No. _____

In The
Supreme Court of the United States

DIACETYL PLAINTIFFS,

Petitioners,

v.

AAROMA HOLDINGS, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Emoral, Inc. ("Emoral") was a manufacturer of diacetyl, a chemical that was added to butter flavoring and is known to cause serious lung injuries. Emoral and Aaroma Holdings LLC ("Aaroma") entered into an Asset Purchase Agreement, under which Aaroma agreed to purchase all of Emoral's assets and liabilities except any claims arising from exposure to diacetyl. Shortly after the Asset Purchase Agreement was consummated, Emoral filed for voluntary chapter 7 bankruptcy. Emoral's chapter 7 trustee (the "Trustee") investigated fraudulent transfer claims against Aaroma, and the parties eventually reached a settlement. The settlement was noticed as a settlement of *only* the Trustee's fraudulent claims, but the order approving the settlement referenced *all* claims against Aaroma.

Those who were injured by diacetyl (the "Diacetyl Plaintiffs") brought a lawsuit against Aaroma in New Jersey state court on a successor liability theory. The bankruptcy court held that the Diacetyl Plaintiffs' claims were not property of the estate because they were particular to each individual Diacetyl Plaintiff. Therefore, the Trustee lacked the authority to settle the Diacetyl Plaintiffs' claims, and the Trustee's settlement of fraudulent transfer claims against Aaroma did not preclude the Diacetyl Plaintiffs' state court actions.

The district court reversed, holding that the Diacetyl Plaintiffs' claims belonged to the estate

QUESTIONS PRESENTED – Continued

because they were "generalized" successor liability claims, and therefore, the Trustee's settlement in bankruptcy precluded the Diacetyl Plaintiffs from going forward with their suit. The United States Court of Appeals for the Third Circuit, in a 2-1 decision, affirmed the district court's ruling against the Diacetyl Plaintiffs.

This case thus poses questions of national importance that have split the circuits:

1. Whether the Third Circuit erred in concluding, contrary to the decisions of this Court and the law in the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, that a trustee in bankruptcy can settle the tort claims of those injured by a company that filed for bankruptcy when the debtor company could neither bring the claim at the commencement of the bankruptcy nor was injured in any way by the underlying allegations.

2. Whether the Third Circuit erred in concluding, contrary to the law in the First, Ninth, and Federal Circuits, that a claim is general and belongs to the estate simply because other claimants could take advantage of a finding of successor liability, rather than finding it is specific and can go forward because it is unique to these plaintiffs.

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PETITION FOR WRIT OF CERTIORARI

Diacetyl Plaintiffs respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit's decision affirming the District Court is found at Appendix (App.) 1, and reported at 740 F.3d 875. The Third Circuit's denial of rehearing *en banc* is found at App.83.

The decision of the United States District Court for the District of New Jersey is found at App.27.

The decision of the United States Bankruptcy Court for the District of New Jersey is found at App.39.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was issued on January 24, 2014. (App.1.) The Court of Appeals denied a timely petition for rehearing and suggestion for re-hearing *en banc* on March 20, 2014. (App.83.) Pursuant to 28 U.S.C. §1254(1), this Court has jurisdiction to review the decision of the United States Court of Appeals for the Third Circuit.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. §541, provides, in relevant part:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) . . . of this section, all legal and equitable interests of the debtor in property as of the commencement of the case.

(b) Property of the estate does not include –

(1) Any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

11 U.S.C. §544, provides, in relevant part:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by –

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a

simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. §704, provides, in relevant part:

(a) The trustee shall –

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

———♦———

STATEMENT OF THE CASE

Emoral, Inc. ("Emoral") was a corporation, organized under the laws of New York with its principal place of business in New Jersey, which manufactured and sold chemicals for the flavor and fragrance industry. Until 2006, Emoral was one of the primary suppliers of diacetyl in the United States. When it was used, diacetyl was a key ingredient that gave artificial butter flavoring its buttery taste and smell.

The 285 plaintiffs in this case (the "Diacetyl Plaintiffs") filed proofs of claim in Emoral's bankruptcy case alleging lung injury from the diacetyl manufactured and sold by Emoral. The Diacetyl Plaintiffs include consumers as well as individuals who worked at flavoring-producing plants across the country, all of whom have directly handled diacetyl that was manufactured and sold by Emoral. Based on similar claims settled in other state courts, each of the Diacetyl Plaintiffs' claims could be worth anywhere between 3 and 30 million dollars. *See* Illinois Worker Wins $30 Million Verdict in Diacetyl Popcorn Chemical Lawsuit, The Joplin Globe (Aug. 16, 2010), http://www.joplinglobe.com/local/x369041172/Illinois-worker-wins-30-million-verdict-in-diacetyl-popcorn-chemical-lawsuit.

In or about August 2010, Emoral and Aaroma Holdings LLC ("Aaroma") entered into an Asset Purchase Agreement, under which Aaroma agreed to purchase demonstrably all of Emoral's assets and liabilities except the diacetyl claims. Both parties were aware of the potential claims against Emoral

arising from exposure to diacetyl, although Aaroma never manufactured or sold products containing diacetyl. Shortly after entering into the Asset Purchase Agreement, Emoral filed for voluntary chapter 7 bankruptcy, and Benjamin Stanziale was appointed as trustee (the "Trustee") of Emoral's bankruptcy estate.

The Trustee investigated potential fraudulent transfer claims against Aaroma, and the parties eventually reached a settlement. Aaroma agreed to pay $500,000 and take certain actions, and the Trustee agreed to release Aaroma from liability from claims that are property of the bankruptcy estate. (App.3). The settlement agreement was presented to the bankruptcy court for approval. Several Diacetyl Plaintiffs opposed the settlement, claiming that it was for insufficient consideration and could not bar them from proceeding against Aaroma in state court. Neither notice of the sale of Emoral's assets nor the settlement with the Trustee was given to all individuals exposed to Emoral's diacetyl.

The bankruptcy court approved the settlement, provided that the Order contained language that would protect the Diacetyl Plaintiffs' right to pursue their claims, which the bankruptcy court understood were not property of the estate: "Nothing contained in this Order or in the Aaroma Settlement Agreement will operate as a release of, or a bar to prosecution of any claims held by any person which do not constitute Estate's Released Claims as defined in the Aaroma Settlement Agreement." (App.3-4).

Several Diacetyl Plaintiffs initiated litigation in New Jersey state court against Aaroma as Emoral's successor for their personal injury and product liability claims. Aaroma then brought a motion in the bankruptcy court to enforce the settlement agreement in order to enjoin the Diacetyl Plaintiffs from pursuing their state law claims. Aaroma argued that its settlement with the Trustee barred the state court claims. The bankruptcy court denied Aaroma's motion, holding that the Diacetyl Plaintiffs' personal injury and product liability claims alleged personal harm, and therefore were "particularized" claims that were not property of the estate. (App.39). Aaroma filed an appeal to the United States district court, which reversed and remanded to the bankruptcy court. (App.27). The district court held that nothing about the Diacetyl Plaintiffs' state law claims was specific to them as opposed to all other creditors because such claims were based on a theory of successor liability, and therefore their claims were property of the estate. (App.37). The bankruptcy court subsequently entered an order implementing the district court's decision. The Diacetyl Plaintiffs appealed to the United States Court of Appeals for the Third Circuit, which, in a 2-1 decision, affirmed the district court decision and held that the Diacetyl Plaintiffs' claims were property of the estate. (App.1). The Third Circuit reasoned that successor liability claims are generally property of the estate, and because other creditors could bring the same claim, the Diacetyl Plaintiffs' claims were property of the estate and thus could be settled in bankruptcy. The Third Circuit

denied rehearing on *en banc* with five judges dissenting from the denial of *en banc* review and one calling for rehearing by the panel. (App.83).

REASONS FOR GRANTING WRIT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE SPLITS AMONG THE CIRCUITS AS TO WHETHER THE INDIVIDUAL TORT CLAIMS OF INJURED PLAINTIFFS CAN BE RESOLVED BY A BANKRUPTCY TRUSTEE.

The Third Circuit created several circuit splits when it granted the Trustee authority to resolve the Diacetyl Plaintiffs' claims. First, there is a circuit split regarding whether specific claims may be brought only by injured creditors. Second, there is a circuit split regarding whether the presence of a procedural claim renders the entire cause of action property of the estate. Finally, there is a circuit split regarding the authority of a bankruptcy trustee to sue third parties in tort.

A. The Third Circuit's Holding Directly Contradicts the Rule Articulated by this Court, and Followed by All Other Circuits, that Specific Claims may be Brought Only by Injured Creditors.

The vast majority of courts agree that in order for a claim to be brought by a trustee on behalf of a

bankrupt estate, the debtor corporation must have sustained an injury arising from the underlying allegation. This follows directly from this Court's holding in *Caplin v. Marine Midland Grace Trust Co. of New York*, that a bankruptcy trustee has no power to assert claims owned by creditors. 406 U.S. 416, 428-29 (1972) ("[N]owhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties" on behalf of creditors.); s*ee also In re Ozark Restaurant Equipment Co., Inc.*, 816 F.2d 1222 (8th Cir. 1987) (noting that Congress's explicit rejection of 11 U.S.C. §544(c), which would have overruled *Caplin*, indicated Congressional approval of the case); *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988) (same).

