SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MAGNETEK, INC.,	App. Div. Docket No.: A-000036-23
Plaintiff-Appellant,	On Appeal From
v.	Docket No. BER-L-3362-17
MONSANTO COMPANY, PHARMACIA LLC f/k/a MONSANTO, and SOLUTIA, INC.,	SUPERIOR COURT, LAW DIVISION, BERGEN COUNTY
Defendants-Respondents.	Sat below: Hon. Mary F. Thurber, J.S.C.

AMENDED OPENING BRIEF OF MAGNETEK, INC.

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[1] Citations to "1T" are to the Transcript of Motion dated May 3, 2023 before Hon. Mary F. Thurber, J.S.C.
Citations to "2T" are to the Transcript of Motion dated January 20, 2023 before Hon. Robert C. Wilson, J.S.C.

AMENDED TABLE OF APPENDIX[2]

[2] Certain exhibits within the Appendix bear confidential tags. The documents were publicly filed as exhibits in the trial court below and need not be under seal.

PRELIMINARY STATEMENT

Plaintiff-Appellant, Magnetek, Inc. ("Magnetek"), submits this brief in support of its appeal from an Order of the Superior Court of New Jersey, Bergen Vicinage (Hon. Mary F. Thurber, J.S.C.) dated July 24, 2023, which granted reconsideration of prior orders of Judge Robert C. Wilson (now retired) that had denied the motion to dismiss of Defendant-Respondents, Monsanto Company ("New Monsanto"), Pharmacia LLC f/k/a Monsanto Company ("Old Monsanto"), and Solutia, Inc.'s ("Solutia") (collectively "Defendants" or "Monsanto") and, upon reconsideration, dismissed the case on comity grounds in favor of Defendants-Respondents' second-filed action in Missouri. (Pa056-57).

Defendants sought reconsideration of the denial of a motion to dismiss they had filed multiple times, and that the previously-assigned judge, Hon. Robert C. Wilson, had denied multiple times. Judge Wilson first denied Defendants' pre-answer motions to dismiss (including one on comity grounds) in October 2017. Five years later, Defendants filed renewed motions to dismiss and a duplicative motion to stay on comity grounds, which Judge Wilson denied on January 20, 2023. Shortly after issuing the January 2023 Orders, Judge Wilson retired from the bench and the action was reassigned to

Judge Thurber. Defendants seized on that event and moved once again, three weeks later, for reconsideration of Judge Wilson's January 2023 Orders.

Defendants' most recent attempt to dismiss Magnetek's first-filed action in New Jersey is based upon exactly the same facts and arguments rejected three times by Judge Wilson. Judge Wilson's decisions involved matters within his discretion and were correctly decided by him. Defendants' repeated challenges offered no permissible basis for a motion to reconsider under this Court's well-established precedents.

For the following reasons, this Court should reverse the Order appealed from and reinstate Magnetek's Complaint.

PROCEDURAL HISTORY

Magnetek commenced this declaratory judgment action in New Jersey Superior Court on May 12, 2017 seeking a declaration that a so-called "Special Undertaking" (an agreement signed by Magnetek's predecessor in 1972) is void and unenforceable, and does not require Magnetek to indemnify Defendants for claims arising from Old Monsanto's manufacture of polychlorinated biphenyls. (Pa001-025).

Unhappy with a New Jersey court presiding over this action, Monsanto filed a mirror-image action in Missouri seven months later, on September 1, 2017 (the "Missouri Action"), seeking defense and indemnity

from Magnetek in connection with the Special Undertaking. (Pa082). Just four days later, on September 5, 2017, Defendants filed two pre-answer motions to dismiss in New Jersey. (Pa481-86). Defendants' first motion sought dismissal of the claims against New Monsanto and Solutia for lack of personal jurisdiction pursuant to Rule 4:6-2(b). (Pa481). Defendants' second motion sought dismissal of the claims against Old Monsanto for failure to join indispensable parties, and on comity grounds based on their second-filed Missouri Action. (Pa488; Pa493).

Recognizing Defendants' forum-shopping effort, Judge Wilson declined to dismiss the case on comity grounds, and denied Defendants' jurisdictional motions pending jurisdictional discovery. (Pa500-511).

This case was then stayed while the parties engaged in mediation. Following that, the parties proceeded with discovery in this action. Monsanto, however, opposed discovery, delaying the case and requiring Magnetek to move to compel. The trial court granted Magnetek's motion to compel in its entirety on March 13, 2020, and discovery then proceeded in New Jersey.

Defendants filed renewed motions to dismiss in September 2022, again on comity grounds, as well as for lack of personal jurisdiction and failure to join indispensable parties. (Pa512-13; Pa521-24; Pa570-51). On November 2, 2022, just before those motions were set to be heard, Defendants filed *yet*

another motion—this time seeking to stay the case on comity grounds in favor of the second-filed Missouri action. (Pa756-57). Defendants' renewed motions to dismiss and for a stay were argued before Judge Wilson on January 20, 2023. Judge Wilson entered a decision on the record, once again denying Defendants' motions in their entirety, and issued Orders to that effect. (2T at 59:3 to 61:16; Pa770-75). The court held that this first-filed action has been pending since 2017, that it has numerous connections to New Jersey, and that it should proceed to trial in New Jersey, notwithstanding Defendants' second-filed litigation in Missouri. (2T at 59:3 to 61:16).

Only three weeks later, and on the heels of Judge Wilson's retirement, Defendants filed their motion to reconsider before Judge Thurber on February 10, 2023. (Pa078-79). This immediate motion to reconsider marked Defendants' *fourth* motion seeking to dismiss or stay the case on comity grounds in favor of their second-filed action in Missouri. Judge Thurber heard oral argument on May 3, 2023, and issued a decision and order on July 24, 2023 overturning the orders of Judge Wilson and dismissing the case on comity grounds.[3] (Pa056-57; Pa058-77). In doing so, Judge Thurber ignored and vacated six years of proceedings in New Jersey, contrary to well-

[3] Judge Thurber did not reach the merits of Defendants' personal jurisdiction or joinder arguments, and those issues are not presented on appeal.

established precedents of this Court. Magnetek timely filed its Notice of Appeal on September 6, 2023. (Pa051-54).

STATEMENT OF FACTS

This action arises out of Defendants' efforts to obtain defense and indemnification from Magnetek for a series of lawsuits against Defendants arising out of Old Monsanto's[4] manufacture and sale of polychlorinated biphenyls ("PCBs"), which Old Monsanto marketed and sold to customers for use in a wide variety of industrial and consumer applications. (Pa001-003). Monsanto sold its PCBs nationwide and now faces lawsuits around the country alleging environmental contamination and personal injuries from PCB exposure. (Pa012) Among the hundreds of pending PCB lawsuits against Defendants is *New Jersey Dep't of Environmental Protection, et al. v. Monsanto Co., et al.*, GLO-L-800-22 (Superior Court, Gloucester County, NJ), filed August 5,

[4] Between the relevant time period in the 1970s and the present day, Old Monsanto underwent a series of corporate reorganizations to form Defendants Solutia and New Monsanto. In 1997, Old Monsanto created Solutia as a wholly-owned subsidiary to operate Old Monsanto's chemical line of business. *See Town of Lexington v. Pharmacia Corp.*, No. 12-CV-11645, 2015 WL 1321457, at *1-2 (D. Mass. Mar. 24, 2015). Similarly, Old Monsanto formed New Monsanto in 2000 as a wholly-owned subsidiary to take over Old Monsanto's agricultural business. Old Monsanto continued its pharmaceutical line of business, later merging and rebranding under the name "Pharmacia." *Id.*

2022.[5] The DEP's lawsuit seeks compensation from Defendants for damage to the state's natural resources caused by Old Monsanto's manufacture, sale, and distribution of toxic PCBs in New Jersey, including in connection with Old Monsanto's discharge of PCBs from its facility adjacent to the Delaware River in Bridgeport, New Jersey.

Magnetek is the successor by merger to Universal Manufacturing Corporation ("UMC"), a New Jersey corporation that was headquartered in Paterson, New Jersey with a manufacturing facility in Totowa, New Jersey. (Pa001-002; Pa498-99). UMC purchased PCBs from Old Monsanto, but was unaware of the extent of the risks posed by PCBs, as Old Monsanto concealed and misrepresented the risks of PCBs to its customers, government agencies, and the public. (Pa002-010). Defendants have now belatedly claimed that the terms of a 1972 agreement referred to as a "Special Undertaking" require Magnetek to defend and indemnify Defendants for billions of dollars in settlements, compensatory and punitive damages, and future liability arising

[5] Curiously, though Defendants have demanded that Magnetek defend and indemnify them "in connection with *all current and future PCB-related litigation*" naming Old Monsanto (Pa471) (emphasis added), they have not specifically tendered the DEP's lawsuit to Magnetek – no doubt in an effort to downplay New Jersey's interest in this case. Defendants *have* expressly tendered the New Jersey DEP case to other former customers of Old Monsanto.

out of Old Monsanto's manufacture and sale of PCBs. (Pa012-013; Pa181-88; Pa470-76).

A. Old Monsanto sold PCBs to Magnetek's predecessor and others while concealing their risks

From 1935 to 1979, Old Monsanto was the sole United States manufacturer of PCBs. (Pa002). Old Monsanto marketed and sold PCB's for a wide array of open and closed applications, including various electrical applications such as transformers and capacitors, carbonless copy paper, plasticizers in paints and cements, caulking, flame retardants, adhesives, and other building materials. (Pa002-003). The manufacture and sale of PCBs was banned in 1979. (Pa002).

Prior to 1979, Magnetek's predecessor, UMC, purchased PCBs from Old Monsanto and incorporated them into certain capacitors as a dielectric insulating fluid. (Pa010). From 1968 until 1979, when the manufacture of PCBs was banned, UMC used Old Monsanto's PCBs in its capacitors and fluorescent lighting ballasts at its manufacturing plant in Totowa, New Jersey. (Pa498-99). Old Monsanto advertised and marketed PCBs to UMC in New Jersey and shipped millions of pounds of PCBs to UMC's New Jersey facility (as well as to other New Jersey customers). (Pa498-99; Pa593-601; Pa610-59). Old Monsanto warehoused many of its PCB products in facilities in Kearny and Elizabeth, New Jersey. (Pa608-09).

During all of this time, Old Monsanto knew the risks and hazards of PCBs, but continued to market them for a wide variety of uses. At the same time, Monsanto concealed those risks and hazards from UMC and others in order to preserve its sales and related profits. (Pa003-008). In fact, Old Monsanto developed a coordinated strategy to conceal those risks from customers and government regulators, including the New Jersey Department of Conservation. (Pa005-009).

By 1972, as a part of its strategy to prolong its sale of PCBs, Old Monsanto began to require its customers to execute so-called "Special Undertakings." The Special Undertakings purport to require customers, including UMC, to defend and indemnify Old Monsanto from claims arising from Old Monsanto's sale of PCBs to that customer. (Pa009-010; Pa026).

In this case, Old Monsanto contacted UMC in New Jersey to solicit the Special Undertaking and sent a copy to UMC in New Jersey. (Pa026; Pa499). UMC's president executed the Special Undertaking at the company's offices in Paterson, New Jersey. (*Id.*). Thereafter, Old Monsanto continued to market, advertise, and ship millions of pounds of PCBs to UMC in New Jersey. (Pa499; Pa573-74; Pa577-601; Pa610-59). Old Monsanto sales staff personally visited UMC's Totowa, New Jersey facility to continue

marketing PCBs to UMC, and to conduct tests on facility intakes and effluent for PCBs. (Pa596-97; Pa602-06).

B. Monsanto belatedly tenders dozens of PCB-related lawsuits to Magnetek after years of litigation, adverse verdicts, and on the eve of settling another group of cases

On August 29, 2016, nearly forty years after Monsanto last sold PCBs to UMC in New Jersey, Old Monsanto demanded that Magnetek defend and indemnify Defendants in connection with "all current and future PCB-related litigation wherein Old Monsanto is, or will be, named as a defendant." (Pa012; Pa471).

At the time Monsanto demanded defense and indemnification, there were 46 PCB-related actions pending against Defendants[6], the earliest of which had been pending since 2009, ***seven years before Monsanto's demand for indemnification from Magnetek***. (Pa470-72; Pa183-88). In fact, at least one of those cases had been tried to verdict, resulting in a $46.5 million judgment against Monsanto for personal injuries and punitive damages. (*Id.*). Defendants were also then on the verge of settling another group of so-called "Food Chain Cases" for approximately $280 million. (Pa474-76). All of this occurred without any notice to Magnetek or any demand for defense or

[6] Since the Complaint was first filed, Defendants have tendered additional PCB cases to Magnetek, now totaling over 200 cases.

indemnification. Monsanto, nonetheless, now demands indemnification from Magnetek who had nothing to do with these cases and never agreed to reimburse Defendants for any of those damages. Defendants' dilatory behavior was apparently due to their previous understanding that they were not entitled to indemnification under the Special Undertakings.

C. Magnetek files this action seeking a declaration that the Special Undertaking is void and unenforceable

Magnetek commenced this declaratory judgment action on May 12, 2017 – more than eight months after Defendant's tender and ***eight years*** after the first case tendered to Magnetek had been commenced in 2009. (Pa001; Pa470-72; Pa184). Magnetek sought a declaration that the Special Undertaking is void and unenforceable, in whole or in part. (Pa001). Among other things, the Complaint asserts that the Special Undertaking is the product of fraud by Old Monsanto because Old Monsanto knew the dangers of PCBs but, to preserve sales and profits, intentionally concealed and misrepresented facts about their dangers to its customers, including UMC. (Pa005-014). The Complaint also alleges that the Special Undertaking is unenforceable because, *inter alia*, Old Monsanto cannot be indemnified for its own negligent, reckless, and/or intentional misconduct (Pa014-15); the Special Undertaking does not apply to the tendered cases because they do not implicate products

manufactured by UMC (Pa016-17); and that the Special Undertaking is otherwise unconscionable or void as against public policy (Pa018-21).

