UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UAB PAMARIO DVARAS and TEISUTIS MATULEVICIUS, Plaintiffs, vs. DKP WOOD RAILINGS & STAIRS, INC., DMITRI ONISHCHUK, VIATCHESLAV CHEPELEVITCH, and VIKTOR KLICHKO, Defendants.	Case No.: 14-cv-04495-KSH-CLW Civil Action **Hearing Date: December 4, 2017**

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO RULE 12

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PRELIMINARY STATEMENT

Pursuant to Fed. R. Civ. P. ("FRCP") 12(b)(1), 12(b)(6), 12(b)(7), and 12(c), Defendants DKP Wood Railings & Stairs, Inc. ("DKP") and Dmitri Onishchuk ("Onishchuk") (collectively "Defendants") move to dismiss Plaintiffs' Complaint in its entirety for lack of capacity to sue, lack of standing, lack of subject matter jurisdiction, and failure to join a foreign bankruptcy administrator which is a necessary and indispensable party. In further support of their motion Defendants submit the Declaration of Gintautus Šulija ("Šulija Decl."), and Declaration of Glenn R. Reiser ("Reiser Decl."). Mr. Šulija is a lawyer in the Republic of Lithuania retained as Defendants' foreign law expert pursuant this Court's orders authorizing reliance on foreign law. [See D.E. 153, and D.E. 181].

Plaintiffs' Complaint stems exclusively from an adverse judgment entered against the corporate plaintiff UAB Pamario Dvaras ("Pamario Dvaras") in the Republic of Lithuania in 2012 arising from a lawsuit brought by the purchasers of three used cars sold by DKP that were damaged during overland transport from the Port of Klaipeda, Lithuania to Minsk, Belarus. DKP contracted with non-party Unitrans-PRA Co., Inc. ("Unitrans) to ship the cars overseas. In turn, Unitrans subcontracted with Pamario Dvaras for the overland transport of the cars. DKP was not named as a defendant in the Lithuania case. A Lithuania appeals court

affirmed the judgment in 2014. This federal action followed about three months later.

The gravamen of the Complaint is that the individual defendant Onishchuk allegedly submitted a misleading letter as evidence to support the car purchasers' claim in the Lithuania lawsuit, and that DKP had used the purchasers as "straw people" to circumvent the default insurance coverage limit of $50 per car provided by the ocean carrier Unitrans. Plaintiffs seek to hold Defendants responsible for the adverse Lithuanian court judgment entered in favor of the three used car purchasers in the amount of 109,741 Litas (the Lithuanian currency) which converted to approximately $40,051 U.S. Dollars. (The parties have stipulated to currency conversion amounts at the relevant times [D.E. 198, Pre-trial Order, Stipulation of Facts section, at ¶¶53, 57). Plaintiffs allege that this relatively modest debt caused Pamario Dvaras to financially deteriorate and eventually file for bankruptcy in Lithuania.

Plaintiffs' Complaint asserts claims under civil RICO, New Jersey Consumer Fraud Act, common law fraud, negligence, indemnification and contribution arising from the adverse Lithuanian court judgment. (In an effort to manufacture a RICO claim, the Complaint accuses Defendants of engaging in an overseas black market auto ring by pleading a number of unrelated used vehicle

sales with shipment made by DKP via Unitrans, all of which arrived overseas and were delivered without incident.)

The Complaint insufficiently pleads several bases of federal question jurisdiction, and also fails to satisfy the minimum $75,000 requirement necessary for diversity jurisdiction. None of Plaintiffs' claims bear any nexus to the ultimate issue of causation and damages; i.e., the overland trucking accident and the resulting adverse trial and appellate decisions issued in Lithuania. [See Exhibit 7 to Šulija Decl.].

STATEMENT OF FACTS

The genesis of this case stems from an earlier lawsuit brought in Lithuania by three women seeking to recover damages against the corporate plaintiff Pamario Dvaras resulting from a shipment of three used cars in a single shipping container, which cars were sold and exported by the corporate defendant DKP. [Complaint, D.E. 1, at ¶¶67, 69].

In 2011 DKP hired Unitrans, a shipping and freight forwarding company specializing in shipping vehicles overseas, to ship a single container of three used cars overseas from a port in the New York City area to the Port of Klaipeda, Lithuania, followed by overland truck transport to the final destination of Minsk, Belarus. [Id., at ¶¶5-7]. In turn, Unitrans subcontracted out the overland shipping leg of the transport to Pamario Dvaras, a Lithuanian corporation operating as a

cargo forwarding company engaged in "forwarding containerized automobiles received from the United States to various destinations across Europe." [Id. at ¶2, 13]. A copy of the Unitrans/Pamario Dvaras contract is attached as Exhibit 14 to the Reiser Decl. DKP had no contractual relationship with Pamario Dvaras.

For its part, Unitrans books overseas shipments and on behalf of their customers, prepares and processes the necessary documents, including a house bill of lading, which contains the terms of the shipping agreement between Unitrans and its customers, including limitations of liability. [Id., at ¶¶8–12.]

Plaintiffs' Complaint establishes that: (i) DKP was a Unitrans "customer"; (ii) Unitrans drafted and processed the bills of lading to export the three used cars at issue; (iii) the bills of lading define the terms of the agreement between Unitrans and DKP; and (iv) the bills of lading supersede all other shipping documents between Unitrans and DKP concerning the limitation of liability of Pamario Dvaras, a subcontractor hired by Unitrans to complete the overland transport of the cars. [D.E. 1, at ¶13].

The Unitrans' bills of lading expressly limit Unitrans' liability and prohibit DKP from suing the undisclosed subcontractor Pamario Dvaras. [See Bill of Lading Contract Terms and Conditions, at ¶¶3, 4(B), 5(B), and 8; Exhibit 15 to Reiser Decl.]. Unitrans provided DKP with a form titled "Shipping Instructions" that limited Unitrans' liability to $50 per car unless the shipper (DKP) selected

optional additional insurance coverage, which it did not. This form was drafted and prepared by Unitrans and completed by DKP. [See Exhibit J to Complaint]. The bills of lading also indicate that the carrier's liability for a "particular segment of the Carriage" "shall be subject to any national law or international conventions that are compulsory applicable to that segment of the Carriage." [Id., at ¶7(B)].