In the present case, Debtor Emoral suffered no injury derived from its own sale of diacetyl. Therefore, it possessed no "mere continuation" claim at the commencement of the bankruptcy nor does it have an underlying claim to pursue which could preclude its creditors from bringing individual claims against Aaroma. As such, the Third Circuit's holding directly contradicts the rule articulated by this Court, and followed by all other circuits, that specific claims can be brought only by the injured creditors.

If a claim is specific, a creditor is free to pursue it. If a claim is general, it belongs to the estate and only the bankruptcy trustee is able to pursue it. The Seventh Circuit has explained that, "to determine whether an action accrues individually to a claimant

or generally to the corporation, a court must look to *the injury for which relief is sought* and consider whether it is peculiar and personal . . . or general and common." *Koch Refining v. Farmers Union Central Exchange, Inc.,* 831 F.2d 1339, 1349 (7th Cir. 1987) (emphasis added). The *Koch Refining* Court applied this "general vs. specific" injury distinction to determine when a trustee may bring an action against a third party on behalf of creditors. *Id.* General injuries to creditors may be brought by the trustee pursuant to his or her powers "to bring suits for the benefit of the estate and ultimately of the creditors" under 11 U.S.C. §544, provided that state law permits the trustee to bring the cause of action in the first place. *Id.* at 1348-49. The *Koch Refining* Court determined that the bankruptcy trustee was the appropriate party to bring an alter ego action against the debtor's shareholders for injury relating to their mismanagement of the debtor. The plaintiffs alleged only financial injuries stemming from the debtor becoming insolvent, which were derivative of the injuries suffered by the debtor corporation, and every creditor suffered exactly that same type of harm. The plaintiffs were "only indirect or secondary victims; they ha[d] alleged nothing about their position that [was] peculiar and personal to them and not shared by [debtor's] creditors . . . the complaint of these appellants allege[d] no harm specific to them personally, no loss to them in their individual capacities." *Id.* at 1349-50.

This test has been embraced by a majority of the circuits, although the distinction between specific and general claims has been the subject of considerable litigation. Consequently, the circuits have articulated and applied different tests in determining which injuries qualify as "general" or "specific." *Compare In re Bernard L. Madoff Inv. Sec. LLC*, 721 F.3d 54 (2d Cir. 2013) ("A debtor's claim against a third party is 'general' if it seeks to augment the fund of customer property and thus affects all creditors in the same way," or "harmed all customers in the same way"), *with St. Paul Fire & Marine Ins. Co. v. PepsiCo., Inc.,* 884 F.2d 688, 701 (2d Cir. 1989) ("If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action.").

It is clear in every circuit's articulation, however, that the debtor corporation must have suffered an injury that gave rise to a cause of action if the trustee is to assert that claim on behalf of creditors. *See, e.g., Steinberg v. Buczynski,* 40 F.3d 890, 892 (7th Cir. 1994) ("If the corporation is injured . . . then the trustee can sue; otherwise he cannot."); *In re Educators Group Health Trust*, 25 F.3d 1281, 1284 (5th Cir. 1994) ("if the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate."); *Smith v. Arthur Andersen*

LLP, 421 F.3d 989, 1002 (9th Cir. 2005) ("Although the line between 'claims of the debtor,' which a trustee has statutory authority to assert, and 'claims of creditors,' which *Caplin* bars the trustee from pursuing, is not always clear, the focus of the inquiry is on whether the Trustee is seeking to redress injuries to the debtor itself caused by the defendants' alleged conduct.").

Even the Third Circuit, in *Board of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 170-71 (3d Cir. 2002), recognized that the debtor must have suffered a direct injury in order for the trustee to have jurisdiction to bring the claim on behalf of creditors. In that case, the Third Circuit denied the bankruptcy trustee of a corporation that had failed to pay withdrawal liability under ERISA the ability to sue its alter egos. The court reasoned that the creditor injured by the alleged harmful conduct was the appropriate party to bring the claim. *Id.* at 170 ("the alleged illegality may have caused other injuries in addition to those caused to the fund, but the direct injury to the fund – the evasion of its statutory entitlement – defines the nature of plaintiffs' claim as a personal one."); *id.* at 171 ("under New Jersey law an *alter ego* action is an equitable remedy that may only be asserted by a corporation when it suffers harm.").

Under any of the above approaches, the Diacetyl Plaintiffs' claims against Aaroma would have been able to go forward in state court. However, the Third Circuit abandoned the rule articulated in its previous

holding by allowing the Trustee to settle the Diacetyl Plaintiffs' claims despite the absence of injury to debtor Emoral. Judge Cowen pointed out this discrepancy in his dissent:

> As a practical matter, I do not see how the same court that was willing to permit the pension fund's third party claims to go forward [in *Foodtown*] could reach the opposite result with respect to the Diacetyl Plaintiffs' own third party claims against Aaroma. Just as we relied on the individualized nature of the underlying withdrawal liability allegations to permit a creditor to pursue its claims against several third parties, we likewise should allow the Diacetyl Plaintiffs' claims against Aaroma to go forward given the individualized nature of their own underlying personal injury and product liability allegations.

In re Emoral, 740 F.3d 875, 884 (3d Cir. 2014) (Cowen, C.J., dissenting).

Because the Third Circuit ignored the injury requirement, it was forced to rely on criteria that have never before been relevant in addressing the "general vs. specific" distinction. These include the lack of uniqueness of the Diacetyl Plaintiffs' factual allegations in proving successor liability, and the possibility that a finding of successor liability may benefit other creditors by allowing them to recover on their claims against Aaroma on the same theory. *Id.* at 881. However, no circuit's articulation of the "general vs. specific" test requires a court to find unique

factual allegations for each individual creditor or to evaluate the potential effects of the creditors' remedies. All other circuits focus on the nature of the *injury*.

Consequently, the Third Circuit's analysis in *Emoral* as to what qualifies as a specific, as opposed to a general, claim is in direct conflict with other circuits. In effect, the Third Circuit reasoned that the mere presence of a successor liability theory rendered all Diacetyl Plaintiffs' lawsuits property of the bankruptcy estate. *Id.* at 879-82. This is equivalent to reasoning that all alter ego claims are property of the bankruptcy estate solely because the factual allegations necessary to proving alter ego liability are not unique to any one party, and therefore other creditors might assert the same theory to pursue their own claims. In fact, the Third Circuit implicitly endorsed this analogy by using alter ego case law to support its conclusion that a successor liability claim is a general one. *See id.* at 880-82.

No other circuit, including the Third Circuit before *Emoral*, has distinguished between a specific and a general injury without examining the nature of the underlying injury. *See, e.g., Foodtown*, 296 F.3d at 170-71; *In re Teknek, LLC*, 563 F.3d 639, 649-50 (7th Cir. 2009) (denying trustee the ability to bring alter ego action, as underlying claims were personal to creditor plaintiff); *In re Icarus Holding, LLC*, 391 F.3d 1315, 1319-20 (11th Cir. 2004) (finding that a trustee could bring an alter ego action only after determining the underlying claim (*i.e.*, fraudulent

transfers by the debtor's former president that injured the debtor) to be "a general claim that applies equally to all creditors."); *Koch Refining*, 831 F.2d at 1349; *St. Paul*, 884 F.2d at 704 (allowing a trustee to bring an alter ego action only after analyzing the underlying injury and determining plaintiff "has not shown that [its] *harm* differs in kind from the harm suffered by any other creditor.") (emphasis added). To the contrary, the reasoning in each of these cases supports Judge Cowen's conclusion that "[t]he successor liability theory alleged by the Diacetyl Plaintiffs is inextricably tied to – and cannot be considered separate or apart from – their underlying personal injury and product liability allegations." *Emoral*, 740 F.3d at 883 (Cowen, C.J., dissenting). Indeed, in *all* other circuits, the Diacetyl Plaintiffs' claims against Aaroma would have been able to go forward in state court.

Consider also what the representative of the Trustee said to the Diacetyl Plaintiffs when they objected to the settlement with Aaroma for fear it might encompass their individual tort claims: "I would like to sell someone the Brooklyn Bridge, but I don't own it so I can't sell it. I cannot, the Trustee cannot release claims that he doesn't own. It was never contemplated that he would be releasing claims he doesn't own." *Id.* at 877 n.1. Clearly, the Trustee did not believe he was dispensing of the Diacetyl Plaintiffs' claims. Not only does this understanding present a contract law issue that should be resolved in favor of the Diacetyl Plaintiffs, but also it

is another example of the injustice of the Third Circuit's conclusion. *See* Restatement (Second) of Contracts §201(2) (1981) ("Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party. . . .")

