IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

EVER BEDOYA, DIEGO GONZALES, and MANUEL DeCASTRO, on behalf of themselves and all others similarly situated, Plaintiffs, v. AMERICAN EAGLE EXPRESS, INC. d/b/a AEXGroup., Defendant.	2:14-cv-02811-ES-JAD

PLAINTIFFS' RENEWED MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM AND TO DISMISS DEFENDANT'S THIRD PARTY COMPLAINT

For the reasons set forth in the accompanying Memorandum of Law, Plaintiffs Ever Bedoya, Diego Gonzales, and Manuel DeCastro[1] hereby move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Defendant American Eagle Express, Inc.'s Counterclaim (Doc. 8) and Third Party Complaint (Doc. 6).

Dated: May 29, 2015

Respectfully,

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[1] In its Third Party Complaint, AEX named three entities as defendants that were associated with Plaintiffs: KV Service, LLC, A&D Delivery Express, LLC, and M&J Express, LLC. These entities join in the instant motion to the extent that Plaintiffs seek dismissal of the Third Party Complaint.

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TABLE OF CONTENTS

I. PERTINENT BACKGROUND 4

II. STANDARD OF REVIEW 6

III. ARGUMENT 6

A. Pennsylvaia Law Should Govern the Interpretation of the TBA. 6

B. The Counterclaim and Third Party Complaint Should be Dismissed Because the Indemnification Clause in the TBA Does Not Provide a Basis for AEX to Recover Costs and Attorneys' Fees in Defending this Complaint. 7

C. AEX's Complaint and Third Party Complaint Are Prohibited by New Jersey's Wage and Hour Law and New Jersey's Wage Payment Law. 15

D. AEX's Counterclaim and Third Party Complaint Constitute Illegal Retaliation under the New Jersey Wage Laws. 19

IV. CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Amero v. Townsend Oil Co., No. 071080C, 2008 WL 5609064 (Mass. Super. Dec. 3, 2008) 10-11

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 6

Bank of N.Y. Trust Co., N.A. v. Franklin Advisers, Inc., 726 F.3d 269 (2d Cir. 2013) 14

Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983) 21

Casias v. Distribution Mgmt. Corp., Inc., No. 1:11-CV-00874, 2012 WL 4511376 (D.N.M. Sept. 28, 2012) 13

Century Village v. Chatham Condominium Associations, 387 So.2d 523, 524 (Fla. 4th Dist.Ct.App.1980). 15

Chen v. Domino's Pizza, Inc., No. CIV.A. 09-107, 2009 WL 3379946 (D.N.J. Oct. 16, 2009) 20

Darveau v. Detecon, Inc., 515 F.3d 334 (4th Cir. 2008) 20

Emanuel v. Rolling in the Dough, Inc., No. 10 C 2270, 2010 WL 4627661 (N.D. Ill. Nov. 2, 2010) 18

Exelon Generation Co., LLC v. Tugboat DORIS HAMLIN, No. CIV.A. 06-0244, 2008 WL 2188333 (E.D. Pa. May 27, 2008) 8

Fernandez v. Kinray, Inc., No. 13-cv-4938, 2014 U.S. Dist. LEXIS (E.D.N.Y. Feb. 5, 2014) 12-13, 19

Getty Petroleum Mktg., Inc. v. Shipley Fuels Mktg., LLC, No. CIV.A. 07-CV-340, 2007 WL 2844872 (E.D. Pa. Sept. 27, 2007) *aff'd*, 293 F. App'x 166 (3d Cir. 2008) 7

Gustafson v. Bell Atlantic Corp., 171 F.Supp.2d 311 (S.D.N.Y. 2001) 18

Halprin v. Verizon Wireless Servs., LLC, No. CIV A 07-4015 (JAP), 2009 WL 1351456 (D.N.J. May 13, 2009) 6

Hargrove v. Sleepy's, et al. Supreme Court Docket No. 072-742 ..... 1-2, 19

Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132 (2d Cir. 1999) 18

Karanjawala v. Associated Humane Societies, Inc., No. A-3560-08T2, 2010 WL 4025911 (App. Div. Aug. 20, 2010) 16

Keeley v. Loomis Fargo & Co., 183 F.3d 257 (3d Cir. 1999) 15

Kiewit E. Co. v. L & R Const. Co., 44 F.3d 1194 (3d Cir. 1995) 8

Kusiak v. Doherty, 942 N.E.2d 1017, 2011 WL 816754 (Mass. App. Ct. Mar. 10, 2011) 9-10, 14

Local 1035, Int'l Bhd. of Teamsters v. Pepsi Allied Bottlers, Inc., 99 F. Supp. 2d 219 (D. Conn. 2000) 18

Longport Ocean Plaza Condo., Inc. v. Robert Cato & Associates, Inc., 137 F. App'x 464, 466 (3d Cir. 2005). 9

Lucas v. Board of Review, No. A-3749-11T2, 2013 WL 5431241 (App. Div. Oct. 1, 2013) 4, 10

Lyle v. Food Lion, Inc., 954 F.2d 984 (4th Cir. 1992) 18

Marx v. Friendly Ice Cream Corp., 380 N.J. Super. 302, 882 A.2d 374 (App. Div. 2005) 17

Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1011 (3d Cir. 1980) 7

Mowry v. McWherter, 365 Pa. 232, 238, 74 A.2d 154, 157 (1950) 7, 10-11

Mulford v. Computer Leasing, Inc., 334 N.J. Super. 385, 759 A.2d 887 (1999) 16

New Jersey State Hotel-Motel Ass'n v. Male, 105 N.J. Super. 174, 251 A.2d 466 (App. Div. 1969) 17

Penthouse North Association v. Lombardi, 461 So.2d 1350 (Fla.1985) 15

Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc., 404 Pa. 53, 60, 171 A.2d 185, 189 (1961) 8

Quintana v. Explorer Enterprises, Inc., No. 09-22420-CIV, 2010 WL 2220310 (S.D. Fla. June 3, 2010) 17-18

Reich v. Gateway Press, Inc., 13 F.3d 685 (3d Cir. 1994) 17

Ruiz v. Affinity Logistics Corp., 667 F.3d 1318 (9th Cir. 2012) 6-7

Ryan v. United States, 233 F. Supp. 2d 668 (D.N.J. 2002) 8, 13

Silva v. Right Way Paving, No. A-3648-06T3, 2008 WL 583659 (App. Div. March 5, 2008) 4, 10

Spellman v. Am. Eagle Express, Inc., 680 F. Supp. 2d 188 (D.D.C. 2010) 12-14

Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944) 17

Topp Copy Products, Inc. v. Singletary, 533 Pa. 468, 471, 626 A.2d 98, 99 (1993) 15

Torres v. Gristede's Operating Corp., 628 F. Supp. 2d 447 (S.D.N.Y. 2008) 20

Varnell, Struck & Associates, Inc. v. Lowe's Companies, Inc., No. 5:06-CV-068, 2008 WL 1820830 (W.D.N.C. Apr. 21, 2008) 18

Vengurlekar v. Silverline Technologies, Ltd., 220 F.R.D. 222 (S.D.N.Y. 2003) 16

Villareal v. El Chile, Inc., 601 F.Supp.2d 1011, 1017 (N.D. Ill. 2009) 18

Winslow v. Corporate Express, Inc., 364 N.J. Super. 128, 834 A.2d 1037 (2003) 16

Yaw Adu Poku v. BeavEx, Inc., CIV.A. 13-3327 SRC, 2013 WL 5937414 (D.N.J. Nov. 1, 2013) (Chesler, J.) 13, 20

Statutes and Rules

29 U.S.C.A. § 215(a)(3) 20

Fed.R.Civ.P 12(b)(6) 2, 6, 19

N.J. Stat. § 34:11, *et seq.* 14, 16-17

N.J. Stat. § 34:11-56a, *et seq.* 14-16, 20

Restatement (Second) of Conflict of Laws § 187(2) 3,6

In this action under the New Jersey Wage Payment Law ("NJWPL") and the New Jersey Wage and Hour Law ("NJWHL"), Plaintiffs Ever Bedoya, Diego Gonzales, and Manuel DeCastro (collectively "Plaintiffs")[1] performed work as delivery drivers for Defendant American Eagle Express, Inc. d/b/a AEXGroup ("AEX" or "Defendant"). *See* Complaint (Doc. 1) at ¶¶ 9-17. Plaintiffs bring claims on their own behalf, and those similarly situated, alleging that they were misclassified as independent contractors, and that they were actually employees under New Jersey law. Relying on this misclassification, AEX failed to comply with statutory overtime obligations applicable to employees under the NJWHL, and made certain pay deductions that are impermissible for employees under the NJWPL. *See id.* at ¶¶ 26-37. Simply put, the outcome of Plaintiffs' claims will turn on whether AEX properly classified them as independent contractors (rather than employees) under New Jersey law. The New Jersey Supreme Court has recently clarified that because Plaintiffs performed services for Defendant, they are presumed to be employees for the purposes of New Jersey's wage laws, and Defendant bears the burden of establishing that they were properly classified as independent contractors.[2] *Hargrove v. Sleepy's,*

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[1] In its Third Party Complaint, AEX named three entities as defendants that were associated with Plaintiffs: KV Service, LLC, A&D Delivery Express, LLC, and M&J Express, LLC. These entities join in the instant motion to the extent that Plaintiffs seek dismissal of the Third Party Complaint.