D. Monsanto's second-filed suit in Missouri

Since the commencement of this Action, Defendants have repeatedly sought to avoid litigating in New Jersey in favor of their home court in Missouri, despite Missouri's lack of any material connection to this dispute. On September 1, 2017, Defendants filed their second-filed action in Missouri seeking to enforce the Special Undertaking. (Pa082). That action is a mirror image of this action involving the same parties, the same underlying transactions and occurrences, and the same proof.[7] Though Defendants have attempted to distinguish their second-filed action, all of the claims Defendants raised in their second-filed action could have been filed here in New Jersey as counterclaims. *See* R. 4:7-1.

[7] Defendants later amended their petition in August 2022 to assert similar claims against five other defendants—former customers (or their successors) who also signed similar Special Undertaking agreements. (Pa105-06). The subsequent addition of new parties to the Missouri Action does not affect the dispute between Magnetek and Monsanto or the comity analysis here. Defendants simply joined together six separate breach of contract actions that could have been sued separately. Defendants' claims against third-parties under separate Special Undertaking agreements have no relevance to Magnetek's alleged liability to Defendants under the Special Undertaking between them.

E. Monsanto's repeated motions seeking to dismiss this first-filed action

As detailed above, prior to Defendants' subject motion for reconsideration seeking to escape New Jersey's jurisdiction on comity grounds, Defendants had previously filed three motions seeking to dismiss or stay this case on the same comity grounds in favor of their second-filed Missouri Action. (Pa481-96; Pa512-25; Pa756-69). Defendants' pre-answer motion to dismiss was denied by Judge Wilson on October 18, 2017. (Pa500-511). Defendants filed renewed motions to dismiss five years later, on September 21, 2022, including on comity grounds. (Pa512-25). Defendants then filed yet another motion on November 2, 2022 alternatively seeking to stay the case on the same comity grounds. (Pa756-59). Defendants' renewed motions to dismiss and to stay were all denied by Judge Wilson in orders dated January 20, 2023. (Pa770-75).

On February 10, 2023, three weeks after Judge Wilson's orders were entered and on the heels of his retirement, Defendants filed their motion for reconsideration before Judge Thurber. (Pa078-79). Judge Thurber heard oral argument on May 3, 2023, and on July 24, 2023 granted reconsideration and dismissed the case on comity grounds in favor of the second-filed Missouri Action. (Pa056-57).

ARGUMENT

POINT I

THE TRIAL COURT SHOULD NOT HAVE RECONSIDERED THE PRIOR ORDERS (Pa56)

A. Defendants' motion to reconsider amounted to an impermissible "lateral appeal" of Judge Wilson's prior Orders

Rule 4:42-2(b) provides that "[t]o the extent possible, application for reconsideration shall be made to the trial judge who entered the order." R. 4:42-2(b). Interpreting that rule, the Appellate Division has held:

> [w]e expressly disapprove the practice of so called "lateral appeals" whereby litigants dissatisfied with an interlocutory order entered by one trial judge seek its overturn or modification by motion to another trial judge.

Lewis v. Preschel, 237 N.J. Super. 418, 422 (App. Div. 1989); *see also Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo*, 345 N.J. Super. 1, 14 (App. Div. 2001) (same). Thus, while a trial judge may reconsider an interlocutory order, "our system of civil litigation does not permit one trial judge to review whether the decision of another judge 'of coordinate jurisdiction' is correct in the same way that an appellate court does." *Black Creek Sanctuary Condo. Ass'n, Inc. v. Fortress Inv. Grp., L.L.C.,* No. A-5227-12T3, 2015 WL 1565644, at *4 (App. Div. Apr. 9, 2015) (citing *Akhtar v. JDN Props. at Florham Park, LLC,* 439 N.J. Super. 391 (App. Div. 2015) ("relitigation of an

interlocutory order before successive judges of coordinate jurisdiction is generally disfavored")); *see also Cineas v. Mammone,* 270 N.J. Super. 200 (App. Div. 1994) (despite inherent power to revise interlocutory orders, "judges should not vacate orders of judges of co-ordinate jurisdiction unless there are exceptional circumstances" or "unless there has been a material change in the facts or available evidence").

Firoz v. Kolaranda, No. A-2886-05T1, 2007 WL 685447, at *5 (App. Div. Mar. 8, 2007) is on point. There, defendant filed a motion months in advance of trial to bar introduction of a document. The motion was denied. At trial, before a different judge, defendant brought the same motion and was successful. The Court found that the second judge should not have excluded the document where defendant's earlier motion to do so was denied by the first judge. The Appellate Division held that the practice of having one trial judge overturn or modify the order of a different judge should be avoided.

This case is no different. Defendants used precisely the same maneuver rejected in *Firoz*, *Brach*, and *Cineas*, *supra*, and should not be rewarded here. Monsanto's motion to reconsider was brought before a different judge only three weeks after Judge Wilson's decision. This was a transparent attempt to take advantage of his retirement and the transfer of the matter to Judge Thurber. There were no exceptional circumstances, and no

facts or law that changed in the intervening three weeks. The fact that Judge Thurber may have viewed the motion differently than Judge Wilson is an insufficient reason to permit reconsideration as a matter of law. *Cineas*, 270 N.J. Super. at 208.

B. Immediately granting reconsideration of a discretionary decision made by a different judge is an abuse of discretion and antithetical to the fair and orderly administration of justice

Defendants' immediate motion to reconsider before a different judge is even more problematic because the issue presented – whether to dismiss or stay the case on comity grounds – was a matter within Judge Wilson's discretion. In *Sensient Colors Inc. v. Allstate Insurance Co.*, 193 N.J. 373 (2008), the New Jersey Supreme Court made abundantly clear that "the determination of whether to grant a comity stay or dismissal is generally within the discretion of the trial court." *Sensient Colors Inc.*, 193 N.J. at 390. Judge Wilson's decision not to grant a comity stay or dismissal was a matter of discretion and therefore *particularly inappropriate* for an *immediate* motion for reconsideration brought before a different trial judge – in essence, asking Judge Thurber to exercise her discretion differently than Judge Wilson had only weeks earlier. To permit this practice would invite endless motions seeking a different decision on every discretionary ruling whenever there is a change in judicial assignment. And one trial judge rejecting another trial judge's decision

merely because he disagrees is antithetical to the orderly administration of justice, as it renders the judicial process arbitrary and subjective. *See Black Creek Sanctuary Condo. Ass'n*, 2015 WL 1565644, at *4 (it is not within a trial judge's authority to contradict a prior judge's decision based merely on a different view of the evidence and applicable law). The Court should reverse the Order below and reinstate Magnetek's Complaint.

C. Defendants' motion to reconsider merely repeated the same arguments and authorities that had been advanced three times previously

Even if Defendants' motion to reconsider did not amount to an improper attempt to obtain a "lateral appeal," the trial court should have declined to reconsider the motion because Defendants simply repeated the same arguments and authorities that they had already advanced *three times* since 2017.

Rule 4:42-2(b) provides that interlocutory orders are subject to revision prior to final judgment "in the sound discretion of the court in the interest of justice." Although a trial court has discretion to review prior interlocutory orders under Rule 4:42-2, that discretion should be exercised sparingly: "the power to reconsider an interlocutory order should be exercised only for good cause shown and in the service of the ultimate goal of substantial justice." *Lombardi v. Masso*, 207 N.J. 517, 536 (2011) (internal quotation omitted); *see also Wolf v. Edison Properties*, No. MID-L-000116-16, 2019 WL

2396994, at *1–2 (N.J. Super. Law Div., Middlesex Cnty. Jan. 28, 2019) (citing *Lombardi* and denying reconsideration where the Court had previously "read and considered all of the voluminous papers presented by the parties" and the motion for reconsideration was "simply a rehash of its prior arguments"; "undoubtedly, Greenview disagrees with the Court's decision . . . But it is not a valid basis for a motion for reconsideration").

> A party seeking reconsideration must show more than a disagreement with the court's decision, and 'recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden' . . . such a rehash cannot establish that the 'interest of justice' [under Rule 4:42-2] require reconsideration and reversal.

Zucco v. Walgreen Eastern, Co., Inc., No. BER-L-005482-19, 2022 WL 1696351, at *4 (N.J. Super. L., Bergen Cnty. Jan. 18, 2022) (citations omitted); *see also Atl. Fabrication & Coatings, Inc. v. SIM/Mestek Mach., Inc.*, No. BER-L-003727-17, 2019 WL 13178933, at *2 (N.J. Super. L., Bergen Cnty. Apr. 16, 2019) (Thurber, J.S.C.) (denying reconsideration where movant repeated previous arguments, as mere "[d]isagreement with the Court's decision is not a basis for reconsideration").

Indeed, as the Court in *D'Atria v. D'Atria* framed the analysis, so long as the court's decision was not arbitrary, capricious, or unreasonable, the court should decline to engage in the reconsideration process, and instead the

disappointed party must seek relief from a non-final order by a motion for leave to appeal. *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (N.J. Super. Ch. 1990).

For example, in *Horizon Healthcare Services, Inc. v. MD-X Solutions, Inc.*, No. BER-L-8463-08, 2009 WL 833333 (N.J. Super. L., Bergen Cnty. Mar. 13, 2009), the Court criticized a party for bringing a motion to reconsider that merely repackaged "still moribund old-wine-in-new-bottles arguments" that were previously made to the Court. The Court observed that motions for reconsideration occupy increasingly scarce judicial resources, and should be reserved for those rare cases where the Court's expressed decision is based on a palpably incorrect or irrational basis, or it is obvious that the Court failed to consider significant probative evidence. "A motion for reconsideration should not be an invitation to experience déjà vu all over again. A difference of opinion with the court's decision should be dealt with through the normal appellate process." *Id.*

New Jersey courts have repeatedly warned against motions to reconsider that are merely repetitious, or which simply is an unwarranted attempt to reverse matters previously decided solely because the prior judge is no longer available." *Lawson v. Dewar*, 468 N.J. Super. 128, 136 (App. Div.

2021); *see also Lombardi*, 207 N.J. at 537 n. 6 (disapproving of repetitive motions for reconsideration by a disappointed litigant).

Here, Defendants' motion to reconsider simply repeated the same arguments and cited the same authorities that had been fully briefed to the Court *three times* previously. *Compare* (Pa487-96) (excerpt of September 2017 motion to dismiss), *with* (Pa514-24) (excerpt of September 2022 renewed motion to dismiss); (Pa758-69) (excerpt of November 2022 stay motion); *and* (Pa305-14) (excerpt of February 2023 motion to reconsider).[8]

"[M]otion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour." *D'Atria*, 242 N.J. Super. at 401. Defendants did not identify anything palpably incorrect or irrational about Judge Wilson's decisions. Rather, Defendants simply disagreed with his conclusions and the exercise of his discretion not to dismiss or stay this first-filed action in favor of a later-filed case in Missouri, and presented the same tired arguments to a new judge.

Defendants' disagreement with Judge Wilson's January 20, 2023 Orders is not a proper basis for reconsideration (and, as discussed below, Judge Wilson's Orders were properly made and a provident exercise of his

[8] Relevant excerpts of the cited memoranda are included within the Appendix pursuant to Rule 2:6-1(a)(2), as the arguments and authorities repeatedly briefed by Defendants are germane to this appeal.

discretion). Judge Thurber should have declined to reconsider Defendants' comity arguments when raised for the fourth time.

POINT II

EVEN IF RECONSIDERATION WERE PERMISSIBLE, JUDGE THURBER SHOULD NOT HAVE DISMISSED THIS FIRST-FILED ACTION ON COMITY GROUNDS (Pa57)

A. There is a strong presumption in favor of the first-filed action and defendants did not establish any "special equities" to justify departing from that presumption.

As discussed above, Defendants failed to establish any reason why, three weeks after Judge Wilson had denied their comity arguments for the third time, Judge Thurber should have reconsidered and reached a different result. But even if Judge Thurber reconsidered the prior orders, Judge Wilson was correct on the merits: Defendants failed to overcome the strong presumption in favor of this first-filed action. This Court should reverse the decision below.

New Jersey courts recognize a strong presumption in favor of the first-filed action, and the first-filed action will take precedence over a second-filed action absent exceptional circumstances. *See, e.g., Yancoskie v. Delaware River Port Auth.,* 78 N.J. 321, 324 (1978); *Cogen Techs. NJ Venture v. Boyce Eng'g Int'l, Inc.,* 241 N.J. Super. 268, 272 (App. Div. 1990). "Thus, any comity

analysis should begin with a presumption in favor of the earlier-filed action." *Sensient Colors Inc. v. Allstate Ins. Co.*, 193 N.J. 373, 387 (2008).

That strong presumption in favor of the first-filed action will not be disturbed unless the court finds that there are "special equities." *Yancoskie,* 78 N.J. at 324; *Sensient Colors Inc.*, 193 N.J. at 387 (2008). "Special equities" are "reasons of a compelling nature that favor the retention of jurisdiction by the court in the later-filed action." *Sensient Colors*, 193 N.J. at 387. Special equities are grounded in principles of fairness, and are only implicated where the first-filed action may not do full justice. *Id.* at 392. New Jersey courts have identified only a small number of factors that could constitute special equities:

> (1) racing to the courthouse so as to deny the other party a reasonable chance of bringing suit in its favored forum;
>
> (2) significant state interests, such as the remediation of pollution in New Jersey or the enforcement of New Jersey public policy; or
>
> (3) circumstances where the first-filed suit would cause great hardship to one party, but no unfairness to the opposing party by proceeding in the second-filed action.