The container of three cars arrived without incident at the Port of Klaipeda in Lithuania, but thereafter was damaged during overland transport to Minsk (in Belarus) when the truck carrying the container went off the road and flipped. [Complaint, at ¶¶29, 67]. DKP did not sue Unitrans or Pamario Dvaras over this accident. Rather, the three women sued Pamario Dvaras in Lithuania as they had already paid DKP for the cars. [Id., at ¶69]. Yet, the Complaint generally alleges that DKP caused the three women to masquerade as the vehicles' true owners in order to recover the vehicles' full value from Pamario Dvaras thereby circumventing the default $50 per car insurance provided by the Unitrans Bill of Lading and Shipping Instructions. [Id., ¶¶69, 75-82]. The Complaint further alleges that this alleged conduct was part of an international black market automobile dealership involving Defendants' use of front men to avoid paying government export tariffs and fees. [Id., ¶¶15, 86]. Conspicuously absent from the Complaint is any reference to a causal link between the foregoing allegations and the overland trucking accident that occurred on a European roadway.

The Lithuanian lawsuit brought by the car purchasers did not name Unitrans, DKP or the individual plaintiff Teisutis Matulevicius ("Matulevicius") as defendants. Rather, they sued only Pamario Dvaras and its further subcontractor, V. Jestrumskis's Commercial Firm. [See Exhibit 6 to Šulija Decl.]. In the course of the Lithuanian lawsuit DKP and its principal Onishchuk were asked to confirm the nature of the sale transaction with the purchasers. [Complaint, D.E. 1, at ¶70]. Onishchuk, himself a resident of New York State, complied by submitting a "letter". [See Exhibit L to Complaint]. The Lithuanian court applied international shipping and carriage laws to determine Pamario Dvaras's liability, and entered a monetary judgment against Pamario Dvaras on September 7, 2012 totaling approximately 109,741 Litas ($40,051 USD) (the "Lithuanian Judgment"). [D.E. 198, Stipulation of Facts, ¶53].

Pamario Dvaras appealed. In a March 20, 2014, decision the Lithuanian appellate court affirmed in all respects except for slightly reducing the damages awarded to one of the car purchasers by the amount of 797 Litas ($291 USD). [See Exhibit 7 to Šulija Decl.; and D.E. 198, Pre-trial Order, Stipulation of Facts, ¶57.] During its appeal in Lithuania Pamario Dvaras argued that its liability to the car purchasers should be limited to $50 per car based on the Unitrans limitation of liability provision, i.e. that Pamario Dvaras should receive the benefit of the limitation of liability set forth in Unitrans' Shipping Instructions [See Exhibit 7 to

Šulija Decl., document stamped as Bates 0573]. Here, Pamario Dvaras argues the exact opposite position. [Šulija Decl., at ¶41].

The Lithuania Register of Legal Persons ("Register") is identified in Lithuania's Civil Code as the governmental agency required to maintain data identifying a legal person's name, legal form, code, registered office, members, etc. This includes business entities. [Šulija Decl., at ¶¶ 19(f), 20]. The Register identifies Pamario Dvaras by the corporate code 104728765 and confirms that on March 21, 2014, just one day after the Lithuanian Judgment was affirmed, Matulevicius (then the sole shareholder of Pamario Dvaras) sold his shares to an individual, non-party Galimzian Jusupov ("Jusupov"), the company changed its name to "Autodoja" and registered a new business address. [See Exhibit 12 to Šulija Decl.]. During the same time period Matulevicius formed a new company with the identical name, Pamario Dvaras, but with a new and different assigned corporate code in the official Register, 303274461, which Matulevicius continues to own and operate to this very day. [D.E. 198, Pre-trial Order, Stipulation of Facts, ¶¶62-66].

Plaintiffs filed this federal suit just three months later. Matulevicius is named as a co-plaintiff in this federal suit based on the false representation that he was the Pamario Dvaras shareholder when Plaintiffs filed this action. However, it is undisputed that Matulevicius was no longer a shareholder of Pamario Dvaras

when the Complaint was signed or filed. [See Exhibit 12 to Šulija Decl.; D.E. 198, Stipulation of Facts, at ¶¶60-61]. In fact, in a pleading docketed more than two years later Plaintiffs identify Matulevicius as the company's "former owner and principal." [D.E. 98, attached as Exhibit 5 to Reiser Decl.]. Matulevicius's current non-shareholder status surfaced when Plaintiffs filed a corporate resolution some two years after this action was commenced purportedly signed by Jusupov as the company's sole shareholder and director. The caption of this questionable document also establishes that Autodoja is the same company as Pamario Dvaras, as the document is titled: "Resolution of Autodoja f/k/a UAB Pamario Dvaras, a Private Limited Company". [See Exhibit 4 to Reiser Decl.].

In an effort to crawl out from under the Lithuanian Judgment, the Complaint advances fanciful allegations and erroneous legal theories designed to create the false impression that Defendants: (i) owed a contractual duty to Plaintiffs arising out of DKP's contract with Unitrans; (ii) operated a black market auto ring to bypass customs' fees by portraying the car purchasers as the real owners of the cars when they were actually straw buyers; (iii) intentionally underinsured the shipment when contracting with Unitrans; (iv) made false representations in the letter submitted by Onishchuk to the Lithuanian trial court; and (v) caused Pamario Dvaras's financial demise culminating with its bankruptcy filing.

The Complaint characterizes the Onishchuk "letter" submitted to the Lithuania trial court as containing false representations that caused Plaintiffs to sustain damages "in excess of $100,000, which includes the judgment rendered by the Lithuania Court ($40,051 USD) and attorney's fees expended by Plaintiff in defending the lawsuit." [D.E. 1, at ¶73]. (As previously noted, Matulevicius was not a party to the Lithuanian lawsuit and the Complaint makes no distinction as to which of the Plaintiffs allegedly incurred legal fees). The Complaint further avers that Defendants' alleged misrepresentations forced Plaintiff "to shutter his business and file for bankruptcy." [Id., at ¶74]. Again, the Complaint makes no distinction as to which of the Plaintiffs actually filed for bankruptcy. However, as Defendants would learn during discovery, no bankruptcy filing for either of the Plaintiffs existed when their counsel signed and filed the Complaint.

Despite trying to pin responsibility for the adverse Lithuanian Judgment on Defendants, incredibly Plaintiffs never paid a single penny of the judgment. During pretrial discovery Defendants learned that Pamario Dvaras filed for liquidation bankruptcy in Lithuania, by the application of its sole director and shareholder Jusupov, on or about April 3, 2015, some 10 months after this action was filed. This resulted in the appointment of UAB Angorela as the bankruptcy administrator to manage the company's assets and liabilities. [See Exhibit 9 to Šulija Decl.]. The foreign bankruptcy case remains ongoing. [Šulija Decl., at ¶60].

The bankruptcy administrator, UAB Angorela, is vested with the powers to pursue recovery of claims on behalf of Pamario Dvaras. [Šulija Decl., at ¶58]. Plaintiffs have not joined UAB Angorela in this action. Matulevicius does not possess the rights and powers of the company's bankruptcy administrator, nor does the Complaint aver that he does. Nor does the Complaint aver that Matulevicius sustained any personal damages.