[2] Under *Sleepy's*, any individual performing services for remuneration is presumed to be an "employee" unless the employer can establish each of the following: (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business. *Id.*

LLC, 220 N.J. 289, 305, 316, 106 A.3d 449, 458, 465 (2015). Defendant cannot carry that burden.

On June 17, 2014, AEX filed its Answer in this matter and asserted a counterclaim, *see* Doc. No. 8, and a third party complaint against Plaintiffs and certain limited liability companies that Plaintiffs were required to form in order to work for Defendants, *see* Doc. No. 6. In doing so, AEX takes the position that the Plaintiffs, by merely asserting their rights under the New Jersey wage statutes and claiming that they were misclassified as independent contractors, have triggered a duty to indemnify AEX for any costs and fees incurred in defending this action, subject to the terms of the parties' "Transportation Brokerage Agreement" ("TBA").

Shortly after receipt of Defendant's Answer, Plaintiffs moved to dismiss the counterclaim and third party complaint under Fed.R.Civ.P 12(b)(6) because the claims are unsupported by the language of the TBA, and because the claims are barred by New Jersey's wage statutes. The parties appeared for a hearing on Plaintiff's Motion on May 6, 2015, and the Court raised two issues that were not fully addressed in Plaintiff's briefing. Specifically, the Court sought clarification as to whether Pennsylvania or New Jersey law governs the interpretation of the TBA in light of a choice of law provision contained therein. The Court also asked whether Plaintiffs' argument that the indemnification clause is inapplicable to "first party" claims between the parties similarly bars Defendant from seeking indemnity for its defense of this action from the corporate entities that Defendant required Plaintiffs to establish. *See* Doc. 50.

In light of these two issues that were not fully addressed in Plaintiffs' initial briefing, the Court permitted Plaintiffs to withdraw their Motion, and allowed Plaintiffs to refile their Motion to Dismiss. *See* Doc. 51.

As to the choice of law issue, though it is profoundly clear that Plaintiffs' substantive wage claims are governed by New Jersey's wage and hour laws, upon further reflection it is likely that the principles of Section 187 of the Restatement (Second) of Conflict of Laws requires that Pennsylvania law should apply to the narrow question of the interpretation of the parties' TBA, and thus Pennsylvania law will determine the scope of the indemnification clause in the parties' TBA. Under either New Jersey or Pennsylvania law, however, Defendant's claims are unsupported by the indemnity provision of the TBA, because 1) it does not apply to litigation between the two contracting parties, and 2) Defendant's potential loss from this lawsuit does not arise out of the "operation of equipment," Plaintiff's or their entities' "obligations" under the Agreement, or any "breach of the agreement," and is thus outside the scope of the parties' alleged agreement. AEX's Counterclaim (Doc. 8) at ¶ 10.

The Court's second inquiry was whether the indemnification provision, if it does not apply to "first party" claims, would also preclude indemnification from a "third party" such as an LLC formed by the Plaintiffs in order to perform their work for Defendant. On this issue, Plaintiffs were unable to locate any case law discussing the unique legal and factual scenario presented here in which Plaintiffs, who are presumed to be employees under New Jersey's wage laws, were required to form an LLC in order to work for the putative employer, and were also required to sign an indemnification agreement on behalf of their LLC in order to secure that employment. Practically speaking, it is impossible to separate the employee from the shell corporation that Defendant required Plaintiff to create here. Plaintiffs are unable to identify reported case law holding that under these unique circumstances, Plaintiffs and their LLC's are literally "one and the same," and therefore indemnification from the LLC constitutes "first party" indemnification for purposes of the Court's analysis. However, New Jersey courts have found

that similar "corporate" entities, albeit in different circumstances, were not separate and distinct from their individual owners. *See Lucas v. Board of Review*, 2013 WL 5431241, *5 (App. Div. Oct. 1, 2013) ("While a partnership may be an employment unit, it is not a legal entity which is distinct and separate from its owners as in a corporation.") (attached as Exhibit A); *Silva v. Right Way Paving*, No. A-3648-06T3, 2008 WL 583659, *3 (App. Div. March 5, 2008) ("in the context of workers' compensation, a partnership is not an independent entity separate form each of the partners.") (attached as Exhibit B).

Even in the absence of case law directly on this point, Defendant's claims against Plaintiffs' LLC's also fail as a matter of law under the plain language of the agreement. In addition, Defendant's attempt to offset their losses arising from this wage and hour lawsuit by seeking indemnification from its employees' LLC's constitutes an invalid agreement to circumvent New Jersey's wage laws.

I. PERTINENT BACKGROUND

In this class action, Plaintiffs worked as delivery drivers for AEX in the state of New Jersey. Plaintiffs allege that they have been improperly classified as independent contractors even though, as a matter of law and fact, they are employees under New Jersey law. As a result, Plaintiffs and the class they seek to represent have been subject to improper deductions from their pay and have been denied overtime pay, and have otherwise been unjustly forced to bear the costs of AEX's business. *See* Complaint (Doc. 1) at Counts I-III. In other words, Plaintiffs are asserting claims based on alleged misconduct by AEX under New Jersey law.

AEX has asserted a counterclaim and a third party complaint against the named Plaintiffs and their limited liability companies in an attempt to shift the burden of its alleged misconduct.

All of these claims are based on an indemnity clause in the TBA entered into between Plaintiffs and AEX. In pertinent part, the indemnity provision states as follows:

> [Plaintiff] agrees to defend, indemnify, and hold harmless [AEX] from any direct, indirect and consequential loss, damage, fine, expense, including reasonable attorneys' fees, action, claim for injury to persons, including death, and damage to property which [AEX] may incur arising out of or in connection with the operation of the Equipment, [Plaintiff's] obligations under this Agreement, or any breach by [Plaintiff] or its drivers or workers of the terms of this Agreement.

AEX's Counterclaim (Doc. 8) at ¶ 10.[3]

AEX alleges that "the claims asserted by Plaintiffs in the Class Action Complaint, and the expenses AEX has incurred and will incur to defend against them," fall within the terms of the indemnity clause, and therefore AEX should be permitted to recover from Plaintiffs their attorney's fees and other costs in defending this action. *See* AEX's Counterclaim, (Doc. 8) at ¶¶ 12-13. The claims asserted in the third party complaint against Plaintiff's LLC's are nearly identical to that which is alleged in the Counterclaim. *See* AEX's Third Party Complaint (Doc. 6) at ¶¶ 10-13. Thus, according to AEX, the Plaintiffs, both individually and through their LLC's, are contractually bound to pay for any loss caused to AEX as a result of this action, in which Plaintiffs challenge their classification as independent contractors. Defendant's counterclaims and third-party claims fail as a matter of law.

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[3] The identical clause is included in a TBA executed between Defendant and certain corporate entities that Plaintiffs were required by AEX to create in order to continue their work for Defendant. Indeed, Defendant's employees completed the paperwork so that Plaintiffs and others could register their "businesses" (for a fee paid to the employer), and the corporations created by the named Plaintiffs never had any independent existence through which they performed courier or delivery work for any company other than AEX.

II. STANDARD OF REVIEW

A counterclaim or complaint will only survive if it contains sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). In the instant case, neither the counterclaim nor the third party complaint state a plausible claim for relief, and both are subject to dismissal under Rule 12(b)(6).

III. ARGUMENT

A. Pennsylvania Law Should Govern the Interpretation of the TBA.

The Court correctly noted that the parties' TBA contained a provision which states: "This Agreement shall be deemed to have been drawn in accordance with the statutes and laws of the State of Pennsylvania and in the event of any disagreement or litigation, the laws of this state shall apply…." *See* Doc. 6-1 at ¶ 25. New Jersey courts apply Section 187 of the Restatement (Second) of Conflict of Laws "to ascertain whether to enforce a choice of law clause in a contract between two private parties." *Halprin v. Verizon Wireless Servs., LLC*, No. CIV A 07-4015 (JAP), 2009 WL 1351456, at *1 (D.N.J. May 13, 2009). The Restatement requires that in this instance, the law of the state chosen by the parties to govern their contractual rights (Pennsylvania) will apply, unless it is shown that Pennsylvania has no substantial relationship to the parties or the transaction, or application of Pennsylvania law would be contrary to a fundamental policy of New Jersey. Restatement (Second) of Conflict of Laws § 187(2).

There can be no dispute that New Jersey's wage laws govern the parties' relationship and that Plaintiffs have properly asserted their wage claims under New Jersey law, as opposed to the laws of Pennsylvania. *See, e.g., Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1323-24 (9th Cir. 2012) (in wage action brought by California workers, wage laws of California held to apply

under Section 187 of the Restatement despite choice of law provision designating Georgia law). In light of this fact, and in recognition that Plaintiffs performed their work for Defendant in New Jersey and had chosen New Jersey as the forum state, Plaintiffs originally suggested that New Jersey law also governed the interpretation of the TBA and its indemnity provision, particularly where Defendant asserted a broad interpretation of the indemnity clause that would undermine enforcement of New Jersey's wage and hour statutes. Upon further reflection, Plaintiffs concede that under the Restatement, it is likely that Pennsylvania law governs interpretation of the TBA. However, under Pennsylvania law, or New Jersey law, Defendant's counterclaims and third party complaint must be dismissed.

B. The Counterclaims and Third Party Complaint Should be Dismissed Because the Indemnification Clause in the TBA Does Not Provide a Basis for AEX to Recover Costs and Attorneys' Fees in Defending this Complaint.

