LOFARO & REISER, L.L.P.
COUNSELLORS AT LAW
55 HUDSON STREET
HACKENSACK, NEW JERSEY 07601
(201) 498-0400
FACSIMILE: (201) 498-0016

E-MAIL: info@new-jerseylawyers.com
WEB SITES: www.njlawconnect.com
www.njbankruptcylawyers.ontheinter.net

MONTCLAIR OFFICE
180 GLENRIDGE AVENUE
MONTCLAIR, NEW JERSEY 07042
(973) 509-0900

NEW YORK OFFICE
80 ORVILLE DRIVE
BOHEMIA, NEW YORK 10038

Carmine LoFaro *
Glenn R. Reiser **

Please Reply to Hackensack

*Admitted in NJ
** Admitted in NJ and NY

September 8, 2004

Joanne Rajoppi
Union County Clerk,
Union County Courthouse, Room 115
2 Broad Street, Elizabeth, New Jersey 07207

Re: Templer Associates vs. Madison Partners, Inc., et als.
Docket No.: UNN-L-1765-04
Motion of Defendant, Harco Industries, Inc., U.S.A. to Dismiss for Failure to State a Claim, and for an Award of Sanctions
Return Date: October 8, 2004

Dear Ms. Rajoppi:

My firm is counsel to Harco Industries, Inc., U.S.A., improperly plead as Harco Industries, Inc. ("Harco"), a named defendant in the captioned litigation. Kindly accept this letter memorandum in lieu of a more formal brief in support of Harco's motion to dismiss plaintiff's Complaint for failure to state a claim, pursuant to R. 4:6-2(e), and for an award of sanctions against plaintiff and its counsel for filing a frivolous pleading in violation of Rule 1:4-8.

In further support of its motion Harco relies upon the Certification of Glenn R. Reiser ("Reiser Cert.") and Certification of Gomidas Hartounian ("Hartounian Cert.") submitted herewith. I kindly ask that you deliver these pleadings to the judge assigned to hear this matter.

PROCEDURAL HISTORY & STATEMENT OF FACTS

Plaintiff, as landlord, commenced this action on May 10, 2004 seeking to recover monetary damages against Madison Partners, Inc. ("MPI"), as tenant, and Harco, as an alleged subsidiary of MPI, for breach of a commercial lease agreement for warehousing/office space located at 1000 Jefferson Avenue, Elizabeth, New Jersey. MPI presumably occupied the space in question, however Harco did not.

MPI is a New York corporation formed on September 23, 2002. *See* Exhibit B to Hartounian Cert. Harco is a New Jersey corporation formed on May 20, 1985. *Id., a*t Exhibit A. Harco is not a subsidiary of MPI. *Id.,* at ¶ 5. Further, Harco never signed nor guaranteed the subject lease agreement between plaintiff and MPI. *See* lease agreement annexed as Exhibit C to Hartounian Cert.. **Thus, Harco maintains that plaintiff has no basis whatsoever for suing Harco with respect to this lease agreement. Consequently, Harco contends that plaintiff's Complaint is frivolous**.

By e-mail dated June 10, 2004, notice and demand was made upon plaintiff's counsel pursuant to R. 1:4-8 to withdraw plaintiff's frivolous Complaint against Harco. *See* Exhibit A to Reiser Cert. This demand was repeated in a second e-mail sent to plaintiff's counsel on July 28, 2004, *see* Exhibit B to Reiser Cert.. Copies of both e-mails were separately sent to plaintiff's counsel by certified mail/rrr and regular mail under cover letter of July 28, 2004. *See* Exhibit C to Reiser Cert. Proof of delivery of the certified mail of July 28, 2004 is annexed as Exhibit D to the Reiser Cert. The 28-day period provided by R. 1:4-8 has expired, and plaintiff has yet to dismiss Harco as a defendant in this action.

In defending this matter Harco has incurred attorney's fees to the law firm of LoFaro & Reiser, L.L.P. at the hourly rate of $250/hr. If the Court is inclined to impose sanctions, counsel will submit the appropriate Affidavit of Services in accordance with R. 4:42-9(b).

LEGAL ARGUMENT

POINT I

THE COURT SHOULD DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO RULE 4:6-2(e)

Unlike a summary judgment motion, a motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e) is based on the pleadings themselves. *See Rider v. State Dept. of Transportation*, 221 N.J. Super. 547 (App. Div. 1987). The Court has the discretion to convert a R. 4:6-2(e) motion into a motion for summary judgment when facts beyond the pleadings are relied upon and limited testimony is required to be taken. *See, e.g., Wang v. Allstate Ins. Co.*, 125 N.J. 2, 9 (1991).[1]

As noted by the Supreme Court of New Jersey in *Printing Mart v. Sharp Electronics*, 116 N.J. 739, 746 (1989), on a motion brought pursuant to R. 4:6-2(e) the complaint must be searched in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. Every reasonable inference is therefore accorded the plaintiff and the motion granted only in rare instances and without prejudice. Moreover, a complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by amendment of the complaint. *Id.* However, if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. *Energy Rec. v. Dept. of Env. Prot.*, 320 N.J. Super. 59, 64 (App. Div. 1999), *aff'd o.b.* 170 N.J. 246 (2001). In the instant case and for the reasons set forth below, Harco respectfully submits that the Court should dismiss plaintiff's Complaint based on the 4 corners of its pleadings.