LEGAL ARGUMENT

POINT I

PLAINTIFFS' STATEMENTS MADE IN THEIR PLEADINGS AND BY THEIR COUNSEL AT COURT CONFERENCES CONSTITUTE BINDING JUDICIAL ADMISSIONS

The doctrine of judicial admissions binds Plaintiffs to the factual allegations made in their pleadings, including their Complaint [D.E. 1], civil RICO Statement [D.E. 21], and Notice of Withdrawal of Claims [D.E. 98]. See, e.g., Sovereign Bank v. BJ's Wholesale Club, Inc., 533 F.3d 162, 181 (3d Cir.2008)(allegation in a complaint held to be a binding judicial admission where party attempted to take a contrary legal position on appeal); Judon v. Travelers Property Cas. Co. of America, 773 F.3d 495, 509 n 6 (3d Cir. 2014) ("A fact asserted in a pleading, which is both unequivocal and which would normally require evidentiary proof, constitutes a judicial admission")(internal citations omitted). Likewise, statements made by Plaintiffs' counsel during Court conferences conducted before Magistrate

Waldor constitutes binding judicial admissions. United States v. Butler, 496 F.Appx. 158, 160-161 (3d Cir. 2012) (a district court may admit "previous statements made by counsel which ha[ve] been made on the record in the course of pretrial proceedings[.]"); EF Operating Corp. v. American Bldgs., 993 F.2d 1046, 1050 (3d Cir. 1993), cert. denied, 510 U.S. 868 (1993) (representations made during the course of litigation, whether oral or written, are binding).

During an August 18, 2016 court status conference conducted before Magistrate Waldor, Plaintiffs' counsel admitted that his clients' alleged damages "stem . . . from the [Lithuania] civil court judgment," and that these damages "culminated with the bankruptcy." [D.E. 113, Tr. 4:23 to Tr. 5:5-25, attached as Exhibit 8 to Reiser Decl.]. In addition, Plaintiffs' attorneys confirmed that the individual plaintiff Matulevicius could not claim any damages arising from the Pamario Dvaras bankruptcy because he was not a shareholder or principal of the company when it filed for bankruptcy. [Id., Tr. 5:17-25; Tr. 6:14-15]. These statements constitute binding judicial admissions.

POINT II

STANDARDS GOVERNING RULE 12 MOTIONS

A. Lack of Standing

Motions challenging standing are governed by FRCP 12(b)(1), which recognizes two types of challenges to a litigant's standing: (i) a facial challenge,

which attacks the complaint on its face without contesting its alleged facts; or (ii) a factual challenge, which attacks allegations underlying the assertion of jurisdiction in the complaint. In a facial challenge the Court is required to consider the allegations of the complaint as true. Petruska v. Gannon Univ., 462 F.3d 294, 302 n. 3 (3d Cir. 2006). A Rule 12(b)(1) motion is facial in nature when filed prior to any answer. Cardio–Med. Assocs., Ltd. v. Crozer-Chester Med. Ctr., 721 F.2d 68, 75 (3d Cir. 1983).

In a factual challenge such as the Defendants pose here, however, "the plaintiff has the burden of proof that jurisdiction does in fact exist," and the court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case," and "no presumptive truthfulness attaches to [the] plaintiff's allegations. . . ." Mortenson v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). In reviewing a factual challenge, "a court may weigh and consider evidence outside the pleadings." Constitution Party of Pa. v. Aichele, 757 F.3d 347, 358 (3d Cir. 2014) (internal quotations omitted). Therefore, a Rule 12(b)(1) factual challenge strips a plaintiff of the protections and factual defense provided under a Rule 12(b)(6) review. See e.g., Davis v. Wells Fargo, 824 F.3d 333, 348-350 (3d Cir. 2016). As demonstrated herein, Plaintiffs will be unable to meet their burden to establish standing.

B. Failure to State a Claim and Judgment on the Pleadings

When reviewing a Rule 12(b)(6) motion, a district court should conduct a three-part analysis. See Malleus v. George, 641 F.3d 560, 563 (3d Cir. 2011). "First, the court must 'take note of the elements a plaintiff must plead to state a claim.'" Id. (quoting Ascroft v. Iqbal, 556 U.S. 662, 675 (2009)). Second, the court must accept as true all of a plaintiff's well-pleaded factual allegations and construe the complaint in the light most favorable to the plaintiff. Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009); see also Connelly v. Lane Const. Corp., 2016 WL 106159 (3d Cir. Jan. 11, 2016). However, the court may disregard any conclusory legal allegations. Fowler, 578 F.3d at 203. Legal conclusions may be used to provide structure for the complaint, but the pleading's factual content must independently "permit the court to infer more than the mere possibility of misconduct." Iqbal, 556 U.S. at 679. In fact, a complaint's "bald assertions" or "legal conclusions" do not need to be credited when deciding a motion to dismiss. Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). Finally, the court must determine whether the "facts are sufficient to show that plaintiff has a 'plausible claim for relief.'" Id. at 211 (quoting Iqbal, 556 U.S. at 679). If the complaint does not demonstrate more than a "mere possibility of misconduct," the complaint must be dismissed. See Gelman v. State Farm Mut. Auto. Ins. Co., 583 F.3d 187, 190 (3d Cir. 2009) (quoting Iqbal, 556 U.S. at 679).

When adjudicating a Rule 12(b)(6) motion, a District Court should consider the complaint, exhibits attached to the complaint, matters of public record, and indisputably authentic documents if the complainant's claims are based upon those documents. See PBGC v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993); see also, In re Burlington Coat Factory Sec. Lit, 114 F.3d 1410, 1426 (3d Cir. 1997) (a document forms the basis of a claim when it is "integral to or explicitly relied upon in the complaint" and such a document "may be considered without converting the motion to dismiss into one for summary judgment."); DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010) (a district court may consider a document not incorporated by reference in the complaint, where the complaint relies heavily upon its terms and effect).

Since Defendants raise a factual attack on subject matter jurisdiction the Court can properly consider the documentary evidence attached to Complaint, the Reiser Decl. and the Šulija Decl., including the Apostilles of foreign public documents that are either directly referenced in the Complaint or pertain to the allegations raised therein. See FRCP 44(a)(2) governing the procedure for proving official foreign records, and FRE 902(3) governing the admissibility of foreign public documents.

C. Failure to Join a Necessary and Indispensable Party

FRCP 12(b)(7) permits a court to dismiss a complaint for failure to join a required party under FRCP 19. If the party is necessary and indispensable to the action and joinder would deprive the court of subject matter jurisdiction, the court must dismiss the complaint. Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 404 (3d Cir. 1993); Malibu Media, LLC v. Tsanko, 2013 WL 6230482, at *7 (D.N.J. Nov. 30, 2013). The Pamario Dvaras foreign court-appointed bankruptcy administrator UAB Angorela is indeed a necessary and indispensable party whom Plaintiffs inexplicably have not joined in this federal action. See Point VI, infra.

