* where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" *Id.* at 529. When the language of a contract is clear and unambiguous, or the facts needed to interpret the contract are not in genuine dispute, the interpretation of a contract is a question of law for the court and is appropriate for summary judgment. See *Fastenberg v. Prudential Ins. Co. of Am.*, 309 N.J.

Super. 415, 420 (App. Div. 1998); *Newark Publishers Ass'n v. Newark Typographical Union No. 103*, 22 N.J. 419, 427 (1956).

As the Superior Court judge who was then handling this case observed more than six years ago, Intelnet elected not to sue ITT Intelnet, the ITT subsidiary that signed the C+ Agreement. See Da28 ("the party who signed the [C+ Agreement] was not a party to the suit"). Instead, Intelnet chose to sue ITT, Sheraton, and Starwood - none of which was a party to the contract.

Because Intelnet did not sue the entity with which it contracted, defendants were entitled to summary judgment with respect to Intelnet's claim under the C+ Agreement. As the court concluded, it "clear and unambiguous that ITT, the parent, was not a party to the C-Plus agreement, and did not intend to be a party, or to be bound by it." Da61. The court also found that "there was no basis for piercing the corporate veil, nor any basis for an agency analysis." *Id.* As we discuss below, those conclusions plainly were correct.

A. The Lower Court Correctly Concluded That The C+ Agreement Unambiguously Bound Only Its Signatories And Did Not Require Any ITT Property To Use Intelnet's Services

It is firmly established that "a contract binds no one but the parties to it, and an action on a contract cannot be maintained against a person who is not a party to the contract." 17B C.J.S. Contracts § 630 (2002). See *Comly v. First Camden Nat'l Bank & Trust Co.*, 22 N.J. Misc. 123, 127 (1944) ("as a general rule an action on a contract cannot be maintained against a person who is not a party to it"). As the lower court

correctly concluded, the unambiguous language of the C+ Agreement demonstrates that the defendants are not parties to the C+ Agreement and therefore cannot be held liable for breaching it.

ITT and Sheraton indisputably are not parties to the C+ Agreement. The preamble identifies the parties to the contract as Intelnet and ITT Intelnet. Pa55. The Agreement was signed by Dominic Dalia, as president of Intelnet, and Jon Danski, as President of ITT Intelnet. Pa82. The "Members" of the limited liability company formed by the Agreement are Intelnet and ITT Intelnet. Pa58. The Agreement contains representations and warranties by Intelnet and ITT Intelnet (Pa65-67 (¶¶ 5.1 & 5.2)), and covenants of Intelnet and ITT Intelnet (Pa68-70 (¶¶ 6.3 & 6.4)), but no representations, warranties or covenants of ITT Corporation or Sheraton. The provisions establishing a party's rights in the event of default and the provisions governing the resolution of disputes apply solely to the "Members" of the limited liability company (Pa78-79; Pa81-82 (¶¶ 11.4 & 12.12)), Intelnet and ITT Intelnet. Pa58. In this respect, the contract could not be any more clear.

Intelnet concedes that neither ITT nor Sheraton signed the C+ Agreement. It nonetheless contends that Paragraphs 2.5(b) and 6.3(b) of the Agreement - in which the parties purport to incur certain obligations "on behalf of [themselves] and [their] Affiliates" - "bind[] ITT and Sheraton to exclusively take services from Intelnet (through Concierge Plus)." Pb20. The court

below had little difficulty concluding that this "was not the agreement." Da60. That was correct for two independent reasons.

a. First, the court correctly rejected the proposition that the references within the C+ Agreement to ITT Intelnet's "Affiliates" made the agreement binding on ITT. Contract language indicating that a contracting party acts "on behalf of" a non-party does not, by itself, make a contract binding on that person, because such language is insufficient to imbue the contracting party with the authority to bind the non-party. See *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l., Inc.*, 758 F. Supp. 908, 920 (S.D.N.Y. 1991) (contract provision in which subsidiary purported to undertake obligations "on behalf of" parent did not bind parent to the agreement when the parent was not a named party; "the use of the phrase 'on behalf of' does not in itself establish an agency relationship, particularly in the absence of specific language of agency");⁴ *Gen. Auth. for Supply Commodities v. S.S. Capetan Costis I*, 631 F. Supp. 1488, 1490 (S.D.N.Y. 1986) (absent express statement that signatory had signed the contract as plaintiff's agent, language indicating that signatory was chartering a vessel 'on behalf of' plaintiff did not bind plaintiff to the contract).

As we discuss further below (at 43-46), the evidence contradicts any inference that ITT Intelnet was acting as ITT's actual or apparent agent when it signed the C+ Agreement.

⁴ The *Carte Blanche* case, upon which the court below relied (Da61), is consistent with New Jersey's law of agency. See pages 43-45, *infra*.

Accordingly, the references to "Affiliates" within the Agreement do not impose binding obligations on ITT.

b. Second, the court correctly rejected Intelnet's argument that Paragraphs 2.5(b) and 6.3(b) gave Concierge Plus the exclusive right to provide services to all ITT properties, if they were to have any service at all. 13T20. See Da724. The court found such a construction without support in the contract's express language.

The so-called "exclusivity provisions" of the C+ Agreement contain no language requiring the use of the Concierge Plus services in any ITT hotel, office building, or casino. Paragraph 2.5 of the C+ Agreement provided that ISNA (an Intelnet affiliate wholly owned by Dominic Dalia) would be the exclusive provider of services to the **Concierge Plus LLC**, not to any ITT entity or property. The provision further states that ITT Intelnet will "not market or promote services to customers which compete directly with the services provided by the LLC **to the extent such services are provided by the LLC.**" Pa61 (emphasis added). This provision plainly did not mandate ITT entities to purchase services from Intelnet. As the court explained, ITT Intelnet merely "agreed not to promote another provider **while Intelnet was providing services.** It was not a guarantee that Intelnet would be given the contract." 13T20 (emphasis added).

In Paragraph 6.3 of the C+ Agreement, ITT Intelnet agreed to use "reasonable efforts to promote the Project to **the employees of ITT [Corporation]** residing within the United States,"

including by delivering "a marketing package promoting the Project." Pa68 (emphasis added). Later in the same paragraph, ITT Intelnet "and its Affiliates" agree, "[s]ubject to the terms and conditions" of the C+ Agreement, "that they will not sell to, promote or endorse to their respective customers any other long distance, cellular, local telephone service program or power, media or cable services." *Id.* As the other provisions thus referred to make clear, this limitation on promotion of competing services applied **only to the extent that Intelnet was actually providing services**. It did not oblige any ITT entity to award Intelnet a contract to provide services to its properties in the first instance. Indeed, if Paragraph 6.3 **required** ITT entities to use Intelnet as their exclusive provider of the services at issue, the requirement that ITT Intelnet use its "best efforts" to persuade ITT employees to use the joint venture would be nonsensical.

Intelnet contends that this interpretation renders the exclusivity clauses of Sections 2.5(b) and 6.3(b) of the C+ Agreement (and, indeed, the entire C+ Agreement) "utterly meaningless." Pb22. That is not so. The C+ Agreement served its expressly-stated purpose of "forming a limited liability company to jointly develop and market [the listed services] to ITT's customers and employees and to exploit such products and services to those Persons and industries" set forth in the Agreement. Pa55. The profit-sharing established by the LLC gave ITT Intelnet financial incentives to promote the joint venture.

At the same time, Sections 2.5(b) and 6.3(b) obliged ITT Intelnet to use "best efforts" to promote the joint venture's services to the employees of ITT Corporation, and forbade ITT Intelnet from promoting a competing provider "to the extent such services are provided by the LLC." Pa68. These provisions clearly had meaning, even though they did not bind ITT Corporation or Sheraton or require ITT properties to use the joint venture's services.

Thus, the trial court properly rejected Intelnet's effort to transform the C+ Agreement - an operating agreement under which Intelnet and a newly-formed subsidiary of ITT were to share profits in an untested joint venture - into an agreement binding ITT and Sheraton to use Intelnet's services exclusively in all their hundreds of properties. That decision should be affirmed.

B. The Trial Court Did Not Misapply The Parol Evidence Rule

1. Finding no sufficient basis for its construction of the C+ Agreement in the language of the contract, Intelnet resorts to evidence outside the contract to support its position. It contends that, after the C+ Agreement was executed, certain ITT and Sheraton employees made statements to one another and to third parties indicating that they "believed ITT and its affiliates were bound" by the contract. Pb25. As the court correctly concluded, however, such evidence was incapable of creating a factual issue precluding summary judgment for defendants when it was "clear and unambiguous" on the face of the contract "that ITT, the parent, was not a party to the C-Plus

agreement, and did not intend to be a party, or to be bound by it." Da61.

As the court explained (*id.*), the parol evidence rule bars consideration of extrinsic evidence for the purpose of altering the express terms of a contract. See *Harker v. McKissock*, 12 N.J. 310, 321-22 (1953); *Atl. N. Airlines, Inc. v. Schwimmer*, 12 N.J. 293, 301-302 (1953); *Cent. Hanover Bank & Trust Co. v. Herbert*, 1 N.J. 426 (1949). When a contract contains an integration clause, as does the C+ Agreement (Pa81), the presumption that the written contract reflects the entire agreement between the parties is "nearly dispositive." *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 191 (2d Cir. 2001) (applying New Jersey law).

More specifically, parol evidence cannot be used to show that the person signing an agreement in fact was acting on behalf of another party. See *Randolph v. Gen. Inv. Co.*, 97 N.J. Eq. 493, 497 (Ch. 1925) ("it cannot be shown by parol that an alleged agent, who is stated in the body of the contract to be a party thereto, and who signed the instrument as a principal, in fact signed as agent for another, thus converting a contract, which on its face is his own, into the contract of his alleged principal"). See also *Schenck v. Spring Lake Beach Improvement Co.*, 47 N.J. Eq. 44, 49-50 (Ch. 1890) (parol evidence inadmissible to show that signatory entered into the agreement for defendant company); *Int'l Customs Assocs., Inc. v. Ford Motor Co.*, 893 F. Supp. 1251, 1256 (S.D.N.Y. 1995) (parol evidence inadmissible to show that Ford was party to contract with

plaintiff signed by Ford's subsidiary) (New York law). The evidence upon which Intelnet relies plainly is covered by the parol evidence rule, and cannot be employed to alter the unambiguous terms of the C+ Agreement.⁵

Intelnet argues that the parol evidence rule "does not preclude evidence of agreements or conduct made **subsequent** to the contract." Pb27. The cases upon which Intelnet relies, however, concern the *amendment* of contracts following execution. See,

⁵ In support of its argument that the C+ Agreement was binding on defendants, Intelnet cites evidence that Danski wrote letters to telecommunications carriers stating that Concierge Plus had been appointed ITT's exclusive provider of telephone services. Pb23. The letters were drafted by Dominic Dalia and sent at his request in order to facilitate Intelnet's dealings with vendors. See 17T1033 (Danski) ("I was trying . . . to get them to work with Mr. Dalia so he could negotiate on our behalf rate reductions and he could prove what kind of rate reductions he could get for us."); 28T3156 (Dalia) ("we had been asking for [the letters] for quite some time . . . because we had to start negotiating discounts"). They shed no light on the actual terms of the C+ Agreement.