The relevant principles of contract interpretation under Pennsylvania law are similar to those of the state of New Jersey, which were cited in Plaintiffs' previous briefing. The court first makes the determination of whether the contract contains an ambiguity. *Getty Petroleum Mktg., Inc. v. Shipley Fuels Mktg., LLC*, No. CIV.A. 07-CV-340, 2007 WL 2844872, at *13 (E.D. Pa. Sept. 27, 2007) *aff'd*, 293 F. App'x 166 (3d Cir. 2008). To determine the existence of ambiguity, the court may consider "the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning." *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1011 (3d Cir. 1980). "The rule is familiar that where there is an ambiguity in a contract a proposed interpretation which yields an inequitable, absurd or unusual result is, if possible, to be avoided." *Mowry v. McWherter*, 365 Pa. 232, 238, 74 A.2d 154, 157 (1950).

Pennsylvania law, like the law of New Jersey, requires that indemnification contracts must be strictly construed against the party seeking the indemnification. *Kiewit E. Co. v. L & R Const. Co.*, 44 F.3d 1194, 1202 (3d Cir. 1995); *Exelon Generation Co., LLC v. Tugboat DORIS HAMLIN*, No. CIV.A. 06-0244, 2008 WL 2188333, at *1 (E.D. Pa. May 27, 2008); *see also Ryan v. United States*, 233 F. Supp. 2d 668, 689 (D.N.J. 2002). Where an indemnity clause is ambiguous, "it must be construed most strongly against the party who drew it." *Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc.*, 404 Pa. 53, 60, 171 A.2d 185, 189 (1961)

Here, the relevant portion of the indemnity clause provides that Plaintiffs will "defend, indemnify, and hold harmless [AEX] from any direct, indirect and consequential loss… including reasonable attorneys' fees… which [AEX] may incur… arising out of or in connection with the operation of the Equipment, [Plaintiff's] obligations under this Agreement, or any breach by [Plaintiff] or its drivers or workers of the terms of this Agreement." AEX's Counterclaim (Doc. 8) at ¶ 10.

In applying Pennsylvania law to a purportedly broad indemnity clause of this nature, the Federal District Court for the Eastern District of Pennsylvania has held that the language cannot be read to require indemnification for attorney's fees resulting from litigation between the two contracting parties. *Exelon Generation Co., LLC v. Tugboat DORIS HAMLIN*, No. CIV.A. 06-0244, 2008 WL 2188333, at *2 (E.D. Pa. May 27, 2008). There, the court held that "a common sense reading of the language suggests that it refers only to third party claims." The same is true in this case, as there is no indication that the indemnity clause was intended to apply to litigation between the contracting parties, and this basic fact alone requires dismissal of Defendant's claims.

The court in *Exelon Generation* relied upon the reasoning of an unreported decision of the United States Court of Appeals for the Third Circuit which applied New Jersey law to a similar indemnity provision and held that the indemnity clause in question did not apply to litigation between the contracting parties. *See Longport Ocean Plaza Condo., Inc. v. Robert Cato & Associates, Inc.*, 137 F. App'x 464, 466 (3d Cir. 2005). There, the Third Circuit held that the term "indemnify" "commonly presumes a tripartite arrangement, in which A recovers from B for losses to C." *Id.* The court also looked to the surrounding language of the supposed indemnity clause. *See id.* Much like the provision at issue in this matter, the language of the indemnity clause in *Longport* required that the indemnitor would "hold harmless" the indemnitee. *Id.* The court explained that "[a] hold-harmless term normally requires one party to assume the liability inherent in the undertaking, thereby relieving the other party of the responsibility." *Id.* at 467 (internal quotation and citations omitted). In *Longport*, the party seeking indemnification could not explain how the "hold harmless" provision could apply in litigation between the parties, and AEX can provide no coherent explanation here.

Other courts have noted that the inclusion of a "duty to defend" provides further evidence of the parties' intention that the indemnification clause should apply only to third-party claims. As set forth above, the relevant portion of the TBA states that Plaintiffs will "defend, indemnify, and hold harmless" AEX under a shared set of circumstances. Were this provision intended to apply to litigation between the two parties, the duty to defend would be rendered entirely meaningless because one party cannot "defend" another in an action between them. For this reason, one court has observed that contractual language by which one party agreed to defend, indemnify and hold harmless the opposing party from certain losses "tends to suggest a prerequisite of a third-party claim." *Kusiak v. Doherty*, 942 N.E.2d 1017, 2011 WL 816754 at

*2 n.6 (Mass. App. Ct. Mar. 10, 2011) (unpublished decision pursuant to Massachusetts Appeals Court Rule 1:28) (observing that one party cannot "defend" the other in *inter se* litigation). If the indemnity provision were read to apply to first party claims, the obligation to "defend" would be absurd and ineffectual, and such an interpretation would run afoul of the basic tenet of contract law a "proposed interpretation which yields an inequitable, absurd or unusual result is… to be avoided." *Mowry*, 365 Pa. at 238, 74 A.2d at 157.

As stated above, Plaintiffs have been unable to uncover case law in which an LLC formed by an employee as a condition of employment was held to be a "first party" to the contractual relationship for purposes of an indemnification analysis. However, New Jersey courts have found that similar "corporate" entities, albeit in different circumstances, were not separate and distinct from their individual owners. *See Lucas*, No. A-3749-11T2, 2013 WL 5431241, *5 ("While a partnership may be an employment unit, it is not a legal entity which is distinct and separate from its owners as in a corporation.") (Exhibit A); *Silva*, No. A-3648-06T3, 2008 WL 583659, *3 ("in the context of workers' compensation, a partnership is not an independent entity separate form each of the partners.") (Exhibit B).

As stated above, Plaintiffs and their LLC's are inseparable, and the corporate entities had no independent existence other than the fact that Defendants required the Plaintiffs to incorporate in order to continue their work.[4] Regardless of the corporate entity's status as a "third party" or

[4] Case law indicates that this is a common scheme utilized by putative employers to perpetuate the fiction that they are engaged in legitimate "contracting" relationships with their workers, and courts have rejected the tactic. Under wage laws similar to the NJWPL, courts have rejected the notion that the worker's corporate status shields a defendant from liability, noting that that such a policy would undermine the entire purpose of the statute. *Amero v.*

a "first party" to the contractual indemnity clause, Defendant is incorrect that the language of the indemnification provision can be interpreted to require Plaintiffs' LLC's to pay AEX's attorneys fees and costs in this litigation. Again, it is noteworthy that the indemnification clause in question contained a "duty to defend." It would strain credulity to suggest that AEX and the named Plaintiffs, when they executed a TBA relating to Plaintiffs' corporate entities, intended that Plaintiffs would undertake the coordination and funding of AEX's defense (through their LLC's) should the parties find themselves on opposing sides of a wage and hour lawsuit. Such a proposition would not only betray the American Rule, but it would turn the adversarial nature of litigation on its head and yield the type of "inequitable, absurd or unusual result" that is impermissible under Pennsylvania rules of contract interpretation. *See Mowry*, 365 Pa. at 238, 74 A.2d at 157. For these reasons, the indemnification language of the TBA that is the subject of Defendant's Third Party Complaint does not encompass the type of "loss" incurred by AEX in defending against Plaintiffs' own wage claims.

Even if the indemnification clause were somehow read to generally require Plaintiffs or their LLC's to provide "first party" indemnification under some circumstances, Plaintiffs' alleged duty to defend, indemnify, and hold AEX harmless is only triggered in three distinct scenarios: (1) if the loss or attorney's fees arise "out of or in connection with the operation of the Equipment;" (2) if the loss arises out of Plaintiff's "obligations under th[e] Agreement;" or

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Townsend Oil Co., No. 071080C, 2008 WL 5609064, at *3 (Mass. Super. Dec. 3, 2008) ("If incorporation alone sufficed to transform an employee into an independent contractor, many employers would require that their employees do just that, and thereby exempt themselves from the requirements of the law.")

(3) if the loss arises from "any breach by [Plaintiff] or its drivers or workers of the terms of this Agreement." AEX's Counterclaim (Doc. 8) at ¶ 10. There is no allegation in the counterclaim or the third party complaint that AEX has incurred damages or attorney's fees arising out of a breach of the TBA, or out of the operation of equipment (as that term is defined in the TBA). Thus, AEX's pleadings apparently rely on an allegation that any loss arises out of the Plaintiffs' "obligations" under the TBA.

Even assuming that Plaintiffs and their entities have undertaken various obligations in the TBA, these obligations are limited to Plaintiffs' agreement to comply with applicable laws and regulations, and their obligations to provide certain service standards. *See, e.g.*, Ex. A to AEX's Answer (Doc. 8) at ¶¶ 4, 13. Rather than having any relationship to Plaintiffs' "obligations," this lawsuit concerns only the actions and obligations of the AEX and its alleged failure to comply with state wage laws. In the *Fernandez* case, in which a defendant asserted similar indemnification counterclaims against FLSA plaintiffs, the court observed that "[t]he only costs that defendants assert, and for which they seek indemnification, are the 'filing of the instant underlying lawsuit… and the resulting legal fees….' This [FLSA] lawsuit arises from defendants' alleged actions, not from any possible breach of the agreement by plaintiffs." *See Fernandez v. Kinray, Inc.*, No. 13-cv-4938, 2014 U.S. Dist. LEXIS, *24 (E.D.N.Y. Feb. 5, 2014).