POINT III

THE COMPLAINT FAILS TO SATISFY THE CASE OR CONTROVERSY REQUIREMENT BECAUSE THE DAMAGES ARE LESS THAN $75,000

Federal Courts are authorized to hear diversity actions only where "the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs." 28 U.S.C. §1332(a). Plaintiffs concede their damages are based entirely on the underlying Lithuanian Judgment entered in the amount of 109,741 Litas ($40,051 USD). [D.E. 198, Pre-trial Order, Stipulation of Facts, ¶53].

As previously stated, Plaintiffs own attorneys concede that their damages stem from the Lithuania civil court judgment and culminated with the bankruptcy filing. [D.E. 113, Tr. 4:23 to Tr. 5:5-25, attached as Exhibit 8 to Reiser Decl.].

Since the Lithuanian Judgment is the equivalent of $40,051 USD Plaintiffs have not established the minimum threshold $75,000 case or controversy requirement under 28 U.S.C. 1332(a). Accordingly, their Complaint must be dismissed as a matter of law.

POINT IV

THE COURT MUST DISMISS THE COMPLAINT IN ITS ENTIRETY BECAUSE PLAINTIFFS ARE NOT THE REAL PARTY IN INTEREST AND LACK THE LEGAL CAPACITY TO SUE

FRCP 17(a)(1) requires an action to "be prosecuted in the name of the real party in interest," [Id.], defined as "one who has substantive rights that may be enforced in the litigation." Integrated Agri, Inc., 313 B.R. 419, 426 (C.D. Ill. 2004) (citing U.S. v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949)). Failure to comply with this rule quires dismissal. FRCP 17(a)(3). Defendants have consistently challenged Plaintiffs' ability to maintain this lawsuit. [See Defendants' Amended Answer, affirmative defense no. 4, attached as Exhibit 2 to Reiser Decl.].

Since Pamario Dvaras is incorporated in Lithuania, that country's corporate internal affairs laws determine its capacity to prosecute this federal suit. "The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs . . . ." Edgar v. MITE Corp, 457 U.S. 624, 645 (1982). The doctrine "achieves the need for certainty and predictability of result while generally protecting the justified

expectations of parties with interests in the corporation." First Nat'l City Bank v Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983).

Claims involving breach of fiduciary duty and shareholders' rights or standing to bring suit on behalf of the corporation are typically considered as issues concerning a corporation's internal affairs. See In re BP PLC Derivative Litig, 507 F.Supp. 2d 302, 308 (S.D.N.Y. 2007); Sagarra Inversiones, SL v. Cementos Portland Valderrivas, SA, 34 A.3d 1074, 1081-82 (Del. 2011). The internal affairs choice of law rule "is well established and generally followed throughout this country". Hausman v. Buckley, 299 F.2d. 697, 702 (2d Cir. 1962), cert. denied, 269 U.S. 885 (1962); Fagin v. Gilmartin, 432 F.3d 276, 282 (3d Cir. 2005).

FRCP 17(b)(2) mandates applying Lithuanian law to determine Plaintiffs' legal capacity to sue or be sued. "Capacity" refers to a party's personal right to litigate in a federal court, which is determined by the law of the individual's domicile. Esposito v. United States, 368 F.3d 1271, 1273 (10th Cir. 2004)). Unlike the doctrines of standing and real-party-in-interest, "capacity is conceived to be a party's personal right to litigate." Lundquist v. University of S. Dakota Sanford Sch. of Med., 705 F.3d 378, 380 (8th Cir. 2013).

Likewise, a corporation's capacity to sue is governed "by the law under which it was organized." FRCP 17(b)(2). A foreign corporate entity's legal existence "must be determined by the laws of the country where it has been created

and continues to exist." Carl Zeiss Stiftung v. VEB Carl Zeiss Jena, 433 F.2d 686, 698 (2d Cir.1970), cert. denied, 403 U.S. 905 (1971).

Plaintiffs assert diversity of citizenship among their subject matter jurisdictional arguments. The Complaint avers that Pamario Dvaras is a Lithuanian corporation and that Matulevicius resides in Lithuania. [D.E. 1, at ¶¶ 33-34]. Accordingly, Lithuanian law must be applied to resolve Plaintiffs' legal capacity under FRCP 17(a) and FRCP 17(b)(2).

Several provisions of Lithuania's Law on Companies dictate Plaintiffs' capacity to sue under FRCP 17(b)(2). For instance, Art. 3 states that, "Each shareholder shall have such rights in the company as are incidental to the shares in the company owned by him." [Art. 3.2, Law on Companies, attached as Exhibit 15 to Šulija Decl.]. "The Law on Companies in conjunction with other Lithuanian laws and the Articles of Association of the company establishes the rights and duties of shareholders." [Id., Art. 14]. [Šulija Decl., at ¶48]. Art. 15 of the Law on Companies identifies shareholders' property rights as including the rights to receive profit or dividends, part of the assets of the company in liquidation, and other property rights established by other laws. [Šulija Decl., at ¶51-52]. Art. 16 identifies the non-property rights of shareholders which includes "filing a claim with the court for reparation of damage resulting from nonfeasance of malfeasance by the company manager and Board members." [Id., citing Art. 16.1].

Shares of a Lithuanian company must be recorded. [Šulija Decl., at ¶53, citing Art. 41(1)]. "Among the list of exclusive rights afforded to the General Meeting and not to other bodies of the company are decisions to reorganis[z]e or split-off the company, transform the company, restructure the company, and liquidate the company." [Id., citing Law on Companies, Art. 20(1)(19), 20(1)(20), 20(1)(21), 20(1)(22)].

Significantly, with respect to Plaintiffs' lack of standing in the instant case, Art. 1.21 of the Lithuania Civil Code specifies that Lithuania law governs the representative offices and branches of organizations registered in Lithuania as well as "the rights and obligations (competence) of the persons acting on behalf of a representative office or branch registered in the Republic of Lithuania." [Šulija Decl., at ¶44, citing Art. 1.21.1 of Civil Code; Exhibit 13]. [Emphasis added].

Another Chapter of the Civil Code governs the legal capacity of legal persons. [Šulija Decl., at ¶45]. Under Art. 2.110 the appointment of a liquidator of a legal person divests the managing bodies of a legal person and its members from their authority to act on behalf of the legal person and delegates such authority to the liquidator effective as of the date of his appointment. [Id., citing Art. 2.110].