Sensient Colors Inc., 193 N.J. at 388-89. The party seeking a comity stay or dismissal in favor of the second-filed action bears the burden of establishing the existence of special equities sufficient to justify a departure from the strong presumption in favor of the first-filed action. *Sensient Colors*, 193 N.J. at 392.

Here, as Judge Wilson correctly recognized, none of these limited "special equities" justifies departing from the first-filed rule.

As to the first "special equity," Magnetek did not "race" to the courthouse in such a way as to deprive Defendants of a reasonable opportunity to file suit in the jurisdiction of their choice. To the contrary, Magnetek did not commence this action until nearly *nine months* after Defendants initially tendered the 46 underlying lawsuits to Magnetek. (Pa001; Pa012). By that point, the oldest underlying cases had been pending *for nearly eight years* and Defendants had fully litigated at least one of those cases to a $46.5 million verdict and were on the verge of settling another large group of cases. (Pa470-72).

These circumstances bear no resemblance to *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 6-7, 21 (1983), cited by Defendants below, where plaintiff rushed to file suit *less than a day* after issuing its refusal to arbitrate, depriving defendant of any reasonable opportunity to file suit first. *See also Century Indem. Co. v. Mine Safety Appliances Co.*, 398 N.J. Super. 422, 438-39 (App. Div. 2008) (cited by Defendants below, where plaintiff's "unseemly haste" to file in a jurisdiction with no connection to the parties supported determination to look beyond first-filed rule). By sharp contrast, Defendants here had ample opportunity to commence litigation as early as

2009 (the year the first of the underlying cases was commenced against the Defendants, *see* Pa181-88).

Defendants have not argued that the second or third special equity exists, nor could they. As to the second special equity, whether there are significant state interests, such as the remediation of pollution in New Jersey or the enforcement of New Jersey public policy, that factor could only favor Magnetek. Indeed, Defendants seek indemnification from Magnetek based on allegations that Magnetek's predecessor released PCBs into the environment at its Totowa, New Jersey plant or that PCBs escaped from products manufactured there. (Pa134-37; Pa474-76). Additionally, the underlying claims against the Defendants include the New Jersey DEP's lawsuit, *NJ Dep't of Envir. Protection, et al. v. Monsanto Co., et al.*, GLO-L-800-22 (Superior Court, Gloucester County, NJ), in which the DEP alleges that Old Monsanto's manufacture, sale, distribution and discharge of PCBs caused environmental damage in New Jersey. Thus, New Jersey's state interests favor retaining this case, rather than deferring to a second-filed action in Missouri to decide these issues.

As to the third special equity, litigating in New Jersey would not cause great hardship to the Monsanto Defendants. Indeed, the Defendants are no strangers to litigating in New Jersey, including the above-referenced case

brought by the DEP in which the State seeks to recover under the New Jersey Spill Compensation and Control Act, the Water Pollution Control Act, the Solid Waste Management Act, and New Jersey common law for contamination of natural resources by PCBs from facilities Monsanto operated in New Jersey as well as statewide PCB contamination through Monsanto's "design, production, use, marketing, sale and distribution of and failure to warn about the hazards of PCBs across New Jersey." Accordingly, there is no basis to ignore the presumption in favor of this first-filed action.

Nonetheless, Defendants argued below that New Jersey lacks a connection to this action. Preliminarily Defendants' arguments do not even fall within the narrow class of "special equities" the New Jersey Supreme Court has recognized as justifying a departure from the presumption in favor of the first-filed rule. Defendants' arguments are also patently without merit. New Jersey has ample connections to this action and is a natural forum to resolve the dispute. Among other things:

- At all relevant times, Magnetek's predecessor, UMC, was a New Jersey corporation. (Pa001; Pa498).
- UMC maintained corporate offices in Paterson, New Jersey and operated a manufacturing plant in Totowa, New Jersey. (Pa498-99).

- Monsanto solicited UMC in New Jersey and ultimately *sold and shipped millions of pounds of PCBs into New Jersey* to UMC. (Pa498-99; Pa592-601; Pa610-59).
- The Special Undertaking at issue was a contract made and entered in New Jersey when signed by UMC's president. (Pa025-26; Pa498).
- Defendants visited UMC in New Jersey for the purpose of sales calls and to test intakes and effluents for the presence of PCBs. (Pa592-606).
- Defendants allege that PCB contamination giving rise to an alleged indemnification obligation took place in New Jersey. (Pa134-37).
- Defendants' claimed entitlement to indemnity arises from UMC's manufacture of PCB-containing capacitors and alleged contamination from its Totowa plant. Thus, New Jersey is the center of relevant activities in this case.

Moreover, the most important of the "special equities" the Court enumerated in *Sensient Colors* is New Jersey's "strong public policy interest in the remediation of environmental contamination within its borders." *See Sensient Colors Inc.,* 193 N.J. at 379 and 394; *see also Century Indem. Co.*, 398

N.J. Super. at 427. Here, New Jersey has a compelling interest in adjudicating matters concerning the enforceability of an indemnity agreement made in ***New Jersey*** by a ***New Jersey corporation*** where Defendants allege that Magnetek's indemnity obligation is triggered in part by alleged environmental contamination ***in New Jersey***, and by the manufacture of PCB-containing products ***in New Jersey*** after Defendants sold and shipped millions of pounds of toxic PCBs ***into New Jersey*** without adequate warnings or disclosures. (Pa025-26; Pa134-37; Pa498-99; Pa592-601; Pa610-59).

Given the foregoing, there are no "special equities" that justified departing from the strong presumption in favor of this first-filed action. Even assuming, *arguendo*, the existence of "special equities," the decision whether to dismiss or stay the case for comity reasons remained within Judge Wilson's discretion, and Defendants presented no credible basis for Judge Thurber to reconsider that decision.

The trial court should have denied Defendant's motion and retained jurisdiction over the case because there are no "special equities" present that would justify a departure from the strong presumption in favor of this first-filed action.

B. This first-filed action should not have been dismissed because this dispute will be more efficiently resolved in this action rather than in the second-filed Missouri Action

This action is certain to conclude long before Defendants' second-filed action in Missouri, and therefore is a more efficient vehicle to resolve the dispute.

First, the Missouri courts have been exceedingly slow to act. Magnetek filed a pre-answer motion to dismiss Monsanto's second-filed action in 2017, which was not decided for *nearly five years* – including over two years after oral argument. (Pa527). That motion was then denied in October 2022 without written opinion or explanation, contrary to controlling Missouri authority that the trial courts should defer to this first-filed action in New Jersey.[9] (*Id.*). Principles of comity are based on mutual cooperation among the states so that rules are applied universally and each state is placed on an equal playing field. *Sensient Colors*, 193 N.J. at 397-98. Because the Missouri court declined to recognize New Jersey's dominant interests in this first-filed action, Judge Wilson correctly exercised his discretion in denying dismissal of

[9] Magnetek had no right to an interlocutory appeal, but has preserved its right to appeal that decision.

this first-filed action.[10] Judge Thurber's reconsideration of that order was error.

More recent developments in Missouri only reinforce that Judge Wilson was correct to deny Defendants' motion to dismiss. Monsanto amended its Missouri petition in August 2022 to add claims against additional parties. (Pa105-06; Pa321). None of those defendants appeared for months. (Pa321). On February 20, 2023 defendant General Electric filed a notice of removal to the Eastern District of Missouri on federal officer removal grounds. (*Id.*). Monsanto moved to remand back to the Missouri state court, and the newly-joined defendants have all filed various motions to dismiss in the Missouri federal court action. All of those motions are still pending before the District Court, and there has been no further progress of the Missouri litigation. Even after all of the pending Missouri motions are decided, there may be appeals[11] and the other defendants will just then be *answering the petition*

[10] Indeed, the Missouri court's refusal to extend comity to New Jersey's courts under the well-settled first-filed rule casts into doubt the validity of any resulting judgment in Missouri, which would be subject to collateral attack and need not be recognized or enforced by any other state's courts. *See, e.g., Grey v. Indep. Order of Foresters*, 196 S.W. 779 (Mo. App. 1917) (Missouri court refused to recognize validity of foreign judgment rendered in second-filed action). Only a judgment rendered by a New Jersey in this first-filed action would be free from any such doubt.

[11] For example, GE would have a right of appeal if Monsanto's motion to remand is granted. *See* 28 U.S.C. 1447(d).

and commencing discovery. Thus, the Missouri action would essentially be re-starting the litigation of these issues from the beginning of discovery with the newly joined parties.

By sharp contrast, this first-filed action in New Jersey is already at a far more advanced posture than the Missouri Action. Indeed, as Judge Wilson recognized, this first-filed action can, and should, proceed to judgment in New Jersey expeditiously. (2T at 59:3 to 61:16). Judge Thurber had no basis to grant reconsideration and disturb Judge Wilson's proper exercise of discretion, and the order to dismiss this case in favor of Defendants' now-stalled Missouri lawsuit violated the strong presumption in favor of preserving this first-filed action. This Court should reverse the decision below erroneously dismissing this case on comity grounds.

CONCLUSION

Based on the foregoing, Magnetek respectfully requests that the Court enter an Order reversing the decision below and reinstating Magnetek's Complaint, together with such other and further relief as the Court deems just and proper.

Dated: Hackensack, New Jersey
February 21, 2024

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MAGNETEK, INC, Plaintiff-Appellant, vs. MONSANTO COMPANY, PHARMACIA LLC f/k/a MONSANTO, and SOLUTIA, INC., Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No: A-000036-23 On Appeal From Docket No.: BER-L-3362-17 Superior Court of New Jersey, Law Division, Bergen County Sat Below: Hon. Mary F. Thurber, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS MONSANTO COMPANY, PHARMACIA, LLC f/k/a MONSANTO AND SOLUTIA, INC. IN OPPOSITION TO PLAINTIFF'S OPENING BRIEF

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Dated: March 22, 2024

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PRELIMINARY STATEMENT

This court should affirm the Order and Decision ("Judgment") of the Superior Court of New Jersey, Bergen Vicinage ("trial court") granting defendants' Motion for Reconsideration and dismissing this preemptive declaratory judgment case on comity grounds in favor of substantially similar, but more comprehensive and coercive (i.e., seeking recovery of damages as opposed to only declaratory relief), litigation currently pending in Missouri (the "Missouri Action"). The trial court acted well within its discretion to both reconsider the prior interlocutory orders and dismiss this case on the basis of comity in favor of the Missouri Action. The trial court's opinion is well-reasoned, acknowledges and follows the appropriate legal standards and applicable analytical paradigms under New Jersey law, and is supported by substantial undisputed evidence in the record. In short, the trial court did not abuse its discretion and many good reasons exist for this Court to defer to the trial court's discretionary decision.

Plaintiff Magnetek, Inc. ("plaintiff") raises two points on appeal. In Point I, plaintiff claims that the trial court (Judge Mary F. Thurber) erred by reconsidering its prior interlocutory orders issued by Judge Robert C. Wilson (days prior to his retirement), which summarily denied defendants' Renewed Motion to Dismiss For Lack of Personal Jurisdiction, Renewed Motion to

Dismiss For Failure to Join Indispensable Parties, and Alternative Motion to Stay. Plaintiff's argument lacks merit. Defendants promptly and appropriately filed their Motion for Reconsideration because in summarily denying defendants' motions at the conclusion of a telephonic hearing, Judge Wilson misapprehended and disregarded key facts, failed to follow the applicable law, and relied on matters outside the record and unrelated to any recognized analysis appropriate for resolving the motions before him. The Motion for Reconsideration was appropriately heard and decided by Judge Thurber because she was the judge assigned to the case after Judge Wilson retired. In short, defendants' Motion for Reconsideration was not an impermissible "lateral appeal" as plaintiff contends. Judge Thurber properly heard defendants' motion and acted well within her sound discretion to reconsider Judge Wilson's orders in the interest of justice because Judge Wilson's summary denial of defendants' motions was erroneous for multiple reasons and entered without reasoned legal analysis supported by proper findings and conclusions as required by New Jersey law.

Plaintiff claims in Point II that the trial court erred in dismissing this case on the basis of comity because this case was filed before the Missouri Action. The first-filed rule is not an unflinching mandate. Rather, it is a flexible doctrine that should give way in circumstances like these. The reasons for deferring here

include that: (1) this is a declaratory judgment case that plaintiff preemptively and surreptitiously filed four days before an agreed-to settlement meeting between the parties; (2) New Jersey has little to no relevant connection to, or local interest in, this case because none of the parties are incorporated or based here, the underlying defense and indemnity contract at issue was made in Missouri and will be governed by Missouri law, and none of the underlying lawsuits for which defendants seek defense and indemnity from plaintiff are venued in New Jersey; and (3) there is a more comprehensive case pending in Missouri, which seeks to recover billions of dollars from plaintiff and five other defendants that the Missouri court has already determined will go forward, and a similarly comprehensive action could not proceed in New Jersey.

An affirmance would be consistent with New Jersey law, supported by the record, and serve the interests of fairness and interstate comity by avoiding unnecessary duplicative, and potentially inconsistent, litigation.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

Defendants submit the following counterstatement of facts pursuant to R. 2:6-4(a).

I. The Special Undertaking Contract.

This case centers on a defense and indemnity contract between plaintiff's predecessor, Universal Manufacturing Corporation ("UMC"), and defendant Pharmacia, LLC f/k/a Monsanto Company ("Old Monsanto"). On February 7, 1972, UMC entered into a contract with Old Monsanto denominated "Special Undertaking by Purchasers of Polychlorinated Biphenyls" (the "Special Undertaking Contract"). (Pa025-026). The Special Undertaking Contract is a Missouri contract[3] that requires UMC, and now plaintiff (as UMC's successor),[4] to defend and indemnify Old Monsanto, and its "future agents," from "liabilities, claims, damages, penalties, actions, suits, losses, costs and expenses" "arising

[2] The Statement of Facts (R. 2:6-2(a)(5)) and Procedural History (R. 2:6-2(a)(4)) are combined as one section because the relevant facts and procedure are intertwined, and defendants respectfully submit that they are more clearly presented in a single chronological narrative.