Plaintiffs anticipate that AEX will rely on the decision in *Spellman v. Am. Eagle Express, Inc.*, 680 F. Supp. 2d 188 (D.D.C. 2010), in which AEX, as defendant in an action under the federal Fair Labor Standards Act ("FLSA"), asserted similar counterclaims based on the same indemnity provision at issue in this case. *See id.* at 190-192. In that case, the court held that the defendant's counterclaims survived a motion to dismiss, based on the convoluted reasoning that

plaintiffs had an "obligation" under the terms of the TBA to work for certain rates, and by alleging that they were owed more than those rates, Plaintiffs' lawsuit arose out of their "obligations" under the TBA, triggering the indemnity provision. *Id*. at 191. Such a theory has not been pled in the instant matter, and it is therefore unnecessary for the Court to entertain any comparison to *Spellman* based on AEX's thin assertion that the "claims asserted by Plaintiffs in the Class Action Complaint, and the expenses AEX has incurred and will incur to defend against them, fall within the terms of Paragraph 10" of the TBA. AEX's Counterclaim (Doc. 8) at ¶ 12. Even if the court were to engage in a comparison to *Spellman*, Plaintiffs note that at least three federal courts (including one from this District) have declined to follow *Spellman*, with one court observing that the *Spellman* court engaged "in mental gymnastics" when interpreting the parties' indemnity agreement. *Casias v. Distribution Mgmt. Corp., Inc.*, No. 1:11-CV-00874, 2012 WL 4511376, at *7 (D.N.M. Sept. 28, 2012); *see also Yaw Adu Poku v. BeavEx, Inc.*, CIV.A. 13-3327 SRC, 2013 WL 5937414 (D.N.J. Nov. 1, 2013) (Chesler, J.) (declining to follow *Spellman* and dismissing defendant's indemnity counterclaim); *Fernandez*, No. 13-cv-4938, 2014 U.S. Dist. LEXIS 17954, at *22-26.

Furthermore, the *Spellman* case did not arise under New Jersey law, and thus did not implicate rules of contractual interpretation relevant in this jurisdiction. "[U]nder New Jersey law, indemnification contracts must be strictly construed against the party seeking the indemnification." *Ryan*, 233 F. Supp. 2d at 689. As discussed above, there is also persuasive authority suggesting that contracts of indemnification for attorney's fees do not apply in litigation between the contracting parties absent a clear manifestation of this intent, and that inclusion of the duty to "defend" in the same clause demonstrates that the parties did not intend

for the provision to apply in *inter se* litigation. *See Bank of N.Y. Trust Co., N.A. v. Franklin Advisers, Inc.*, 726 F.3d at 283; *Kusiak v. Doherty*, 2011 WL 816754 at *2.

Finally, and most importantly, the supposed "obligation" that the plaintiffs undertook in the *Spellman* case, which the court described as an obligation to work only for the rates set forth in the TBA, would be invalid under New Jersey law. As discussed in more detail below, under New Jersey law, any contractual "obligation" of the named Plaintiffs to work for a specific amount, and to somehow forgo their rights to overtime and full payment of wages, constitutes an unenforceable contract under the NJWPL and NJWHL. N.J. Stat. § 34:11-4.7 (every agreement made in violation of [the Wage Payment Law] shall be deemed to be null and void…); N.J. Stat. § 34:11-56a25 (any agreement between such employee and the employer to work for less than such minimum fair wage shall be no defense to the action"). Thus, the ill-defined "obligation" that the *Spellman* court found in the TBA is void and unenforceable under the laws of New Jersey, and the *Spellman* decision has no bearing on outcome of this case.

In sum, AEX has failed to plead any facts stating a plausible claim for relief on their indemnification counterclaim asserted against the three named Plaintiffs. Defendant asks the court to ignore the plain language of the TBA, and to interpret its convoluted indemnification, "hold harmless," and "duty to defend" clause as a basic contractual fee-shifting provision, which it most certainly is not. Had the parties intended to create a contractual arrangement by which one party agreed to pay the prevailing party's attorney's fees in potential litigation, they would

have chosen straightforward language to that effect.[5] Instead, Defendant's attempt to invoke the TBA to obtain their costs and fees from Plaintiffs, both directly and through Plaintiffs' corporate entities, fails as a basic matter of contract interpretation and must be dismissed.

C. AEX's Counterclaim and Third Party Complaint Are Prohibited by New Jersey's Wage and Hour Law and New Jersey's Wage Payment Law.

The purpose of New Jersey's Wage and Hour Law is "[t]o safeguard [workers'] health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being."[6] N.J. Stat. § 34:11-56a; *see also Keeley v. Loomis Fargo & Co.*, 183 F.3d 257, 259 (3d Cir. 1999) (the purpose of the Wage and Hour Law is to "protect employees from unfair wages and excessive hours"). Among other protections, the law establishes a

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[5] Under similar reasoning, the Florida Supreme Court has held that any indemnification provision which is not limited to benefitting the "prevailing party" cannot encompass first party claims between the contracting entities. *See Penthouse North Association v. Lombardi*, 461 So.2d 1350 (Fla.1985). Under Florida law, when confronted with a contract provision in which Party A agrees to hold Party B harmless for all attorney's fees and loss incurred in defending against "all claims," but no limitation is included permitting such an award only to the prevailing party, it is "quite obvious" that the clause is not intended to apply to actions between the parties, but rather that it is to apply to actions by third parties. *Century Village v. Chatham Condominium Associations*, 387 So.2d 523, 524 (Fla. 4th Dist.Ct.App.1980). Accepting the alternative contention "would amount to accepting the incongruous theory that although [Party A] may be successful in their litigation, they would nevertheless have to satisfy their own judgment in addition to paying [Party B's] costs." *Id.*

[6] Pennsylvania rules of contract interpretation disfavor enforceability of any indemnification clause that 1) contravenes public policy, 2) extends beyond the private affairs of the contracting parties, or 3) is entered into through unequal bargaining positions or as a contract of adhesion. *Topp Copy Products, Inc. v. Singletary*, 533 Pa. 468, 471, 626 A.2d 98, 99 (1993). Based on these principles, the indemnification clause cannot be used to undermine the public policy of the NJWPL, particularly where the TBA's were entered into as a condition of employment between an employer and employee.

minimum wage and requires that overtime be paid at a rate of one-and-one half the regular rate for hours worked in excess of forty in a given week. *See* N.J. Stat. § 34:11-56a4. Aggrieved employees are granted a private right of action to seek damages arising from a violation of the law, and a prevailing plaintiff is entitled to an award of attorney's fees in such an action. N.J. Stat. § 34:11-56a25; *see also Karanjawala v. Associated Humane Societies, Inc.*, No. A-3560-08T2, 2010 WL 4025911 (App. Div. Aug. 20, 2010) (affirming judgment awarding unpaid overtime to plaintiff as well as award of attorney's fees under N.J. Stat. § 34:11-56a4).

The purpose of New Jersey's Wage Payment Law is "primarily to protect employees." *Vengurlekar v. Silverline Technologies, Ltd.*, 220 F.R.D. 222, 231 (S.D.N.Y. 2003) (citing *Mulford v. Computer Leasing, Inc.*, 334 N.J. Super. 385, 759 A.2d 887 (1999); *Winslow v. Corporate Express, Inc.*, 364 N.J. Super. 128, 834 A.2d 1037, 1043 (2003)). The Wage Payment Law governs the timing of wage payments, requiring that "every employer shall pay the full amount of wages due to his employees at least twice during each calendar month." N.J. Stat.§ 34:11-4.2. The law forbids deductions and withholdings from wages, except under a very limited set of circumstances (not applicable here). *See* N.J. Stat. § 34:11-4.4. The NJWPL also contains a strict prohibition on any agreements between an employer and employee to circumvent or waive the protections of the statute, and grants an aggrieved employee a private right of action to assert his or her rights under the law. *See* N.J. Stat. § 34:11-4.7.[7]

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[7] This section provides, in full:

> It shall be unlawful for any employer to enter into or make any agreement with any employee for the payment of wages of any such employee otherwise than as provided in this act, except to pay wages at shorter intervals than as herein

Overall, the wage laws are "social legislation designed to correct abuses in employment." *New Jersey State Hotel-Motel Ass'n v. Male*, 105 N.J. Super. 174, 177, 251 A.2d 466, 467 (App. Div. 1969). Due to their remedial and humanitarian purpose, the New Jersey wage laws are applied broadly and may even extend their "protection to a greater number of employees [than the FLSA] …." *Marx v. Friendly Ice Cream Corp.*, 380 N.J. Super. 302, 309-10, 882 A.2d 374, 378 (App. Div. 2005) (citing the FLSA, 29 U.S.C. § 218(a)).

Though there is not yet any New Jersey case law regarding the exact question raised by this motion to dismiss, numerous courts have dismissed similar indemnity counterclaims in cases arising under the FLSA, the federal analogue to New Jersey's wage laws. Similar to the New Jersey statutes discussed above, the FLSA is a remedial statute. *See Reich v. Gateway Press, Inc.*, 13 F.3d 685, 694 (3d Cir. 1994). As the Supreme Court has explained, the FLSA is intended "to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602-603 (1944). Based on this legislative purpose, courts have uniformly held that an employer in an FLSA action cannot seek indemnification from the plaintiff-employees. *See, e.g., Quintana v. Explorer Enterprises, Inc.*, No. 09-22420-CIV, 2010

> provided, or to pay wages in advance. Every agreement made in violation of this section shall be deemed to be null and void, and the penalties in this act provided may be enforced notwithstanding such agreement; and each and every employee with whom any agreement in violation of this section shall be made by any such employer, or the agent or agents thereof, shall have a right of civil action against any such employer for the full amount of his wages in any court of competent jurisdiction in this State.