Reading the Lithuania Law on Companies in conjunction with its Civil Code substantiates that Matulevicius possessed no legal rights to represent Pamario Dvaras when Plaintiffs filed their Complaint on July 16, 2014 because he

previously sold his shares to Jusupov effective March 26, 2014. [Šulija Decl., at ¶54]. As of March 26, 2014, Matulevicius was not entitled to vote at the company's General Meeting, and otherwise relinquished all of his duties and rights to participate in its ownership and management. [Id.]. Indeed, the official Lithuania Register entries for Pamario Dvaras confirms the sale of shares from Matulevicius to Jusupov, the corporate name change to "Autodoja" and its new registered office. [Id.]. Undoubtedly, Lithuanian laws establish that Matulevicius is not the proper party under FRCP 17(a) to be pursuing litigation on behalf of a company he possesses no legal interest in.

Lithuania "Law on Companies" and "Enterprise Bankruptcy Law" also confirm that Plaintiffs are not the real parties-in-interest to prosecute the within action. The Lithuania Register reflects that Matulevicius held no ownership interest in Pamario Dvaras when this federal suit was filed, identifies the company's status as "bankrupt", and names the bankruptcy administrator as the company's current legal representative. [Exhibit 12 to Šulija Decl."]. Pursuant to Art. 2.71(3) of the Lithuania Civil Code, data maintained by the Register "shall have *prima facie* authority, meaning that such information, data and documents are presumed to be true and correct, unless disproved or declared invalid in accordance with the procedures set by the laws of Lithuania." [Šulija Decl., at ¶19(f), citing Art. 2.71(3) of Civil Code].

Likewise, Lithuania Enterprise Bankruptcy Law mandates dismissal of the Complaint for lack of capacity under FRCP 17(b)(2) because the Lithuanian court-appointed bankruptcy administrator is the party vested with the legal rights to marshal the company's assets and manage its affairs to the exclusion of the company's sole director and shareholder Jusupov. [Šulija Decl., at 58, citing Lithuania Enterprise Bankruptcy Law, Art. 11(5), attached as Exhibit 16 thereto]. [Emphasis added].

POINT V

THE COMPLAINT SHOULD BE DISMISSED ENTIRELY FOR LACK STANDING

A. Standing in General

A party must establish three elements to satisfy the "constitutional minimum of standing": (1) an "injury in fact"; (2) a causal connection between the injury and the conduct complained of, Duquesne Light Co. v. U.S. E.P.A., 166 F.3d 609, 613 (3d Cir. 1999); and (3) it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (internal citations omitted). Standing is subject to review at all stages of litigation because a lack of standing undermines federal court jurisdiction. Bender v. Williamsport Area School Dist., 475 U.S. 534, 546-547 (1986).

Plaintiffs bear the burden of proving facts giving rise to standing by a preponderance of the evidence, McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1936), "at the successive stages of the litigation." New Jersey Physicians, Inc. v. President of U.S., 653 F.3d 234, 239 (3d Cir. 2011) (citing Lujan, supra, 504 U.S. at 561)). Because this is a challenge to the Court's "very power to hear the case," this presents a factual attack on subject matter jurisdiction, and "no presumptive truthfulness attaches to plaintiff's allegations" for this inquiry. Mortensen v. First Federal Sav. and Loan Ass'n., supra, 549 F.2d at 891.

B. Plaintiffs Lack Standing to Maintain a Derivative Lawsuit

When stripped of its bare conclusive allegations, Plaintiffs' Complaint, if construed as a derivative suit, does not meet the requirements of FRCP 23.1 and therefore must be dismissed. Pursuant to FRCP 23.1(b), a complaint must be verified and "allege that the plaintiff was a shareholder or member at the time of the transaction complained of," and "state with particularity . . . any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members." Id.

The Third Circuit interprets FRCP 23.1 as requiring a continuous ownership of corporate stock as a basis for derivative standing. Santomenno v. John Hancock Life Ins. Co. (USA), 677 F.3d 178 (3d Cir. 2012); Kauffman v. Dreyfus Fund, Inc.,

434 F.2d 727 (3d Cir. 1970), cert. den., 401 U.S. 974 (1971). In fact, ". . . the only right that a plaintiff in a derivative suit possesses is a secondary right derived from his status as a shareholder." Thus, if a plaintiff does not retain shareholder status, the plaintiff does not retain the right to pursue an action that derives from that status. *The Continuous Ownership Requirement: A Bar To Meritorious Shareholder Derivative Actions?*, 43 Wash. & Lee L. Rev. 1013, 1020 (1986) (internal citations omitted). (Emphasis added). Because the corporation owns the underlying cause of action and any resulting recovery, a non-stockholder "could not benefit from any recovery" and therefore lacks standing to pursue the litigation. Lewis v. Chiles, 719 F.2d 1044, 1047 (9th Cir. 1983).

Consistent with federal law, New Jersey law also applies the continuous ownership requirement to determine a stockholder's derivative standing. See N.J.S.A 14A:3-6.2 which requires the plaintiff to remain "a shareholder throughout the derivative proceeding," and "fairly and accurately represent[s] the interest of the corporation in enforcing the right of the corporation." Id. See also, Pogostin v. Leighton, 216 N.J. Super. 363, 371 (App. Div. 1987)(citing earlier version of the statute and New Jersey Court Rule 4:32-5).

Similarly, Lithuania law is consistent with both New Jersey and federal law as to the powers and rights of a shareholder. [See pp. 16-22 of this Brief, supra, citing to portions of Šulija Decl.].

C. Lithuania Bankruptcy Law and Federal Bankruptcy Law Strip Plaintiffs of Standing to Pursue Third Party Claims

United States bankruptcy law is in accord with Lithuania Enterprise Bankruptcy Law when it comes to vesting a bankruptcy trustee with exclusive standing to pursue causes of action on behalf of a company engaged in Chapter 7 liquidation. See Nagel v. Commercial Credit Business Loans, Inc., 102 F.R.D. 27, 30 (E.D. Pa. 1983). "The trustee stands in the shoes of the debtor, and can only maintain those actions that the debtor could have brought prior to commencement." In re NJ Affordable Homes Corp., 2013 Bankr. LEXIS 4798, at *82 (Bankr. D.N.J. Nov. 8, 2013). See, e.g., Pepper v. Litton, 308 U.S. 295, 307 (1939)(stockholders' derivative actions belong to a bankruptcy trustee, not to the stockholders.)