Intelnet also cites (Pb23-24) isolated remarks by Sheraton employees reflecting generalized concern about the contractual commitments made to Intelnet. See, e.g., Pa2464 ("We do not trust Intelnet - we want out of the agreement we never supported and you signed it."). Such comments - by laypersons who for the most part had not even read the C+ Agreement - plainly cannot be used to impose obligations on ITT that do not appear on the face of the contract.

Finally, Intelnet contends that Prudential would not have extended the bridge loan unless "it reasonably believed, after reviewing the C+ Agreement, conducting extensive due diligence, and speaking with Danski, that ITT was bound by that agreement and was committed to honoring its obligations under that contract." Pb24. Obviously, speculative inferences regarding a third party's views of the meaning of the C+ Agreement cannot justify departing from the written contract's express terms. Here, moreover, the evidence was that Prudential decided to extend Intelnet the bridge loan **despite** the concerns of its lawyers that the C+ Agreement "had no teeth." 15T445.

e.g., *Emerson N.Y.-N.J., Inc. v. Brookwood Television, Inc.*, 122 N.J. Super. 288, 292 (Law Div. 1973) (parol evidence rule does not "preclude evidence of **agreements made subsequent to the writing**") (emphasis added). Because Intelnet does not argue that the C+ Agreement was amended after it was signed, the cases are inapposite.

2. Conversely, Intelnet argues that the court violated the parol evidence rule by considering the negotiating history of the C+ Agreement in construing the agreement. See, e.g., Pb27. In fact, the court had no need to refer to extrinsic evidence to interpret the contract, which it found, in relevant respects, to be "clear and unambiguous." Da61. The court adverted to the contract's negotiating history only for the purpose of explaining its rejection of Intelnet's veil-piercing and agency theories. See *id.* ("There was no fraud in the drafting . . . of this agreement, and therefore there was no basis for piercing the corporate veil. . . . No agency relationship appears in the document or the drafting history, and the drafting history makes it clear that none was intended, nor could it reasonably have been expected by the plaintiff."). Thus, contrary to Intelnet's arguments, the lower court applied the parol evidence rule properly and consistently.

D. The Court Correctly Rejected Intelnet's Veil-Piercing Argument

Intelnet contends that "ITT Intelnet was a myth, not a real corporation, and that injustice will result if ITT is not bound" by the C+ Agreement. Pb30. The undisputed evidence showed,

however, that Intelnet knew full well that it was entering into an agreement with a wholly-owned subsidiary that had been created by ITT for the purposes of shielding ITT itself from any liability in connection with the joint venture. Accordingly, the court below properly concluded that there was no basis to disregard the separate corporate identities of ITT and ITT Intelnet.

1. As a preliminary matter, Intelnet contends that the court erred in applying New Jersey law to the veil-piercing issue rather than the law of Delaware, ITT Intelnet's state of incorporation. Pb29. In fact, courts applying New Jersey's choice-of-law rules decide such questions under the law of the state having the most significant interest in the litigation. See *Coyer v. Hemmer*, 901 F. Supp. 872, 881-82 (D.N.J. 1995) (applying New Jersey law to veil-piercing analysis where the relevant entity was incorporated in Delaware); see also Jennifer J. Johnson, *Risky Business: Choice-of-Law and the Unincorporated Entity*, 1 J. Small & Emerging Bus. L. 249, n.91 (Winter 1997). In this case, because Intelnet's principal place of business is in New Jersey, the contracts are governed by New Jersey law, and much of the relevant conduct occurred in New Jersey, New Jersey had a very significant interest in the litigation, while Delaware had no demonstrated interest in the matter. The court's decision to apply New Jersey law accordingly was proper.

2. New Jersey law adheres firmly to the principle that a corporation is a separate entity from its shareholders. See *State*

Dep't of Env'tl. Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983); *Lyon v. Barrett*, 89 N.J. 294, 300 (1982). New Jersey courts also recognize "that a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." *Ventron*, 94 N.J. at 500. "Even in the case of a parent corporation and its wholly owned subsidiary," therefore, "limited liability normally will not be abrogated." *Id.*; see also *OTR Assocs. v. IBC Servs., Inc.*, 353 N.J. Super. 48, 52 (App. Div. 2002).

In order to pierce the corporate veil under New Jersey law, a court must find (1) that the parent so dominated the subsidiary that it had no separate existence and was merely a conduit for the parent, **and** (2) that the parent corporation used the subsidiary to perpetrate a fraud or injustice or otherwise circumvent the law. See *Ventron*, 94 N.J. at 500; *OTR Assocs.*, 353 N.J. Super. at 52; *Seltzer v. I.C. Optics, Ltd.*, 339 F. Supp. 2d 601, 611 (D.N.J. 2004); *Major League Baseball Promotion Corp. v. Colour-Tex, Inc.*, 729 F. Supp. 1035, 1047 (D.N.J. 1990). The party seeking to pierce the corporate veil bears the burden of proving that corporate separateness should be disregarded. See *Tung v. Briant Park Homes, Inc.*, 287 N.J. Super. 232, 240 (App. Div. 1996); *Touch of Class Leasing v. Mercedes-Benz Credit of Can., Inc.*, 248 N.J. Super. 426, 441 (App. Div. 1991).

Intelnet makes three arguments for disregarding the distinct corporate identities of ITT and ITT Intelnet. *First*, Intelnet contends that ITT "misled Intelnet with respect to its intent to

be bound by the exclusivity provisions of the C+ Agreement." Pb32. According to Intelnet, Jon Danski told Stuart Wilkins and Dominic Dalia of Intelnet that ITT "would regard itself as bound by, and would honor, the exclusivity obligations" in the contract. *Id.* Intelnet also contends that Danski "encouraged Intelnet to incur the \$15 million bridge loan from Prudential as a way to obtain financing for the ITT-Intelnet joint venture," thus "implicitly confirm[ing] his understanding that ITT stood behind the C+ Agreement." *Id.*

As the trial court found, however, ITT made it perfectly clear throughout the course of contract negotiations that it was unwilling to sign the C+ Agreement; that it was creating ITT Intelnet for the purpose of shielding itself from any liability in connection with the joint venture being created by the Agreement; and that it would not guarantee ITT Intelnet's performance under the Agreement. See pages 8-9, *supra*. Intelnet's CEO Dominic Dalia, a sophisticated businessman who was represented by counsel throughout the contract negotiations, was well aware that ITT Corporation had refused to become a party to the Agreement and that Intelnet was contracting with a wholly-owned subsidiary of ITT. See Pa 489, Pa519-520, Pa523-526, Pa537-539, Pa879. Indeed, Intelnet itself frequently incorporated wholly-owned subsidiaries. See Pa853, Pa496-503, Pa504-507, Pa551-554. Under the circumstances, no factfinder could reasonably conclude that ITT Intelnet reasonably relied on

isolated statements that ITT nonetheless would regard itself as contractually bound under the Agreement.

Similarly, ITT's encouragement and support for the joint venture is not grounds for treating ITT as though it was itself a party to the joint venture's operating agreement. It was hoped and anticipated that ITT would cooperate with the joint venture and promote the activities of its subsidiary ITT Intelnet. Evidence that it did so is not a basis for veil-piercing. See, e.g., *In re Chateaugay Corp.*, 139 B.R. 598, 601 (S.D.N.Y. 1992) (statement that subsidiary had parent's "full financial and management backing" did not justify holding parent liable under contract with subsidiary) (internal quotation marks omitted); *Scott-Douglas Corp. v. Greyhound Corp.*, 304 A.2d 309, 313 (Del. Super. Ct. 1973) (statements that Greyhound would be "behind [its subsidiary] legally, morally, spiritually, and financially" were insufficient to justify treating Greyhound as incurring obligations under its subsidiary's contract with plaintiff and did not support a claim that Greyhound fraudulently induced the plaintiff to enter into the agreement).

Second, Intelnet contends that ITT Intelnet was the mere alter ego of ITT and was totally dominated by its parent. Pb33. Corporate dominance alone, however, is not grounds for veil-piercing under New Jersey law. See *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 149 (3d Cir. 1988). "Even in the presence of corporate dominance, liability generally is imposed only when the parent has abused the privilege of incorporation by

using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law." *Ventron*, 94 N.J. at 501. See also, e.g., *Seltzer*, 339 F. Supp. 2d at 611 (rejecting alter ego theory because "nothing in the record indicates that [the parent] abused the parent/subsidiary relationship to perpetrate any criminal or tortious wrongdoing") (internal quotation marks omitted).

The undisputed evidence demonstrates that ITT Intelnet was not established "to perpetrate a fraud or injustice" but for the entirely legitimate business purpose of limiting ITT's potential liability in a new business venture. Having agreed to contract with ITT Intelnet rather than its parent, Intelnet may not rewrite the contract to bind ITT merely because it is disappointed with the bargain it made. See *Telecom Int'l*, 280 F.3d at 200 (applying New Jersey law) (rejecting counterclaimant AT&T's veil-piercing argument on summary judgment where AT&T knew that it was contracting with a subsidiary created for the purpose of limiting the parent's liability in a new venture).⁶

⁶ Courts in other jurisdictions apply the same rule. See, e.g., *Fisser v. Int'l Bank*, 282 F.2d 231, 239 (2d Cir. 1960) (no veil-piercing allowed where plaintiffs were informed that they would be contracting with a wholly-owned subsidiary rather than the parent and were aware of the subsidiary's financial condition yet did not obtain a guarantee or other assurance from the parent); *TNS Holdings, Inc. v. MKI Sec. Corp.*, 703 N.E. 2d 749, 751-52 (N.Y. 1998) (parent could not be found to have "perverted the privilege [of doing] business in a corporate form" where the parent conducted the contract negotiations but the plaintiff was aware that it was executing the agreement with the subsidiary); *Miller v. Dixon Indus. Corp.*, 513 A.2d 597, 604 (R.I. 1986) (trial court erred in piercing corporate veil with respect to employment contract signed by employee and subsidiary, even

(cont'd)

Finally, Intelnet contends that veil-piercing is justified because "ITT created an undercapitalized [subsidiary] that was effectively judgment-proof." Pb33. Under New Jersey law, however, one who enters into a contract with a corporate subsidiary with knowledge that it lacks substantial capital is not entitled to pierce the corporate veil on that basis. See *Telecom Int'l*, 280 F.3d at 200 (no veil-piercing under New Jersey law when parent corporation "created [a subsidiary] as a separate entity with only as much capital as then-currently needed" in order "to limit its potential losses from" its contract with AT&T "and AT&T knew it").⁷ Because Intelnet adduced no evidence of any false representation that ITT Intelnet would hold substantial capital, ITT Intelnet's level of capitalization is not a ground for veil-piercing.

In short, Intelnet knew full well when it executed the C+ Agreement that it was contracting with a wholly-owned subsidiary of ITT that had been newly formed for the purpose of engaging in the joint venture while insulating its parent from liability. See, e.g., Pa178. Having agreed to contract with ITT Intelnet,

(... cont'd)

though the parent negotiated the agreement; courts are "less likely to ignore corporate forms in contract cases when the plaintiff has made a knowing and deliberate choice" in dealing with a particular entity).