[1] It should not be necessary for the Court to treat Harco's motion as one for summary judgment, as all of the necessary facts can be gleaned directly from the 4 corners of plaintiff's Complaint. Even if the Court were to treat Harco's motion to dismiss as a motion for summary judgment, there are no genuine issues of material fact in dispute, so in any event it would be appropriate to grant summary judgment dismissing the action in its entirety as to Harco

Plaintiff's only theory of liability against Harco is premised upon the bare allegation that MPI, the tenant, is a subsidiary of Harco. As established by the Hartounian Cert., there is no parent-subsidiary relationship between MPI and Harco. In any regard, Plaintiff, not Harco, bears the burden of persuasion to establish that such a relationship exists between the two (2) companies. Assuming for purposes of this motion that such a relationship exists, plaintiff does not plead a *prima facie* case for piercing Harco's corporate veil and holding Harco responsible for MPI's breach of the lease agreement with plaintiff.

Under New Jersey law, parent and subsidiary corporations are distinct legal entities, and courts are extremely reluctant to pierce the veil between the two absent compelling circumstances. *Rico Co., Ltd. V. Honewell, Inc.*, 817 F.Supp. 473 (D.N.J. 1993). In that case, the court held that a parent corporation could not be held liable as an "owner" or "operator" under federal environmental law (CERCLA) for merely exercising control over a subsidiary unless the corporate veil is pierced.

"[T]he basic finding that must be made to enable the court to pierce the corporate veil is 'that the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent.'" *OTR Associates v. IBC Services, Inc.*, 353 N.J. Super. 48 , 52 (App. Div. 2002), *certif. denied*, 175 N.J. 78 (2002), *citing State Dep't. of Environmental Protection v. Ventron Corp.*, 94 N.J. 473, 501 (1983). "But beyond domination, the court must also find that the 'parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law.' And the hallmarks of that abuse are typically the engagement of the subsidiary in no independent business of its own but exclusively the performance of a service for the parent and, even more importantly, the undercapitalization of the subsidiary rendering it judgment-proof." *Ibid.*

In its Complaint plaintiff fails to assert any facts that would establish the existence of a parent-subsidiary relationship between MPI and Harco. Further, plaintiff's Complaint is devoid of any of allegations generally required for the Court to pierce the corporate veil and hold the parent liable for the actions of its subsidiary; i.e., fraud, failure to observe corporate formalities, etc.. *See OTR Associates, supra* (citing *Ventron Corp., supra.*).

Since MPI is not a subsidiary of Harco, and in the absence of plaintiff carrying its burden of persuasion on this issue, the Court should dismiss plaintiff's Complaint against Harco with prejudice for failure to state a claim pursuant to R. 4:6-2(e).

POINT II

THE COURT SHOULD IMPOSE SANCTIONS AGAINST PLAINTIFF AND ITS COUNSEL FOR FILING A FRIVOLOUS PLEADING AGAINST HARCO IN VIOLATION OF RULE 1:4-8.

Pursuant to R. 1:4-8 the Court has the discretion to impose sanctions against an attorney who signs a pleading that is found to be frivolous in violation of the Rule.

R. 1:4-8 provides as follows:

> **(a) Effect of Signing, Filing or Advocating a Paper.** The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney or pro se party certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> > (1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> >
> > (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support; and
> >
> > (4) the denials of factual allegations are warranted on the evidence or, as to specifically identified denials, they are reasonably based on a lack of information or belief or they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.
>
> If the pleading, written motion or other paper is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the document had not been served. Any adverse party may also seek sanctions in accordance with the provisions of paragraph (b) of this rule.

Ibid.

Pursuant to subsection (b) of R. 1:4-8, the Court may award the prevailing party reasonable attorney's fees and expenses in presenting the motion. R. 1:4-8(b). Further, the Court may impose sanctions against a litigant who violates R. 1:4-8 in the same manner as prescribed by N.J.S.A. 2A:15-59.1. R. 1:4-8(f).

As highlighted previously, plaintiff has sued Harco under the bare allegation that MPI is a subsidiary of Harco and therefore should be held responsible for MPI's alleged

breach of the lease. Harco has not signed the lease and plaintiff has not pleaded any allegations that would establish otherwise, let alone any allegations that would demonstrate that Harco is, in fact, a parent of MPI.

One of the primary functions of R. 1:4-8 is to discourage attorneys from signing and filing pleadings without performing a modicum of due diligence. It is evident that at the time the Complaint was prepared and filed that plaintiff and its counsel failed to undertake any investigation to verify the statement(s) set forth therein as to MPI being an alleged subsidiary of MPI. Further, it is readily apparent from reviewing plaintiff's Complaint that neither plaintiff nor its counsel conducted any legal research to ascertain the standards by which a parent can be held responsible for the actions of its subsidiary.

Reasonable efforts were made by counsel for Harco to avoid brining a motion of such personal nature. The appropriate notice and demand was delivered to adversary counsel informing of the reasons why Harco contends the Complaint is frivolous. However, plaintiff's counsel has chosen not to respond at all and otherwise has failed to take the necessary corrective action within the time frame permitted by R. 1:4-8. As previously stated, Harco is incurring legal fees at the rate of $250/hr to defend this matter. Harco most respectfully asks the Court to compel the plaintiff and/or its counsel to reimburse Harco for all reasonable attorney's fees and costs that Harco has incurred in defending this matter. If the Court grants this portion of the motion, Harco's counsel will submit the appropriate Affidavit of Services as required by R. 4:42-9.

CONCLUSION

For the foregoing reasons and authorities cited, plaintiff's Complaint should be dismissed in its entirety and with prejudice as to Harco for failure to state a claim upon which relief can be granted pursuant to R. 4:6-2(e). In addition, the Court should impose

sanctions against plaintiff and/or its counsel in the form of reasonable attorney's fees and costs incurred by Harco in defending this frivolous action, pursuant to R. 1:4-8(b).

Respectfully submitted,

Glenn R. Reiser

Cc: Manual R. Grova, Esq. (w/encl.)
Gomidas Hartounian (w/encl.)