N.J. Stat. § 34:11-4.7.

WL 2220310 at *2 (S.D. Fla. June 3, 2010) (dismissing indemnification counterclaim and observing that "the circuits that have addressed the issue consistently found that indemnification claims against employees or owners are contrary to public policy and the legislative intent of the FLSA.").[8] Courts have reached the same conclusion in interpreting state wage and hour laws similar to New Jersey's. *See Gustafson v. Bell Atlantic Corp.*, 171 F.Supp.2d 311, 328 n. 8 (S.D.N.Y. 2001); *Villareal v. El Chile, Inc.*, 601 F.Supp.2d 1011, 1017 (N.D. Ill. 2009) ("As with the FLSA, the [Illinois Minimum Wage Law's] statutory goals would be undermined by diminishing the employer's compliance incentives if an employer were permitted to seek indemnity or contribution from its employees for statutory violations.").

Like the FLSA, the New Jersey wage laws are remedial in nature; they specifically provide for a private right of action and prohibit agreements that would permit an employer to circumvent the laws protections. Though Defendant has previously protested that the Court need

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[8] Additional case law includes the following: *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 143 (2d Cir. 1999) (affirming dismissal of third-party indemnification claim against employee in FLSA action); *Lyle v. Food Lion, Inc.*, 954 F.2d 984, 987 (4th Cir. 1992) (affirming dismissal of third party claim for indemnification) ("In effect, [defendant] sought to indemnify itself against [plaintiff] for its own violation of the FLSA, which the district court found, and we agree, is something the FLSA simply will not allow."); *Local 1035, Int'l Bhd. of Teamsters v. Pepsi Allied Bottlers, Inc.*, 99 F. Supp. 2d 219, 221 (D. Conn. 2000) (holding that indemnification clause in union contract was void in regard to plaintiffs' FLSA action, and dismissing indemnification counterclaim under Rule 12(b)(6)); *Varnell, Struck & Associates, Inc. v. Lowe's Companies, Inc.*, No. 5:06-CV-068, 2008 WL 1820830 at *10 (W.D.N.C. Apr. 21, 2008) ("It would indeed be unconscionable for an employer to escape liability for unlawful labor practices by having the employee agree to indemnify the employer for FLSA violations" and "to hold otherwise would be to gut the remedial nature of the FLSA."); *Emanuel v. Rolling in the Dough, Inc.*, No. 10 C 2270, 2010 WL 4627661 at *4 (N.D. Ill. Nov. 2, 2010) ("Every case to consider the issue of indemnification in the FLSA context has reinforced that to allow employers to seek indemnification from their employees for FLSA violations would frustrate the very purpose of the statute.").

not be concerned with the policies underlying the New Jersey wage laws because Plaintiffs are not "employees," this argument misses the mark. Under New Jersey law, Plaintiffs are presumed to be employees for purposes of the wage statutes until Defendant carries its burden of proving all three elements of the "ABC" test. *Hargrove v. Sleepy's, LLC*, 220 N.J. 289, 305, 316, 106 A.3d 449, 458, 465 (2015). Moreover, AEX has acknowledged that it cannot assert these indemnification claims once Plaintiffs are deemed employees. *See* Doc. 28 at p. 10 ("And, to be certain, AEX concedes that its indemnification claims will fail in the event Plaintiffs prove an employment relationship.") The legislative protections enshrined in the wage laws would disintegrate if a plaintiff, who is presumed to be an employee and alleges he was misclassified as a "contractor," could be threatened with the prospect of indemnifying the defendant for attorney's fees and other losses arising from the litigation if the employer were ultimately successful in carrying its burden under the "ABC" test; the threat of indemnification for litigating an unsuccessful misclassification claim would deter plaintiffs from bringing suit in the first place, frustrating the entire purpose of the statutes. *See Fernandez*, No. 13-cv-4938, 2014 U.S. Dist. LEXIS 17854. Plaintiffs therefore ask that this Court join the number of decisions condemning indemnity counterclaims against employees who seek unpaid wages, and dismiss AEX's counterclaim and third party complaint under Rule 12(b)(6).

D. AEX's Counterclaim and Third Party Complaint Constitute Illegal Retaliation under the New Jersey Wage Laws.

AEX's counterclaim and third party complaint are also subject to dismissal because they constitute illegal retaliation in violation of the New Jersey wage laws. The NJWHL protects workers from retaliation, prohibiting an employer from discharging or in "any other manner" discriminating against an employee "because such employee has caused to be instituted or is

about to cause to be instituted any proceeding under or related to this act, or because such employee has testified or is about to testify in any such proceeding." N.J. Stat. § 34:11–56a24; *Chen v. Domino's Pizza, Inc.*, No. CIV.A. 09-107, 2009 WL 3379946, at *3 (D.N.J. Oct. 16, 2009). In fact, the NJWHL makes retaliation against a complaining employee a criminal offense. *See id.*, at *3 (citing N.J. Stat. § 34:11–56a24).

Under the similar "anti-retaliation" provision of the federal FLSA, courts have routinely held that an employer's baseless counterclaim against the employee constitutes actionable retaliation in violation of the Act.[9] *See, e.g, Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008) (finding employer's lawsuit alleging fraud was filed with a retaliatory motive and without a reasonable basis in fact or law, and was an actionable adverse employment action under FLSA); *Yaw Adu Poku v. BeavEx, Inc.*, 2013 WL 5937414, at *4 (granting plaintiffs leave to amend and add FLSA retaliation based upon defendant's filing of an indemnification counterclaim). These courts have explained that "groundless counterclaims … against employees who assert statutory rights are actionable retaliation [ ] because of their *in terrorem* effect." *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 473 (S.D.N.Y. 2008) (citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 740 (1983)).

As set forth above, the counterclaim and third party complaint in this action are unsupported by the indemnity clause in the TBA, and are otherwise barred by the NJWHL and NJPWL. In addition, AEX's pleadings demonstrate that the sole basis for AEX's counterclaim

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[9] The FLSA utilizes similar language to the NJWHL, stating that it is unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under [the FLSA]." 29 U.S.C.A. § 215(a)(3).

and third party complaint is Plaintiffs' decision to exercise their rights under New Jersey's wage laws. *See* AEX's Counterclaim (Doc. 8) at ¶¶ 12-13; AEX's Third Party Complaint (Doc. 6) at ¶¶ 10-13. By asserting claims of this nature, AEX no doubt intends to "place its employees on notice that anyone who engages in such conduct [i.e., asserts his or her rights to wages] is subjecting himself to the possibility of a burdensome lawsuit." *Bill Johnson's Restaurants*, 461 U.S. at 740. This is precisely the type of retaliation that constitutes a crime under the NJWHL, and this Court should dismiss AEX's counterclaim and third party complaint in order to demonstrate to all employees, including putative class members, that AEX cannot retaliate against them for their participation in this type of litigation.

IV. CONCLUSION.

For the above reasons, Plaintiffs request that the Court dismiss AEX's Counterclaim and Third Party Complaint.

Dated: May 29, 2015

Respectfully,

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Exhibit A

2013 WL 5431241
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

James W. LUCAS, Appellant,
v.
BOARD OF REVIEW, DEPARTMENT OF LABOR and Voxred International, L.L .C., Respondents.

Argued Sept. 9, 2013. | Decided Oct. 1, 2013.

On appeal from the Board of Review, Department of Labor, Docket No. 266,534.

Attorneys and Law Firms

James W. Lucas, appellant, argued the cause pro se.

Alan C. Stephens, Deputy Attorney General, argued the cause for respondent Board of Review (John J. Hoffman, Acting Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Mr. Stephens, on the brief).

Respondent Voxred International, L.L.C. has not filed a brief.

Before Judges ASHRAFI and ST. JOHN.

Opinion

PER CURIAM.

*1 Appellant James W. Lucas appeals from a final decision of the Board of Review finding him disqualified from benefits from November 29, 2009, on the ground that he lacked sufficient base year weeks or base year wages in employment, *N.J.S.A.* 43:21–4(e). Our examination of the record satisfies us that the Board's final decision was properly premised on facts in the record and is consonant with relevant statutory provisions. Accordingly, we affirm.

I.

The record discloses the following facts and procedural history leading to the administrative determination under review.

Lucas filed a claim for unemployment benefits on November 29, 2009. A determination by a deputy claims examiner mailed on December 23, 2009, held Lucas ineligible for benefits from November 29, 2009, on the ground that his employer was a limited liability company "with a 1065 filing return." Lucas appealed the determination and a hearing was held before the Appeal Tribunal on March 9, 2010. On March 30, 2010, the Appeal Tribunal affirmed the deputy's determination that Lucas's benefit claim was invalid under *N.J.S.A.* 43:21–4(e) because he lacked sufficient base year weeks or base year wages. Lucas appealed to the Board and, on September 27, 2010, the Board affirmed the decision of the Appeal Tribunal.

Lucas appealed the Board's decision to us. On June 29, 2011, on the Board's application, we remanded the matter to the Board for a new hearing and decision. The Board reopened the matter, set aside its prior decision, and remanded it to the Appeal Tribunal for a new hearing to take testimony. The Board requested information concerning Lucas's job title, the nature of his job, the amount of compensation received, and corresponding amount of interest he held in the partnership from 2002 through December 31, 2008. [1] The Board also requested the organizational information concerning Voxred International, LLC, (Voxred) a copy of its 1065 federal tax return forms, [2] and any W–2 forms, and copies of form K–1.