[3] Although it was signed first by UMC in New Jersey on January 7, 1972, the Special Undertaking Contract was not finally executed until Old Monsanto signed it in Missouri on February 7, 1972. (Da102). When it entered into the Special Undertaking Contract, UMC was a New Jersey corporation that had its principal place of business in Patterson, New Jersey and Old Monsanto was a Missouri corporation that had its principal place of business in St. Louis, Missouri. The opinion takes note of these facts. (Pa072).

[4] Plaintiff is the successor by merger to UMC. (Pa002-003).

out of or in connection with the receipt, purchase, possession, handling, use, sale or disposition of" PCBs that were sold or delivered to UMC by Old Monsanto on or after February 7, 1972 "whether alone or in combination with other substances." Id.

PCBs are a class of unique, chemically inert and heat-resistant, chemicals that UMC used to manufacture capacitors for use in electrical products such as florescent light ballasts. (Pa107). Between approximately 1935 and 1977, Old Monsanto manufactured and sold PCBs in bulk to a number of industrial customers like UMC who incorporated those PCBs into a wide variety of finished products. Id. In 1970, in response to growing concern regarding environmental persistence of PCBs, Old Monsanto announced it would phase out production of PCBs for non-electrical PCB applications. Id. For electrical applications, Old Monsanto agreed to continue manufacturing and selling PCBs to certain customers for use in closed electrical applications (e.g., transformers and capacitors) until suitable alternatives to PCBs became available, but only if those customers would agree to defend and indemnify Old Monsanto against all future PCB-related claims. Id. UMC entered into the Special Undertaking Contract so that it could continue purchasing PCBs from Old Monsanto. (Pa026).

II. Plaintiff Surreptitiously Filed This Case Against Defendants.

On August 29, 2016, defendants sent a letter to plaintiff tendering the defense of certain PCB-related lawsuits (the "underlying PCB lawsuits") to plaintiff and demanding that plaintiff indemnify Old Monsanto (and related entities as stated in the Special Undertaking Contract) in those lawsuits. (Pa469-472). Plaintiff responded on September 13, 2016, rejecting Old Monsanto's defense and demand for indemnification. (Pa081). On April 7, 2017, defendants invited plaintiff to attend an informational and settlement meeting in St. Louis, Missouri that was to take place on May 16, 2017. (Pa081, Pa477-479). Plaintiff's counsel responded on May 1, 2017, stating that he would attend the Missouri meeting on plaintiff's behalf. (Pa081).

All three of the letters that defendants sent to plaintiff expressed defendants' desire and willingness to try to resolve the parties' dispute over the scope of the Special Undertaking Contract outside of formal litigation:

- "Our Client would welcome the opportunity to discuss the PCB-related litigation referenced above . . . New Monsanto expects to put a process in place for resolution of this obligation, and those obligations of other similarly situated parties." (Pa472).
- "Monsanto would prefer to resolve the parties' disagreement over the scope of [plaintiff]'s obligations under the Special Undertaking [Contract]

without resorting to formal litigation. Informal resolution of the dispute will be more cost-effective for both sides, and allow greater flexibility in crafting a solution." (Pa476).

- "We hope you are able to attend the informational meeting next month, and that we can begin working toward an agreement regarding the amount [plaintiff] owes to Monsanto under the Special Undertaking [Contract]." (Pa479).

Moreover, the stated purpose of the May 16, 2017 meeting was, among other things, to discuss whether the parties could structure a dispute resolution process to resolve their dispute **without litigation**. (Pa081, Pa478).

With the Missouri meeting pending and without notifying defendants or their counsel, plaintiff filed this case against defendants on May 12, 2017 seeking "a declaration that the Special Undertaking [Contract] is void and unenforceable as against [plaintiff], in whole or in part." (Pa001-023). Plaintiff did not immediately serve defendants with the Complaint and Jury Demand in this case. (Pa082). Nor did plaintiff advise defendants or their counsel of the New Jersey Action. Id. Instead, counsel for plaintiff arrived in St. Louis on May 16, 2017 and attempted to attend the scheduled informational and settlement meeting under the guise of accepting defendants' invitation to work towards a potential resolution in good-faith and without resort to formal

litigation. Id. When confronted by defendants' counsel prior to the start of the meeting, plaintiff's counsel confirmed that this case had been filed, stating that it was a "placeholder." Id.

Plaintiff's counsel ultimately did not attend the May 16, 2017 meeting. (Pa082). On June 21, 2017, plaintiff served defendants with the Complaint. Id. Plaintiff was and still is the only company to file a lawsuit against defendants relating to the Special Undertaking Contracts.

III. The Missouri Action And Jurisdictional Discovery In This Case.

On September 1, 2017, defendants filed a multi-count Petition against plaintiff in the Circuit Court of St. Louis County, Missouri. (Pa082). Then, on September 5, 2017, defendants filed two interrelated motions to dismiss the New Jersey Action. The first motion, filed by defendants Monsanto Company ("New Monsanto") and Solutia, Inc. ("Solutia"), sought to dismiss plaintiff's claims against them for lack of personal jurisdiction. (Pa481-483). The second motion, filed by Old Monsanto, New Monsanto, and Solutia, sought to dismiss this entire case on the basis of comity and because New Monsanto and Solutia are indispensable parties who cannot be joined due to the lack of personal jurisdiction over them. (Pa484-486). After briefing and oral argument, Judge

Wilson denied both motions, without prejudice to refiling "subject to further jurisdictional discovery proceedings." (Pa505, Pa511).

The parties engaged in jurisdictional and some merits discovery over the next few years.[5] (Da004-005). For most of that time period, and apparently in response to the parties' requests to stay the case while they explored the possibility of resolving the dispute, this case was in a state of administrative dismissal. (Pa064, Da005). This case remained stayed and dormant (and reflected on the system as "dismissed by the Court without prejudice") until August 1, 2022 when it was set for trial. Id. In response to the order setting this case for trial, the parties filed a joint motion requesting that the trial court adjourn the trial date and set a briefing schedule on defendants' anticipated renewed motions to dismiss. (Pa083, Da005). The trial court granted the parties' motion (Pa064) and defendants filed renewed motions to dismiss on September 21, 2022. (Pa083, Da013-014, Da040-041).

IV. The First Amended Petition In The Missouri Action.

On August 3, 2022, defendants filed a First Amended Petition in the Missouri Action adding claims against five other companies who entered into defense and indemnity contracts with Old Monsanto that are substantially

[5] Defendants filed their Answer to the Complaint and Affirmative Defenses on November 29, 2017.

similar to the Special Undertaking Contract.[6] (Pa082-083, Pa105-175). The First Amended Petition seeks, among other things, to recover billions of dollars in damages from plaintiff and the other five defendants, including amounts expended by defendants in defending the underlying PCB lawsuits, judgments entered against defendants in some of the underlying PCB lawsuits, and amounts paid or agreed to be paid by defendants to resolve certain underlying PCB lawsuits. Id.

On September 2, 2022, plaintiff filed a renewed motion to dismiss or stay the Missouri Action in favor of this case.[7] (Pa083). After briefing and oral argument, the Circuit Court of St. Louis County denied plaintiff's renewed motion finding that the Missouri Action should proceed despite the existence of the New Jersey Action.[8] (Pa177). Plaintiff did not attempt to appeal the Missouri order. Instead, plaintiff filed its answer to the First Amended Petition and a cross-claim against the other five defendants in the Missouri Action on

[6] The additional defendants in the Missouri Action are General Electric Co., Paramount Global, Kyocera AVX Components Corporation, Cornell Dubilier Electronics Inc., and The Gillette Company LLC.

[7] Plaintiff's previous motion to dismiss the Petition in the Missouri Action was briefed and argued remotely during COVID but had not been decided at the time defendants filed the First Amended Petition.

[8] As is typical practice in Missouri state courts, the court issued its ruling orally and the order denying plaintiff's motions is a one-page handwritten order that was drafted by the parties. There is no record of the oral argument at which the oral ruling was made because plaintiff did not request that the proceedings be on the record.

November 1, 2022. (Pa085, Pa276-332). The same day, plaintiff served deposition notices in the Missouri Action for the depositions of New Monsanto, Old Monsanto, and Solutia. (Da105-122). Plaintiff then filed an Amended Answer to the First Amended Petition (which also included a cross-claim against the other five defendants) on January 20, 2023 in response to defendants' Motion to Strike.

On November 2, 2022, defendants filed an Alternative Motion to Stay this case pending the outcome of the Missouri Action. (Pa084, Da076-077).

V. Judge Wilson's Summary Denial Of Defendants' Renewed Motions to Dismiss and Motion to Stay.

Judge Wilson heard argument on defendants' renewed motions to dismiss and alternative motion to stay by telephone on January 20, 2023. (Pa084-085). The hearing transcript incorrectly reflects that the hearing took place by Zoom. (2T1). Telephonic hearing was ordered by Judge Wilson despite defendants' timely request for an in-person or Zoom hearing. (Pa084-085).

The hearing began with Judge Wilson stating incorrectly that "it doesn't look like anything's happening in Missouri," that the parties "haven't shown me anything [about the Missouri Action] other than there's some name of a judge," (2T6:12-13) and that the Missouri court "hasn't assigned a trial date."[9]

[9] Judge Wilson also remarked on the salaries of Missouri judges stating that "[t]hey only pay their judges $165,000.00 there." (2T6:17).

(2T6:19). From there, Judge Wilson stated, at least twice, his misplaced belief that the Missouri court disrespected him when it "popped off," and that the Missouri court arbitrarily decided that Missouri has jurisdiction over the parties and did not respect the jurisdiction of New Jersey over this case. (2T30:7).

The following is a collection of some of Judge Wilson's remarks at the hearing:

- "I kind of take a little umbrage here because we did give you the right to do jurisdictional discovery. And, apparently in Missouri, they just popped off and said we have jurisdiction, which is not quite a fair thing . . . " (2T30:4-8).
- "And, Missouri just decides – we got jurisdiction. Well, okay, that's fine if Missouri would like to do that, but I may now decide clearly that we also have jurisdiction. And, I will not have just popped off, we will have already had the benefit of discovery . . . " (2T30:11-16).
- "But, the fact that I gave you – the ability to conduct jurisdictional discovery, and apparently Missouri decided that they don't need to do that kind of step first, frankly, as they might say in Missouri, that dog don't hunt . . . " (2T30:21-25).
- "They – they condemned me by saying we have jurisdiction even though Judge Wilson was exploring that through discovery as to whether New

> Jersey had discovery [sic].[10] So – and, again, didn't even bother to call this Court. That judge, whoever he is out in Missouri, should have known and counsel should have told him, just like you told me his name in these papers, maybe counsel out in Missouri should have told him that this case has been managed by Judge Wilson, the complex commercial judge in New Jersey, a State Superior Court Judge there. Maybe he wasn't told, or maybe he didn't case [sic]."[11] (2T31:21-32:7).

Judge Wilson's belief that he was disrespected by the Missouri court's jurisdictional ruling colored his consideration of defendants' motions. In particular, Judge Wilson used this offense at the Missouri court's jurisdictional ruling, which was based on different law focusing on different facts, as a reason to give short shrift to defendants' comity argument. Instead of engaging in a careful and thoughtful analysis of comity factors and jurisdictional facts, Judge Wilson denied defendants' motions at the conclusion of the telephonic hearing with a few conclusory, and in some instances, caustic remarks. Judge Wilson called defendants' arguments "anathema to our state" (2T59:17) and concluded his ruling with a statement that "[i]f there are other claims elsewhere it is of no moment to this Court." (2T61:3-4).

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[10] It is apparent from the context of the statement that Judge Wilson intended the word "jurisdiction."

[11] From context, it is clear that Judge Wilson intended the word "care."

Judge Wilson expressed no legal basis for his rulings. He simply announced that he would not be staying the case any further and concluded without explanation that jurisdiction existed over New Monsanto and Solutia because those entities were "successors" to Old Monsanto. (2T27:3-4, 2T35:6, 2T59:10). Judge Wilson did not mention the differences between this case and the Missouri Action (this case is a preemptive declaratory judgment case while the Missouri Action is a comprehensive action for damages and other relief), that defendants are the natural plaintiffs in this dispute, or that plaintiffs—who have no present connection to New Jersey—were clearly forum shopping when they filed this case as a "placeholder" in advance of the scheduled meeting with defendants. Nor did Judge Wilson discuss the evidence in the record establishing that the Special Undertaking Contract is a Missouri contract governed by Missouri law.

On January 23, 2023, Judge Wilson issued written orders denying each of the motions "for the reason stated on the record" (the "January 23 Orders"). (Pa770-774).

VI. Defendants' Motion For Reconsideration.

Defendants did not delay in seeking reconsideration of the January 23 Orders. On February 10, 2023, defendants timely filed their Motion for Reconsideration pursuant to R. 4:42-2. The Motion for Reconsideration asked

the trial court to revisit the issues of personal jurisdiction, indispensable parties, and comity in light of the record and in the interests of justice. (See, e.g., Da137). The only reason defendants' motion was heard by Judge Thurber instead of Judge Wilson is because Judge Wilson retired days after he issued the January 23 Orders and this case was subsequently reassigned to Judge Thurber. (Pa059 at n.1). Indeed, defendants took no action to have their Motion for Reconsideration heard by a different judge. Had Judge Wilson not immediately retired after issuing his ruling, he would have heard and decided defendants' Motion for Reconsideration.

Defendants' Motion for Reconsideration was heard on May 3, 2023. After briefing, a multi-hour in-person hearing, and the receipt of supplemental materials Judge Thurber had requested regarding the Missouri Action, Judge Thurber issued the Judgment—a well-reasoned twenty-page written decision granting defendants' Motion for Reconsideration and dismissing this case without prejudice on the basis of comity in favor of the Missouri Action. (Pa056-077).