Likewise, Lithuania Enterprise Bankruptcy Law authorizes the Lithuania court to appoint a bankruptcy administrator. [Šulija Decl., at ¶57, citing Enterprise Bankruptcy Law, Art. 10.4.1, attached as Exhibit 16 thereto]. Lithuania Enterprise Bankruptcy Law vests the bankruptcy administrator with the right to represent the company in bankruptcy court, protect the company's rights and interests, to control the use of the bankrupt company's assets, and "take measures to recover debts, . . ." [Šulija Decl., at ¶¶57-58, citing various Articles of Enterprise Bankruptcy Law]. [Emphasis added]. Critically, the adoption of a ruling to initiate a company bankruptcy proceeding in Lithuania strips the corporate governing bodies of their powers, and no other person aside from the bankruptcy administrator may attempt

to exercise control over the bankrupt company's assets and funds. [Šulija Decl., at ¶¶57-58, citing Lithuania Enterprise Bankruptcy Law]. [Emphasis added]. Accordingly, application of Lithuania Enterprise Bankruptcy Law mandates dismissal of the Complaint in totality for lack of standing.

POINT VI

THE COURT SHOULD DISMISS THE COMPLAINT FOR FAILURE TO JOIN THE FOREIGN BANKRUPTCY ADMINISTRATOR WHO IS A NECESSARY AND INDISPENSABLE PARTY

FRCP 19(a)(1) defines a "required party" as being either: (i) one whose absence "the court cannot accord complete relief among existing parties; or (ii) a person who "claims an interest relating to the subject of the action" whose absence "may as a practical matter impair or impede the person's ability to protect that interest, or leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." FRCP 19(a)(1)(A) and (B). See, Janney Montgomery, supra, 11 F.3d at 404; Liberty Mut. Ins. Co. v. Treesdale, Inc., 419 F.3d 216, 230 (3d Cir. 2005).

Determining whether a party must be joined under FRCP requires a two-step analysis. First, the court must determine whether an absent party is "necessary" to the dispute under Rule 19(a). Janney Montgomery, 11 F.3d at 404. Under FRCP 19(a), a party is "necessary" only if it has a legally protected interest, and not merely a financial interest, in the action. Liberty Mut. Ins. Co. v. Treesdale, Inc.,

supra, 419 F.3d at 230 (internal citations omitted). Second, if the absent party is "necessary" but joinder is not feasible because it would destroy diversity, the Court must decide whether the absent party is "indispensable" under FRCP 19(b). Id. at 405 ("[A] holding that joinder is compulsory under Rule 19(a) is a necessary predicate to a district court's determination under Rule 19(b) that the case must be dismissed because joinder of the party is not feasible and the party is indispensable to the just resolution of the controversy."). If a court does not find that a party is "necessary" to the proceedings, the party is, by definition, not "indispensable" to the action. See Janney Montgomery, supra, 11 F.3d at 404.

UAB Angorela, the foreign court-appointed bankruptcy administrator of Pamario Dvaras, is a necessary and indispensable party to this federal action under either prong of Rule 19(a)(1). As previously mentioned, Lithuania Enterprise Bankruptcy Law vests UAB Angorela as the party responsible for administering Pamario Dvaras' bankruptcy estate, which encompasses the affirmative claims asserted by the Plaintiffs here. Plaintiffs possess no legal authority to act on behalf of the foreign bankruptcy administrator, let alone pursue claims against Defendants in the United States for their own pecuniary benefit and to the exclusion of the Pamario Dvaras bankruptcy estate. In fact, Matulevicius is in conflict with the foreign bankruptcy administrator who is independently suing him in Lithuania for

engaging in fraudulent asset transfers involving Pamario Dvaras. [See Exhibits 10 and 11 to Reiser Decl.].

Absent the bankruptcy administrator's joinder in this federal action the Defendants could be subjected to the same suit in Pamario Dvaras' bankruptcy case thereby exposing them to multiple lawsuits in two different country's judicial systems and duplicative obligations concerning the same underlying claims. Consequently there cannot be any finality to this litigation without joinder of the bankruptcy administrator. Thus, dismissal of the Complaint is appropriate under FRCP 12(b)(7).

POINT VII

THE COURT SHOULD DISMISS PLAINTIFFS' CIVIL RICO CLAIM UNDER THE RULE 12(b)(6) STANDARD AND THE RECENT SUPREME COURT HOLDING IN RJR NABISCO v. EUROPEAN COMMUNITY

In pleading a private cause of action under RICO, 18 U.S.C. 1961, et seq., Plaintiffs generally aver that they "have been injured in their business" and "have suffered pecuniary damages of at least $100,000." [D.E. 1, at ¶111]. On that basis, Plaintiffs seek treble damages under 18 U.S.C. § 1964(c).

A valid claim under 18 U.S.C. § 1962(c) must allege the following four elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Lum v. Bank of Am., 361 F.3d 217, 223 (3d Cir. 2004). In addition, a plaintiff must also demonstrate that the § 1962 violation damaged his or her

business or property. 18 U.S.C. § 1964(c). The damage to a private plaintiff's business or property must be domestic to the United States. RJR Nabisco, Inc. v. European Community, 579 U.S.____, 136 S.Ct. 2090 (2016). The RICO standing requirement, 18 U.S.C. § 1964(c), obligates a plaintiff to "show that defendant's RICO violation was not only a `but for' cause of his injury, but also that it was the proximate cause." Anderson v. Ayling, 396 F.3d 265, 269 (3d Cir. 2005). These standing requirements help prevent expanding RICO "to provide a federal cause of action and treble damages to every tort plaintiff." Maio v. AETNA, Inc., 221 F.3d 472, 483 (3d Cir. 2000)(internal citations omitted).

A. Individual Shareholders of Corporations Lack Standing to Assert Private RICO claims

In circumstances similar to the case at bar, the court in Warren v. Manufacturers National Bank, 759 F.2d 542 (6th Cir. 1985) dismissed a RICO claim brought by a stockholder of a corporation allegedly bankrupted by a creditor's interest rate overcharge, finding the corporation owned the right of action. Other circuit courts have rejected individual stockholder RICO suits to redress injuries directed against the corporation. See e.g., Sparling v. Hoffman Constr. Co., 864 F.2d 635, 640-641 (9th Cir. 1988); Roeder v. Alpha Indus. Inc., 814 F.2d 22, 29-30 (1st Cir. 1987); Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 (2d Cir.), cert. denied, 479 U.S. 987 (1986). The result does not change even if the plaintiff is the sole stockholder of the corporation. See Sparling, supra,

864 F.2d at 640-641. Likewise, it is well settled that a shareholder of a corporation lacks standing to bring a RICO claim if the alleged injury is a diminution in stock value. Rand v. Anaconda-Ericsson, supra, 794 F.2d 849; Roeder v. Alpha Indus., supra, 814 F.2d at 29-30.