A limited liability company (LLC) may be classified for federal income tax purposes as a partnership, a corporation, or an entity disregarded as an entity separate from its owner by applying the rules in the Department of Treasury regulations. Treas. Reg. § 301 .7701–3 (as amended in 2006). However, pursuant to the entity classification rules, a domestic entity with more than one member will default to a partnership. Thus, an LLC with multiple owners can either accept its default classification as a partnership, or file Internal Revenue Service Form 8832 to elect to be classified as an association taxable as a corporation. *N.J.A.C.* 12:16–11.2.

The Board directed testimony and documentation "showing the number of partners for each year and the percentage of ownership of each partner during the entire course of time the claimant was a percentage holder and provided services." Additionally, "copies of payroll records, including [Federal Unemployment Tax Act] quarterly tax reports, and payroll forms showing social security and income taxes withheld and remitted to the federal government, should be obtained for all years from 2002 to 2008." The Board directed that "the

chief auditor shall have the opportunity to provide a witness regarding the department's treatment of shareholders in a partnership for the collection of employer contributions." [3]

*2 Voxred was formed as a Delaware limited liability company on September 6, 2001. Voxred registered with the State of New Jersey, Division of Revenue, as an "L.L.C. (1065 filer)" by application dated May 20, 2002. Voxred filed for bankruptcy and its plan of liquidation under Chapter XI of the U.S. Bankruptcy Code was approved by the United States Bankruptcy court by order dated October 1, 2009. Lucas stated he delayed filing his claim for unemployment benefits until after Voxred had been liquidated and he was no longer a member.

Upon remand to the Appeal Tribunal, a hearing was held on December 13, 2011. The Appeal Tribunal determined that the income received by Lucas from Voxred was not wages. That decision was appealed to the Board. The Board agreed with the Appeal Tribunal that the claim of Lucas dated November 29, 2009 should be invalid. The Board determined that "the claimant was a member of a partnership L.L.C. and such employment is exempt from unemployment benefits as the claimant was an employer and had no wages as defined by law. Hence, his work was not in employment and the claim dated November 29, 2009 is invalid." It is from that decision that Lucas appeals.

There is no significant factual dispute between the parties. At all relevant times, Lucas owned more than a ten percent membership interest in Voxred. From 2001 through 2007, Voxred reported to the Internal Revenue Service on Form 1065. Lucas reported pursuant to Schedule K–1, partner's share of income, deductions, credits, etc. In 2008, Voxred again filed Form 1065, and Lucas filed a K–1 showing his individual share of income, losses, deductions, credits and liabilities derived from Voxred. His 2008 K–1 evinced his partnership interest in Voxred as 10.253813%. [4] Lucas also filed a W–2 for 2008 showing wages from Voxred of $100,000 and unemployment and temporary disability taxes were withheld from his earnings for that year.

Chief Auditor Christine Serenco testified that for unemployment and disability tax purposes, an LLC which files an Internal Revenue Service Form 1065 is a partnership under Department regulations. The regulations provide:

> (a) A limited liability company (LLC) is composed of one or more authorized persons who complete and file a certificate of formation with the Division of Revenue. An LLC must have one or more members and may commence operations at any date or time after filing the certificate of formation.
>
> (b) An LLC consisting of two or more members shall be classified as a partnership unless classified otherwise for Federal income tax purposes.
>
> (c) An LLC consisting of one member shall be classified as a sole proprietorship unless the LLC elected a corporate classification for Federal income tax purposes by completing IRS Form 8832; or if the member is a corporation. In the event that the member is a corporation, and where the LLC is disregarded for Federal income tax purposes, the member shall be considered the employer with regard to all individuals performing services for the LLC.
>
> *3 [*N.J.A.C.* 12:16–11.2.]

The Board determined that **Lucas**, even though he was a working member of Voxred, is ineligible to receive unemployment compensation after Voxred ceased doing business and his work for Voxred ended. Since Voxred was treated as a partnership for tax purposes and since **Lucas** was a member, he was not an employee of Voxred, but an employer and therefore was not "in employment." **Lucas** argues that the policy of excluding a working member of an LLC violates the Administrative Procedure Act (APA), *N.J.S.A.* 52:14B–1 to –15, as administrative rule-making pursuant to *N.J.S.A.* 52:14B–23. *See Metromedia, Inc. v. Director, Division of Taxation,* 97 *N.J.* 313, 331–32 (1984). **Lucas** also contends that this policy violates the Unemployment Compensation Law (UCL), *N.J.S.A.* 43:21–1 to 24.30, and the agency's reasonable interpretation of the UCL as reflected in its regulations. **Lucas** asserts the denial of his unemployment compensation is also inconsistent with public policy considerations.

II.

Our scope of review of an agency decision is limited. *In re Stallworth,* 208 *N.J.* 182, 194 (2011) (quoting *Henry v. Rahway State Prison,* 81 *N.J.* 571, 579 (1980)). In challenging an agency conclusion, the claimant carries a substantial burden of persuasion and the determination of the administrative agency carries a presumption of correctness. *Gloucester Cnty. Welfare Bd. v. N.J. Civil Serv. Comm'n,*

93 *N.J.* 384, 390–91 (1983). We also accord substantial deference to the agency's interpretation of a statute it is charged with enforcing. *Bd. of Educ. of Neptune v. Neptune Twp. Educ. Ass'n,* 144 *N.J.* 16, 31 (1996); *see also Merin v. Maglaki,* 126 *N.J.* 430, 436–37 (1992). Further, "[w]e are obliged to defer to the Board when its factual findings are based on sufficient credible evidence in the record." *Lourdes Med. Ctr. of Burlington Cnty. v. Bd. of Review,* 197 *N .J.* 339, 367 (2009) (internal citations omitted). We overturn an agency determination only if it is arbitrary, capricious, unreasonable, unsupported by substantial credible evidence as a whole, or inconsistent with the enabling statute or legislative policy. *Barry v. Arrow Pontiac, Inc.,* 100 *N.J.* 57, 71 (1985) (quoting *Gloucester Cnty. Welfare Bd., supra,* 93 *N.J.* at 391).

Lucas contends the agency's position that he is ineligible for unemployment benefits violates the APA. The APA defines an administrative rule as "each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." *N.J.S.A.* 52:14B–2(e). "If an agency determination or action constitutes an 'administrative rule,' then its validity requires compliance with the specific procedures of the APA that control the promulgation of rules." *Airwork Serv. Div. v. Director, Div. of Taxation,* 97 *N.J.* 290, 300 (1984), *cert. denied,* 471 *U.S.* 1127, 105 *S.Ct.* 2662, 86 *L. Ed* .2d 278 (1985). However, generally "agency decisions and findings in contested cases" are not administrative rules. *N.J.S .A.* 52:14B–2(e)(3).

***4** In *Metromedia, supra,* 97 *N.J.* at 328–32, the Court discussed the distinction between an administrative rule and an administrative adjudication and outlined factors to consider when evaluating whether an agency determination, "to be valid, had to comply with the requirements governing the promulgation of administrative rules as provided by the APA." *Id.* at 328. "The procedural requirements for the passage of rules are related to the underlying need for general fairness and decisional soundness that should surround the ultimate agency determination." *Id.* at 331.

The *Metromedia* Court concluded

> that an agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication.
>
> [*Id.* at 331–32.]

"The *Metromedia* criteria, although originally formulated in a context that distinguished rule-making from adjudication, essentially provide a test of when rule-making procedures are necessary in order to validate agency actions or determinations." *Woodland Private Study Group v. State, Dep't of Envtl. Prot.,* 109 *N.J.* 62, 68 (1987). These "factors are relevant whenever the authority of an agency to act without conforming to the formal rule making requirements is questioned." *Doe v. Poritz,* 142 *N.J.* 1, 97 (1995). They "need not be given the same weight, and some factors will clearly be more relevant in a given situation than others: 'All six of the Metromedia factors need not be present to characterize agency action as rule[-]making, and the factors should not merely be tabulated, but weighed.' " *Ibid.* (quoting *In re Request for Solid Waste Util. Customer Lists,* 106 *N.J.* 508, 518 (1987)).

***5** It has been the Department's position that income derived from a partnership is not considered to be "wages" regardless of whether or not employment security taxes were paid. While a partnership may be an employment unit, it is not a legal entity which is distinct and separate from its owners as in a corporation. A general partner is not an employee of the partnership, but an employer and therefore is not "in employment." *See Lazar v. **Board** of **Review**, Division of Employ. Sec.,* 77 *N.J.Super.* 251, 259 (App.Div.1962). **Lucas** acknowledges that since Voxred is an LLC consisting of

two or more members, under Department regulations it is classified as a partnership since it did not opt otherwise for federal income tax purposes. *N.J.A.C.* 12:16–11.2(b).

The Board found that **Lucas**, who was one of the members of Voxred, is deemed a partner and not considered "in employment" in accordance with *N.J.A.C.* 12:16–11.2. Therefore, his income derived from Voxred as a member is not considered "covered employment" and may not be used to establish a claim upon cancellation of the LLC and termination of work. Consequently, his claim is invalid in accordance with *N.J.S.A.* 43:21–4(e).