The Second and Sixth Circuits, like all of the other authorities described above, examine the nature of the underlying injury in determining whether a claim is general or specific, and have held that tort claims are excluded from the Trustee's purview unless the creditor's injuries are simply derivative to the debtor's. *See, e.g.*, *Madoff*, 721 F.3d at 70-71 (claims for injuries arising from Madoff's massive Ponzi scheme are not property of the bankruptcy estate even though injuries appear to be general and shared amongst all creditors, because "[t]he customers' claims against the Defendants are not 'common' or 'general' . . . Defendants' alleged wrongful acts . . . could not have harmed all customers in the same way."); *see also In re Van Dresser Corp.*, 128 F.3d 945, 947 (6th Cir. 1997) (allowing trustee to bring suit where plaintiff's injury from alleged tortious conduct was derivative to primary harm suffered by debtor corporation). In applying this analysis to the present case, where Emoral has not been injured in any way by its own sale of diacetyl, it is clear that the Trustee

cannot settle the Diacetyl Plaintiffs' claims. This Court should grant review to resolve a clear split among the circuits as to what qualifies as a general as opposed to a specific claim.

B. This Court Should Grant Review to Resolve a Circuit Split as to Whether the Presence of a Procedural Claim in a Creditor's Complaint May Render the Entire Cause of Action Exclusive Property of the Bankruptcy Estate.

The Third Circuit found that the Diacetyl Plaintiffs' product liability claims are transformed into generalized claims merely because they rely upon a procedural finding, successor liability, that shifts recovery to a third party and may, in the abstract, benefit other creditors. *Emoral*, 740 F.3d at 879-82. However, other circuits that have considered arguments involving the similar procedural device of alter ego have expressly rejected it.

In *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1249 (9th Cir. 2010), the Ninth Circuit held that the creditor, as opposed to the trustee, was the appropriate party to initiate an alter ego action. The litigation arose out of a simple contract dispute, with plaintiff Ahcom contracting to purchase almonds and debtor Nuttery Farms, Inc. ("NFI") failing to deliver. Frustrated in its attempts to recover from the debtor NFI, plaintiff sued defendant Smeding on an alter ego theory. Just as the Diacetyl Plaintiffs' tort claims rely on a successor liability theory to permit recovery

against Aaroma, "[c]rucially, both of Ahcom's substantive claims to recover the arbitration award and the contract-related damages, by their terms, depend on the success of Ahcom's alter ego allegations." *Id.* Defendant Smeding relied on the argument that prevailed in *Emoral*, that "[t]he alter ego claim alleged by Ahcom is . . . a general claim . . . which belongs exclusively to the trustee." *Id.* at 1250. The Ahcom Court emphatically rejected this argument, saying:

> [T]here is a crucial problem with [defendant's] argument: it assumes the existence of a general alter ego claim. . . . In fact, there is no such thing as a substantive alter ego claim at all: "A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural. . . ."

Id. at 1250-51 (quoting *Hennessey's Tavern, Inc. v. Am. Air Filter Co.,* 204 Cal.App.3d 1351, 1358 (1988)).

In *Futurewei Technologies v. Acacia Research Corp.*, the Federal Circuit relied on *Ahcom* to dismiss a claim seeking declaratory relief that SmartPhone was acting as Acacia Research's alter ego. 737 F.3d 704, 710 (Fed. Cir. 2013) ("[I]t makes no sense for this count to be adjudicated as a stand-alone claim in California while the relevant, substantive claims to which it directly relates are being litigated in Texas. Indeed, SmartPhone's status as an alter ego to Acacia

Research matters only insofar as it affects substantive rights found elsewhere – here, the rights being litigated in Texas.").

The *Ahcom* and *Futurwei* courts acknowledged that alter ego claims are procedural devices meant to effectuate relief for injured parties, and consequently do not matter absent an underlying substantive claim. The holdings in those cases turn on this characterization, with those courts refusing to treat alter ego claims as stand-alone substantive claims. The successor liability claim at issue in *Emoral*, just like the alter ego claims in *Ahcom* and *Futurwei*, is "not itself a claim for substantive relief . . . but rather, procedural." *Ahcom*, 623 F.3d at 1250. The Diacetyl Plaintiffs could not bring a successor liability claim against Aaroma absent an underlying claim for relief against Emoral, just as the creditors in *Ahcom* could not bring an alter ego claim against Smeding absent the underlying breach of contract claim. *Id.* The Third Circuit, however, focused entirely on the existence of a procedural claim in order to preclude Diacetyl Plaintiff's from bringing their substantive claims. *Emoral*, 740 F.3d at 879-82. These different approaches guarantee different results in different circuits, and this Court's intervention is necessary to resolve this split.

Perhaps even more illustrative of this circuit split is the First Circuit's decision in *In re Savage Industries, Inc.*, 43 F.3d 714 (1st Cir. 1994). The First Circuit applied New Jersey state successor liability law to product liability claims related to the sale of

defective firearms. It held that a non-debtor's successor liability claim against an asset purchaser could not be extinguished in the context of a §363 sale, because the non-debtor did not receive notice that its claim would be affected by the sale. *Id.* at 723. Implicit to this conclusion, the court found that a successor liability claim, because it arises from a tort claim, specifically belonged to the tort creditors and not to the bankruptcy estate. *See id.* at 717 n.4 (explaining that under New Jersey law, successor liability arises from a tort claim). Professor Dan Schechter, who served as an expert witness in the tort action related to the *Savage Industries* decision, explained:

> The holding in *Savage Industries* necessarily means that the "successor liability" claim in that case must have belonged to the non-debtor tort plaintiffs, rather than to the estate. Otherwise the debtor would have had the sole authority to extinguish that claim in a sale "free and clear" of all other claims, yet the court held that the estate had no such power.

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The Third Circuit in *Emoral* came to the opposite conclusion to the First Circuit's in *Savage*, though both courts applied New Jersey successor liability law to nearly identical facts. Had the Diacetyl Plaintiffs been heard in the First Circuit, their claims could have proceeded. If this split persists, it appears that whether or not an individual will be capable of being

made whole for his injury depends entirely on where and by whom they were injured.

C. This Court Should Grant Review to Clarify the Authority of a Trustee to Sue Third Parties in Tort.

This Court has not revisited the issue of a trustee's authority to sue third parties since *Caplin* in 1972. Since that time, the Bankruptcy Code has been overhauled and amended. As a result of a lack of guidance from this Court, circuits have been approaching the "general vs. specific" issue in ways that differ from the traditional rule examining the underlying injury discussed above. Still, each of these minority rules, which focus on the trustee's authority to sue third parties, if applied to the facts of *Emoral*, would have permitted the Diacetyl Plaintiffs to adjudicate their individualized tort claims.

For example, if the minority rule followed in the Eighth Circuit was applied to this controversy, the result would undoubtedly be in favor of permitting adjudication of the Diacetyl Plaintiffs' successor liability claims. That rule was articulated in the case of *In re Ozark*, in which the Eighth Circuit denied bankruptcy trustees generally the ability to bring alter ego actions on behalf of creditors against a debtor's principals 816 F.2d at 1223.

The *Ozark* Court's reasoning was two-fold. First, under Arkansas law an alter ego claim is not property of the debtor's estate because the debtor himself,

prior to bankruptcy, could not bring it. *Id.* at 1225-26 ("Because the corporate entity will be disregarded under Arkansas law only if it has been abused to the detriment of a third person, and because the nature of the alter ego theory of piercing the corporate veil makes it one personal to the corporate creditors rather than the corporation itself . . . we conclude that the trustee here does not have standing under these sections to bring an alter ego action on behalf of Ozark's creditors."). Second, 11 U.S.C. §544 does not permit the suit because of this Court's holding in *Caplin*. *Id.* at 1226-30. Consequently, creditors are always the appropriate party to bring actions against a bankrupt corporation's alter egos, at least where Arkansas law governs. Therefore, the Eighth Circuit would have ruled that, because successor liability claims are not the property of the bankruptcy estate, the Diacetyl Plaintiffs' claims could be adjudicated in state court.

One of the issues before the Third Circuit in *Emoral* was whether or not a debtor corporation is capable of bringing a successor liability suit against a "mere continuation" of itself. If not, then that claim could not be property of the bankruptcy estate or asserted by the Trustee. *See* 11 U.S.C. §704(a)(1). The Third Circuit held that a debtor corporation could, in fact, sue its mere continuation. It analogized to its previous allowance of alter ego actions brought by debtor corporations, saying, "[j]ust as the purpose behind piercing the corporate veil, however, the purpose of successor liability is to promote equity and

avoid unfairness, and it is not incompatible with that purpose for a trustee, on behalf of a debtor corporation, to pursue that claim." *In re Emoral*, 740 F.3d at 881 (citing *Phar-Mor, Inc. v. Coopers & Lybrand,* 22 F.3d 1228, 1240 n.20 (3d Cir. 1994)).