B. The Supreme Court's Recent Decision in RJR Nabisco is Fatal to Plaintiffs' Civil RICO Claim

The Supreme Court's recent landmark ruling in RJR Nabisco, Inc. v. European Community, supra, 136 S.Ct. 2090, **prohibits** the application of RICO here by requiring private litigants to allege and prove a domestic injury to its business or property in order to overcome the strong presumption against applying RICO extraterritorially. Simply stated, RICO does not allow for recovery of foreign injuries. Id., 136 S.Ct. at 2111. See also, Bascuñan v. Elsaca, 2016 U.S. Dist. LEXIS 133664 (S.D.N.Y. Sep. 28, 2016) (focusing on the plaintiff and the location of the alleged injury is the proper approach to determine whether a private plaintiff can maintain a civil RICO claim.).

The RJR Nabisco Court explained that "providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct." RJR Nabisco, 136 S.Ct. at 2106. Plaintiffs' Complaint and civil RICO Statement are bereft of any allegation that they have suffered a domestic injury to any business or property in the United States. To the contrary, paragraphs 4 and 15 of their RICO Statement

speak solely of alleged damages that occurred outside of the United States. [See Exhibit 3 to Reiser Decl.].

Defendants anticipate that Plaintiffs will rely on a recent case in this District decided after RJR Nabisco. See Ardak Akishev v. Sergey Kapustin, 2016 U.S. Dist. LEXIS 169787 (D.N.J. Dec. 8, 2016), where Judge Hillman noted that "[t]he application of [the domestic injury] rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is 'foreign' or 'domestic.'" Kapustin, at *16-17 (citing RJR Nabisco, 136 S.Ct. at 2111). The plaintiffs in Kapustin ordered automobiles from a United States-based website to be shipped to Russia. The Kapustin court determined that this Internet-based transaction satisfied the domestic injury requirement of RJR Nabisco because defendants failed to deliver the cars from the United States or refund their money from the United States. Id., at * 18. Here, to the contrary, the cars arrived safely to the Port of Klaipeda and the purchasers of the cars did not sue DKP but rather sued the overseas trucking company (Pamario Dvaras) which the Lithuania courts held responsible for the very accident that damaged the cars. For this reason, among others, Kapustin is readily distinguishable and not applicable. Here, the parties had no privity of contract and never communicated about the overseas shipment of the cars from the United States to the Port of Klaipeda or the corresponding overland trucking transport to Minsk, Belarus.

Just recently, a New Jersey state appeals court held that a private plaintiff could not maintain a civil RICO case under New Jersey's parallel RICO statute because the thrust of the alleged enterprise misconduct occurred in New York and thus New York law applied. Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., L.L.C., 2017 N.J. Super. LEXIS 55 (App. Div. Apr. 27, 2017). Because New York law does not recognize a private RICO claim the plaintiff could not avail itself of New Jersey's state RICO statute.

Plaintiffs' civil RICO Statement confirms that the alleged RICO activities occurred on foreign soil and that the alleged damages involve the three cars incorporated in the Lithuanian Judgment. [See RICO Statement, ¶15, attached as Exhibit 3 to Reiser Decl.]. Plaintiffs have not, and cannot, plead or prove any domestic injury to any business or property in the United States because they are domiciled in Lithuania, the alleged incidents occurred there, and their damage claims are exclusively bound to the adverse Lithuanian Judgment, as their counsel readily conceded during a prior conference conducted before Magistrate Waldor [Reiser Decl., ¶17]. This mandates dismissal of their private RICO claim under RJR Nabisco and FRCP 12(b)(6).

POINT VIII

PLAINTIFFS HAVE FAILED TO ESTABLISH SUBJECT MATTER JURISDICTION UNDER EITHER THE CARRIAGE OF GOODS BY SEA ACT OR THE SHIPPING ACT OF 1984

A. Carriage of Goods by Sea Act

Plaintiffs' Complaint includes a one-sentence reference to the Carriage of Goods by Sea Act ("COSGA"), 46 U.S.C. § 1301, et seq., as an independent basis to establish federal question jurisdiction pursuant to 28 U.S.C. §1331. [D.E. 1, at ¶44]. This blanket statement does not comport with the general pleading requirements of FRCP 8(a)(1), and in any event the Complaint does not articulate a factual basis for COSGA's application.

COSGA applies to the carriage of goods between U.S. and foreign ports. See 46 U.S.C. §§ 1300, 1312. The term "carriage of goods" is defined as "the period from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. § 1301(e).

The duties and rights of a "carrier" under COSGA are spelled out in 46 U.S.C. § 1302, which incorporates 46 U.S.C. § 1303 (responsibilities and liabilities of carrier and ship), and 46 U.S.C. § 1304 (rights and immunities of carrier and ship). At some point "federal admiralty jurisdiction over the underlying shipping contract must end." Brosonic Co., Ltd. v. M/V "Matilda Mersk", 120 F.Supp.2d 372, 376 (2d Cir. 2000). Although a bill of lading is considered a maritime

contract, ". . . simply because an item was once transported across the sea pursuant to a bill of lading, [does not mean that] admiralty jurisdiction permanently attaches to any and all disputes concerning that item. Admiralty jurisdiction is rightly linked to the action of ocean carriage itself, not to the subjects of such carriage." Id. at 376. The "fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce.'" Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603, 608 (1991). "If the contract contains both maritime and non-maritime elements, admiralty jurisdiction generally is absent." Brosnic Co. Ltd., supra, 120 F.Supp. 2d. at 377. See also, Berkshire Fashions, Inc. v. M.V. Hakusan II, 954 F.2d 874, 881 (3d Cir.1992) (if the bill of lading was a contract for partial sea and partial land transport, it would not give rise to admiralty jurisdiction; the extensive cross-United States transport of goods would not be an incidental aspect of the contract, nor could the land and sea portions appropriately be severed)

Plaintiffs' attempt to apply COSGA to the inland trucking leg of the journey does not provide a basis for federal maritime jurisdiction. COSGA only applies as a matter of law from "tackle to tackle"; i.e., port to port. See Sompo Japan Ins. Co. of Am. v. Union Pac. R.R., 456 F.3d 54 (2d Cir. 2006). In the instant case, the maritime component of the shipment of the three cars ended when the goods arrived safely at the port in Klaipeda, Lithuania - that was the point of constructive delivery under COSGA.