However, **Lucas** contends that the Department's position, where it does not recognize an employment relationship where the employer is an LLC and the employee is a working member of an LLC, can only be accomplished pursuant to the promulgation of a rule in compliance with the APA. Basic principles of the UCL inform our analysis of this issue.

Under the UCL, a key predicate to eligibility for benefits upon becoming unemployed is the employer-employee relationship. Self-employed persons, or independent contractors, are not eligible for benefits, nor must they pay unemployment compensation taxes. A determination that the relationship between a business and a person providing services to that business is "employment" has two significant consequences. First, the employer and the employee must contribute a specified percentage of the employee's wages to the Unemployment Compensation Fund. *N.J.S.A.* 43:21–7. Second, one who is classified an employee rather than an independent contractor may collect unemployment benefits, if otherwise eligible and not otherwise disqualified. *See generally N.J.S.A.* 43:21–4 (eligibility conditions); *N.J.S.A.* 43:21–5 (disqualification criteria).

However, a self-employed person, or a working partner, is exempt from the UCL because the law does not recognize an employment relationship where the employer and employee are one and the same. A self-employed person is generally ineligible for unemployment benefits. *See Lazar, supra,* 77 *N.J.Super.* at 261 (citing with approval a decision finding self-employed person not eligible for benefits when he terminated his business venture); 76 *Am.Jur.2d Unemployment Compensation* § 63 (2005) ("Self-employment is not generally considered 'employment' in unemployment compensation statutes, and no benefits arise due to work performed while self-employed.").

***6** Likewise, a partner or joint-venturer is not considered eligible for benefits, even if he or she receives regular remuneration from the partnership or joint venture for services. *See Koza v. N.J. Dep't of Labor,* 307 *N.J.Super.* 439, 444 (App.Div.1998) (group of musicians were members of joint venture who were not employees under the Unemployment Compensation law); 76 *Am.Jur.2d Unemployment Compensation* § 48 (2005) ("A working partner is not, for the purposes of an unemployment compensation statute, an employee."). *Cf. Mazzuchelli v. Silberberg,* 29 *N.J.* 15, 22 (1959) (regarding workers' compensation, "it has been generally held elsewhere that a working partner may not obtain compensation benefits from the partnership by resort to the entity theory, since the partner-employee would also be an employer[ ]"). By contrast, a partnership is considered a separate entity liable for unemployment compensation taxes for the benefit of non-partner employees. *Finston v. Unemployment Comp.Comm'n,* 132 *N.J.L.* 276, 278–80 (Sup.Ct.1944), *aff'd sub nom. Naidech v. U.C.C. of New Jersey,* 134 *N.J.L.* 232 (E. & A.1946).

After enactment of the New Jersey Limited Liability Company Act (LLC Act), *N.J.S.A.* 42:2B–1 to 70, the Department adopted the regulation that determined treatment of LLC members under the UCL based on the LLC's tax treatment. If the LLC opted for tax treatment as a partnership, then it would be deemed a partnership for purposes of unemployment compensation taxes. On the other hand, if the LLC opted for taxation as a corporation, it would be treated as a corporation.

The regulation is consistent with the plain language of the LLC Act, that "[f]or all purposes of taxation," *N.J.S.A.* 42:2B–69(a), the LLC should be treated as a partnership, unless it opts for other treatment. Thus, an LLC's working members stand on equal footing with working partners of a partnership regarding their exposure to unemployment compensation taxes; they are exempt. And, because they are exempt from taxation, it is reasonable for the agency to determine they are exempt from benefits. Once an LLC is deemed a partnership for unemployment compensation purposes—because it has opted to be treated as a partnership for taxation purposes—then the LLC members, like partners, are deemed ineligible for benefits.

However, this determination does not end our inquiry, as it still leaves unresolved the issue presented by **Lucas** of whether the position of the Department could only be effected

by rule in compliance with the APA. We conclude that the Department's decision and finding in this case is not an administrative rule. *N.J.S.A.* 52:14B–2(e)(3). Application of the *Metromedia* factors to the Department's LLC policy leads us to conclude that the Department did not engage in rule-making, even though some factors supporting rule-making, to be sure, are present.

In weighing the factors not supporting rule-making, we observe the policy is not designed to operate prospectively, is a standard that is clearly and obviously inferable from the UCL, and does not reflect an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter. *Metromedia, supra,* 97 *N.J.* at 331–32. We therefore hold that upon applying and weighing the *Metromedia* factors, the Department's position that **Lucas** was ineligible for benefits constituted a legal standard that is clearly and obviously inferable from the enabling statutory authorization of the UCL, not rule-making, and was not subject to APA requirements.

***7** We find **Lucas's** remaining contentions to be without sufficient merit to warrant discussion in the opinion. *R.* 2:11–3(e)(1)(E).

We conclude there was no error in the Board's determination that **Lucas**, as a working member of an LLC who ceased work when the LLC discontinued operations, is ineligible for unemployment benefits.

Affirmed.

Footnotes

1 In the remand decision, the Board referred to the employer of Lucas, Voxred International, L.L.C., as a partnership. The employer was a limited liability company and not a partnership.

2 Form 1065 is an information return used to report the income gains, losses, deductions, credits, etc., from the operation of a partnership. A partnership does not pay tax on its income but "passes through" any profits or losses to its partners. Partners must include partnership items on their individual tax or information returns. IRS, www.irs.gov/instructions/i1065/ch01.html (last visited September 25, 2013).

3 Neither partnerships nor limited liability companies have shareholders. Partnership interests are owned by its partners and ownership interests in LLCs are owned by its members.

4 Lucas previously had a twenty-five percent membership interest.

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Exhibit B

2008 WL 583659
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

Carlos **SILVA** and Silvia Sales, his wife, Plaintiffs-Appellants,
v.
RIGHT WAY PAVING, Bill Peterson and Thomas Mc Gill, Defendants-Respondents.
Ari Companies, Plaintiff-Respondent,
v.
Carlos **Silva** and Silvia Sales, his wife, Defendants-Appellants,
and
Right Way Paving, Bill Peterson and Thomas Mc Gill, Defendants-Respondents.
Proformance Insurance Company, Plaintiff-Respondent,
v.
Carlos **Silva** and Silvia Sales, his wife, Defendants-Appellants,
and
Right Way Paving, Bill Peterson and Thomas Mc Gill, Defendants-Respondents.

Argued Jan. 7, 2008. | Decided March 5, 2008.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-7989-04, L-5867-05 and L-1750-06.

Attorneys and Law Firms

Christopher L. Musmanno argued the cause for appellants Carlos **Silva** and Silvia Sales (Einhorn Harris Ascher Barbarito & Frost, attorneys; Mr. Musmanno, on the brief).

Joshua H. Beinhaker argued the cause for respondent Proformance Insurance Company (DiFrancesco Bateman Coley Yospin Kunzman Davis & Lehrer, attorneys; Santina M. Bombaci, on the brief).

Gregory D. Winter argued the cause for respondent ARI Companies (Winter & Winkler, attorneys; Mr. Winter, on the brief).

Before Judges STERN, COLLESTER and C.L. MINIMAN.

Opinion

PER CURIAM.

***1** Carlos **Silva** (plaintiff in the personal injury action), [1] appeals from an order, entered on March 2, 2007, denying his motion for reconsideration of an order entered on January 5, 2007, [2] granting summary judgment to ARI Insurance Company and Proformance Insurance Company in this consolidated matter, including the declaratory judgment action. The January order declares that Proformance owes no "defense or indemnification obligation" to Thomas McGill. It does not expressly, or otherwise, grant summary judgment to ARI Insurance Company, or declare that ARI has no obligation to defend or indemnify its insured, Bill Peterson, but the motion judge's letter opinion and the motion for reconsideration made that clear.

The Law Division found that **Silva** was an employee of **Right Way Paving** (and that **Right Way Paving** was a partnership composed of Peterson and McGill), and dismissed the complaint against them because of the workers' compensation bar to common law actions. It rejected the contention that **Silva** was either an "independent contractor" or "casual employee," and concluded, by reference to *Sloan v. Luyando*, 305 *N.J.Super.* 140 (App.Div.1997), that under "both the 'control test' and the 'relative nature of the work test,' ... Mr. **Silva** was an employee of **Right Way Paving**." In their briefs before us, the carriers seek to uphold the judgment, and assert there is no coverage under their automobile policies with respect to injuries to their insureds' "employees." On the motion for reconsideration the judge developed her holding that **Silva** was employed by both McGill and Peterson as partners, and rejected the contention there was an issue of material fact as to that question:

> The argument that is being made that these two individuals were not partners, did not act "in concert" with one another with regard to this particular incident, everything that has been presented to this Court says differently.
>
> You, at any point in time, read through the various transcripts of Mr. McGill and Mr. Peterson, and they both

agree that they were partners. That they acted together, if not on this particular job site, on other job sites....

... That **Right Way Paving** was something that they did together and that they split in the profits. What more you need to show that they, in their minds, and in their conduct, were operating as a partnership, I don't know.

I looked at the statute *N.J.S.A.* 42:1[A]-10, which defines what a partnership can be, and it says it's an association of two or more persons to carry on as co-owners of business for profit that is formed-they form a partnership whether or not the persons intended to form a partnership. That's what the statute in fact says. And then it says, in determining whether or not a partnership is formed, the Court is directed to look to all the surrounding circumstances and the intent of the parties and their conduct. Everything in the depositions that these two gentlemen said complies with how the Court is directed to look at them.