STANDARD OF REVIEW

It is well-established that reconsideration and comity decisions are reviewed under an abuse of discretion standard. See R. 4:42-2; Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021) ("Until entry of final

judgment, only 'sound discretion' and the 'interest of justice' guides the trial court, as Rule 4:42-2 expressly states."); Sensient Colors, Inc. v. Allstate Ins. Co., 193 N.J. 373, 390 (2008) ("The determination of whether to grant a comity stay or dismissal is generally within the discretion of the trial court."). Accordingly, this court should review the Judgment under an abuse of discretion standard. See Sensient Colors, 193 N.J. at 389-90 (2008) ("A trial court's decision to apply the doctrine of comity requires 'a fact-specific inquiry that weighs considerations of fairness and comity,' which we review under an abuse of discretion standard."); Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015) ("[A] trial court's reconsideration decision will be left undisturbed unless it represents a clear abuse of discretion.").

As explained in detail below, the Judgment was a proper exercise of the trial court's broad discretion, based on a rational, and well-thought out and explained, application of the facts to established law. Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) ("Although the ordinary 'abuse of discretion standard defies precise definition, it arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.").

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS SOUND DISCRETION TO RECONSIDER THE JANUARY 23 ORDERS IN THE INTEREST OF JUSTICE. (Pa056, Pa067-068).

Plaintiff's argument that the trial court erred in reconsidering the January 23 Orders is based on a mischaracterization of defendants' Motion for Reconsideration. Defendants' Motion for Reconsideration was not an "impermissible 'lateral appeal'" that simply sought to have the trial court review and overturn the January 23 Orders based on the same arguments previously considered and rejected. To the contrary, defendants filed their Motion for Reconsideration almost immediately and sought reconsideration on multiple well-supported grounds relating to errors and deficiencies in the summary denial of their motions. Defendants' were not judge shopping—the only reason Judge Thurber heard defendants' Motion for Reconsideration instead of Judge Wilson is because Judge Wilson retired days after entering the January 23 Orders, and it was therefore not possible for him to hear the motion.[12] The trial court's determination—after an in-person hearing and based on a fuller record—that the interests of justice required reconsideration of the January 23 Orders in light of

[12] See R. 4:42-2(b) ("To the extent possible, application for reconsideration shall be made to the trial judge who entered the order.") (emphasis added).

the circumstances identified by defendants was an appropriate exercise of the trial court's sound discretion under R. 4:42-2.

A. Defendants' Motion For Reconsideration Was Not An "Impermissible 'Lateral Appeal.'"

Defendants' raised multiple grounds for reconsideration based on serious errors and irregularities in Judge Wilson's conduct, commentary, and ruling. These grounds were clearly stated in defendants' Motion for Reconsideration and at oral argument on the motion. In the Preliminary Statement to their Motion for Reconsideration, defendants' explain that they sought reconsideration for three primary reasons:

1. the January 23 Orders "denied [defendants] the benefit of a reasoned legal analysis premised on findings from the record" (Da129-130);
2. the January 23 Orders "turned a blind eye to the rules of comity and the 'special equities'" stating "the Missouri Action is 'of no moment to this court'" in direct contravention "to the analytical paradigm established by the New Jersey Supreme Court in Sensient Colors, Inc. v. Allstate Ins. Co., 193 N.J. 373, 388-393 (2008)" (Da130); and
3. the January 23 Orders "violate[d] fundamental tenets of due process to the extent [Judge Wilson's rulings] allow[ed] this case to proceed against two entities who [plaintiff] concede[d] do not themselves

> have sufficient contacts with New Jersey to support general or specific personal jurisdiction." (Da131).

Defendants' Motion for Reconsideration also includes a section titled "The Interest of Justice Mandates Reconsideration and Revision of the Court's January 23, 2023 Orders" where defendants further explained why reconsideration is necessary in the interest of justice. (Da137).

Defendants further supported their Motion for Reconsideration with multiple excerpts from the transcript of oral argument before Judge Wilson. In particular, defendants highlighted various remarks (quoted supra, at 11-13) from the January 20, 2023 telephonic hearing. (See, e.g., Da129); see also (2T6:8-17, 2T30:4-16, 2T21-25, 2T31:21-32:7, 2T61:3-4)). These remarks establish that Judge Wilson (i) misapprehended and then disregarded key facts (i.e., the status of the Missouri Action), (ii) misapplied or failed to apply the law (i.e., Sensient Colors), and (iii) was influenced and motivated by matters outside the record and unrelated to any recognized analysis appropriate for resolving the motions before him (i.e., misplaced feelings that he was "condemned" and taking "umbrage" at the Missouri trial judge, who apparently earns less than Judge Wilson, purportedly "popp[ing] off" and deciding Missouri has

jurisdiction without consulting Judge Wilson, the "complex commercial judge in New Jersey," first). (2T30:17, 2T34:10-22).[13]

These multiple bases for reconsideration raised by defendants distinguish this case from plaintiff's authorities regarding so-called "lateral appeals." Plaintiff primarily and inappropriately relies on the unpublished, unprecedential case of Firoz.[14] Even if the court were to consider it, Firoz is not "on point," as plaintiff claims, because it did not involve a motion for reconsideration under R. 4:42-2. (Pb14);[15] Firoz v. Kolaranda, No. A-2886-05T1, 2007 WL 685447, at *5 (N.J. App. Div. Mar. 8, 2007). In Firoz, this court found that a trial court

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[13] As noted above, defendants also discussed these bases for reconsideration in detail at the hearing on their Motion for Reconsideration. See, e.g., (1T28:24-29:19 (discussing the absence of factual findings and conclusions of law in the January 23 Orders), 1T29:21-30:11 (discussing Judge Wilson's failure to consider the special equities, weighed heavily against strict application of the first-filed rule), 1T34:25-35:4 (discussing the status of the Missouri Action as "moving forward"), 1T35:24-36:15 (discussing the more comprehensive nature of the Missouri Action), 1T37:7-25 (discussing the importance of being able to apportion responsibility among defendants in the Missouri Action), 1T87:5-88:19 (reiterating the absence of facts and law in the January 23 Orders)).

[14] See R. 1:36-3 ("No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in New Jersey Tax Court Reports or an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel.").

[15] Citations to "Pb" are to the Amended Opening Brief of Magnetek, Inc., dated February 21, 2024.

abused its discretion by granting a pre-trial motion to bar testimony. Id. Key to this court's ruling was its finding that the plaintiff "presented nothing different in support of [her] pre-trial application [to bar the testimony] than she did in support of the earlier motion [to bar the same testimony]" that was denied by the motion judge. Id. The Firoz decision should not be considered, but if it is, it is inapposite here because this case involves a motion for reconsideration (not the re-filing of the same motion), which is based on specifically identified reasons why the "interest of justice" necessitated reconsideration.

The other decisions cited by plaintiff are equally distinguishable and, in many cases, actually support defendants' position that reconsideration was appropriate here. See, e.g. Lewis v. Preschel, 237 N.J. Super. 418, 423 (App. Div. 1989) (finding that the challenged motion for reconsideration and associated decision did not constitute an improper "lateral appeal") (Pb13). Defendants did not opt to wait to seek reconsideration like the defendant-counter plaintiff in Ezekwo. See Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, PC v. Ezekwo, 345 N.J. Super. 1, 14 (App. Div. 2001) (finding that the defendant/counter-plaintiff's challenge to a trial court order constituted an improper lateral appeal where she opted not to apply for reconsideration to the original judge, and then argued his decision should have been overruled without ever articulating "how or why the interests of justice required the trial

court to reconsider the prior judge's ruling") (Pb13). Nor did defendants intentionally maneuver to apply for reconsideration to a different judge. This is also not a situation where Judge Wilson issued a detail written opinion "demonstrat[ing] careful attention to the facts and the law that applied" as was the case in the unpublished, unprecedential Fortress Inv. Grp. improperly cited and relied on by plaintiff. See Black Creek Sanctuary Condo. Ass'n v. Fortress Inv. Grp., LLC, 2015 WL 1565644 (N.J. App. Div. 2015) (finding reconsideration and vacation of prior trial court order improper where "[t]he second judge simply had a different view of the evidence and applicable law" and the first judge's "detailed written opinion demonstrate[d] careful attention to the facts and the law that applied to each count of plaintiffs' complaint . . .") (Pb13-14).[16]

In short, this court should reject plaintiff's mischaracterization of defendants' well-reasoned Motion for Reconsideration as an "impermissible

[16] Plaintiff's reliance on Cineas is misplaced in that the standard for reconsideration applied in Cineas was rejected by this court in Lawson. Compare Cineas v. Mammone, 270 N.J. Super 200, 208 (App. Div. 1994) (finding that "[t]here must be a clear showing of fundamental error in law or the submission of new factual material" for a trial court to reconsider an interlocutory order), with Lawson, 468 N.J. Super. at 136 ("We observe as well there is nothing in our jurisprudence to suggest reconsideration of an interlocutory order is prohibited unless the movant can provide something 'new' or unless the prior judge acted in an 'arbitrary, capricious or unreasonable' manner.").

'lateral appeal.'" (Pb13). Defendants appropriately sought reconsideration of the January 23 Orders because Judge Wilson "erred" and "entered . . . order[s] that [did not] promote a fair and efficient processing" of this case. Lawson, 468 N.J. Super. at 134. In relying on its misplaced "lateral appeal" argument, plaintiff never actually addressed or attempted to rebut defendants' reasons for seeking reconsideration in the trial court, nor has it attempted to do so here. Accordingly, plaintiff has waived or forfeited any argument that the reasons for reconsideration articulated by defendants in their Motion for Reconsideration are insufficient under New Jersey law. See N. Haledon Fire Co. No. 1. V. Borough of N. Haledon, 425 N.J. Super. 615, 631 (App. Div. 2012) ("An issue not raised below will not be considered for the first time on appeal.").

B. The Trial Court Properly Exercised Its Sound Discretion To Reconsider The January 23 Orders.

The power to reconsider an interlocutory order rests within the "sound discretion" of the trial court "in the interest of justice." R. 4:42-2; Lawson, 468 N.J. Super. At 134. Under this "more liberal" standard, (Lawson, 468 N.J. Super at 134), a trial judge has the power to reconsider an interlocutory order "where the judge believes it would be just to do so" or "where . . . the judge later sees or hears something that convinces him that a prior ruling is not consonant with the interest of justice." Lombardi v. Masso, 207 N.J. 517, 536-37 (2011). The "interest of justice" standard does not, as plaintiff incorrectly argues (Pb17-18),

require a trial judge to determine that a prior interlocutory order was "arbitrary, capricious, or unreasonable" before the court can reconsider it. Lawson, 468 N.J. Super. at 136 ("There is nothing in our jurisprudence to suggest reconsideration of an interlocutory order is prohibited . . . unless the prior judge acted in an 'arbitrary, capricious or unreasonable' manner."). Nor does the standard require "a showing the challenged order was 'palpably incorrect,' 'irrational,' or based on a misapprehension or overlooking of significant material presented on the earlier application." See id. at 134.[17] Where, like here, the prior order is erroneous or "has ceased to promote a fair and efficient processing" of the case, it can and should be reconsidered under R. 4:42-2.[18]

[17] Plaintiff's attempt to establish and apply a "palpably incorrect or irrational" standard in this case through reliance on Horizon Healthcare Servs, Inc. v. MD-X Sol., Inc., No. BER-L-8463-08, 2009 WL 833333 (N.J. Super. L., Bergen Cnty. Mar. 13, 2009) is misplaced. (Pb18). First, the trial order in Horizon is not precedential. R. 1:36-3. Second, the standards articulated and applied by the trial court in Horizon were expressly rejected by this court in Lawson. See Lawson, 468 N.J. Super. at 134. Third, the trial court in Horizon misconstrued the important difference between standards applicable to reconsideration of final orders and those applicable to reconsideration of interlocutory orders. Compare Horizon, 2009 WL 833333 ("Accordingly, I expressly adopt the view . . . that the same modes of though and method of analysis apply to applications for reconsideration of both interlocutory and final orders."), with Lawson, 468 N.J. Super. at 133-34.

[18] A trial judge also does not owe deference to a prior trial judge. See Lawson, 468 N.J. Super. at 135 ("If a prior judge has erred or entered an order that has ceased to promote a fair and efficient processing of a particular case, the new judge owes respect but not deference and should correct the error.").

This case falls squarely within the "interest of justice" standard. Contrary to plaintiff's assertions, defendants did not seek reconsideration from a different judge of a well-reasoned and properly supported interlocutory order.[19] (See, e.g., Pb15). Rather, as discussed above, Judge Wilson summarily rejected defendants' comity, personal jurisdiction, and indispensable parties arguments without reasoned legal analysis premised on findings from the record. (Pa770-775). The numerous legal infirmities in how Judge Wilson handled and summarily decided defendants' motions (which are not disputed by plaintiff) are more than sufficient to support reconsideration "in the interest of justice." See Lawson, 468 N.J. Super. at 136 ("[S]ome reconsideration motions – those that argue in good faith a prior mistake, a change in circumstances, or the court's misappreciation of what was previously argued – present the court with an opportunity to either reinforce or better explain why the prior order was appropriate or correct a prior erroneous order."). Reconsideration was also appropriate given Judge Thurber's need, as the new judge assigned to this case,

[19] The court should reject plaintiff's attempt to imply that defendants' Motion for Reconsideration was their third bite at the apple. The January 23 Orders were the first and only time that the trial court purported to rule on the merits of defendants' personal jurisdiction, comity, and indispensable party arguments prior to the Motion for Reconsideration. The trial court denied defendants' initial motions to dismiss in 2017 without prejudice on the basis that the trial court required further facts before it could rule on personal jurisdiction. (Pa505, Pa511).

to ensure that the January 23 Orders "promote[d] a fair and efficient processing of" the parties' dispute given the pendency of the Missouri Action. Id. at 135.