⁷ In another case very similar to this one, the Texas Court of Appeals refused to pierce the corporate veil between a corporation and its subsidiary when the plaintiff had entered into a contract with the subsidiary, with knowledge that it held minimal assets, even after the parent refused to guarantee the contract. See *Hanson Southwest Corp. v. Dal-Mac Constr. Co.*, 554 S.W.2d 712 (Tex. Civ. App. 1977).

Intelnet may not transform the agreement into one that imposes obligations on ITT under a veil-piercing theory. See *Telecom Int'l*, 280 F.3d at 200 (finding it to be "inconceivable that [plaintiff] should be allowed to satisfy its judgment by access to [defendant's] assets" when the plaintiff knew it was dealing with a subsidiary created for the purpose of limiting the parent's liability).⁸

D. The Court Correctly Rejected Intelnet's Agency Theory

Intelnet also argues that there existed a triable issue of fact as to whether Intelnet ITT "had actual or apparent authority to bind ITT [to] the exclusivity provisions" of the C+ Agreement. Pb34. Intelnet bases this argument on the fact that the contract was negotiated by ITT's officers, combined with the agreement's two references to ITT Intelnet's "Affiliates." Pb35-36. The lower court correctly rejected Intelnet's agency theory.

First, it is has long been settled in New Jersey that

every written contract made by an agent, in order to be binding on his principal, **must purport on its face to be made by the principal, and must be executed in his name, and not in the name of the agent**; and that, consequently, it cannot be shown by parol that an alleged agent, who is stated in the body of the contract to be a party thereto, and who signed the instrument as a principal, in fact signed as an agent for another, thus converting a contract, which on its face is his own, into the contract of his alleged principal.

⁸ For the same reason, Intelnet would not be entitled to pierce the corporate veil between ITT and ITT Intelnet even if Delaware law were applicable. Under Delaware law, "[p]iercing the corporate veil under the alter ego theory requires that the corporate structure cause fraud or similar injustice." *Wallace ex rel. Cencom Cable Income Partners II, L.P. v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999) (internal quotation marks omitted).

Randolph, 97 N.J. Eq. at 497 (emphasis added); see also *Jacobson v. Lambert*, 109 N.J. Eq. 88, 90-91 (Ch. 1931); *Le Grand Co. v. Richman*, 82 N.J. Eq. 481, 482 (Ch. 1913). It is undisputed that ITT Intelnet signed the contract in its own name, and not as ITT's agent. Because the contract does not "purport on its face to be made by [ITT]" and was not "executed in [ITT's] name" (*Randolph*, 97 N.J. Eq. at 497), Intelnet cannot proceed on an agency theory under New Jersey law.

Second, Intelnet presented no evidence whatsoever that ITT Intelnet actually was authorized to enter into the C+ Agreement on ITT's behalf. To the contrary, the undisputed facts showed that ITT created ITT Intelnet precisely because it was **unwilling** to become a party to that agreement.

Third, there was no basis for a ruling that ITT Intelnet had apparent authority to enter into the C+ Agreement on ITT's behalf. To establish that one party had "apparent authority" to act for another, New Jersey law requires "(1) that the appearance of authority has been created by the conduct of the alleged principal . . . (2) that a third party has relied on the agent's apparent authority to act for a principal . . . and (3) that the reliance was reasonable under the circumstances." *Mercer v. Weyerhaeuser Co.*, 324 N.J. Super. 290, 318 (App. Div. 1999) (citations omitted). "The acts or statements of the ostensible agent alone cannot serve to create an agency relationship on which third parties are entitled to rely." *Macaluso v. United States Life Ins. Co.*, 2004 WL 1497606, at *3 (S.D.N.Y. July 2,

2004). Instead, the **principal** must mislead the third party "into believing that the relationship or the authority exists." *Shadel v. Shell Oil Co.*, 195 N.J. Super. 311, 314 (Law Div. 1984).

As discussed above (at 30), the references within the C+ Agreement to ITT Intelnet's "Affiliates" do not demonstrate that ITT Intelnet had apparent authority to make commitments on behalf of ITT. See *Carte Blanche*, 758 F. Supp. at 919-20. Appearing in a contract that was signed only by ITT Intelnet, not ITT, those phrases are not "conduct of the alleged principal" (*Mercer*, 324 N.J. Super. at 318) capable of creating the appearance of authority.

The fact that the agreement was negotiated by ITT's as well as ITT Intelnet's officers also was insufficient to create an apparent agency, given that these same employees made it perfectly clear that ITT was creating a separate subsidiary to participate in the joint venture because ITT was unwilling to sign the contract. See *Seltzer*, 339 F. Supp. 2d at 610; *Bulletin Broadfaxing Network, Inc. v. Times Mirror Co.*, 1992 WL 121477 (D.D.C. May 13, 1992) (granting summary judgment to defendants on question of whether subsidiary had apparent authority to act for parent where plaintiff knew that the parent and subsidiary were separate corporations and the parent never stated expressly that the subsidiary was acting as its agent); *Dorksy Hodgson & Partners, Inc. v. Nat'l Council of Senior Citizens*, 766 A.2d 54 (D.C. 2001) (where defendant had insisted upon being replaced with its affiliate corporation as party to architectural

contract, plaintiff could not establish that the affiliate was acting as defendant's agent in signing the contract, although defendant procured funds for the project, had a close relationship with the affiliate, and regularly communicated with plaintiff regarding the project).

Moreover, Intelnet's representatives were told that ITT would not be a party to the contract, that ITT would not co-sign the contract, that ITT would not make representations or warranties within the contract, and that ITT would not guarantee the contract. Given that negotiating history, Intelnet's representatives could not reasonably have believed that ITT Intelnet had the authority to incur enforceable contractual obligations on behalf of its parent.

E. The Trial Court Correctly Rejected Intelnet's Ratification Argument

The court also was correct in rejecting Intelnet's ratification argument. Ratification occurs when a person affirms a prior act which purportedly was done on his account, but which did not bind him because it was unauthorized. See *Thermo Contracting Corp. v. Bank of N.J.*, 69 N.J. 352, 361 (1976). "The doctrine of ratification is not applicable except where an agent has assumed to act for a principal, but without authority." *Brown Realty Co. v. Myers*, 89 N.J.L. 247, 249 (1916).

Neither element of ratification was present here. First, ITT Intelnet did not purport to act as ITT's agent in signing the C+ Agreement. To the contrary, Danski explicitly executed the C+ Agreement on behalf of ITT Intelnet only, after ITT expressly

refused to become a party to the contract. Second, ITT never thereafter affirmed that ITT Intelnet had signed the contract on its behalf. Instead, ITT refused Intelnet's repeated requests that it guarantee ITT Intelnet's obligations under the C+ Agreement. Thus, the ratification doctrine is totally inapplicable.

F. Intelnet's Fraud On the Court And Its Unclean Hands Also Justify Dismissal of Its Claims Under the C+ Agreement.

Although the trial court correctly determined that Intelnet's claim for breach of the C+ Agreement was meritless, Intelnet's misconduct in this action provides an alternative ground for affirming the dismissal of that claim.

In suing under a contract that it knew had been executed, without authorization by ITT, after the allegedly breaching event, Intelnet committed fraud upon the court justifying dismissal of the entire action. See *Rosenblit v. Zimmerman*, 166 N.J. 391, 402-403 (2001) (discussing court's power to dismiss action as a sanction for litigation misconduct); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1122 (1st Cir. 1989); *Perna v. Elec. Data Sys. Corp.*, 916 F. Supp. 388, 397 (D.N.J. 1995). Intelnet also came into court with "unclean hands," barring its equitable claim to enforce the C+ Agreement. See *Kingsdorf v. Kingsdorf*, 351 N.J. Super. 144, 156 (App. Div. 2002) ("[a] suitor in equity must come into court with clean hands and he must keep them clean after his entry and throughout the proceedings") (internal quotation marks omitted); *Pollino v. Pollino*, 39 N.J. Super. 294,

299 (Ch. Div. 1956) ("where the unclean hands of the plaintiff has infected the very subject matter in litigation, the plaintiff is barred from relief in a court of equity").

II. THE TRIAL COURT DID NOT IMPROPERLY DENY INTELNET A JURY TRIAL

Intelnet contends that the trial court improperly deprived it of its jury trial right by conducting a bench trial on the validity of the RMPA. Pb41. Intelnet also contends (Pb43) that the court improperly struck its jury demand with respect to its claims relating to the C+ Agreement - a moot issue unless this Court reverses the trial court's order dismissing those claims on summary judgment. As we discuss below, Intelnet was not entitled to a jury trial on any of its claims.

A. Intelnet's Express Waiver Of Its Right To A Jury Trial For All Disputes Under Or Relating To The RMPA Includes Disputes Regarding The Validity Of The Contract

The right to a jury trial may be waived by contract as long as the waiver is knowing and intentional. See *Fairfield Leasing Corp. v. Techni-Graphics, Inc.*, 256 N.J. Super. 538, 540-41 (Law Div. 1992) (citing *Sexton v. Newark Dist. Tel. Co.*, 84 N.J.L. 85, 101 (1913), *aff'd*, 86 N.J.L. 701 (1914)); *Franklin Disc. Co. v. Ford*, 27 N.J. 473, 492-93 (1958). A jury waiver is deemed knowing and intentional when the parties were "represented by counsel or there was evidence of negotiation without substantial inequality in bargaining positions, or the waiver provision was conspicuous." *Fairfield Leasing Corp.*, 256 N.J. Super. at 542.

The trial court ruled that Intelnet was not entitled to a jury trial with respect to its claims under the RMPA because that

purported agreement "contains a clear . . . jury waiver clause."

Da55. In the section entitled "Governing Law," the RMPA states:

This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey and the parties consent to the venue and jurisdiction of any federal district court having subject matter jurisdiction with respect to any dispute arising under or relating to this Agreement. THE PARTIES KNOWINGLY AND INTENTIONALLY WAIVE THEIR RIGHTS TO A JURY TRIAL.

Pa129. Intelnet does not dispute that this provision qualifies as the "knowing and intentional" waiver of the jury trial right in all disputes "arising under or relating to" the RMPA, and that it includes both contract and tort claims relating to the RMPA.⁹

Although Intelnet does not challenge the validity of the waiver as a general matter, it nonetheless contends that the trial court erred "in enforcing the jury trial waiver clause in the RMPA before it determined whether the RMPA was a valid and enforceable agreement." Pb42-43. There is no basis for that argument.

First, there is no textual basis for any contention that disputes about the enforceability of the RMPA are excluded from the jury trial waiver. The provision covers all disputes "under" or "relat[ed] to" the RMPA. Pa129. Issues that go to the contract's validity clearly "relate[] to" the RMPA, and hence are covered by the provision.