Aside from creating the question of how settling the Diacetyl Plaintiffs' claims for $500,000, to be shared with all other creditors, promotes equity and avoids unfairness, the Third Circuit's single-sentence analysis is unconvincing. Whereas the *Ozark* Court critically examined Arkansas law in determining that creditors are the intended beneficiaries of alter ego actions, the Third Circuit's analysis did not address the overwhelming weight of New Jersey state law, which reveals that successor liability is intended to benefit injured parties, not sellers. *See Ramirez v. Amsted Indust., Inc.*, 86 N.J. 332, 343 (1981) (stating that the "mere continuation" exception developed in order to expand corporate successor liability in the products liability context, and that the right to assert a successor liability claim is that of the injured party's, not that of the tortfeasor); *Mettinger v. W.W. Lowensten, Inc.*, 153 N.J. 371, 381 (1998) (the right to assert a successor liability claim is that of the injured party's, not that of the tortfeasor); *Class v. Am. Roller Die Corp.*, 308 N.J.Super. 47, 55 (1998) (same); *Alloway v. Gen. Marine Indus., L.P.*, 288 N.J. Super. 479, 489 (1996) (same); *Bussel v. DeWalt Prod. Corp*., 259 N.J.Super. 499, 515 (1992) (same). If the Third Circuit had considered and followed these relevant state law authorities, as the Eighth Circuit did in *Ozark*, then

it could not have precluded the Diacetyl Plaintiffs from bringing their successive liability claims.

As an additional example, the approach followed in the Sixth Circuit also would lead to a ruling in favor of the Diacetyl Plaintiffs. The Sixth Circuit in *Van Dresser* held that the trustee, not the creditor, was the appropriate party to bring various tort claims against a third party for allegedly contributing to a debtor's downfall. 128 F.3d at 946. The Sixth Circuit's rule regarding when a trustee may bring suit on behalf of its creditors against a third party turns on whether or not the creditor or debtor could have brought the state law claims at the commencement of the bankruptcy case. *See id.* at 947. After the court determined that, under Michigan law, both the creditor and the debtor could have brought the tort claims at that time, the court asked whether the parties "could recover on their claims. If a judgment against these defendants by either [creditor] or [debtor] in state court precluded the other from a subsequent recovery, then the claims are not truly independent, and by default the claims are exclusively property of the trustees in bankruptcy." *Id.* at 947-48.

In other words, in the Sixth Circuit, a creditor is only precluded from bringing suit if: (1) the debtor could also have brought the claims at the commencement of the bankruptcy case; and (2) there is a single pot of money being fought over, or a single injury that defendants are required to pay for. *See id.* at 948 ("If a thief steals a diamond necklace from a married couple, the husband cannot recover the value of the

converted necklace from the thief after the wife has already recovered the necklace itself . . . if [creditor] had slipped and fallen on a negligently maintained floor at [defendant's] offices, he could recover irrespective of his status as [the debtor's] shareholder."). Only after establishing that Michigan state tort law would support just a single payout from defendants for the alleged illegalities was the creditor denied the ability to bring suit independently. *Id.* at 948-49. Therefore it appears that the Sixth Circuit would not preclude the Diacetyl Plaintiffs from bringing suit *even if* Emoral could somehow sue its "mere continuation" for tort damages at the commencement of the filing of bankruptcy because products liability tort law does not bar injured plaintiffs from recovery.

The Sixth Circuit was comfortable reaching its conclusion because the plaintiff creditor did not actually object to the trustee settling his claims. *Id.* at 948-49 ("Although [creditor] maintains that the trustees' minimal settlement with [defendants] is in effect an abandonment of the estates' claim, his failure to object to the proposal precludes his argument that the settlement was anything less than a fair compromise of [defendant's] potential liability."). Applied to this case, the Sixth Circuit would likely have decided that the Trustee abandoned the Diacetyl Plaintiffs' claims both by expressly acknowledging through his representative that he did not believe he owned them, and by settling for a small amount to be split with all other creditors of Emoral over the Diacetyl Plaintiffs' objections. That finding would

permit the Diacetyl Plaintiffs to bring their claims, even if the Sixth Circuit were to also find that the claims originally belonged to the bankruptcy estate.

It is clear that every circuit, including the Third Circuit had it followed its own precedent in *Foodtown*, would have allowed the Diacetyl Plaintiffs' successor liabilities claims to be decided on the merits. This Court's intervention is necessary not only to resolve this circuit split created by *Emoral*, but also to prevent the unjustness of evaporating the Diacetyl Plaintiffs' claims simply because they were filed in the one circuit that would tolerate that result.

II. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE THAT THIS COURT SHOULD ADDRESS BECAUSE THE THIRD CIRCUIT'S OPINION IS CONTRARY TO IMPORTANT PUBLIC POLICY, PROVIDES PATHS FOR DEFENDANTS TO AVOID TORT LIABILITY, AND ENCOURAGES BANKRUPTCY TRUSTEES TO RELEASE CREDITORS' CLAIMS WITHOUT DUE PROCESS IN EXCHANGE FOR CHARGING A PREMIUM.

The consequences of the Third Circuit's opinion are far-reaching. Barring the Diacetyl Plaintiffs from pursuing their state law tort claims is not only unjust to the Diacetyl Plaintiffs themselves and inconsistent with public policy, but also provides troubling precedent for defendants to avoid tort liability, violates constitutional due process requirements, and may

lead trustees to charge more for their services in exchange for reaching inadequate settlements. These troubling aspects of the Third Circuit's opinion present an opportunity for this Court to address issues of national importance.

A. The Third Circuit's Opinion Establishes Harmful Precedent Contrary to Public Policy, and Creates Broad Paths for Defendants to Circumvent Tort Liability.

The Third Circuit has left nearly three hundred people without means to redress the serious injuries inflicted on them, and such precedent is inconsistent with public policy. Its opinion characterized the Diacetyl Plaintiffs' claims as general, rather than specific, thereby handing power and control to the bankruptcy trustee to settle them. With this power, the trustee released the Diacetyl Plaintiffs' claims, worth upwards of several tens of millions of dollars, for a mere $500,000. Along with Emoral's other creditors, the Diacetyl Plaintiffs are now left to fight over a fraction of the value of their claims. The Third Circuit's opinion cannot be reconciled with public policy, and creates avenues for tort defendants to escape liability for their actions.

The public policy underlying successor liability is to "promote equity and avoid unfairness," *see In re Emoral*, 740 F.3d at 881, and there is a powerful public interest in "providing adequate compensation to individuals seriously injured by defective products." *Id.* at 886. States have implemented successor

liability as a way for plaintiffs to receive compensation for their injuries where traditional legal doctrines fail – the goal is to protect plaintiffs by distributing costs onto parties who are better suited to absorb the risks. Specifically, when New Jersey adopted the "mere continuation" theory of successor liability, it did so to protect plaintiff remedies, support the public policy of distributing the risk to society as a whole, and promote fairness by requiring a successor to assume certain responsibilities in exchange for the benefits it receives by continuing to operate the original manufacturer's business. *See Ramirez*, 86 N.J. at 349. The Third Circuit's opinion is inconsistent with these goals. As a result, several hundred innocent plaintiffs suffering from severe lung damage are left with no meaningful recourse.

Not only does the Third Circuit's opinion deprive the Diacetyl Plaintiffs of any hope of adequate recovery, but it has also paved a broad path for defendants to circumvent tort liability. This precedent encourages defendants to sell their assets prior to filing for bankruptcy. By doing so, defendants can settle any possible avoidance claims with the bankruptcy trustee, and insert broad language in settlement agreements releasing them from massive tort liability. In affirming the legitimacy of this conduct, the Third Circuit incites debtor corporations to diminish their own assets, while simultaneously preventing plaintiffs from suing their successors. Although New Jersey and New York law recognize that a fraudulent transfer cannot be used to escape successor liability,

the Third Circuit's characterization of all successor liability claims as "general" will bar any and all creditors from pursuing them. The consequence is that injured parties are left without ability to recover, even if they can prove fraudulent transfer of assets to escape liability, while defendants are furnished with a how-to guide on escaping tort liability.

B. The Third Circuit's Opinion Ignores Due Process Issues, and Thereby May Lead to Bankruptcy Trustees Selling Tort Liability for a Premium.

By granting the Trustee authority to release the Diacetyl Plaintiffs' claims without due process to all affected individuals, the Third Circuit has provided precedent for trustees across the nation to do the same. Neither notice of the sale of Emoral's assets nor of the settlement with the Trustee was given to all individuals who had been exposed to Emoral's diacetyl. Additionally, the bankruptcy court's order approving the Trustee's settlement with Aaroma only stated that the fraudulent transfer claims were settled, but the settlement agreement refers to all claims. These failures to provide notice clearly violate constitutional due process requirements as established by this Court, *see Mullane v. Cent. Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), and directly conflict with First Circuit precedent. *See In re Savage*, 43 F.3d at 722 (holding that a non-debtor's successor liability claim could not be sold by the

trustee because the creditors were not all given notice of the sale).

Further, now that they are able to bring and settle claims belonging to creditors without their consent, in the future bankruptcy trustees may be encouraged to sell tort liability in exchange for a premium. The Third Circuit's opinion has made it possible for bankruptcy trustees to enter into tort liability settlements with debtors, eliminating claims of involuntary tort creditors without due process, in order to charge defendants more. This Court should grant review to address these issues, which have far-reaching consequences of national importance.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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740 F.3d 875
United States Court of Appeals,
Third Circuit.

In re EMORAL, INC., Debtor.
Diacetyl Plaintiffs, Appellants.

No. 13-1467. | Argued Oct. 10, 2013. |
Filed: Jan. 24, 2014.