II. THE COURT SHOULD AFFIRM DISMISSAL OF THIS CASE ON THE BASIS OF COMITY DUE TO THE PENDENCY OF THE MISSOURI ACTION. (Pa057, Pa077).

Plaintiff argues in its Point II that the trial court erred in dismissing this case because it was filed before the Missouri Action. (Pb20-29). This court should reject plaintiff's argument and affirm the trial court's dismissal because the trial court's thorough, well-reasoned decision is supported by the record and consistent with Sensient Colors and Century Indem. Co. v. Mine Safety Appliances Co., 398 N.J. Super. 422, 438 (App. Div. 2008). In short, the trial court properly exercised its discretion to dismiss this anticipatory declaratory judgment case in favor of the more comprehensive and coercive Missouri Action.

A. The First Filed Rule Is Not A Mandate For New Jersey Courts to Always Defer to the First-Filed Action.

Plaintiff argues that the trial court had no choice but to condone plaintiff's transparent forum shopping simply because it filed this case before defendants filed the Missouri Action—regardless of any other factors weighing against continuing with a declaratory judgment action and instead favoring deference to a more comprehensive action in a natural forum. But that is not the law. The first-filed rule is not a controlling mandate on New Jersey courts to hear the

first-filed case in all circumstances. To the contrary, as directed by the Supreme Court in Sensient Colors, the law gives courts broad discretion to determine the application of the first-filed rule depending on context and principles of comity and fairness. Sensient Colors, 193 N.J. at 397. Moreover, "New Jersey courts have the discretion to dismiss declaratory judgment actions that are found to have been improperly filed." Century Indem., 398 N.J. Super. at 438.

The seminal New Jersey decision on comity is Sensient Colors. There, the Supreme Court explained that although New Jersey courts typically apply a presumption in favor of the first-filed of two substantially similar lawsuits, "the first-filed rule is not an inflexible doctrine." Sensient Colors, 193 N.J. at 387. Where, like here, the facts and circumstances establish there are "special equities," a trial court has the discretion and authority to "disregard the traditional deference paid to the first-filed action" and defer to a second-filed action while dismissing or staying the first-filed action. Id. at 387-88. While there is no inflexible or exhaustive list of "special equities," the Supreme Court recognized a number of quintessential "special equities" in Sensient Colors, which include "when one party has engaged in jurisdiction shopping to deny the other party the benefit of its natural forum." Id. at 387. A prime and highly relevant example of this "special equity" is when "a party acting in bad faith has filed first 'in anticipation of the opposing party's imminent suit in another, less

favorable forum.'" Id. at 388 (quoting EEOC v. Univ. of Pa., 850 F. 2d 969, 976 (3d Cir. 1988)).

New Jersey disfavors "litigation of substantially similar lawsuits in multiple jurisdictions with opposing parties racing to acquire the first judgment [because it] is not only wasteful of judicial resources, but anathema in a federal system that contemplates cooperation among states." Sensient Colors, 193 N.J. at 387. Where a first-filed case is an anticipatory declaratory judgment action like this one, which runs parallel to a later-filed coercive action encompassing the facts and claims at issue in the first-filed case, the usefulness of the declaratory judgment action is significantly curtailed. See Century Indem., 398 N.J. Super. at 438 (affirming dismissal of first-filed declaratory judgment action in favor of a later-filed action in Pennsylvania on the basis of comity). This is particularly true, where, like here, New Jersey is neither the place of incorporation nor principal place of business for the party filing the anticipatory declaratory judgment (or, here, any of the parties). See id. at 440 (finding no deference needed to be given to the plaintiff's choice of forum through an anticipatory declaratory judgment because New Jersey is "neither its place of incorporation or principal place of business").

B. The Trial Court Acted Well Within Its Discretion When It Dismissed This Case On Comity Grounds In Favor Of The Missouri Action.

The trial court followed the Supreme Court's guidance in Sensient Colors, and this court's decision in Century Indem., and appropriately exercised it discretion to dismiss this case in favor of the Missouri Action based on an extensive analysis of the record and a weighing of considerations of fairness and comity. Plaintiff's displeasure with the result of the trial court's thoughtful analysis is not a legitimate basis for this court to reverse. Indeed, plaintiff offers no basis for this court to find that the trial court abused its discretion in dismissing this case in favor of the Missouri Action.

The overarching flaw in plaintiff's argument is that it misconstrues the applicable analytical framework. Plaintiff advances an incorrectly narrow view of what constitutes a "special equity" sufficient for a trial court to deviate from the first-filed rule. (Pb21). The Supreme Court did not, as plaintiff argues, establish "only a small number of factors that could constitute special equities" or a "narrow class of 'special equities'" in Sensient Colors. (Pb21, Pb24). To the contrary, the Supreme Court:

(1) defined "special equities" broadly to encompass any "reasons of a compelling nature that favor the retention of jurisdiction by the court in the later-filed action" (Sensient Colors, 193 N.J. at 387);

(2) endorsed "a fact-specific inquiry that weights considerations of fairness and comity" (id. at 389-90); and

(3) clarified that "[t]he determination of whether to grant a comity stay or dismissal is generally within the discretion of the trial court" (id. at 390).

The Supreme Court also looked at factors applicable to a forum non conveniens analysis. Id. at 390-91. In other words, Sensient Colors established a discretionary totality of the circumstances analysis based on fairness and comity—not a bright-line test or pre-determined set of factors a trial court must slavishly follow.

This court applied the analytical framework from Sensient Colors to affirm dismissal of a first-filed declaratory judgment action in favor of a later-filed breach of contract case in Century Indem. See Century Indem., 398 N.J. Super. at 441. In Century Indem., this court found that "many of the concepts that informed the Court's decision in Sensient are relevant" to a motion to dismiss a first-filed declaratory judgment lawsuit "in that they provide a useful framework for analysis of a circumstance in which to competing actions are pending, and a court is called upon to determine which should prevail." Id. at 428. This court started its analysis from the premise that New Jersey courts have the discretion to dismiss "first-filed preemptory declaratory judgment

actions instituted to obtain a forum advantage, so as to permit the 'natural plaintiff's' action to proceed in the plaintiff's chosen court." Id. at 438. This court then found the following forum non conveniens concepts relevant to its analysis:

(1) none of the principal parties to the coverage dispute was a New Jersey corporation;

(2) the litigation would be complex, time-consuming, and constitute a drain upon New Jersey's judicial resources;

(3) resolution of the issues would require application of foreign state's law; and

(4) it was "unlikely that any local interest [would] be generated in the resolution of a dispute regarding the allocation of coverage obligations under a contract delivered in Pennsylvania to a Pennsylvania company."

Id. at 440. After consideration of these factors, this court concluded that the trial court had not abused its discretion in dismissing the first-filed New Jersey case because "adequate relief [could] be obtained by [the declaratory judgment plaintiff in New Jersey] in the breach of contract action instituted by [the declaratory judgment defendant in New Jersey] in the Pennsylvania courts," where the party's posture was reversed. Id. at 441.

This case is very similar to Century Indem. To start, this is a declaratory judgment case, which plaintiff preemptively filed in an attempt to deprive defendants (who are the natural plaintiffs in this dispute) of the ability to pursue their breach of contract and other affirmative claims in Missouri—where multiple defendants are based and where the state courts are already familiar with the provisions of the Special Undertaking Contract. (Pa074, Pa082); see also Monsanto Co. v. Gould Electrs., Inc., 965 S.W.2d 314, 317 (Mo. App. 1998) (finding that a substantially similar Special Undertaking "clearly and unequivocally provide[s] for . . . [indemnification of] Monsanto against any and all claims"). Plaintiff's unabashed forum shopping through the filing of a preemptive declaratory judgment action is a sufficient basis on its own to support the trial court's dismissal of this case. See Century Indem., 398 N.J. Super. at 438 (noting courts "in other jurisdictions" have "dismiss[ed] first-filed preemptory declaratory judgment actions instituted to obtain a forum advantage, so as to permit the 'natural plaintiff's' action to proceed in the plaintiff's chosen court."); Sensient Colors, 193 N.J. at 388.

Courts across the country take a "dim view" of declaratory judgment actions like this one, which are preemptively filed by natural defendants in hopes of securing a favored forum. See, e.g., AmSouth Bank v. Dale, 386 F.3d 763, 788 (6th Cir. 2004) ("Courts take a dim view of declaratory plaintiffs who file

their suits mere days or weeks before the coercive suits filed by a 'natural plaintiff' and who seem to have done so for the purpose of acquiring a favorable forum. Allowing declaratory actions in these situations can deter settlement negotiations and encourage races to the courthouse, as potential plaintiffs must file before approaching defendants for settlement negotiations, under pain of a declaratory suit."); Digitrax Entm't, LLC v. Universal Music Corp., 21 F. Supp. 3d 917, 923 (E.D. Tenn. 2014) (dismissing first-filed declaratory judgment suit where the parties were engaged in pre-litigation settlement discussions on the basis that the filing party "engaged in forum shopping and procedural fencing, if not bad faith" in an effort to "secure its preferred forum"). Indeed, as correctly noted by the trial court, court after court has dismissed first-filed declaratory judgment cases in favor of second-filed coercive actions. (Pa074-075) (citing Rsch. Auto., Inc. v. Schrader-Bridgeport Int'l Inc., 626 F.3d 973 (7th Cir. 2010); Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp., 511 F.3d 535 (6th Cir. 2007)); see also Honeywell Int'l Inc. v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., 502 F. App'x 201, 206 (3d Cir. 2012) (affirming dismissal of first-filed New Jersey declaratory judgment action in favor of "the second-filed action for coercive relief" pending in Michigan).[20]

[20] See, e.g., BASF Corp. v. Symington, 50 F.3d 555, 558 (8th Cir. 1995) ("It is our view that where a declaratory plaintiff raises chiefly an affirmative defense, and it appears that granting relief could effectively deny an allegedly injured

Plaintiff's claim that this case was not a preemptive filing (Pb22) ignores the relevant facts. Defendants made clear to plaintiff that they sought to resolve the parties' dispute over the scope of the Special Undertaking Contract without resort to formal litigation, and would file suit if, but only if, settlement negotiations failed. (Pa472, Pa476). To that end, defendants invited plaintiff (and other special undertakers) to a meeting where defendants intended in good faith to provide plaintiff with additional information about the underlying PCB lawsuits and discuss "options for resolving [plaintiff's] liabilities [under the Special Undertaking Contract] outside the context of formal litigation." (Pa478). Plaintiff accepted defendants' invitation on May 1, 2017, leading defendants to believe that plaintiff, too, desired to enter into good-faith settlement negotiations. (Pa081). Then, eleven days later (and four days before the scheduled meeting), plaintiff surreptitiously filed this case.

The forum non conveniens factors analyzed in Century Indem. are also present here and support the trial court's Judgment. Contrary to plaintiff's

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party its otherwise legitimate choice of the forum and time for suit, no declaratory judgment should issue."); Clockwork Home Servs., Inc. v. Robinson, 423 F. Supp. 2d 984, 992-93 (E.D. Mo. 2006) (dismissing declaratory judgment suit where defendant preemptively filed in a race to the courthouse); Eli's Chicago Finest, Inc. v. Cheesecake Factory, Inc., 23 F. Supp. 2d 906, 909 (N.D. Ill. 1998) (dismissing first-filed declaratory judgment lawsuit that was filed after accusation of trademark infringement "in hopes of securing a favorable forum").

assertion, this case has little to no relevant connection to New Jersey, and New Jersey does not have a compelling state interest in adjudicating this dispute. The Special Undertaking was made in Missouri, is governed by Missouri law, and is an agreement to defend and indemnify a Missouri company. (Da101-102). None of the parties to this case are incorporated in New Jersey or make New Jersey their principal place of business. (Pa001 (plaintiff), Pa002 (defendants)). Plaintiff is incorporated in Delaware and has its principal place of business in Wisconsin. (Pa001). As the trial court correctly found, the *only* connection plaintiff has to New Jersey is that its predecessor, UMC, had a corporate office and a manufacturing plant there decades ago. (Pa072). This court made clear in Century Indem. that "no deference need be given to [a party's] choice of forum that is neither its place of incorporation or principal place of business." 398 N.J. Super. at 440 (citing Kurzke v. Nizzan Motor Corp., 164 N.J. 159, 171 (2000)). That is precisely the circumstance here.

The court should disregard plaintiff's misplaced attempt to manufacture a connection to New Jersey through reference to a lawsuit filed against defendants by the New Jersey Department of Environmental Protection. (Pb23) (citing N.J. Dep't of Env't Protection, v. Monsanto Co., GLO-L-800-22 (N.J. Super. Gloucester Cnty.) (the "DEP Lawsuit"). As an initial matter, the DEP Lawsuit was not raised by plaintiff in the trial court as a basis for denying

defendants' motion so it is not part of the appellate record and should not be considered by this court in reviewing the Judgment. But even were it otherwise, defendants have not tendered the DEP Lawsuit to plaintiff or otherwise sought defense or indemnity from plaintiff for the DEP Lawsuit. That lawsuit, therefore, is not, as plaintiff incorrectly claims, included in "the underlying claims against" defendants. (Pb23). Rather, the record reflects that, as of the time of the Judgment, defendants had tendered approximately 180 PCB lawsuits to plaintiff under the Special Undertaking Contract and not one of those underlying PCB lawsuits was venued in New Jersey or relates to alleged PCB contamination in New Jersey. (Pa073).