Second, Intelnet offers no support for its position that the plaintiff in an action seeking to **enforce** a contract may avoid a

⁹ Counts I, II, III, V, VI, and VII of the First Amended Complaint all are either "under or relat[ed] to" the RMPA. See Pa286-294.

jury waiver within the contract simply because the defendant disputes the contract's validity. The two cases that Intelnet cites (at Pb41-42) do not support that position. *Gevers v. Wrights Ex'rs*, 18 N.J. Eq. 330, 334 (Ch. 1867) - an ancient decision concerning the enforceability of a voluntary promise to give after-acquired property to children - is entirely irrelevant. In the other case, *Battle v. General Cellulose Co.*, 23 N.J. 538 (1957), the court ruled that "[t]he one who **denies** the existence of [a] contract" containing an arbitration clause may be entitled to a judicial determination of the contract's validity before the arbitration clause is enforced. *Id.* at 543-544 (emphasis added). That, of course, makes perfect sense, as there is no inconsistency in denying both the contract and the jury trial waiver. That is fundamentally different from Intelnet's situation, which relies on the existence of the RMPA, jury waiver and all, in seeking millions of dollars in damages.

Nothing in *Battle* suggests that one who *seeks to enforce* a contract may avoid an express jury waiver because its opponent challenges the validity of the contract, nor are we aware of any other court applying such an irrational rule. To the contrary, courts in other jurisdictions have sensibly taken the view that "[a] party who has signed an agreement may not simultaneously rely upon it as the foundation of the claim for damages and repudiate a provision contained therein to the effect that the right to a trial by jury is waived." *O'Brien v. Moszynski*, 101 A.D.2d 811, 812, 474 N.Y.S.2d 133, 134 (App. Div. 1984). See also

Leav v. Weitzner, 268 A.D. 466, 468, 51 N.Y.S.2d 775, 777 (App. Div. 1944) (plaintiffs "may not at the same time rely upon the lease as the foundation of their claim for damages and repudiate the provisions by which they waived their constitutional right to a jury trial").

Conversely, Intelnet's argument notwithstanding (Pb42), there is no inconsistency when defendants invoke the RMPA's jury trial waiver while denying that the contract was validly executed. As long as Intelnet seeks a remedy under the RMPA, defendants may rely on its provisions in defending against Intelnet's claims. See, e.g., *Medivoc Prods., Inc. v. Hoffmann-LaRoche, Inc.*, 107 N.J. Super. 47 (Law Div. 1969) (in breach of contract action, considering contractual defenses as well as defense that contract was void because fraudulent); *N.J. Poultry Producers' Ass'n v. Tradelius*, 96 N.J. Eq. 683 (Ch. 1924) (same).

B. Intelnet Was Not Entitled To A Jury Trial On Its Claims Under the C+ Agreement

The trial court ruled that Intelnet was not entitled to a jury trial on its claims relating to the C+ Agreement because those claims were "primarily equitable in nature." Da55. That decision was clearly correct. Moreover, although the trial court did not reach the issue, the C+ Agreement, like the RMPA, contains a broad and express waiver of jury trial rights.

1. Intelnet's Claims Under The C+ Agreement Were Primarily Equitable And Hence Did Not Trigger A Jury Trial Right

Under the New Jersey Constitution, litigants have no right to a jury determination of equitable matters. See *Ins. Co. of N.*

Am. v. Anthony Amadei Sand & Gravel, Inc., 162 N.J. 168, 176 (1999); *In re Env'tl. Ins. Declaratory Judgment Actions*, 149 N.J. 278, 293 (1997). To determine whether a particular claim is equitable, the court must look to "the historical basis for the cause of action and focus on the requested relief." *Id.* (internal quotation marks omitted). The forum for the actions - "i.e., whether Law Division or Chancery Division" - is "not determinative of a party's right to a trial by jury." *Boardwalk Props. Inc. v. BPHC Acquisition, Inc.*, 253 N.J. Super. 515, 526 (App. Div. 1991).

When a complaint primarily seeks equitable relief, the parties have no right to a jury trial on related legal claims presented in the same action. See *Lyn-Anna Props., Ltd. v. Harborview Dev. Corp.*, 145 N.J. 313, 324 (1996); *Eckerd Drugs of N.J., Inc. v. S.R. 215, Rite-Aid Corp.*, 170 N.J. Super. 37 (Ch. Div. 1979). If the legal claims are "germane to or grow out of the subject matter of the equitable jurisdiction" (*Steiner v. Stein*, 2 N.J. 367, 374 (1949)), the court may try the legal claims together with the equitable claims, pursuant to its "general jurisdiction to adjudicate ancillary and incidental matters" *Apollo v. Kim Anh Pham*, 192 N.J. Super. 427, 431 (Ch. Div. 1983) ("the constitutional right of trial by jury is subject to the inherent jurisdiction of equity"), *aff'd*, 224 N.J. Super. 89 (App. Div. 1987). Moreover, the court "may decide . . . ancillary legal issues by way of a bench trial even if all of the

issues in equity have been resolved." *Ward v. Merrimack Mut. Fire Ins. Co.*, 312 N.J. Super. 162, 166 (App. Div. 1998).

Intelnet's claims relating to the C+ Agreement were primarily equitable: it principally sought "specific performance and injunctive relief" under the C+ Agreement, eschewing a claim for contract damages. Pa289. A claim for specific performance or an injunction seeks "equitable relief" and hence "does not trigger a right to a jury trial." *In re Env'tl. Ins. Declaratory Judgment Actions*, 149 N.J. at 293.¹⁰

Intelnet also contended that ITT violated "fiduciary responsibilities" arising from the C+ Agreement. Pa288-289. Under New Jersey law, a claim of breach of fiduciary duty sounds in equity and confers no jury trial right. *See Lyn-Anna Prop.*, 145 N.J. at 332; *500 Columbia Tpk. Assoc. v. Haselmann*, 275 N.J. Super. 166, 171 (App. Div. 1994) (plaintiff not entitled to jury trial because "[t]he issue whether [defendant] owed a fiduciary duty to plaintiff is primarily equitable in nature"). Claims for breach of fiduciary duty are considered equitable claims even if the plaintiff seeks only money damages. *See Lyn-Anna Props.*, 145 N.J. at 332.

Intelnet also raised two tort claims that related, in part, to the C+ Agreement. In Count VI, Intelnet contended that Sheraton and Starwood interfered with its "rights as exclusive provider of the services set forth in the RMPA and the C+

¹⁰ See also *Anthony Amadei Sand & Gravel, Inc.*, 162 N.J. at 170 (case was "essentially an action for specific performance, to which a right to trial by jury does not attach").

Agreement." Pa293. In Count VII, Intelnet contended that Sheraton and Starwood "usurped[ed] the business opportunity" it expected to receive from those agreements. Pa294. Because these claims "related to" the RMPA as well as the C+ Agreement, they were covered by the RMPA's jury trial waiver. To the extent that these tort claims are treated as pertaining solely to the C+ Agreement, however, they were intertwined with and subsidiary to Intelnet's equitable claims. Accordingly, they did not give rise to a jury trial right. See *Eckerd Drugs*, 170 N.J. Super. at 42-43 (plaintiff not entitled to jury trial on damages claims for tortious interference with contract or prospective business relations because the claims were ancillary to equitable claims).

Intelnet now argues that the trial court erred in denying it a jury trial because six of its seven causes of action sought money damages, while only one was for specific performance. Pb38. That argument is a red herring. As discussed above, most of Intelnet's claims were covered by the jury trial waiver in the RMPA, as the court ruled. See Da55 ("The RMPA contains a clear . . . jury waiver clause."). The only claims deemed triable by the court on the basis that they were primarily equitable were those **relating solely to the C+ Agreement**. See Da56 ("If we were proceeding with the C+ Agreement alone, clearly because of its equitable nature a jury would not be implicated.").

Intelnet next contends that it was entitled to a jury trial because its claim for specific performance of the C+ Agreement became moot when it went out of business. Pb39. That argument

fails because the nature of the plaintiff's claims - and hence the parties' entitlement to a jury trial - is tested at the initiation of the lawsuit. See *Steiner*, 2 N.J. at 373; *Boardwalk Props.*, 253 N.J. Super. at 527 (citing *Mantell v. Int'l Plastic Harmonic Corp.*, 141 N.J. Eq. 379, 393 (Ch. 1947)); *Associated Metals & Minerals Corp. v. Dixon Chem. & Research, Inc.*, 82 N.J. Super. 281 (App. Div. 1963). Even when subsequent events render the requested equitable relief unnecessary or inappropriate, the plaintiff has no right to insist that its claims be tried before a jury.¹¹

Intelnet states that there is no "inflexible rule" in New Jersey "that the question whether an action is primarily equitable is controlled by the facts existing at the inception of the case and cannot be affected in any way by subsequent events."

¹¹ See, e.g., *Mantell*, 141 N.J. Eq. at 393 (if at the inception of the lawsuit the complainant is entitled to equitable relief, then equity's power to settle all issues, even purely legal issues, "will not be defeated by subsequent events which render equitable relief impracticable or unnecessary or unsuitable"); *Boardwalk Props., Inc.*, 253 N.J. Super. 515 (defendants who amended their pleadings to eliminate all equitable claims after their jury demand was rejected were not entitled to a jury trial because the power of a court in equity to adjudicate equitable claims should be tested by the facts existing at the inception of the lawsuit); *Kaplan v. Cavicchia*, 107 N.J. Super. 201, 205-06 (App. Div. 1969) ("where complete equitable relief has become unavailable, inadequate or no longer fully attainable by reason of changed circumstances, equity may grant, and without any right to trial by jury, such substitutionary relief as plaintiff may be entitled to, according to the conscience of the court"); see also Bruce D. Greenberg & Gary K. Wolinetz, *The Right to a Civil Jury Trial in New Jersey*, 47 Rutgers L. Rev. 1461, 1474 (Summer 1995) (discussing the strong tendency of New Jersey courts to limit a party's right to a jury trial and noting that even when a request for equitable relief is rendered moot by circumstances occurring after the lawsuit is filed, New Jersey courts still recognize the court's authority to adjudicate the claims without a jury).

Pb39; *see also* Pb41. In the case upon which Intelnet relies, however, the court ultimately ruled that the defendant had no right to a jury trial even though the plaintiff's claims for equitable relief had become moot. *See Associated Metals & Minerals Corp.*, 82 N.J. Super. at 297-298. The court's decision to strike Intelnet's jury demand thus clearly comported with New Jersey law.

2. Intelnet Expressly Waived Its Right To A Jury Trial On Claims Relating To The C+ Agreement

Although the court below found it unnecessary to reach the issue, Intelnet is not entitled to a jury trial with respect to claims under the C+ Agreement because, like the RMPA, it contains a broadly-worded jury waiver. Paragraph 12.12(a) of the C+ Agreement reads in pertinent part:

Except for any specific performance remedies set forth in this Agreement, ***in the event a dispute of any kind arises in connection with this Agreement***, the Members will attempt to resolve the dispute as set forth in paragraph (b) before proceeding to arbitration as provided in paragraph (c). Each Member ***waives*** all rights to seek remedies in any court (including the right to seek Dissolution by decree of court), except as otherwise specifically set forth herein, ***and the right to jury trial.***

Pa81 (emphasis added). Intelnet's CEO Dominic Dalia was well aware of this clear and express waiver of Intelnet's jury trial right when he signed the C+ Agreement on Intelnet's behalf. *See* Pa6596.