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Before: FUENTES, COWEN and BARRY, Circuit Judges.

Opinion

OPINION OF THE COURT

BARRY, Circuit Judge.

This appeal requires us to determine whether personal injury causes of action arising from the alleged wrongful conduct of a debtor corporation, asserted against a third-party non-debtor corporation on a "mere continuation" theory of successor liability

under state law, are properly characterized as "generalized claims" constituting property of the bankruptcy estate. We conclude that they are, and will, therefore, affirm the order of the District Court.

I.

In August of 2010, Aaroma Holdings LLC ("Aaroma"), f/k/a Duane Street, LLC, purchased certain assets and assumed certain liabilities of Emoral, Inc. ("Emoral"), f/k/a Polarome International, Inc., a manufacturer of diacetyl, a chemical used in the food flavoring industry. At the time of the transaction, the parties were aware of potential claims against Emoral arising from exposure to diacetyl, although those individuals who came to be known in this litigation as the "Diacetyl Claimants" or the "Diacetyl Plaintiffs" (herein, "Diacetyl Plaintiffs") apparently had never themselves been employed by Emoral. The Asset Purchase Agreement specifically provided that Aaroma was not assuming Emoral's liabilities related to "the Diacetyl Litigation," and that it was not purchasing Emoral's corresponding insurance coverage. (App. at 326-27.)

When Emoral filed for bankruptcy protection in June of 2011, disputes arose between the bankruptcy trustee (the "Trustee") and Aaroma, including, for example, the Trustee's claim that Emoral's sale of assets to Aaroma constituted a fraudulent transfer. On September 21, 2011, the Trustee and Aaroma entered into a Settlement Agreement (the "Agreement")

resolving the claims. As part of the Agreement, Aaroma agreed to pay $500,000 and take certain specific actions, and the Trustee agreed to release Aaroma from any "causes of action . . . that are property of the Debtor's Estate" as of the date of the Agreement. (*Id.* at 1079-80.)

At a hearing before the Bankruptcy Court regarding approval of the settlement, the Diacetyl Plaintiffs objected to the releases contained in the Agreement to the extent that those releases might bar them from bringing claims against Aaroma, as a successor to Emoral, for personal injuries related to diacetyl. A representative for the Trustee stated its view that the Diacetyl Plaintiffs' successor liability claims against Aaroma "do[ ] not belong to the Estate" and that the Trustee, therefore, "can't release [them]."[1] (*Id.* at 1277.) Counsel for Aaroma argued, however, that whether or not the Diacetyl Plaintiffs' causes of action were property of the estate (and therefore covered by the release) was not an issue before the Bankruptcy Court at that time. (*Id.* at 1280-81.) Ultimately, the parties added the following language to the order approving the settlement to address concerns expressed by the Diacetyl Plaintiffs: "Nothing contained in this Order or in the Aaroma Settlement

[1] The Trustee's representative stated: "I would like to sell someone the Brooklyn Bridge, but I don't own it so I can't sell it. I cannot, the Trustee cannot release claims that he doesn't own. It was never contemplated that he would be releasing claims he doesn't own." (*Id.* at 1278.)

Agreement will operate as a release of, or a bar to prosecution of any claims held by any person which do not constitute Estate's Released Claims as defined in the Aaroma Settlement Agreement." (*Id.* at 1206, 1355.) By order of October 7, 2011, the Bankruptcy Court approved the settlement. The ultimate question, however, of whether the Diacetyl Plaintiffs' causes of action constituted "Estate's Released Claims," as defined in the Agreement, was not resolved.

The Diacetyl Plaintiffs filed individual complaints against Aaroma in the Superior Court of New Jersey (*see, e.g., id.* at 1227-45) alleging personal injury and product liability claims and asserting that Aaroma was a "mere continuation" of Emoral and, therefore, liable. (*Id.* at 1233.) In April 2012, Aaroma filed in the Bankruptcy Court a "Motion to Enforce Court Order Approving Settlement with Bankruptcy Trustee and Compelling Dismissal of State Court Actions," arguing that the Diacetyl Plaintiffs' claims were barred by the Agreement's language as to release. The Diacetyl Plaintiffs opposed the motion, arguing that it was the understanding of the parties that their claims were not released under the Agreement. (*Id.* at 1324-26.) They cited, for example, the statement made on behalf of the Trustee during the hearing before the Bankruptcy Court prior to the approval of the settlement that their claims "do[ ] not belong to the Estate" and that the Trustee, therefore, "can't release [them]." (*Id.*) In the motion to enforce the order approving the settlement, however, the Trustee did not take a

position, stating that it was an issue of law for the Bankruptcy Court to determine. (*Id.* at 1341.)

Following oral argument, the Bankruptcy Court, in a lengthy opinion, denied Aaroma's motion, holding that the Diacetyl Plaintiffs' personal injury causes of action were not property of the estate because the Diacetyl Plaintiffs alleged "a particular injury not generalized injury suffered by all shareholders or creditors of Emoral." (*Id.* at 1387.) The Bankruptcy Court stated that "While successor liability has been imposed derivatively, this Court finds that the underlying injury that is alleged to be the basis and premise of the state court actions is personal harm . . . to the individual plaintiffs" and that "Emoral has not suffered any personal harm nor have the creditors as a general whole." (*Id.*)

Aaroma appealed to the District Court, and the District Court reversed, emphasizing that the Diacetyl Plaintiffs had no cause of action against Aaroma (which, it was not disputed, neither manufactured nor sold diacetyl) except on a successor liability theory. (*Id.* at 7-8.) The District Court held that the cause of action for successor liability was a "generalized" claim belonging to the estate because the facts giving rise to the cause of action were not specific to the Diacetyl Plaintiffs but common to all creditors, and because, if the Diacetyl Plaintiffs were to succeed in establishing that Aaroma constituted a "mere continuation" of Emoral, this would benefit the creditors of Emoral generally. (*Id.* at 7-9.) It stated:

> [T]he potential liability of Aaroma to the Diacetyl Plaintiffs does not arise out of the alleged misfeasance of Aaroma as to these creditors individually but rather out of its alleged continuation of the general business operation of the actual alleged wrongdoer, Emoral. Put slightly differently, for purposes of determining whether the cause of action belongs to the Estate, the critical distinction between the personal injury claim against Emoral and the successor liability claim against Aaroma is that establishing the former would benefit only the allegedly injured Diacetyl Plaintiffs whereas establishing the latter – that Aaroma is the "mere continuation" of Emoral and thus should be charged with all its liabilities – would benefit creditors of Emoral generally.

(*Id.* at 8-9.) Accordingly, the District Court reversed and remanded to the Bankruptcy Court for entry of an order consistent with the District Court's opinion. The Diacetyl Plaintiffs now appeal, arguing that they have standing to assert their personal injury causes of action against Aaroma, and that the District Court erred in conflating these claims with their successor liability theory.

II.

We have jurisdiction to review the order of the District Court pursuant to 28 U.S.C. §§ 158(d) and 1291. The District Court had jurisdiction to review the Bankruptcy Court's decision pursuant to 28

U.S.C. § 158(a). We "exercise the same standard of review as the District Court when it reviewed the original appeal from the Bankruptcy Court," and, thus, review the Bankruptcy Court's factual findings under a clearly erroneous standard and exercise plenary review over legal issues. *In re Rodriguez,* 629 F.3d 136, 138 (3d Cir.2010) (quoting *In re Handel,* 570 F.3d 140, 141 (3d Cir.2009)).

III.

The basic legal framework applicable to this case is not in dispute. After a company files for bankruptcy, "creditors lack standing to assert claims that are 'property of the estate.'" *Bd. of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.,* 296 F.3d 164, 169 (3d Cir.2002). The "estate," as defined in the Bankruptcy Code, includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). This includes causes of action, which are considered property of the bankruptcy estate "if the claim existed at the commencement of the filing and the debtor could have asserted the claim on his own behalf under state law." *Foodtown,* 296 F.3d at 169 n. 5. In order for a cause of action to be considered "property of the estate,"

> the claim must be a "general one, with no particularized injury arising from it." On the other hand, if the claim is specific to the creditor, it is a "personal" one and is a legal or equitable interest only of the creditor.

> A claim for an injury is personal to the creditor if other creditors generally have no interest in that claim.

Id. at 170 (citing *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.,* 884 F.2d 688, 701 (2d Cir.1989) and *Koch Refining v. Farmers Union Cent. Exch., Inc.,* 831 F.2d 1339, 1348-49 (7th Cir.1987)).

A cause of action that is "property of the estate" is properly pursued by the bankruptcy trustee because it inures to the benefit of all creditors. This promotes the orderly distribution of assets in bankruptcy, and comports with "the fundamental bankruptcy policy of equitable distribution to all creditors that should not be undermined by an individual creditor's claim." *Koch Refining,* 831 F.2d at 1344. As the Second Circuit has held, when examining "common claims against the debtor's alter ego or others who have misused the debtor's property in some fashion," where a claim is "a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action." *St. Paul Fire & Marine Ins. Co.,* 884 F.2d at 701.