***2** Their intent, they say specifically, we acted together as partners. Their conduct, one had one part of the equipment needed to conduct the business, and the other had another part of the equipment to conduct the business, and without both pieces there was no business to be conducted. They said it, one had the paver, one had the truck, one had the trailer. They said it, when anyone had a job, we would contact the other one if he didn't have a job, and we would bring everybody together and we would work that job. That's the **way** we did it.

....

Everything that has been presented to m[e] on behalf of Mr. Peterson, on behalf of Mr. McGill, on behalf of Mr. **Silva**, indicates that Mr. **Silva** worked for Peterson, McGill and on that day and time, Peterson, McGill were operating under what they call **Right Way Paving**, and it's as simple as that.

Silva contends that "the trial court erred in granting summary judgment in favor of ARI and Proformance and holding applicable their respective employee policy exclusions," and that "the trial court erred in deciding as a matter of law a partnership existed between Thomas McGill and Bill Peterson." Following oral argument on the appeal, **Silva** and McGill reached a settlement, leaving for resolution the case as to Peterson only.

The record on the summary judgment motion revealed that **Silva** moved to the United States around 1992, and was living in Perth Amboy. Since coming to the United States, he has worked a variety of manual labor jobs. Sometime in 2002, **Silva** began working as a day laborer for McGill and Peterson helping **pave** driveways, and would sometimes drive a dump truck. **Silva** estimates that he worked on a couple of hundred jobsites for McGill and Peterson between 2002 and 2004. It could have been "over 600 times."

McGill and Peterson are cousins and are self-employed in the driveway **paving** business. McGill owns his own **paving** equipment, including the dump truck insured under Proformance's commercial automobile policy. McGill had operated for "about a year and a half" prior to the accident under the name of "**Right Way Paving** trading as Thomas McGill." The name "**Right Way Paving**" is registered as a trade name of McGill and his wife, but is not incorporated, and McGill had no partnership agreement with Peterson. McGill had no employees on the books and maintained no Workers' Compensation Insurance. He employed the services of several day laborers on any given job, who were paid in cash.

Peterson has operated under the unregistered trade name "Bill the Paver" for around ten years prior to the accident, and also owns his own **paving** equipment, including the paver and trailer insured under an ARI commercial auto policy. Peterson similarly employed day laborers on his jobs. Depending on how busy or slow business was, McGill and Peterson would sometimes partner on jobs, in which case they would split the profits but would so operate under the name of **Right Way Paving**.

***3** On July 24, 2004, McGill and Peterson assert they partnered on a driveway **paving** job in Warren. **Silva** worked on the job as a driver and day laborer. McGill stayed home and was not on site that day. According to **Silva**, while at the job site, Peterson instructed him to drive the McGill dump truck to another site and then left the site accompanied by the day laborer who normally operated the paver. The dump truck was connected, however, to the Peterson trailer, on which the paver was located. **Silva** believed that Peterson's order required him to "unhitch the trailer from the Peterbilt" truck and doing that required that he first unhitch and "move the paver." **Silva** knew how to "move the paver" from having observed other laborers do so but he did not know how to do **paving**. He had never before moved the paver onto or off of the trailer before.

Silva climbed onto the trailer and stood behind the paver, in order to ensure that it would not drive off the side of the trailer. He accidentally operated the wrong lever, however, causing the paver to back up over his leg and crush it against the back of the trailer. The other laborers responded to his cries for help and were able to free his leg. **Silva** was rushed to the hospital by ambulance and underwent an operation that same day. He underwent several other operations, which required extensive hospitalization. [3]

As already noted, the dump truck was insured by the Proformance policy issued to "Magill **Paving** Co, Thomas Magill T/A." The named insured on the ARI policy that insured the paver and the trailer was "Bill & Anthony Peterson T/A Bill the Paver." Both policies contained a clause that excluded coverage of bodily injury to an employee of the insured "arising out of and in the course of" the insured's business or performance of the duties "related to the conduct of the 'insured's' business."

Silva contests the judge's conclusion on summary judgment that he was an "employee" rather than an independent contractor and contends that, even if he was an "employee," there was a material issue of fact as to the identity of his employer. Before us (prior to the partial settlement), **Silva** insists that he could only have been an employee of Rite **Way Paving**, or of either McGill or Peterson, but not both. Moreover, **Silva** argues that even if he was employed by both simultaneously, it was under the trade name **Right Way Paving**, and that since **Right Way Paving** is not a named insured under either policy, the exclusions in those policies do not apply.

We are in total agreement with the motion judge that **Silva** was not an independent contractor while working on the job. There is no basis for concluding that **Silva** conducted an independent business. He did not "control" the means by which he performed his work and he was "economically dependent" on his employer. *See Sloan v. Luyando, supra,* 305 *N.J.Super.* at 148.

The issue relating to the employer's identification poses a harder question. It is clear, however, that an employee can simultaneously have more than one employee for purposes of workers' compensation. *Walrond v. County of Somerset,* 382 *N.J.Super.* 227, 234 (App.Div.2006); *Murin v. Frapaul Const. Co.,* 240 *N.J.Super.* 600, 606-07 (App.Div.1990); *Antheunisse v. Tiffany & Co.,* 229 *N.J.Super.* 399, 402 (App.Div.1988), *certif. denied,* 115 *N.J.* 59 (1989). Moreover, it is clear that McGill and Peterson acted together on certain jobs. They both testified that they sometimes worked together and would share equipment, labor and profits. In sum, they considered their relationship a partnership, and in the context of workers' compensation, a partnership is not an independent entity separate from each of the partners. *Mazzuchelli v. Silberberg,* 29 *N.J.* 15 (1959) (no ability of employee to sue individual partner incident to his negligence in auto accident).

***4** According to McGill's deposition:

Q. Was Carlos **Silva** such a day laborer?

A. He worked for Bill Peterson. He was Bill Peterson's driver.

Q. Was Carlos **Silva** a worker for you?

A. When we worked together-well, we-when we worked together, yes. He would work for both of us, but when we were separated, he'd work for Bill. Or if I needed him a day or two, Bill didn't have no work, he'd work for me.

Q. So he worked for both of you, depending upon the job?

A. Yes, depending on the job.

Q. And whoever he worked for, that would be the person who paid him in cash?

A. Paid him, yeah.

Q. So in and about July of 2004, either you or Mr. Peterson would pay Mr. **Silva** cash depending on whether he worked for you or worked for Mr. Peterson on that particular job?

A. Yes.

Q. So when you said a moment ago that he was Bill Peterson's driver, that may be true for one job-

A. Yes. But he worked for-

Q. -but for another job, he may be-

A. -yes. Drive for me.

Q. -your driver-

A. **Right.**

Q. -or do something else for you?

A. Yes. Yes, sir.

Q. When your day laborers, including Mr. **Silva**, were working for you, were you always present when they were working for you?

A. No.

Peterson testified in depositions that on the day in question McGill was sick, so Peterson needed someone to assist him on the job. He would not have used **Silva** "had Mr. McGill not been sick." He asked **Silva** to report for work. According to **Silva's** deposition, [4] Peterson told him "to take the paver off the trailer," although he had never been asked to do so before the accident. [5] In any event, according to **Silva**, Peterson told **Silva** to drive the Peterbilt truck "to the other job site." The injury occurred when he was unhitching the trailer from the truck.

There may be some immaterial factual disputes in the record, but according to **Silva** the accident occurred as a result of a direction given to **Silva** by Peterson who told him to drive the dump truck to another site, and **Silva** was injured when endeavoring to follow that direction. In those circumstances, we find no basis in the record for disturbing the judgment with respect to ARI.

We affirm the grant of summary judgment to ARI. [6]

Footnotes

1 We refer to plaintiffs as "**Silva**" even though his wife sues per quod.

2 The March 2, 2007 order refers to the summary judgment order as having been entered on January 7, 2007.

3 There is no dispute as to the injuries, and their scope is irrelevant to the appeal.

4 Peterson testified that **Silva** was not supervised on the job, and he did not instruct **Silva** "to take [the] dump truck from [the] site to another place" or to move the truck.

5 This is our interpretation of the deposition. It is not that clear if **Silva** said Peterson told him to remove the paver.

6 Given the settlement with McGill, we need not decide whether he and Peterson actually formed a partnership with respect to the work on the day in question. Nor do we address any issue related to the impact of the carriers' defenses which result in a concession that their insured violated the requirement to provide workers' compensation coverage, or any other remedy **Silva** may have for his injuries.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

EVER BEDOYA, DIEGO GONZALES, and MANUEL DeCASTRO, on behalf of themselves and all others similarly situated, Plaintiffs, v. AMERICAN EAGLE EXPRESS, INC. d/b/a AEXGroup., Defendant.	2:14-cv-02811-ES-JAD

ORDER

NOW, this ____ day of _____, 2015, upon consideration of Plaintiffs' Renewed Motion to Dismiss Defendant's Counterclaim and to Dismiss Defendant's Third Party Complaint (Doc. 54) ("Motion") and the accompanying Memorandum of Law, Defendant's response thereto, and all other papers and proceedings herein, it is hereby **ORDERED** that the Motion is **GRANTED** and that Defendant's Counterclaim against Plaintiffs and its Third Party Complaint are **DISMISSED.**

_____
J.

CERTIFICATE OF SERVICE

I declare, subject to the penalty of perjury, that the foregoing documents were filed electronically via the Court's ECF system and thereby sent to the counsel listed below via electronic mail:

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Date: May 29, 2015

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