Intelnet contends that the parties' waiver of their right to a jury trial applies only in the context of an arbitration. Pb43. Nothing in the provision or the surrounding paragraph, however,

suggests that the jury waiver disappears if judicial proceedings are conducted. Moreover, Intelnet's proposed construction makes little sense; arbitration by its nature does not involve jury trials, so the waiver provision would have been entirely unnecessary had the parties intended to preclude jury trials only in the case of an arbitration.

Moreover, the provision expressly contemplates the possibility of litigation yet does not make the waiver inapplicable to that circumstance: it provides that the parties waive their right to resort to the courts "except as provided herein," but states without qualification that there shall be no right to a jury trial. Thus, Intelnet was not entitled to a jury trial here.¹²

III. THE FINDING THAT THE RMPA WAS UNAUTHORIZED BY THE DEFENDANTS WAS SUPPORTED BY OVERWHELMING EVIDENCE

As discussed above, the trial court conducted a bench trial to determine the circumstances under which the RMPA was signed. Over 23 trial days, the court heard live testimony from eleven witnesses, considered deposition testimony from ten other witnesses, and accepted scores of documents into evidence. After

¹² Intelnet also contends that it was entitled to a jury trial on its claims under the Boardwalk Regency ("BRC") Agreement. Pb43-44. As explained above (at page 5), Intelnet's claims under that agreement were raised in a separate action that was severed from this case and dismissed without prejudice by stipulation following the court's dismissal of Intelnet's claims in this case. See Da121; see also Stipulation of Dismissal, *Intelnet Int'l Corp. v. Boardwalk Regency Corp.*, No. L-4163-99 (Aug. 24, 2004) (Da18-22). Accordingly, the issue of Intelnet's entitlement to a jury trial on its claims under the BRC Agreement is not before this Court.

considering that evidence and the arguments of counsel, the court concluded "that the RMPA was not a valid existing contract on or before the publication of the Sheraton.Net press release." Da99.

"The scope of appellate review of a trial court's factfinding function is limited. The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial and credible evidence." *P.B. v. T.H.*, 370 N.J. Super. 586, 601 (App. Div. 2004); see *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474 (1974). An appellate court must "not disturb the factual findings and legal conclusions of the trial judge unless [it is] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." *Rova Farms Resort*, 65 N.J. at 484 (internal quotation marks omitted). "Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility because, having heard the case, and seen and observed the witnesses, the trial court has a better perspective than a reviewing court in evaluating the veracity of witnesses." *P.B.*, 370 N.J. Super. at 601; see *Pascale v. Pascale*, 113 N.J. 20, 33 (1988). Intelnet falls far short of meeting that demanding standard.

A. The Trial Court's Finding That the RMPA Was Not Signed Prior To November 6, 1997, Was Amply Supported By The Evidence

There was a wealth of evidence supporting the trial court's finding that the RMPA was not executed before the November 1997

Sheraton.net press release. Indeed, any contrary conclusion would have been insupportable.

First, as the court found, "no one" other than Dominic Dalia testified to having seen a signed copy "until after the road show in November of 1997. People who in the ordinary course of business might have been expected to have seen the document did not." Da97. The long list of witnesses who were unaware of a signed RMPA prior to December 1997 included the Intelnet employees who were most involved in the negotiating the terms of the contract and in exploiting Intelnet's contractual relationships to obtain financing. See, e.g. 1T332 (Donnelly); 20T1581-1585 (Vogt); 21T1782 (Oberholtzer); 23T1536-2542 (Wilkins); 3T45-47, 2T296-297 (Sloane). It also included representatives of the three investment banks from which Intelnet sought to obtain financing throughout 1997, who conducted extensive due diligence regarding Intelnet's contracts but never were told about that alleged contract. See 7T92-94 (Von Esche); 22T2008 (Brunet); 24T2722-2724, 24T2742 (Wilkins).

Second, there was no documentary evidence indicating execution of the RMPA before November 1997. No communications between Intelnet and ITT referred to a signed RMPA. None of the documents memorializing Intelnet's communications with investment bankers and their due diligence reviews of Intelnet's material contracts contained any reference to the RMPA. See Da226-307;

Da308-355; Da364-369; Da410-477; Da484-569; 24T2718-1743
(Wilkins); 22T1997-2019 (Brunet).¹³

Third, the signed RMPA, which contains typographical errors and obvious omissions, does not look like a final document. See, e.g., Pa121. Danski's and Dalia's signatures are not dated. Pa131. Furthermore, although Dalia testified that he retained a complete signed original of the RMPA while Danski also had an original signature page (28T3615-3616; 28T3572), Intelnet was never able to produce an original of the RMPA. That fact comports with Danski's testimony that he and Dalia removed a copy of the draft RMPA from Danski's files, signed it, and then copied it; and that Danski kept the signed original while Dalia retained the copy. 18T1122-1123.

Fourth, the circumstances under which the signed RMPA was "found" in December 1997 were highly suggestive of fabrication. Most notably, Intelnet's counsel Margaret Vogt, whose testimony

¹³ Intelnet has included in its Appendix an internal Lehman Brothers memorandum, dated June 25, 1997, which according to Intelnet's heading "contain[s] evidence of Lehman's knowledge of the [RMPA]." Pa7670. The trial court "specifically reject[ed]" Intelnet's argument that this memorandum established the existence of the RMPA. Da80. In fact, the defendants proved at trial that the memorandum's reference to an October 1996 contract (Pa7673) could only be a reference to the C+ Agreement, with the erroneous date perhaps confused with that of an October 1996 contract under which ITT Corporation assigned its contracts with AT&T and MCI to the Concierge Plus LLC. See Da223-225. As noted above, Dominic Dalia admitted that he did not direct that Lehman Brothers be given the RMPA (28T3638-3640), and no other ITT representative testified to having given the contract to Lehman Brothers. See, e.g., 20T1575 (Vogt); 22T2000-2004 (M. Dalia). Moreover, the RMPA did not appear on the list of material contracts provided to Lehman Brothers (Da364-369), and the contract section in the Lehman Brothers memorandum mentions only the C+ Agreement, not the RMPA. Pa7709.

the court found to be "truthful" (Da84), testified that she was stunned when Tim Tantillo "discovered" the signed RMPA in December 1997 and became even more suspicious when Tantillo and Dalia were unable to supply any information about the execution of the agreement. 20T1581-1585.

Fifth, both before and after the Prudential roadshow in 1997, Intelnet made efforts to obtain an amendment to the C+ Agreement that would bind ITT and require it to take services from the joint venture. See Da388-398 (9/4/97 letter from D. Dalia to J. Danski attaching draft First Amendment to C+ Agreement); Da588-598 (11/17/97 fax from M. Vogt to S. Benfield attaching unsigned draft of First Amendment to C+ Agreement); 15T451-452 (Tantillo). Such an agreement would not have been needed if the parties already had signed the RMPA.

Sixth, the inference of recent fabrication was not in the least dispelled by the testimony of Dominic Dalia, which the court stated was "not found to be credible." Da96. Dalia, who initially claimed in an affidavit that the RMPA had been signed on October 1, 1996 (Pa7428), and later testified during his depositions that he could not remember when the agreement was signed (Pa1305, Pa1317), came forward at trial with a sudden recollection of signing the document on a specific date in May 1997, in the library of a mansion, dressed in formal attire, during the cocktail hour of a charity event. 27T3246-3247, 28T3609-3618. Dalia claimed that his epiphany sprang largely from reviewing photographs of friends and acquaintances who had

attended the event. 27T3245. Further, Dalia claimed to remember that the document was signed, at *Danski's* urging, some five months after the two had last discussed the RMPA. See 27T3145; 28T3574 ("he said, now Dominic you promised we're going to get that agreement signed"). And Dalia claimed to have completely forgotten within a few months after the event the unusual circumstances under which the RMPA was signed. 29T3702-3704.

Dalia's inherently incredible story was inconsistent with all evidence. For example, on May 9, 1997, the very day after the RMPA allegedly was signed, Dalia met with representatives of Lehman Brothers for three-and-a-half hours (27T3274-3275), during which he failed to disclose or even mention the RMPA, even though the bankers were interested in understanding Intelnet's contractual relationships (see Da706) and Dalia claimed that he had placed the signed RMPA in a briefcase that he had carried to the Lehman meeting. 28T3565. The trial court expressly rejected Dalia's explanation for his failure to disclose the RMPA to Lehman Brothers. Da96; see also 28T3638.

Dalia also could not explain Margaret Vogt's testimony that, after May 1997, and at Dalia's direction, she continued her attempts to obtain a contract directly binding ITT. 20T1583. Vogt firmly refuted Dalia's testimony that he asked her to find his signed copy of the RMPA. 28T3641-3657. Vogt never once heard it suggested that the RMPA had been signed until she was told in December 1997 that Tim Tantillo had "found" an executed RMPA in files he had brought over from ITT. 20T1581-1582. Further,

Dalia could not explain why, if he had truly misplaced such an important agreement, he had not simply asked Jon Danski for a copy. 28T3653.

Finally, Tantillo and Danski themselves recanted their prior statements and explicitly admitted that the RMPA was signed and backdated, without authorization by ITT, after the Prudential road show was suspended. See 15T349-350; 16T571. Tantillo's testimony that Dalia gave him the agreement on December 3, 1997, and told him to give it to Vogt with the explanation that he "found it in his files" (15T458) was corroborated by Vogt's testimony regarding the suspicious events surrounding the appearance of the agreement and the evasive answers by Tantillo and Dalia to her immediate questions about the circumstances of the contract's execution. 20T1580-1585.

Danski's testimony that Dalia persuaded him to sign the RMPA in or about late November 1997, and without authority from ITT (18T1134-1135), was amply corroborated. First, Danski stood to gain financially if Intelnet succeeded in its efforts to obtain financing. 18T1121-1134, 1134-1135. Danski knew that he would be leaving ITT following the Starwood acquisition (18T1147), and Dalia had offered him a job, including potentially lucrative equity stakes in Dalia's companies, if Intelnet's efforts to obtain financing were successful (18T1145, 17T1048-1049). Danski also had become close personally with Dalia and his family (17T1035-1036), giving Danski an additional motivation to take an action that would help Dalia and his business.

Second, Danski's recantation was corroborated by the fact that the "key people" at ITT never saw the document. See 33T4524 (Mandell). Knowing that ITT never would have approved the signing of the RMPA, and believing that it would be used by Intelnet only in connection with the financing effort, Danski told no one at ITT what he had done but put the signed original of the RMPA in his file and distributed no copies. 17T943. (Danski).