To determine whether the Diacetyl Plaintiffs' cause of action against Aaroma constitutes property of Emoral's bankruptcy estate, we must examine the nature of the cause of action itself. While the Diacetyl Plaintiffs focus on the individualized nature of their

personal injury claims against *Emoral,* we cannot ignore the fact, and fact it be, that their only theory of liability as against *Aaroma,* a third party that is not alleged to have caused any direct injury to the Diacetyl Plaintiffs, is that, as a matter of state law, Aaroma constitutes a "mere continuation" of Emoral such that it has also succeeded to all of Emoral's liabilities.

The parties do not dispute that under both New Jersey and New York state law,[2] an acquiring company is generally "not liable for the debts and liabilities of the selling company simply because it has succeeded to ownership of the assets of the seller," except in limited circumstances. *Lefever v. K.P. Hovnanian Enters., Inc.,* 160 N.J. 307, 310, 734 A.2d 290 (1999). One exception to the general rule against successor liability is where the purchasing company "is a mere continuation of the seller." *Id.* To establish liability based on a "mere continuation" theory, as the Diacetyl Plaintiffs seek to do against Aaroma, a plaintiff must "establish that there is continuity in management, shareholders, personnel, physical location, assets and general business operation between selling and purchasing corporations following the asset acquisition." *Ramirez v. Amsted Indus., Inc.,* 86 N.J. 332, 342, 431 A.2d 811 (1981).

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[2] There is no dispute that either New Jersey or New York law applies and that the two states' relevant applicable legal standards are identical, rendering a choice-of-law analysis unnecessary.

The Diacetyl Plaintiffs fail to demonstrate how any of the factual allegations that would establish their cause of action based on successor liability are unique to them as compared to other creditors of Emoral. Likewise, they fail to demonstrate how recovery on their successor liability cause of action would not benefit all creditors of Emoral given that Aaroma, as a mere continuation of Emoral, would succeed to all of Emoral's liabilities. Thus, the Diacetyl Plaintiffs' cause of action against Aaroma is "general" rather than "individualized." *See Foodtown,* 296 F.3d at 169-70.

Although we have not before squarely addressed this issue, other courts applying New York and New Jersey law have held that state law causes of action for successor liability, just as for alter ego and veil-piercing causes of action, are properly characterized as property of the bankruptcy estate. In *In re Keene Corp.,* 164 B.R. 844, 849 (Bankr.S.D.N.Y.1994), for example, plaintiffs alleged that they had claims for asbestos-related injuries against Keene, the debtor corporation, and brought various lawsuits against certain third-party non-debtor defendants, alleging that Keene wrongfully transferred assets to those defendants which prevented plaintiffs from collecting damages from Keene. 164 B.R. at 848. Invoking successor liability, plaintiffs argued that by acquiring the assets of Keene, defendants also assumed the asbestos-related liabilities. The court, applying New York law with respect to successor liability, held that

plaintiffs' causes of action constituted property of the estate:

> [T]he remedy against a successor corporation for the tort liability of the predecessor is, like the piercing remedy, an equitable means of expanding the assets available to satisfy creditor claims. The class action plaintiffs that invoke it allege a general injury, their standing depends on their status as creditors of Keene, and their success would have the effect of increasing the assets available for distribution to all creditors.

Id. at 853. Accordingly, the court held that the successor liability causes of action should be asserted by the trustee on behalf of all creditors.

Likewise, in *In re Buildings by Jamie, Inc.,* 230 B.R. 36, 43 (Bankr.D.N.J.1998), the court, applying New Jersey law, concluded that a debtor's individual creditors lacked standing to bring an alter ego veil-piercing cause of action seeking recovery from non-debtor third-party defendants, because that cause of action constituted property of the bankruptcy estate. It held that because New Jersey law permits a corporation to pierce its own veil and because recovery on the alter ego claim would benefit the estate as a whole,[3] the cause of action was "properly characterized

[3] In *Buildings by Jamie,* there was no question that recovery on the alter ego claim "would necessarily inure to the benefit of all creditors," because the plaintiff creditors constituted the entire body of creditors. 230 B.R. at 44.

as a general claim as to which the trustee alone has standing as representative of the estate." 230 B.R. at 44. The court discussed our holding in *Phar-Mor, Inc. v. Coopers & Lybrand,* 22 F.3d 1228, 1240 n. 20 (3d Cir.1994), in which we observed that it "may seem strange" to allow a corporation to pierce its own veil, "since it cannot claim to be either a creditor that was deceived or defrauded by the corporate fiction, or an involuntary tort creditor." *Id.* However, we recognized that, in New Jersey and in other states, "piercing the corporate veil and alter ego actions are allowed to prevent unjust or inequitable results; they are not based solely on a policy of protecting creditors." *Id.* Thus, because a veil-piercing cause of action is "based upon preventing inequity or unfairness, it is not incompatible with the purposes of the doctrine[ ] to allow a debtor corporation to pursue a claim based upon such a theory." *Id.*

As we observed in *Phar-Mor,* so, too, here it "may seem strange" to hold that a cause of action for successor liability against Aaroma is property of Emoral's bankruptcy estate. As a practical matter, it is difficult to imagine a factual scenario in which a solvent Emoral, outside of the bankruptcy context, would or could bring a claim for successor liability against Aaroma. *See Buildings by Jamie,* 230 B.R. at 42 (similarly acknowledging in the veil-piercing context that "from a practical standpoint, principals of a solvent debtor will not be compelled to pierce the veil of the very entity they use as a conduit for their personal business," as this would "effectively

extinguish their limited liability and expose them to the personal liability that the corporate form is employed to avoid").

Just as the purpose behind piercing the corporate veil, however, the purpose of successor liability is to promote equity and avoid unfairness, and it is not incompatible with that purpose for a trustee, on behalf of a debtor corporation, to pursue that claim. *See Phar-Mor, Inc.,* 22 F.3d at 1240 n. 20; *see also Baker v. Nat'l State Bank,* 161 N.J. 220, 227-28, 736 A.2d 462 (1999) (discussing successor liability and holding that it requires a "fact specific and equitable analysis"); *Walensky v. Jonathan Royce Int'l, Inc.,* 264 N.J.Super. 276, 284, 624 A.2d 613 (App.Div.1993) (holding that "the doctrine of successor liability exists to protect against [ ] inequities"). As in *Keene Corp.* and *Buildings by Jamie,* the Diacetyl Plaintiffs' cause of action against Aaroma would be based on facts generally available to any creditor, and recovery would serve to increase the pool of assets available to all creditors. Therefore, the District Court appropriately classified that cause of action as a generalized claim constituting property of the estate. *See also In re OODC, LLC,* 321 B.R. 128, 136 (Bankr.D.Del.2005) (holding that the bankruptcy trustee had standing to pursue successor liability claims because the claims were general and common to all creditors, noting that "most other courts have found that the trustee in bankruptcy has standing to bring successor liability (or alter ego) suits on behalf of all creditors").

The Diacetyl Plaintiffs concede that there is no relevant caselaw directly supporting their position that individual personal injury claims asserted on a successor liability theory should not be considered property of the bankruptcy estate. They attempt to distinguish *Keene Corp.* and related caselaw, however, by drawing a distinction between, on one hand, a successor liability claim as a *primary cause of action,* and, on the other hand, successor liability as an *equitable remedy* to satisfy an individual damage claim. We are not aware of any applicable legal authority drawing such a distinction and, indeed, we note that any cause of action asserting successor liability necessarily contemplates some underlying damage or liability for which the claimant is seeking recourse from a third party.

The Diacetyl Plaintiffs also argue that *Foodtown* supports their position because we held in that case that a pension fund's claim against third party affiliates of a debtor employer did not constitute property of the debtor's bankruptcy estate. *See* 296 F.3d at 170. Their reliance on *Foodtown* is misplaced. In *Foodtown,* a plaintiff pension fund sought to recover $9.3 million in ERISA withdrawal liability owed by the debtor to the pension fund by bringing an alter ego veil-piercing claim and claims for breach of fiduciary duty against third parties. The cause of action at issue, however, did not constitute a general claim for successor liability based on a mere continuation theory, but instead a specific claim for liability pursuant to ERISA. We observed in *Foodtown* that "[w]ith

regard to *alter ego* liability in cases involving claims to pension benefits protected by ERISA . . . there is a federal interest supporting disregard of the corporate form to impose liability." *Id.* at 169 (citation and internal quotation marks omitted). Moreover, crucial to our holding in *Foodtown* was the fact that the cause of action did not arise until after the debtor's bankruptcy filing, and thus could not be considered property of the estate. We distinguished the cause of action in *Buildings by Jamie,* which "was based on a general injury suffered by a corporate debtor prior to its bankruptcy filing" from the cause of action in *Foodtown,* which "ar[ose] from a statutorily imposed withdrawal liability that occurred after the filing of the bankruptcy petition." *Id.* at 171. The Diacetyl Plaintiffs' cause of action is distinguishable from the claim in *Foodtown* for the same reason.

IV.