Missouri is the natural forum for the parties' dispute. As the trial court correctly found, the Special Undertaking Contract is a Missouri contract which will be governed by Missouri law.[21] At the time it was executed, the Special Undertaking Contract required UMC to defend and indemnify a Missouri

[21] UMC signed the Special Undertaking Contract and then returned it to Old Monsanto in Missouri, where Old Monsanto signed it to finalize the agreement. See (Da101) (stating, in pertinent part: "Thank you for signing and returning the 'Special Undertaking By Purchasers of Polychlorinated Biphenyls' document. It has now been signed by Monsanto and we are enclosing a copy for your files."); Filson v. Bell Tel. Labs., Inc., 82 N.J. Super. 185, 190 (App. Div. 1964) ("A contract is made at the place where the final act necessary for its formation is done."). The Special Undertaking Contract became a part of all existing and future PCB contracts between UMC and Old Monsanto, which specifically included Missouri choice-of-law provisions. See, e.g., (Pa390 at ¶ 12) ("This contract is to be construed according to the laws of the state of Missouri.").

company headquartered in Missouri. (Pa001-002, Pa089). The PCBs forming the basis for plaintiff's obligations to defend and indemnify Old Monsanto were sold by Old Monsanto from Missouri. (Pa385-468). Moreover, Solutia and New Monsanto remain headquartered in Missouri, (Pa002) and the vast majority of the underlying PCB lawsuits tendered to plaintiff (approximately 103 of the 180) were filed in state or federal courts in Missouri. (Pa180-188). Finally, the Missouri Action is a more comprehensive and coercive action that seeks recovery of billions of dollars from multiple defendants (including plaintiff) who entered into substantially similar defense and indemnity agreements.

Plaintiff's assertion that this case is "at a far more advanced posture than the Missouri Action" (Pb29) and is a "more efficient vehicle to resolve the dispute" (Pb26) also lacks merit. Although this case has been pending a few months longer, it had not advanced any further than the Missouri Action prior to it being dismissed. Moreover, prior to dismissal and when jointly seeking adjournment of a trial date, plaintiff represented to the trial court that there is "much fact discovery" (Da005) and "extensive expert discovery" (Da006) left to do before this case could be ready for the six-week trial plaintiff has requested.[22] (Da009). The Missouri Action remains pending and has advanced

[22] Defendants also respectfully direct the court's attention to the judicial "[v]acany [c]rises" currently affecting New Jersey courts (Pa303-304), which

since this case was dismissed. On February 6, 2024, the Missouri Action was remanded to Missouri state court (because the removal was untimely) where defendants have served discovery while certain other defendants pursue an appeal of the remand order in the Eighth Circuit.[23] Plaintiff's assertion that the Missouri courts have been slow to act is belied by the record, which reflects that the Missouri state court promptly heard and decided plaintiff's renewed motion to dismiss the First Amended Petition on October 7, 2022, a little over a month after the motion was filed and the day it was heard.[24]

Finally, plaintiff is not prejudiced by dismissal of this case in favor of the Missouri Action. The Missouri Action is moving forward no matter what happens in this case because the Missouri court denied plaintiff's motion to dismiss, a ruling plaintiff did not seek to appeal. Instead, plaintiff has embraced

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defendants understand will very likely cause delays in resolution of this case if it were to proceed.

[23] The briefing on the Eighth Circuit appeal will be completed in May 2024, and defendants expect the Eighth Circuit will render a decision shortly thereafter affirming the remand order.

[24] Plaintiff misrepresents the course of the Missouri Action. Plaintiff moved to dismiss the original Petition filed in the Missouri Action and that motion was heard during COVID and taken under submission by the Missouri state court. Plaintiff never took action to notice a hearing, submit on the briefs, or otherwise seek a conference with the Missouri court, as would be customary under Missouri procedure to prompt a ruling. Defendants later filed the First Amended Petition, (Pa105-175) and plaintiff then filed a renewed motion to dismiss on September 2, 2022. (Pa083). The Missouri court heard plaintiff's renewed motion on October 7, 2022 where it promptly denied plaintiff's motion. (Pa177).

the opportunity to litigate its claims in the Missouri Action by (1) asserting the claims animating this case as defenses in the Missouri Action (Pa085, Pa242-247), (2) asserting cross-claims for contribution against the other five defendants in the Missouri Action (Pa085, Pa247),[25] and (3) moving forward with discovery by serving comprehensive deposition notices on Old Monsanto, New Monsanto, and Solutia. (Pa085, Da106-123). Allowing this case to proceed in parallel with the more comprehensive and coercive Missouri Action would place the parties in the untenable position of litigating two substantially similar lawsuits in multiple jurisdictions and cause the New Jersey judiciary to unnecessarily expend judicial resources on a complex case lacking New Jersey connections or local interest. Such a result is directly contrary the purpose and policy behind comity. See Sensient Colors, 193 N.J. at 387 ("The litigation of substantially similar lawsuits in multiple jurisdictions . . . is not only wasteful of judicial resources, but anathema in a federal system that contemplates cooperation among states.").

* * *

To conclude, the trial court acted well within its discretion when it dismissed this "placeholder" declaratory judgment case in favor of the more comprehensive and coercive Missouri Action. There is no reason this case

[25] Plaintiff later dismissed these cross-claims. (2T45:10-13).

should proceed in New Jersey. New Jersey has no relevant connection to the dispute or the parties, and no interest in adjudicating a complex, defensive declaratory judgment action about a Missouri defense and indemnity contract, that was filed by plaintiff—a Delaware company based in Wisconsin—to usurp defendants' choice of forum and avoid unfavorable Missouri law. There is also no prejudice to plaintiff in litigating in Missouri. The Missouri Action is more comprehensive and plaintiff can litigate, and in fact is already litigating, all of its claims in the Missouri Action.

CONCLUSION

For foregoing reasons, the court should affirm the trial court's order in its entirety, dismissing this case in favor of the Missouri Action on the grounds of comity.

March 22, 2024

Respectfully Submitted,

/s/ Michael S. Stein

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MAGNETEK, INC.,	App. Div. Docket No.: A-000036-23
Plaintiff-Appellant,	On Appeal From
v.	Docket No. BER-L-3362-17
MONSANTO COMPANY, PHARMACIA LLC f/k/a MONSANTO, and SOLUTIA, INC.,	SUPERIOR COURT, LAW DIVISION, BERGEN COUNTY
Defendants-Respondents.	Sat below: Hon. Mary F. Thurber, J.S.C.

REPLY BRIEF OF MAGNETEK, INC.

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PRELIMINARY STATEMENT

Plaintiff-Appellant, Magnetek, Inc. ("Magnetek"), submits this brief in further support of its appeal from an Order of the Superior Court of New Jersey, Bergen Vicinage (Hon. Mary F. Thurber, J.S.C.) dated July 24, 2023, which granted reconsideration of prior orders of Judge Robert C. Wilson and, upon reconsideration, dismissed the case on comity grounds in favor of Defendants-Respondents' second-filed action in Missouri. (Pa056-57). The Court should reverse the Order and reinstate Magnetek's Complaint.

ARGUMENT

POINT I

DEFENDANTS FAILED TO ESTABLISH PROPER GROUNDS FOR RECONSIDERATION OF JUDGE WILSON'S ORDERS (Pa56)

A. Defendants' motion to reconsider was a lateral appeal, intended to take advantage of the change in judicial assignment

Rule 4:42-2 permits courts to reconsider their prior interlocutory orders, but provides an important safeguard: to the extent possible, such applications "shall be made to the trial judge who entered the order." R. 4:42-2(b). This Court has expressly disapproved of "lateral appeals," where a dissatisfied litigant seeks to have an interlocutory order overturned or modified by another trial judge. *Lewis v. Preschel*, 237 N.J. Super. 418, 422 (App. Div. 1989); *Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo*, 345 N.J. Super. 1, 14 (App. Div. 2001). The same logic applies whether the issue

arises on a motion for reconsideration, or where a litigant simply presents serial motions raising the same issue.

Defendants assert that their motion to reconsider to Judge Thurber did not constitute a "lateral appeal," but cite no authority in support of their argument, and instead unsuccessfully attempt to distinguish Magnetek's authorities.

For example, Defendants argue that *Firoz v. Kolaranda*, No. A-2886-05T1, 2007 WL 685447 (App. Div. Mar. 8, 2007) did not involve a motion to reconsider under Rule 4:42-2, but their argument misses the forest for the trees. In *Firoz*,[1] though not presented as a motion for reconsideration, the defendant filed successive motions to bar certain evidence at trial. The first motion was denied, but at trial, before a different judge, the defendant made the same motion and succeeded. This Court noted that the defendant did not move pursuant to Rule 4:42-2, but had "presented nothing different in support of the pre-trial application than she did in support of the earlier motion." 2007 WL 685447, at * 5. Although interlocutory orders remain subject to revision, the Court held that where the defendant presented the same application before a different judge without any new law or new facts, the trial court should not have reached a different ruling. That

[1] Defendants also argue that this Court should not consider *Firoz*, or other unpublished decisions, under Rule 1:36-3. Contrary to Defendants' argument, though unpublished decisions are not binding, this Court may find such decisions persuasive. *E.g. Sauter v. Colts Neck Volunteer Fire Co. No. 2*, 451 N.J. Super. 581, 600 (App. Div. 2017) (unpublished opinions may be cited, and courts may find them persuasive); *see also* Pressler & Verniero, N.J. Court Rules, cmt. 2 on R. 1:36-3 (2017).

general rule holds true whether a litigant explicitly frames its motion as one for reconsideration, or merely seeks the same relief in a subsequent motion.

Defendants also unsuccessfully attempt to distinguish *Cineas v. Mammone,* 270 N.J. Super. 200, 207-08 (App. Div. 1994), where this Court held that "judges should not vacate orders of judges of co-ordinate jurisdiction unless there are exceptional circumstances" or "there has been a material change in the facts or available evidence." Defendants mistakenly argue that this holding of *Cineas* been overruled, but this Court has continued to apply the relevant holdings from *Cineas*: judges of coordinate jurisdiction may not conduct appellate review, relitigation of interlocutory orders before successive judges is disfavored, and a second judge should not vacate the order of a prior judge absent exceptional circumstances. *See Black Creek Sanctuary Condo Ass'n v. Fortress Inv. Grp.*, No. A-5227-12T3, 2015 WL 1565644, at *4 (App. Div. Apr. 9, 2015) (citing *Cineas*); *see also Lawson v. Dewar*, 268 N.J. Super. 128, 136 (App. Div. 2021) (warning against motions to reconsider that "constitute an unwarranted attempt to reverse matters previously decided solely because the prior judge is no longer available").

This case falls squarely within this Court's prior admonitions against "lateral appeals." Defendants' motion to reconsider was brought before a different judge only three weeks after Judge Wilson's decision, and was an obvious attempt to take advantage of the change in assigned judge. There were no exceptional

circumstances, and no change in facts or law. Under the circumstances, Judge Thurber should have declined to reconsider the well-reasoned decision of the previous trial judge, Judge Wilson. *Cineas*, 270 N.J. Super. at 208.

B. Judge Thurber's reversal of Judge Wilson was an abuse of discretion

Defendants also fail to address the fact that the decision at issue – whether to dismiss or stay the case on comity grounds – was a matter within Judge Wilson's discretion, and had been briefed to him three times between 2017 and 2022. Even if Defendants *had* established the existence of "special equities" permitting the trial court to depart from the strong presumption in favor of this first-filed action (Defendants failed to do so), Judge Wilson still had discretion to deny the motion and retain this first-filed action. *See Sensient Colors Inc. v. Allstate Ins. Co.*, 193 N.J. 373, 390 (2008) ("[t]he determination of whether to grant a comity stay or dismissal is generally within the discretion of the trial court"). When Defendants moved to reconsider only 3 weeks after Judge Wilson's January 20, 2023 Orders, nothing had changed except the assigned judge. Thus, the motion to reconsider brought to Judge Thurber sought not to correct an error of law, but to obtain a different exercise of the court's discretion. New Jersey law is clear that such practice is improper.

Where a matter is left to a trial court's discretion, there can certainly be cases that will present a "close call," and where reasonable minds might

disagree. Although Judge Thurber might have viewed the comity issue differently than Judge Wilson, she erred by entertaining Monsanto's immediate motion to reconsider and then doing a complete 180, dismissing the case based on the same comity arguments Judge Wilson had previously rejected three times. Permitting one judge to immediately overturn a previous judge of coordinate jurisdiction in these circumstances is inequitable, arbitrary and capricious, and a flagrant form of judge shopping. As the Court held in *Black Creek*, it is not within a trial judge's authority to contradict a prior judge's decision based merely on a different view of the evidence and applicable law. 2015 WL 1565644, at *4. The Court should reverse the Order below and reinstate Magnetek's first-filed Complaint.