Plaintiffs will no doubt point to the provision in the Unitrans' bills of lading which state that COSGA applies "throughout the entire time that the Goods are in the custody of the Carrier or its Subcontractors." [See Unitrans bills of lading terms and conditions, at ¶6(B), attached as Exhibit D to Complaint]. (A more legible copy of those terms and conditions is attached as Exhibit 15 to Reiser Decl.). However, the bills of lading also indicate that the carrier's liability to the shipper is expressly subject to other national law or international conventions deemed to apply to a particular segment of the carriage. [Id., 7(B)]. This is significant because the Lithuania court applied international shipping and carriage laws in holding Pamario Dvaras liable for the damages incurred during the inland trucking accident. [See English translation of Lithuanian Judgment attached as Exhibit 6 to Šulija Decl.]. Despite Pamario Dvaras exhausting its appellate rights in Lithuania, Plaintiffs are attempting a "second bite at the apple" in this federal suit by arguing COSGA's application to the overland transport leg of the journey.

B. Shipping Act of 1984

A single sentence of Plaintiffs' Complaint erroneously asserts the Shipping Act of 1984 (46 U.S.C. § 40101, et seq.) (the "Shipping Act") as a basis for subject matter jurisdiction. [D.E. 1, at ¶ 44]. "[T]the Shipping Act does not provide for a private cause of action in federal district court; rather, alleged violations of the Shipping Act must be addressed with the Federal Maritime Commission."

Mediterranean Shipping Co. USA Inc. v. AA Cargo Inc., 46 F. Supp.3d 294, 301 (S.D.N.Y. 2014); see also Port Auth. of New York & New Jersey v. Maher Terminals, LLC, 2008 WL 2354945, at *3 (D.N.J. June 3, 2008) ("[N]o provision of the Shipping Act of 1984 provides a federal cause of action for violations of the Act.").

POINT IX

PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE NEW JERSEY CONSUMER FRAUD ACT

Plaintiffs' Complaint fails to establish that this international shipping transaction falls within the scope of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 - 56:8-184 (hereinafter "NJCFA"). None of the parties are domiciled in New Jersey. Although this claim should be dismissed outright for lack of standing pursuant to FRCP 12(b)(1), Defendants also address this claim under the FRCP 12(b)(6) standard.

A. Purpose of NJCFA

The NJCFA "is aimed basically at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate." D'Ercole Sales v. Fruehauf Corp., 206 N.J. Super. 11, 18-19 (App. Div. 1985) (internal citations omitted). (Emphasis added). The law's objective is "to greatly expand protections for New Jersey consumers." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 555 (2009). (Emphasis added).

B. Notice to Attorney General

Plaintiffs' NJCFA claim fails to meet the statutory threshold requirement of serving the Complaint upon the New Jersey Attorney General pursuant to N.J.S.A. 56:8-20. The purpose of this provision is to afford the Attorney General an opportunity to intervene in a private CFA action. See Kugler v. Romain, 58 N.J. 522, 535-541 (1971); Zorba Contractors, Inc. v. Housing Auth., City of Newark, 362 N.J. Super. 124, 138 (App. Div. 2003). Plaintiffs inexplicably failed to provide the New Jersey Attorney General with the opportunity to intervene in this matter. Accordingly, their NJCFA claim must be dismissed as a matter of procedural due process.

C. Prima Facie Elements of NJCFA Claim

The *prima facie* elements to maintain a NJCFA claim require a plaintiff to prove: (i) unlawful conduct, (2) an ascertainable loss, and (3) a causal relationship between the unlawful conduct and ascertainable loss." New Jersey Citizen Action v. Shering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div. 2003); see also, N.J.S.A. 56:8-19. Even if the Court excuses Plaintiffs' failure to serve their Complaint upon the New Jersey Attorney General, as demonstrated herein Plaintiffs fall woefully short of demonstrating a legally cognizable claim under the NJCFA.

First, neither of the Plaintiffs qualifies as a "consumer" within the NJCFA. In fact, their Complaint contains no such allegation. A business entity can qualify as a member of the public, or "person," only in a consumer-oriented situation. See, e.g., Viking Yacht Co. v. Composites One LLC, 496 F.Supp.2d 462 (D.N.J. 2007); J & R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259, 1273 (3d Cir. 1994).

Second, the Complaint does not adequately plead an ascertainable loss necessary to sustain a claim under the NJCFA predicated on the adverse Lithuanian Judgment, especially considering that Plaintiffs never paid a single penny of the Lithuanian Judgment and, due to the bankruptcy proceeding in Lithuania, never will. An "ascertainable loss" under the NJCFA requires proof of compensatory damages with requisite certainty and cannot be based on speculation like Plaintiffs are attempting here. See Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 375–76 (2011). Accord Thiedemann v. Mercedes-Benz USA, LLC, 369 N.J. Super. 402 (App. Div. 2004).

Third, the Complaint fails to plead sufficient facts to establish that Defendant's alleged unlawful conduct caused the "ascertainable loss". See, e.g., Pron v. Carlton Pools, Inc., 373 N.J. Super. 103 (App. Div. 2004)(court dismissed NJCFA claim where plaintiff could not show that his loss was caused by a home improvement contractor's technical violation of the statute). The Complaint's

general allegations do not establish a causal connection between Defendants' alleged wrongful conduct and the trucking accident that occurred on foreign soil.

Fourth, Plaintiffs' NJCFA claim fails because they have not demonstrated any nexus to New Jersey. See, e.g., Crete v. Resort Condos. Int'l, LLC, 2011 U.S. Dist. LEXIS 14719 (D.N.J. Feb. 14, 2011)(Applying the "most significant relationship" test under New Jersey's conflict of law principles, Judge Sheridan dismissed plaintiffs' NJCFA claim by concluding that New Jersey had no connection to transactions involving plaintiffs' purchases of timeshare memberships while vacationing in the Dominican Republic)(citing Cooper v. Samsung Elecs. Am., Inc., 374 Fed. Appx. 250, 255 (3d Cir. 2010)). Accord, Maniscalco v. Brother Int'l (USA) Corp., 709 F.3d 202 (3d Cir. 2013). See also, Bedi v. BMW of N. Am., LLC, 2016 U.S. Dist. LEXIS 9365 (D.N.J. Jan. 27, 2016) (NJCFA claim dismissed where plaintiff was unable to establish any link to New Jersey aside from defendant's location, and "all other pertinent activities occurred in California.").

Here, aside from Plaintiffs alleging the cars were exported from New Jersey, our State has no connection to this international shipping transaction, the trucking accident on foreign soil, or the resulting Lithuanian lawsuit. None of the parties reside in New Jersey and the Complaint is completely bereft of accusations that

Defendants' committed any wrongful conduct in New Jersey. Accordingly, this Court should dismiss Plaintiffs' NJCFA claim pursuant to FRCP 12(b)(6).

CONCLUSION

For the foregoing reasons and authorities cited, the Court should dismiss the Complaint in its entirety based on a combination of FRCP 12(b)(1), 12(b)(6), 12(b)(7), and 12(c).

Respectfully submitted,

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-and-

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Dated: November 8, 2017

By: /s Glenn R. Reiser
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