Because the Diacetyl Plaintiffs' cause of action for successor liability against Aaroma belongs to the bankruptcy estate, it falls within the "Estate's Released Claims" within the meaning of the Agreement between the Trustee and Aaroma. The District Court, therefore, properly reversed the Bankruptcy Court's denial of Aaroma's motion to enforce the order approving the settlement, and we will affirm the order of the District Court. We recognize that, in so doing, we leave the Diacetyl Plaintiffs, who allege that they have suffered serious personal injuries resulting from exposure to a harmful chemical, albeit not at the

hands of Aaroma, with no apparent recourse against Aaroma. We note, however, that our holding has no bearing on any remedy the Diacetyl Plaintiffs may be seeking directly against Emoral in the bankruptcy proceeding or against any of the numerous other defendants the Diacetyl Plaintiffs have named in the actions pending in the Superior Court of New Jersey.

COWEN, Circuit Judge, dissenting.

I agree with the Bankruptcy Court that the Diacetyl Plaintiffs' claims against Aaroma constitute "individualized claims" belonging to the Diacetyl Plaintiffs themselves. Because the majority instead concludes that such claims are "generalized claims" belonging to the bankruptcy estate, I must respectfully dissent.

It is undisputed that "creditors lack standing to assert claims that are 'property of the estate.'" *Bd. of Trs. of Teamsters Local 863 Pension Fund v. Foodtown, Inc.,* 296 F.3d 164, 169 (3d Cir.2002). A cause of action or claim, in order to be considered property of the estate, "must be a 'general one, with no particularized injury arising from it.'" *Id.* at 170 (quoting *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.,* 884 F.2d 688, 701 (2d Cir.1989)). "[W]here a claim 'is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action.'" (Majority Opinion at 879

(quoting *St. Paul,* 884 F.2d at 701); *see also id.* at 879 (quoting *Foodtown,* 296 F.3d at 170).) "On the other hand, if the claim is specific to the creditor, it is a 'personal' one and is a legal or equitable interest only of the creditor." *Id.*

Because the Diacetyl Plaintiffs' against Aaroma "could [not] be brought by any creditor of the debtor," they constitute individualized claims belonging to the Diacetyl Plaintiffs themselves – and not to the debtor or the bankruptcy estate. Initially, it is uncontested that the underlying personal injury claims against Emoral are individualized in nature. In fact, personal injury and product liability causes of action under state law represent quintessential examples of an individualized claim, i.e., "a 'personal' [claim that is] a legal or equitable interest only of the creditor." *Id.* The majority insists that "we cannot ignore the fact . . . that [the Diacetyl Plaintiffs'] only theory of liability as against Aaroma, a third party that is not alleged to have caused any direct injury to the Diacetyl Plaintiffs, is that, as a matter of state law, Aaroma constitutes a 'mere continuation' of Emoral such that it has also succeeded to all of Emoral's liabilities." (*Id.* at 8-9 (emphasis omitted).) Nevertheless, the Court also cannot ignore the claims or allegations underlying this theory or remedy of successor liability. As the Bankruptcy Court explained in its thorough and well-reasoned ruling, "the underlying injury that is alleged to be the basis and premise of the state court actions is personal harm by exposure to Diacetyl by the individual plaintiffs or harm to the

individual plaintiffs." (A1387.) The successor liability theory alleged by the Diacetyl Plaintiffs is inextricably tied to – and cannot be considered separate or apart from – their underlying personal injury and product liability allegations. Because the Diacetyl Plaintiffs' underlying allegations are clearly individualized in nature, their claims against Aaroma – which seek to hold this third party liable for their alleged injuries as the "mere continuation" of Emoral – must also be considered as individualized claims. In short, "any creditor of the debtor" could not allege that the third party should be held responsible on this specific theory of successor liability for injuries allegedly suffered as a result of exposure to a product made and sold by the debtor itself. For instance, a trade creditor of the debtor could not make such a claim.

I believe that the prior case law, beginning with our own ruling in *Foodtown,* weighs in favor of this approach to the Diacetyl Plaintiffs' claims.

"In *Foodtown,* a plaintiff pension fund sought to recover $9.3 million in ERISA withdrawal liability owed by the debtor [Twin] to the pension fund by bringing an alter ego veil-piercing claim and claims for breach of fiduciary duty against third parties." (Majority Opinion at 13.) This Court determined that "Twin's withdrawal liability is not property of the estate" because "the claim did not arise until after the filing of the bankruptcy petition." *Foodtown,* 296 F.3d at 170 (footnote omitted). We, however, did not stop there. On the contrary, we went on to conclude that "[t]he claim for withdrawal liability is also not a legal

or equitable interest of the debtor." *Id.; cf., e.g., Philadelphia Marine Trade Ass'n – Int'l Longshoremen's Ass'n Pension Fund v. Comm'r of Internal Revenue,* 523 F.3d 140, 147 n. 5 (3d Cir.2008) ("We note that this portion of the opinion is an alternative holding, not a *dictum:* 'Where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.'" (quoting *Woods v. Interstate Realty Co.,* 337 U.S. 535, 537, 69 S.Ct. 1235, 93 L.Ed. 1524 (1949))). In doing so, the *Foodtown* Court specifically focused on the creditor's underlying withdrawal liability allegations, referring, for example, to "Twin's withdrawal liability" and "Appellees' evasion of withdrawal liability." *Foodtown,* 296 F.3d at 170. The alleged evasion of liability, in turn, did not injure either Twin or the creditors in general:

> In this case, the injury is not insolvency stemming from Appellees' actions. Here, the injury is the Appellees' evasion of withdrawal liability. Withdrawal liability is not owed to Twin; rather, it is owed to the pension fund. Because the liability is owed only to the fund, the claim is personal to the Appellant. Moreover, absent a general creditors' interest, a trustee can only collect money that may be owing to the bankrupt entity. Here, there is no general creditors' interest in the statutorily imposed withdrawal liability owed to the fund. Rather, the action to recover the withdrawal liability has the character of an action for damages flowing from an alleged illegality against the fund. The alleged illegality may have caused other

> injuries in addition to those caused to the fund, but the direct injury to the fund – the evasion of its statutory entitlement – defines the nature of plaintiff's claim as a personal one. . . .

Id. (citing *Steinberg v. Buczynski,* 40 F.3d 890, 892 (7th Cir.1994); *Apostolou v. Fisher,* 188 B.R. 958, 968 (N.D.Ill.1995)). In fact, we did not specifically address the elements of the pension fund's alter ego and veil piercing causes of action until we considered the claims on their merits, after concluding that this creditor had standing to pursue such claims in the first place. *See id.* at 167-73. Likewise, even though our opinion in *Foodtown* referred to a federal interest in disregarding the corporate form in ERISA and MPPAA cases, *id.* at 169, we actually applied New Jersey law to conclude that the creditor stated claims for alter ego liability and for piercing the corporate veil, *id.* at 171-73.

We thereby adopted in *Foodtown* an expansive approach to the question of whether a creditor's cause of action against a third party constitutes an individualized claim and, at the very least, exhibited a preference for allowing a third party claim to be decided on the merits. As a practical matter, I do not see how the same court that was willing to permit the pension fund's third party claims to go forward could reach the opposite result with respect to the Diacetyl Plaintiffs' own third party claims against Aaroma. Just as we relied on the individualized nature of the underlying withdrawal liability allegations to permit

a creditor to pursue its claims against several third parties, we likewise should allow the Diacetyl Plaintiffs' claims against Aaroma to go forward given the individualized nature of their own underlying personal injury and product liability allegations.

The Court in *Foodtown* turned for support to the Seventh Circuit's opinion in *Steinberg,* which addressed what we called "a similar case." *Id.* at 171. The *Steinberg* court determined that a bankruptcy trustee lacked standing to pursue an adversary proceeding against the debtor's shareholders "seeking to pierce the corporate veil and hold them personally liable for the corporation's debt to the pension fund," where the pension fund had already obtained a monetary judgment against the debtor corporation prior to bankruptcy. *Steinberg,* 40 F.3d at 891. Like *Foodtown,* the Seventh Circuit's opinion distinguished between the claims of the debtor corporation and the claims belonging to its creditor pension fund:

> The point is simply that the trustee is confined to enforcing entitlements of the corporation. He has no right to enforce entitlements of a creditor. He represents the unsecured creditors of the corporation; and in that sense when he is suing on behalf of the corporation he is really suing on behalf of the creditors of the corporation. But there is a difference between a creditor's interest in the claims of the corporation against a third party, which are enforced by the trustee, and the creditor's own direct – not derivative –

> claim against the third party, which only the creditor himself can enforce. . . .

Id. at 893. A trustee has standing to pursue an action to pierce the corporate veil on behalf of the bankrupt corporation only if the corporation was injured by the shareholders' disregard of corporate formalities. *Id.* at 892; *see also, e.g., Foodtown,* 296 F.3d at 170-71 (citing *Steinberg*). I do not see how Aaroma's alleged "mere continuation" of Emoral could have harmed Emoral itself. To paraphrase *Foodtown,* "the injury [alleged by the Diacetyl Plaintiffs] is not insolvency stemming from [Aaroma's] actions." *Foodtown,* 296 F.3d at 170.