Third, Danski and Dalia had ample opportunity to sign the RMPA during the key time period. For example, Dalia was in New York City on November 20, 1997 (Da579), and had an expensive meal at the St. Regis hotel near Danski's office (*id.*), on a day when Danski also was available. Dalia's assertion that he had dinner at the St. Regis with several NYNEX executives on that date (30T4012-4016) was rebutted by one of the alleged participants, who testified that while he and his superior at NYNEX did meet on one occasion with Dalia at a hotel restaurant, the meeting was at lunch, not dinner, and was memorable for the two men being drenched in a downpour. See 36T4709-4710 (Carroll). Defendants proved that no rain fell on New York City on December 20, 1997. See 36T4719.

Providing further circumstantial support for Danski's testimony are the facts that (1) during this very same period, Prudential was demanding written confirmation of ITT's commitment to purchase Intelnet's services and (2) immediately after the RMPA allegedly was "found" by Tim Tantillo, it was faxed to Prudential's lawyers.

Although the trial judge expressed doubt about Danski's and Tantillo's credibility, he found that their recantations at least nullified their prior testimony that the RMPA had been validly executed. Da82. Moreover, the court apparently accepted the key point that Danski had signed the RMPA without authority: it found that Danski did not disclose his improper execution of the document to his employers following the filing of the complaint because "[t]o confess at that time would have been an admission of wrong and would most certainly have resulted in a reduction or complete denial of his golden parachute." Da91.

In sum, there clearly was sufficient support for the court's finding that the RMPA was executed late after the suspension of the Prudential road show, without authorization from ITT, and that Intelnet had thus failed to meet its burden of demonstrating the existence of a legally authorized contract prior to the alleged breach. As we discuss next, none of Intelnet's efforts to avoid the clear import of the evidence has any merit.

B. Intelnet Offers No Basis For Disturbing The Trial Court's Factual Findings

1. The court was not required to treat defendants' "judicial admissions" regarding the signing of the RMPA as dispositive

Intelnet contends that the trial court committed reversible error in failing to treat as dispositive defendants' "judicial admissions" that the RMPA was signed on October 1, 1996. Pb45. This argument is totally insubstantial.

First, Intelnet argues that the court was wrong to allow the defendants to withdraw their admissions regarding the RMPA

without any "credible explanation" (Pb45) of their "extraordinary six year delay in moving to amend" (Pb46). Intelnet contends that it was prejudiced by the so-called "delay" because, "[h]ad this issue been raised promptly, witnesses from Intelnet, the various investment bankers from which Intelnet sought financing in 1997, and Intelnet's outside counsel on the Prudential offering, Kutak Rock, would have been better able to remember when they first saw a signed RMPA or had conversations concerning the RMPA during 1997." Pb46-47.

In fact, the court acted well within its discretion in allowing defendants to amend their answers to reflect newly-obtained witness admissions that the RMPA was a sham and a fraud on the court. Defendants were able to obtain those admissions only after they learned through discovery that Intelnet "found" the signed RMPA under suspicious circumstances in December 1997, that no signed RMPA had ever been provided to Intelnet's bankers or their lawyers prior to that time, and that Jon Danski had secretly been offered a lucrative position by Dalia while he was still at ITT.

There was a clear and sufficient explanation for defendants' failure to learn sooner that the RMPA had been fraudulently executed. First, Danski, who was in charge of the Intelnet relationship and who purported to sign the RMPA on behalf of ITT, did not tell his employers the true circumstances surrounding the signing of the agreement. 17T943-947. He adhered to this course of action for years, hoping that the case would "go away" without

further testimony from him, until he was confronted with other evidence that the RMPA had not been signed until late in 1997. 18T1124-1125. Second, because the complaint was filed in the midst of the Starwood takeover, a chaotic period during which many ITT executives had left or were preparing to leave their positions, the other individuals having knowledge of the Intelnet relationship failed to uncover the falsity of the complaint's allegations regarding the RMPA. See, e.g., 18T1147 (Danski); 1T329 (Donnelly) ("The company had just been acquired and the legal department was disbanding in large part.").

There is no evidence that Intelnet was prejudiced by fading memories regarding the progeny of the RMPA. Margaret Vogt and Tim Tantillo both had vivid recollections of the "discovery" of a signed RMPA in December 1997. 15T460-462 (Tantillo); 20T1580-1585 (Vogt). There was irrefutable **documentary** evidence that no signed RMPA was given to the investment bankers, to their lawyers, or to Intelnet's outside counsel until early December 1997. See Da226-307; Da308-355; Da364-369; Da410-477; Da484-569; Da651-666; Da682-697; 4T219-221 (Griffith); 22T1997-2019 (Brunet); 24T2718-2743 (Wilkins); 7T96-100 (Van Esche). Furthermore, Intelnet's employees and outside counsel testified unequivocally that they **would** have given a signed RMPA to the investment bankers had they known of its existence. See 21T1949; 20T1696-1697; 20T1573; 24T2720-2721.

As for Dominic Dalia, his supposed "memory" of signing the RMPA became **clearer** over time. Intelnet's initial complaint -

which was filed only seven months after the May 1997 charity event at which Danski and Dalia supposedly signed the RMPA - included an allegation that the RMPA had been signed in October 1996. Pa39. Dalia attested to this "fact" in a 1999 affidavit. Pa7428. In a September 2002 deposition, Dalia stated that he had no recollection of signing the document but "imagine[d]" that it was signed in October 1996. Pa1305. At his deposition on the eve of trial - the only one taken *after* Danski and Tantillo confessed to the true circumstances regarding the appearance of the RMPA in late 1997 - Dalia testified that he believed he signed the RMPA "around the summer" of 1997 (Pa1317), but had no specific recollection of the event. At trial, however, Dalia claimed to have a vivid recollection of signing the RMPA more than seven months after its putative date. See 27T3244 ("I know exactly where I signed it now"). Because Intelnet has never provided a satisfactory explanation for Dalia's change in position regarding the signing of the RMPA, it is in no position to demand that defendants be held to their initial admission that the RMPA was signed on its putative date of execution.

Second, Intelnet contends that the trial court erred in rejecting the "overwhelming" evidence that ITT "would have known immediately that the action was predicated on a sham." Pb47. As Intelnet notes (Pb49), the "key people who should have known" about a signed RMPA were in fact "shocked to find out" that it existed. 33T4524 (Mandell) ("And we went around and asked, did anybody know this existed And no one had a copy.").

Despite this, defendants were in no position to deny the legitimacy of the document so long as ITT Vice President Jon Danski did not deny that his signature on the agreement was genuine. See 27T945-946 (Danksi). The fact that the complaint was filed during the chaotic period that followed the Starwood takeover further explains defendants' failure to probe Danski's admission more deeply. The trial court was entitled to accept this explanation for the defendants' initial admissions, rather than to speculate that the ITT and Sheraton executives who testified that they were surprised to learn of a signed RMPA were being untruthful.

Third, Intelnet contends that "there is no evidentiary support" for the court's finding that ITT's counsel Patrick Donnelly "did not give much or any attention to just another law suit" because of the Starwood takeover and "because he was winding down his affairs at ITT." Pb50 (quoting 38T4962). There was, in fact, **undisputed** record evidence supporting the court's finding. Donnelly testified that (1) he did not learn that Intelnet had sued ITT until after he left the company (1T40); (2) he spent the "large majority" (more than 75%) of his time in 1997 working on takeover matters (1T60); and (3) after Starwood agreed to acquire ITT in November 1997, he "was not offered the position as general counsel to Starwood and . . . decided to pursue other opportunities" (1T56).¹⁴ Far from being clearly erroneous, the

¹⁴ Intelnet's reliance on Donnelly's testimony that "he worked on Intelnet matters until the day he left" ITT (Pb50) is
(cont'd)

court's findings with respect to Donnelly were squarely supported by this evidence. There is no basis for reversing them on appeal.

2. The trial court was justified in rejecting Intelnet's alleged "proof" that the RMPA was signed in the Spring of 1997

Intelnet next argues that it "proved that the RMPA was signed in the Spring of 1997." Pb51. The unreliable character of Intelnet's "proof" that the RMPA was genuine confirms the soundness of the trial court's contrary findings.

First, Intelnet argues (Pb51-52) that the version of the RMPA that was ultimately signed was approved, in draft form, by ITT's management. Intelnet supports this contention with evidence that, on December 18, 1996, Patrick Donnelly sent a draft RMPA that was "identical" to the version that Danski and Dalia ultimately signed. Pb52.¹⁵ The referenced communication, however, merely states that a "blacklined draft" of the RMPA is "attached," while giving no indication that management had authorized the corporation's execution of the agreement. Pa7622. The fact that the draft had not been approved by ITT management

(... cont'd)

misplaced. Donnelly specifically testified that his final work on ITT matters concerned the attempted assignment of the AT&T contract to Concierge Plus and the exchange of drafts of an RMPA and an amendment to the C+ Agreement (1T62) - all work that ended well before the lawsuit was filed.

¹⁵ Intelnet contends (Pb52) that the court erred in indicating that the signed RMPA was not identical to prior drafts of the agreements that were in the parties' files. We agree that the court erred in suggesting that the agreement was retyped before it was signed. Da72-74. In fact, the evidence was that Danski and Dalia simply removed an existing draft from Danski's files and signed it. See 17T930-934 (Danski). The court's error in suggesting otherwise was immaterial to its ruling, however.

is further supported by Donnelly's "surprise" upon learning that the RMPA had been signed. 1T332 (Donnelly).

Second, Intelnet cites Dalia's "refreshed" recollection that the RMPA was signed in May 1997. Pb53. As discussed above, however, the trial court had good reasons for deeming Dalia's testimony on this point to be "not credible," including (among other things) Dalia's inability to explain satisfactorily why he had failed to give the document to Lehman Brothers representatives when he met with them the day after the RMPA was supposedly signed.

Third, Intelnet relies on the fact that a signed RMPA was produced in discovery by Intelnet's auditor Arthur Andersen. Pb53. Intelnet contends that the RMPA must have been given to Arthur Andersen before the Prudential offering because Dominic Dalia's son Michael Dalia testified that he gave Intelnet's contracts to Andersen during an audit that was completed before the offering and did not give any ITT/Intelnet contracts to Anderson after litigation commenced. *Id.* But this testimony does not compel an inference that Andersen received a signed RMPA before the Prudential offering. First, Michael Dalia never testified with certainty that he actually gave the RMPA to Anderson. See 15T2193. Second, no testimony was presented from Andersen to explain how the RMPA came to be in its files. Third, because Andersen remained Intelnet's auditor in the 1997-1998 time period (22T2152-2153), Andersen easily could have obtained the contract during the period between the filing of the lawsuit

in December 1997 and Andersen's production of a copy of the signed RMPA in response to defendants' subpoena several years later. Moreover, the court was free to reject Intelnet's proposed inference that Andersen received the signed RMPA before the Prudential offering in light of the overwhelming proof that other third parties who would have been expected to have received the RMPA did not.

Finally, Intelnet relies on Tantillo's initial deposition testimony that he brought the signed RMPA with him when he arrived at Intelnet in October 1997. Pb53. As the court found, that testimony was "nullified" by Tantillo's later admission that it was an outright lie. 15T349-350. Contrary to Intelnet's suggestion (Pb53-54), Tantillo's admittedly false testimony was not rehabilitated by Vogt's statement that Dalia stopped asking her to obtain a signed RMPA after Tantillo joined the company: Vogt herself did not believe Tantillo's story that he had "found" the document in his files, and Dalia testified that the RMPA was signed **five months before** Tantillo came to Intelnet. 20T1582-3244-47.