C. Defendants' motion to reconsider was merely a rehash of their thrice-rejected arguments, citing the same authorities

Defendants' motion to reconsider should have been denied for the additional reason that Defendants simply repeated the same arguments and cited the same authorities concerning a comity stay or dismissal that had been fully briefed, argued, and rejected *three times* previously. Defendants' attempts to claim otherwise do not withstand even a moment's scrutiny:

Motion	**Summary of Comity Arguments Advanced by Defendants**	**Authorities Cited**	**Result**
Sept. 5, 2017 Motion to Dismiss	• Magnetek's declaratory judgment action was preemptively filed, depriving the "natural plaintiff" of its choice of forum. (Pa494-95) • Judicial efficiency and convenience of the parties and witnesses favor	• *Sensient Colors* • *Century Indem. Co.* • *Moses H. Cone*	Motion denied by Judge Wilson Oct. 17, 2017 (Pa506-11)

	Missouri (Pa496)	*Mem'l Hosp.* (Pa493-96)	
Sept. 21, 2022 Renewed Motion to Dismiss	• Magnetek's declaratory judgment action was preemptively filed, depriving the "natural plaintiff" of its choice of forum. (Pa521-22) • Dispute belongs in Missouri based on joinder of additional parties to the Missouri action. (Pa522-23) • Missouri's interest in interpretation and enforcement of the Special Undertaking (Pa523)	• *Sensient Colors* • *Century Indem. Co.* • *Moses H. Cone Mem'l Hosp.* (Pa521-24)	Motion denied by Judge Wilson Jan. 20, 2023 (Pa770-71) (*see also* 2T59:3-61:16)
Nov. 2, 2022 Alternative Motion to Stay	• The Missouri case is more "comprehensive" based on joinder of additional parties (Pa765) • Magnetek filed a defensive declaratory judgment action preemptively, and Defendants are the natural plaintiffs (Pa765-67) • Staying the case on comity grounds would not prejudice Magnetek because claims could be litigated in Missouri(Pa768)	• *Sensient Colors* • *Century Indem. Co.* (Pa764-68)	Motion denied by Judge Wilson Jan. 20, 2023 (Pa774-75) (*see also* 2T59:3-61:16)
Feb. 10, 2023 Motion to Reconsider	• Magnetek filed a defensive declaratory judgment action preemptively, and Defendants are the natural plaintiffs (Pa311-12) • Staying the case on comity grounds would not prejudice Magnetek because claims could be litigated in Missouri (Pa314) • Missouri's interest in adjudicating the dispute is greater than New Jersey's (Pa313)	• *Sensient Colors* • *Century Indem. Co.* (Pa311-314)	Motion granted by Judge Thurber July 24, 2023 (Pa56)

Defendants' argument that "[r]econsideration was appropriate given Judge Thurber's need, as the new judge assigned to this case, to ensure that the January 23 Orders 'promote[d] a fair and efficient processing of' the parties'

dispute" (Db25-26)[2] is a meritless rationalization for attempting to obtain a reversal after Judge Wilson's retirement. Parties cannot conduct a do-over of recently decided motions each time there is a change in judicial assignment. To the contrary, such practice is strongly disfavored under New Jersey law. *See Lewis*, 237 N.J. Super. at 422; *Brach*, 345 N.J. Super. at 14; *Cineas*, 270 N.J. Super. at 208.

By simply repeating the same arguments and authorities, Defendants failed to satisfy the "interest of justice" standard under Rule 4:42-2(b). *E.g., Lawson*, 468 N.J. Super. at 136 (warning against repetitious motions to reconsider, or attempts to take advantage of a change in judge); *Lombardi v. Masso*, 207 N.J. 517, 537 n.6 (2011) (disapproving of repetitive motions for reconsideration); *Wolf v. Edison Props.*, No. MID-L-000116-16, 2019 WL 2396994, at *1–2 (N.J. Super. L, Middlesex Cnty. Jan. 28, 2019) (rehash of prior arguments and disagreement with court's decision not a basis for reconsideration and cannot establish that the "interest of justice" requires reversal). Accordingly, this Court should reverse Judge Thurber's Order and reinstate Magnetek's Complaint.

[2] Citations to "Db" are to the Brief of Defendants, dated March 22, 2024.

POINT II

DEFENDANTS FAIL TO ESTABLISH THAT SPECIAL EQUITIES SUPPORTED THE DISMISSAL OF THIS FIRST-FILED ACTION (Pa57)

A. Defendants' attacks on Judge Wilson's decision are without merit

At oral argument of Defendants' renewed motions to dismiss and motion to stay, Judge Wilson heard extensively from three separate attorneys for Defendants. (2T1-28, 32-52). At the conclusion of the hearing, Judge Wilson issued his findings and decision denying those motions again. (2T59:3-61:16). Defendants now assert that Judge Wilson's decision was improperly "colored" by comments he made regarding the second-filed case in Missouri, that his remarks were "caustic" and hostile to Defendants' positions, and that Judge Wilson did not address some of their arguments in detail. (Db11-14).

Defendants' criticisms are misplaced and divorced from context. By the time of the January 20, 2023 hearing, Defendants had spent more than 5 years seeking to avoid litigation in New Jersey and resisting Judge Wilson's orders. Defendants unsuccessfully moved to dismiss in 2017, including on comity grounds. (Pa506-511). After Judge Wilson ordered jurisdictional discovery, Defendants resisted discovery, ultimately requiring a motion to compel that Judge Wilson granted in its entirety. Defendants then filed renewed motions to dismiss in 2022, again on personal jurisdiction, joinder, and comity grounds. (Pa512-13; 570-71). Finally, just before their renewed motions were set to be heard,

Defendants filed a duplicative motion to *stay* the case based on the same comity arguments that already had been briefed. (Pa756-57).

It was against this backdrop of Defendants' oppressive motion practice (at least some of which could be categorized as frivolous) that Judge Wilson heard argument and issued his decision on January 20, 2022. Any apparent frustration in Judge Wilson's remarks is certainly understandable and confirms that he fully considered and understood Defendants' arguments after voluminous briefing and a lengthy oral argument. Judge Wilson's comments merely reflect his frustration with the lack of merit in Defendants' repetitious arguments on successor jurisdiction and comity, which he properly rejected.

B. The rule favoring retention of the first-filed action should not have been disregarded because Defendants did not establish "special equities" required to overcome that presumption.

New Jersey courts recognize a strong presumption in favor of the first-filed action, and "[t]hus, any comity analysis should begin with a presumption in favor of the earlier-filed action." *Sensient Colors Inc.*, 193 N.J. at 387; *see also Yancoskie v. Del. River Port Auth.,* 78 N.J. 321, 324 (1978); *Cogen Techs. NJ Venture v. Boyce Eng'g Int'l, Inc.,* 241 N.J. Super. 268, 272 (App. Div. 1990).

Defendants cite only two New Jersey authorities in support of their argument that special equities permitted a departure from the first-filed rule, *Sensient Colors* and *Century Indemnity Co.*, neither of which support Defendants'

position. Defendants otherwise rely on a number of federal authorities for the proposition that declaratory judgment actions are disfavored – a proposition that finds no support in New Jersey law. (Db32-33).

For example, defendants cite *Century Indem. Co. v. Travelers Cas. & Sur. Co.*, 398 N.J. Super. 422, 440 (App. Div. 2008) for the proposition that no deference need be given to a party's choice of forum that is neither its place of incorporation or principal place of business. But *Century Indemnity* is readily distinguishable, and Defendants' reliance is misplaced. There, the plaintiff insurance company filed in a state "with which the parties had no relevant contact." *Id*. at 439. Here, Magnetek's predecessor, UMC, was headquartered in New Jersey; UMC's conduct with respect to the Special Undertaking and UMC's manufacture of PCB-containing products took place in New Jersey; Defendants shipped millions of pounds of PCBs to UMC (and others) in New Jersey; and one of the underlying suits for which Defendants seek indemnity was brought by the New Jersey Department of Environmental Protection to redress PCB pollution in New Jersey, *N.J. Dep't of Env't Protection, et al. v. Monsanto Co.*, *et al.*, GLO-L-800-22 (N.J. Super. L, Gloucester Cnty. filed Aug. 4, 2022) (the "NJ DEP Action"). (Pa025-26; Pa134-37; Pa498-99; Pa592-601; Pa610-59).

Defendants then incorrectly argue that factors applicable to a *forum non conveniens* analysis also inform the comity analysis as part of a free-ranging

totality-of-the-circumstances test. (Db30). Defendants misconstrue the applicable analytical framework. As the New Jersey Supreme Court has made clear, New Jersey adheres to the general rule in favor of the first-filed action, and a trial court should not reach the fact-specific inquiry of whether to exercise its discretion to grant a comity stay or dismissal *unless and until* the party seeking to litigate in the second-filed action has established the existence of "special equities." *See Sensient Colors*, 193 N.J. at 386, 393; *see also Century Indem. Co.*, 398 N.J. Super. at 426-27 ("the party seeking to preserve the second-filed action must demonstrate the existence of one or more special equities that overcome the presumption favoring the first-filed suit"). *Forum non conveniens* factors may by relevant to one recognized special equity (whether the first-filed suit would cause "great hardship and inconvenience" to one party) but cannot, by themselves, overcome the presumption in favor of the first-filed action. *See Sensient Colors*, 193 N.J. at 389 (citing *Am. Home Prods. Corp. v. Adriatic Ins. Co.*, 286 N.J. Super. 24, 39 (App. Div. 1995)).[3]

Nor are "special equities" defined as broadly as Defendants suggest. (Db29-30). The New Jersey Supreme Court has described "special equities" as being "extenuating circumstances," (*Sensient Colors*, 193 N.J. at 387) and has

[3] Defendants have not argued that litigating in New Jersey would cause them great hardship or inconvenience.

identified only three circumstances qualifying as "special equities" that may be sufficient to depart from the strong presumption in favor of the first-filed suit:

> (1) racing to the courthouse so as to deny the other party a reasonable chance of bringing suit in its favored forum;
>
> (2) significant state interests, such as the remediation of pollution in New Jersey or New Jersey public policy; or
>
> (3) circumstances where the first-filed suit would cause great hardship to one party, but no unfairness to the opposing party by proceeding in the second-filed action.

Sensient Colors, 193 N.J. at 387-89. Defendants, as the parties seeking dismissal in favor of the second-filed action, had the burden of establishing the existence of special equities sufficient to overcome the presumption in favor of the first-filed action. *Sensient Colors*, 193 N.J. at 392. Here, as Judge Wilson correctly recognized, none of these limited "special equities" is present. Indeed, "[t]he most important special equity" in a comity analysis – the presence of significant state interests, such as New Jersey's strong public policy interest in the remediation of environmental contamination within its borders – favors retaining this first-filed action. *Id.* at 394; *see also Century Indem.*, 398 N.J. Super. at 427.

1. The "significant state interests" special equity requires denial of Defendants' motion

Among the suits tendered to Magnetek is the NJ DEP Action, where the State seeks to recover for PCB contamination from Monsanto's former New Jersey facilities and from Monsanto's design, production, marketing, sale, and

distribution of PCBs throughout New Jersey. Thus, New Jersey's state interests favor retaining this case, rather than deferring to a second-filed action in Missouri.

Defendants mistakenly argue that the NJ DEP Action is not relevant to the evaluation of this factor. (Db35-36). The record, however, clearly shows that Defendants tendered "***all*** current and future PCB-related litigation wherein Old Monsanto is, or will be, named as a defendant." (Pa012; Pa471) (emphasis added). This obviously includes the NJ DEP Action.

Given the foregoing, New Jersey has a compelling interest in retaining this action, rather than deferring to a second-filed action in Missouri, where the case concerns the enforceability of an indemnity agreement made in ***New Jersey*** by a ***New Jersey corporation*** where Defendants allege that Magnetek's indemnity obligation is triggered by alleged environmental contamination ***in New Jersey***, and by the manufacture of PCB-containing products ***in New Jersey*** after Defendants sold and shipped millions of pounds of toxic PCBs ***into New Jersey*** without adequate warnings or disclosures, and one of the underlying PCB lawsuits is brought by the New Jersey Department of Environmental Protection to redress pollution ***in New Jersey***. (Pa025-26; Pa134-37; Pa498-99; Pa592-601; Pa610-59).

2. Magnetek did not race to the courthouse or deprive Defendants of a reasonable opportunity to file first

The first "special equity" does not apply here because Magnetek did not "race" to the courthouse or deprive Defendants of a reasonable opportunity to

file suit in the jurisdiction of their choice. To the contrary, Magnetek did not commence this action until nearly *nine months after* Defendants began tendering the underlying PCB lawsuits to Magnetek. (Pa001; Pa012). In fact, much of that litigation had already been pending for years, including one case that was litigated fully to verdict. (Pa470-72). Defendants' characterization of Magnetek's first-filed action as being a "surreptitious" or "preemptive" filing (Db3) simply makes no sense.

Defendants do not cite a single New Jersey decision with analogous facts. In *Sensient Colors*, the plaintiff notified Zurich insurance of a suit, and the insurer informed Sensient that it would participate in the defense under a reservation of rights. "Without a denial of coverage . . . Sensient had little reason to file an action in New Jersey for a declaration of its rights. In a preemptive move . . . Zurich without warning filed suit in New York, thereby denying Sensient the opportunity to select its own forum for resolving the coverage dispute." *Sensient Colors*, 193 N.J. at 393. The Supreme Court found that such an immediate "first strike" breached the insurer's duty of good faith to its insured.

Similarly, in *Century Indem. Co.,* Century Indemnity filed an action to determine coverage obligations of itself and third-two other insurers with respect to the defendant insured. 398 N.J. Super. at 424. The insured sent letters to Century Indemnity's claims administrator stating its position. *Id.* at 432-33. *On the same*

day that the claims administrator responded, Century Indemnity filed an action in New Jersey. The Court noted the insurance company's "unseemly haste" to file in a jurisdiction with *no connection* to the parties was the type of "unannounced race to the courthouse" that the New Jersey Supreme Court had discussed in *Sensient Colors*. *Id.* at 438-39.

The circumstances in Defendants' authorities, therefore, bear no resemblance to this case. Defendants here had ample opportunity to commence litigation as early as 2009 (when the first of the underlying cases was commenced), and had months to file suit after Magnetek unequivocally rejected their 2016 tender letter. (Pa81, 155). Therefore Magnetek's first-filed suit does not present the type of "race to the courthouse" constituting a special equity sufficient to permit a court to disregard the strong presumption in favor of this first-filed action.

Based on the foregoing, the trial court should have denied Defendant's motion and retained jurisdiction over the case because there are no "special equities" that would justify a departure from the strong presumption in favor of this first-filed action.

CONCLUSION

Based on the foregoing, Magnetek respectfully requests that the Court enter an Order reversing the decision below and reinstating Magnetek's Complaint, together with such other and further relief as the Court deems just and proper.

Dated: Hackensack, New Jersey
April 22, 2024

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