Intelnet's assertion that Kimball Griffith (an attorney with Kutak Rock) recalled discussing the RMPA with Tantillo before the Prudential offering (Pb54) is misleading. After it was pointed out to Griffith that the RMPA was not listed in the Prudential offering memorandum, he testified that he **did not know** when he had first discussed a signed RMPA with Tantillo. 4T202. The documentary evidence that Tantillo sent a copy of the signed RMPA

to Griffith on December 3, 1997 (Da651-666), and that Griffith promptly called Prudential's lawyers to discuss the document (Da692-697), further refutes any suggestion that Griffith learned of a signed RMPA prior to the offering.

In sum, Intelnet relies for its argument that the RMPA was signed in May 1997 on (1) a letter transmitting a blacklined draft of the RMPA from ITT to Intelnet, months before the final document allegedly was signed; (2) the production of a signed RMPA by Arthur Andersen, years after the complaint was filed and the attached RMPA widely circulated; (3) testimony of Dominic Dalia that the court expressly and for good reason found "not . . . credible"; and (4) testimony of Tim Tantillo that Tantillo recanted and admitted was a lie. The trial court did not commit error in finding that this "evidence" failed to outweigh the overwhelming proof that a signed RMPA did not exist before December 1997.

3. The court was entitled to rely upon the ample evidence supporting its findings

Intelnet next contends that the trial court's finding that Intelnet failed to prove the existence of a legitimate contract was not supported by the evidence. As explained above, there was ample evidence to support those findings. Intelnet's arguments to the contrary are unpersuasive.

1. Intelnet contends that the trial court rejected Tantillo's and Danski's testimony in toto, thereby depriving its findings of foundation. Pb54. In fact, although the court expressed doubt about the veracity of some parts of Tantillo's

and Danski's testimony, it plainly did not reject their accounts entirely. For example, the court accepted as "truthful" (Da84) Vogt's testimony regarding the sudden appearance of the RMPA in December 1997, which comported with Tantillo's testimony. The court also implicitly accepted Danski's statement that he signed the agreement without authority when it adopted Danski's explanation for his failure to disclose his wrongdoing to others at ITT. Da91.

In any event, as the court found, there was ample additional evidence that the RMPA was signed after the suspension of the road show, including the absence of any evidence that either party had a signed RMPA before that date, the fact that Intelnet failed to reveal the existence of a signed RMPA to representatives of the investment banks from which it was seeking financing, and Vogt's testimony that the agreement appeared under suspicious circumstances just as Prudential was demanding a written commitment from ITT. This other evidence is sufficient to support the court's conclusion, even if Danski's and Tantillo's testimony is entirely disregarded.

2. Intelnet contends that the trial court placed undue emphasis on the importance of the RMPA, and thus erroneously "refused to believe that Dalia could have obtained a signed RMPA without regarding it as an extraordinary development that would have to be immediately highlighted to the investment bankers and celebrated by every member of Intelnet management." Pb55. To be sure, the court viewed the signing of an agreement that "bound

ITT . . . to give Intelnet exclusive rights to hundreds of hotels throughout the world" as an event that would have been important. Da98. That view was supported by the agreement itself, which, unlike the C+ Agreement, included ITT Corporation as a party and expressly required ITT and Sheraton to purchase telecommunications services exclusively from Intelnet. See Pa122, RMPA ¶ 2(f) ("ITT hereby grants to INTELNET the exclusive right" to provide services to its properties). The court's conclusion that the RMPA was significant also was supported by the testimony of many witnesses, including Dalia himself, who admitted that the agreement was "important." See 29T3739.

Intelnet argues that "Intelnet management regarded the C+ Agreement, not the RMPA, as by far Intelnet's most important contract." Pb56. That argument does not support Intelnet's position: its management viewed the C+ Agreement as Intelnet's most important contract only because, until December 1997, **they had never heard that the RMPA had been signed**. As soon as the RMPA "appeared," however, it was treated as the more important agreement. Intelnet's initial complaint, which was filed by Dalia's son-in-law Stuart Wilkins eight days after the RMPA was allegedly "found" (Pa34-64), sought damages under the RMPA, not the C+ Agreement, and treated the RMPA, not the C+ Agreement, as the source of defendants' allegedly exclusive purchase obligations. PA40. The undisputed evidence that Intelnet provided the document to the lawyers on the Prudential deal as soon as it allegedly was "found" by Tim Tantillo (Da651-666) further

undercuts the contention that the contract was viewed as unimportant.

Relatedly, Intelnet argues that the trial court was wrong in thinking that "Intelnet's intent in proposing an amendment to the C+ Agreement in September 1997 'was to bind ITT and obtain exclusivity.'" Pb56 (quoting 38T4941). In fact, both the documents and the witness testimony amply support that conclusion. The amendment was first proposed in September 1997 in an effort to satisfy concerns raised by Lehman Brothers regarding ITT's contractual commitment to the C+ joint venture. 20T1596-1596 (Vogt); Da388-398 (9/4/97 letter from D. Dalia to J. Danski attaching proposed First Amendment to C+ Agreement). Unlike the C+ Agreement, the draft Amendment was to be signed by ITT Corporation and was to include an express agreement by ITT that the Concierge Plus LLC would be "the sole and exclusive vehicle through which any of the services listed on Exhibit A . . . are provided to any of the hotels and casinos owned or operated by ITT, ITT Parent, or their respective Affiliates." Da391. The same Amendment was later proposed again in connection with Intelnet's effort to persuade Prudential to restart the road show. See Da588-598 (11/17/97 fax from M. Vogt to S. Benfield attaching unsigned draft of First Amendment to the C+ Agreement dated 9/8/97); 15T449 (Tantillo). ITT refused to sign the agreement because it represented a "blatant expansion" of ITT's obligations and "did not represent anything [ITT] had ever talked about with Intelnet." 1T374 (Donnelly).

3. Intelnet argues that the trial court's findings are cast into doubt by the absence of evidence that "Dalia, or someone from Intelnet, spoke to Prudential about the RMPA after the offering collapsed and tried to persuade them that it was a document that supported a resumption of the financing activity." Pb57. In fact, there was evidence that Patrick Brown and Kim Griffith at Kutak Rock (Intelnet's outside lawyers on the Prudential offering) and Claude Serfilippi and Sandra Von Essche at Chadbourne & Park (Prudential's outside lawyers on the offering) had a telephone conversation regarding the RMPA on December 4, 1997 - the day after Tantillo allegedly "found" the signed RMPA in his files. See Da682 (12/4/97 facsimile transmission from Kutak Rock to Chadbourne & Park attaching the RMPA, "which Kim discussed on our phone call today"). George Alex, the Prudential officer who was heading up the Intelnet offering, also recalled being told about the RMPA in connection with the effort to restart the road show. 9T175-176 (Alex).

It is not surprising that the effort to use the RMPA to re-invigorate the financing effort turned out to be a non-starter. As Intelnet notes, "Prudential needed a validation of Sheraton's *current* intent to take services from Intelnet" (Pb59), and the RMPA, dated October 1, 1996, may have been considered insufficient. More likely, the sudden appearance of a significant agreement never before mentioned but dated October 1996 would have raised more questions than it answered. In any event, Intelnet soon changed its strategy and simply sued defendants

under the RMPA. In sum, Intelnet's apparent inability to leverage the RMPA into a successful financing does not undermine the trial court's finding that the agreement was a sham.

4. Finally, Intelnet argues that the trial court lacked "clear and convincing" evidence that the RMPA was fraudulently executed. Pb60. But this was not a cause of action by the defendants for fraud, for which damages can be recovered only upon clear and convincing evidence. Rather, the court's findings with respect to the RMPA were made in order to determine whether Intelnet had established an essential element of its contract and related tort claims - *i.e.*, the existence of a valid contract. In answering that question - an issue on which Intelnet bore the burden of proof (*see Gionti v. Crown Motor Freight Co.*, 128 N.J.L. 407, 412 (1942)) - the court was not required to apply a heightened evidentiary standard. *See Polygram Records, Inc. v. Buddy Buie Productions, Inc.*, 520 F. Supp. 248, 252 (S.D.N.Y. 1981) ("The plaintiff has the burden of proof to establish by a fair preponderance of the credible evidence the existence of a contract under which it claims to be entitled to injunctive relief and damages.").

Any other rule would be utterly perverse, as it would encourage litigants to engage in the kind of fraud on the court that Intelnet attempted to perpetrate in this case.

IV. THE TRIAL COURT'S RULINGS ON THE PARTIES' MOTIONS TO AMEND THEIR PLEADINGS WERE APPROPRIATE

More than five years after filing its initial complaint and several years into fact and expert discovery, Intelnet sought

leave to file a second amended complaint raising new claims against defendants. The trial court denied that motion. Pa11-13. Subsequently, the court granted defendants' motion for leave to amend their answers to reflect newly-discovered facts regarding the fraudulent execution of the RMPA. Pa16-17. Intelnet challenges both of these decisions. We have already discussed the powerful justification for allowing the defendants' amendment and will focus here on whether the court was compelled to permit Intelnet's proposed amendment.

"Whether to allow a party to file an amended pleading always rests in the court's sound discretion." *Hansen v. Hansen*, 339 N.J. Super. 128, 140 (App. Div. 2001). See also *Kernan v. One Wash. Park Urban Renewal Assocs.*, 154 N.J. 437, 457 (1998); *Balthazar v. Atl. City Med. Ctr.*, 358 N.J. Super. 13, 27 (App. Div.), *certif. denied*, 177 N.J. 221 (2003). The trial court decides such motions based upon "the factual situation actually existing at the time the application is made." *Keller v. Pastuch*, 94 N.J. Super. 499 at 502 (App. Div. 1967); see also *Kernan*, 154 N.J. at 457. "The achievement of substantial justice [and avoidance of prejudice] is the fundamental consideration" in making such determination. *Jersey City v. Hague*, 18 N.J. 584, 602 (1955).

Rule 4:9-1 provides that leave to amend "shall be freely given in the interest of justice." "It is well settled," however, "that an exercise of [the court's] discretion [to deny or grant leave to amend a pleading] will be sustained where the trial

court refuses to permit new claims and new parties to be added late in the litigation and at a point at which the rights of other parties to a modicum of expedition will be prejudicially affected." *Brown v. Township of Old Bridge*, 319 N.J. Super. 476, 513 (App. Div. 1999) (internal quotation marks omitted), *certif. denied*, 162 N.W. 131 (1999).

In its proposed amendment to the complaint, Intelnet sought to add claims that ITT fraudulently induced it to enter into the C+ Agreement and that Sheraton and Starwood interfered with its existing and prospective contractual relations. The trial court ruled that the request to amend simply "[came] too late." Da52. It noted that the information underlying the proposed new claims "was information that was known years ago" (*id.*), and that, were the amendment allowed, "defendants would be perfectly justified in saying we need another year, two years, three years to do discovery on the new cause of action." Da53.

Intelnet also sought to add a claim for damages under the C+ Agreement while dropping its claim for injunctive relief. Years earlier, Intelnet had made a deliberate tactical decision to seek **only** injunctive relief under the C+ Agreement in order to avoid the Agreement's mandatory arbitration clause. In persuading the the lower court to deny defendants' motion to compel arbitration, Intelnet emphasized that it was seeking damages **only** under the RMPA, which contains no arbitration clause, and that the specific performance remedies it sought under the C+ Agreement were "expressly exclude[d]" from that contract's arbitration clause.

Pa5923. The trial court properly refused to condone such "legal gamesmanship." *Weyerhaeuser Co. v. Borough of Closter*, 190 N.J. Super. 528, 543 (App. Div. 1983).

Intelnet contended that it had ceased its business operations and could no longer take advantage of a specific performance remedy. See Plaintiff's Memorandum of Law In Support of Its Motion For Leave To File A Consolidated Amended Complaint, at 6. According to the testimony of its principals, however, Intelnet had been out of business since 1998, or, at the latest, 2000 - more than three years before Intelnet sought to amend its complaint. See Pa6086-88; Pa6089; Pa6090-91; Pa6092. In any event, the court made it clear that it would award money damages to Intelnet under its equitable jurisdiction if Intelnet's status made specific performance infeasible. See Da53 ("plaintiff would be entitled, if they prevail, to money damages where specific performance cannot occur"); see also *Kaplan v. Cavicchia*, 107 N.J. Super. at 205-06 ("where complete equitable relief has become unavailable, inadequate or no longer fully attainable by reason of changed circumstances, equity may grant, and without any right to trial by jury, such substitutionary relief as plaintiff may be entitled to, according to the conscience of the court"). Although there are many reasons why Intelnet is not entitled to money damages under the C+ Agreement, the court's willingness to consider granting such substitute relief

demonstrates that Intelnet was not prejudiced by its inability to add new legal claims to its complaint.¹⁶

Finally, Intelnet is wrong in contending that the court "impermissibly applied a double standard" (Pb63) in denying it permission to amend its complaint while allowing defendants to amend their Answers. There is a world of difference between seeking to pursue new legal theories, as Intelnet sought to do, and withdrawing factual admissions that have been proven wrong in discovery. Indeed, on October 15, 2001 - nearly *two years before* it denied Intelnet's motion to amend its complaint - the court denied defendants' motion to amend their counterclaims, explaining that too much time had passed to allow such an amendment. *See* Da49; *see also* Da52 ("There was an attempt to amend the counterclaim, which I denied as being untimely.").

In short, the trial court acted well within its discretion in denying Intelnet's motion to amend its complaint.

V. THE SUPERIOR COURT CORRECTLY DISMISSED INTELNET'S TORT CLAIMS

Intelnet acknowledges that its "tort-based claims directly rely upon the premise that ITT was bound by the C+ Agreement and/or the RMPA." Pb63. Accordingly, if this Court affirms the Superior Court's rulings that the C+ Agreement did not bind

¹⁶ Intelnet may contend that the addition of a damages claim under the C+ Agreement would have triggered the right to a jury trial on that claim. As explained above, however, the right to a jury trial is determined at the outset of a case. Moreover, as we discuss below in connection with the cross-appeal, any claim for damages under the C+ Agreement would have had to be referred for mandatory arbitration.

defendants and that the RMPA was invalid, it also should affirm the court's dismissal of Intelnet's tort claims.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

CROSS-APPEAL

In the event the Court reverses the Superior Court's decision dismissing Intelnet's claims related to the C+ Agreement **and** concludes that Intelnet would be entitled to a jury trial in a judicial proceeding regarding such claims, then defendants appeal the lower court's denial of their motion to compel arbitration. If, on remand, Intelnet is permitted to raise non-equitable claims related to the C+ Agreement, then those claims are subject to arbitration under that Agreement's broad arbitration clause.

Procedural Background

Intelnet's initial complaint, filed on December 12, 1997, raised no claims under the C+ Agreement. Pa34-54. On November 11, 1998, Intelnet filed an amended complaint in which it raised a claim for injunctive relief and specific performance under the C+ Agreement (Count V). Pa289-291. The new complaint also included three tort claims relating, at least in part, to the C+ Agreement - *i.e.*, breach of fiduciary duty (Count IV), intentional interference with contract (Count VI), and interference with prospective business relations (Count VII).

On November 18, 1998, defendants moved to compel arbitration under Paragraph 12.12(a) of the C+ Agreement. At that time, the

parties had not yet engaged in extensive discovery: Intelnet had not responded to defendants' limited document requests and interrogatories, and no depositions had been scheduled.

On February 5, 1999, Judge Robert E. Fluharty denied the motion to compel arbitration. Pa6648-71. He ruled that the dispute resolution provisions in the RMPA, rather than the C+ Agreement, was applicable to the parties' dispute. Da37.

Argument

In the event that this Court reverses the decision below and remands the case for adjudication of a claim for damages arising from breach of the C+ Agreement or from violation of tort duties relating to the C+ Agreement, then such claim or claims must be submitted for arbitration pursuant to the C+ Agreement's arbitration clause.

"Both the federal and state arbitration statutes have been held to express a strong policy favoring arbitration." *Young v. Prudential Ins. Co.*, 297 N.J. Super. 605, 617 (App. Div. 1997); see also *Martindale v. Sandvik, Inc.*, 173 N.J. 76 at 83-86 (2002); *Singer v. Commodities Corp. (U.S.A.)*, 292 N.J. Super. 391, 401-02 (App. Div. 1996), *certif. denied*, 149 N.J. 408 (1997); *Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc.*, 240 N.J. Super. 370, 375-77 (App. Div. 1990). When a written agreement to arbitrate exists, both the Federal Arbitration Act and N.J.S.A. 2A:24-3 requires courts to direct that arbitration proceed in a manner provided for in the agreement. When arbitrable and non-arbitrable claims are joined

together in the same lawsuit, the parties' right to arbitrate the claims covered by an arbitration clause are not diminished. See *Elizabethtown Water Co. v. Watchung Square Assocs., Ltd.*, 376 N.J. Super. 571, 577 (2005).

When construing the scope of arbitration clauses, both New Jersey courts and federal courts apply a strong presumption in favor of arbitrability. See *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 133 F.3d 225, 231 (3d Cir. 1998). When it cannot be said "with positive assurance" that the parties have "clearly and unequivocally excepted a certain dispute from arbitration, the court must compel arbitration." *Id.* (internal quotation marks omitted); see also *J. Baranello & Sons, Inc. v. Paterson*, 168 N.J. Super. 502, 507 (App. Div. 1979) (an agreement to arbitrate should be read "liberally to find arbitrability if reasonably possible") (*certif. denied*, 81 N.J. 340 (1979)); Martin Domke, *Domke on Commercial Arbitration* § 12:3 (2004). The presumption in favor of arbitration also applies to "allegation[s] of waiver, delay or a like defense to arbitrability." *Bleumer v. Parkway Ins. Co.*, 277 N.J. Super. 378, 402 (Law Div. 1994) (quoting *Moses H. Cone Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-25 (1983)).

The construction of an arbitration clause is a matter of law subject to *de novo* review. See *Fastenberg*, 309 N.J. Super. at 420. Whether a party has waived its right to arbitration is a mixed question of law and fact, requiring the Court upon review to give deference to the lower court's supported findings, but to

review *de novo* the application of legal rules to those facts. See *State v. Behn*, 375 N.J. Super. 409, 432 (App. Div. 2005).

A. Any Damages Claim Relating To The C+ Agreement Would Be Covered By The Agreement's Arbitration Clause

The C+ Agreement contains a broad arbitration clause. Pa81-82 (¶ 12.12). It provides that, "[e]xcept for any specific performance remedies set forth in this Agreement," the parties will arbitrate "a dispute of any kind [that] arises in connection with this Agreement." Pa81.

A claim that Intelnet is entitled to damages arising from the alleged breach of the C+ Agreement plainly would be covered by the arbitration clause. Any claim that Intelnet was injured by defendants' violation of tort duties relating to the C+ Agreement - such as breach of the duty of good faith and fair dealing, breach of fiduciary duty, or tortious interference with contractual relations - also would clearly "arise[] in connection with" the C+ Agreement, and hence would be subject to arbitration.

When defendants moved to compel arbitration in the trial court, Intelnet was not seeking damages for breach of the C+ Agreement. See Pa289-291. Accepting Intelnet's argument that the RMPA governed the action, the Superior Court ruled that the arbitration provision in the C+ Agreement was inapplicable. See Da37. The court never suggested that damages claims under the C+ Agreement would not be covered by the arbitration clause. To the contrary, it observed that the C+ Agreement "clearly says disputes under this agreement are arbitrated." *Id.*

If Intelnet is permitted on remand to raise damages claims under the C+ Agreement, therefore, defendants are entitled to have those claims referred for arbitration under the contractual arbitration clause. Defendants also are entitled to arbitration of any tort claims relating to the C+ Agreement.

B. Defendants Did Not Waive Their Right To Arbitration Of Claims Under The C+ Agreement

In denying defendants' motion to compel arbitration, Judge Fluharty stated that the court "[felt] that [defendants] waived the right to arbitrate." Pa7467. The court observed that the suit "[had] been pending for a year" and that "ITT as a defendant filed a counterclaim and a third-party complaint." *Id.* Although the lower court ultimately did not rule against arbitration on the basis of waiver, Intelnet likely will argue on appeal that defendants have waived their right to arbitration of any damages claim under the C+ Agreement. There is no basis for finding waiver under the circumstances here.

First, there can be no argument that defendants waived their right to arbitration of damages claims under the C+ Agreement by employing tactics of delay. As noted above, it was not until November 11, 1998, that Intelnet raised a claim for breach of the C+ Agreement. Defendants filed their motion to compel arbitration **one week later** - on November 18, 1998. That defendants did not seek arbitration **before** Intelnet sued under the C+ Agreement cannot be deemed a waiver of the arbitration clause in that agreement. See *Caruso v. Ravenswood Developers, Inc.*, 337 N.J. Super. 499, 508 (App. Div. 2001).

Second, defendants did not forfeit their right to seek arbitration by filing a counterclaim and a third-party complaint against Intelnet and Concierge Plus. Defendants' counterclaims were purely defensive and were designed to avoid any waiver of rights. See Pa248-256. Moreover, in the same pleading in which it asserted its counterclaims and third-party complaint, ITT contended that the claims under the C+ Agreement were "subject to arbitration" and "should be dismissed" on that ground. Pa238. Parties do not waive their right to arbitration by taking defensive measures in litigation. See *Lucier v. Williams*, 366 N.J. Super. 485, 500 (App. Div. 2004) (defendant did not waive right to arbitration by answering complaint; "[n]ot every foray into the courthouse effects a waiver of the right to arbitrate") (internal quotation marks omitted).

Conclusion

Accordingly, if this Court reverses the judgment below and permits Intelnet to pursue damages claims relating to the C+ Agreement, it should order that those claims be referred for arbitration.

Respectfully submitted,

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