The Second Circuit recently considered the question of standing in *In re Bernard L. Madoff Investment Securities LLC,* 721 F.3d 54 (2d Cir.2013), *petition for cert. filed,* 82 U.S.L.W. 3264 (U.S. Oct. 9, 2013). A trustee appointed under the Securities Investor Protection Act sought to bring claims on behalf of the victims of a multi-billion-dollar Ponzi scheme against several financial institutions for their alleged role in this fraudulent scheme. *Madoff,* 721 F.3d at 57-58. The trustee focused on "a passage in *St. Paul* – stating that a trustee may bring a claim if the 'claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor' " – and asserted that "the third-party claims here are common to all customers because all customers were similarly injured by Madoff's fraud and the Defendants' facilitation." *Id.* at 70 (quoting *St. Paul,* 884 F.2d at 701). The Second

Circuit nevertheless determined that the trustee's theory "is flawed on many levels." *Id.* Relying, inter alia, on the Seventh Circuit's reasoning in *Steinberg,* the *Madoff* court thereby rejected the trustee's "broad reading" of *St. Paul. Id.* at 70-71. "As illustrated by *St. Paul,* when a creditor seeks relief against third parties that pushed the debtor into bankruptcy, the creditor is asserting a derivative claim that arises from harm done to the estate" and that accordingly belongs to the bankruptcy estate. *Id.* at 70. In addition, the *Madoff* trustee "seeks to assert claims on behalf of thousands of customers against third-party financial institutions for their handling of individual investments made on various dates in varying amounts," *id.* at 71. Because these alleged wrongful acts could not have harmed all of the customers in the same way, the claims could not be considered to be "common" or "general" in nature.[1] *Id.*

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[1] The majority turns for support to two bankruptcy court decisions that "have held that state law causes of action for successor liability, just as alter ego and veil-piercing causes of action, are properly characterized as property of the bankruptcy estate." (Majority Opinion at 880.) However, I believe that both opinions – which clearly are not binding on this Court – are distinguishable on a number of different grounds. Unlike our ruling in *Foodtown,* neither *Buildings by Jamie* nor *Keene* really looked to the underlying injury or injuries alleged by the creditors. In turn, *Buildings by Jamie* did not involve either personal injury or product liability claims. The *Foodtown* Court distinguished this New Jersey bankruptcy case because, among other things, "the trustee [in *Buildings by Jamie*] had standing to pursue an *alter ego* action on behalf of the corporate debtor to recover on a defaulted loan." *Foodtown,* 296 F.3d at 171.

(Continued on following page)

The majority admits that "we leave the Diacetyl Plaintiffs, who allege that they have suffered serious personal injuries resulting from exposure to a harmful chemical, albeit not at the hands of Aaroma, with no apparent recourse against Aaroma." (*Id.* at 14.) I do not believe that either federal bankruptcy law or state law mandates such a drastic and harsh result. After all, the plaintiffs in this case are not trade

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"Furthermore, the *In re Buildings by Jamie* court held, consistent with our decision here, that under New Jersey law an *alter ego* action is an equitable remedy that may only be asserted by a corporation when it suffers harm." *Id.* As the majority acknowledges, the plaintiff creditors actually constituted the entire creditor body in this New Jersey bankruptcy proceeding. *Buildings by Jamie,* 230 B.R. at 44. I also note that "the plaintiffs' counsel conceded that the creditors' claims belonged to the bankruptcy estate and acknowledged, therefore, that the creditors would not be named as co-plaintiffs with the trustee in the adversary complaint." *Id.* (citation omitted). For its part, the New York bankruptcy court in *Keene* construed the creditors' complaints as invoking the "fourth exception" for successor liability, i.e., " 'the transfer of assets is for the fraudulent purpose of escaping liability.' " *Keene,* 164 B.R. at 852-53 (citations omitted); *see also, e.g., RDM Holdings, Ltd. v. Cont'l Plastics Co.,* 281 Mich.App. 678, 762 N.W.2d 529, 707 (2008) ("Con-Plastics' role as an alleged successor is tied solely to plaintiffs' allegations concerning the fraudulent transfer of assets; however, we find that this aspect of the successor liability claim was subsumed under the UFTA [Uniform Fraudulent Transfer Act] claim, which was properly dismissed on the basis of res judicata. . . . For the same reasons, we will not permit plaintiffs to pursue any fraudulent transfer allegations against Con-Coatings under the guise of a successor liability claim."). In any event, I find *Keene's* reasoning with respect to successor liability and other third party theories to be at odds with the more liberal approach set forth by this Court in *Foodtown.*

creditors seeking to recover from the successor a specific amount of money owed by the debtor; they are men and women allegedly suffering from severe lung problems caused by exposure to a chemical made and sold by the debtor. Their state law claims accordingly implicate important state interests, such as providing adequate compensation to individuals seriously injured by defective products. *Cf., e.g., Foodtown,* 296 F.3d at 169 ("With regard to *alter ego* liability in cases involving claims to pension benefits protected by ERISA, as amended by the MPPAA, there is 'a federal interest supporting disregard of the corporate form to impose liability.'" (quoting *Lumpkin v. Envirodyne Indus., Inc.,* 933 F.2d 449, 460-61 (7th Cir.1991))). The Diacetyl Plaintiffs additionally have not obtained any judgment against Emoral (or Aaroma) for a specified amount, and their claims accordingly have not been denominated. I further note that the Bankruptcy Court granted the Diacetyl Plaintiffs relief from the automatic stay to permit them "to litigate their products liability action against [Emoral] to judgment and to seek recovery from applicable insurance policies insuring the Debtor for their alleged injuries." (12/11/12 Order at 2.) The Bankruptcy Court, in turn, ordered that their recovery against Emoral "shall be limited to the extent of the insurance coverage provided to the Debtor and shall be paid from such insurance, if at all, and not from any other assets of the Debtor's estate."[2]

[2] I agree with the majority that its holding has no bearing on any remedy the Diacetyl Plaintiffs may have against Emoral

(Continued on following page)

(*Id.* at 2-3.) Given the circumstances, it is not surprising that a representative of the Trustee stated, at the hearing held by the Bankruptcy Court to decide whether to approve the Trustee's $500,000 settlement with Aaroma, that the Diacetyl Plaintiffs' successor liability claim against Aaroma "does not belong to the Estate" and that the Trustee accordingly "can't release it." (A1277.)

Because the claims against Aaroma belong to the Diacetyl Plaintiffs, the Bankruptcy Court properly determined that "the Diacetyl plaintiffs' right to assert those claims [was] not affected by the settlement agreement [or] the settlement approval order" (A1388). *See, e.g., id.* at 175 ("Because Appellant's cause of action is based on withdrawal liability under ERISA and is not considered property of the estate, Twin's release does not affect Appellant's claims."). For the foregoing reasons, I would vacate the District Court's order, which reversed the order of the Bankruptcy Court denying Aaroma's motion to enforce the settlement approval order and to compel dismissal of the Diacetyl Plaintiffs' state court actions against Aaroma, and would remand for further proceedings.

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the bankruptcy proceeding or against any of the other defendants named in the state court proceedings. Specifically, it appears the Diacetyl Plaintiffs' insurance proceed claims are currently pending before the New Jersey Superior Court, and our ruling today has no effect whatsoever on such claims.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In re: EMORAL, INC., f/k/a POLAROME INTERNATIONAL, INC., Debtor.	Civil Action No. 12-7085 (SRC) Bankr. Ct. No. 11-27667 (RG)
AAROMA HOLDINGS, LLC, Appellant, v. DIACETYL PLAINTIFFS, Appellees.	**OPINION** (Filed Jan. 23, 2013)

***CHESLER**, District Judge*

This matter comes before the Court on appeal of the September 26, 2012 Order entered by the United States Bankruptcy Court for the District of New Jersey in the proceedings captioned *In re Emoral, Inc., f/k/a Polarome International Inc.*, Case No. 11-27667 (RG) (hereinafter, the "September 26 Order"). The September 26 Order denied a motion filed by Appellant Aaroma Holdings, LLC ("Aaroma") to enforce the bankruptcy court's order approving Aaroma's settlement with the bankruptcy trustee and to compel dismissal of various personal injury lawsuits filed against Aaroma as barred by that settlement and

release. Appellees are the individual plaintiffs who filed those lawsuits, which arise out of injuries allegedly sustained as a result of exposure to a chemical known as diacetyl. The Court will hereinafter refer to Appellees as the "Diacetyl Plaintiffs." The Court has considered the papers submitted by the parties and opts to rule on the motion without oral argument, pursuant to Federal Rule of Bankruptcy Procedure 8012. For the reasons discussed below, the Court will reverse the September 26 Order and remand this action to the bankruptcy court for an order consistent with this Opinion.

I. BACKGROUND

This action arises out of the bankruptcy of Debtor Emoral, Inc. ("Debtor" or "Emoral"), a corporation which was engaged in the business of manufacturing and selling natural and synthetic flavors and fragrances, including diacetyl, a food additive with a buttery flavor. In August 2010, Aaroma (then known as Duane Street, LLC) entered into an Asset Purchase Agreement with Emoral (then known as Polarome International, Inc.), under which Aaroma agreed to purchase certain of Emoral's assets and liabilities, specifically excluding assets and liabilities associated with diacetyl. It is undisputed that Emoral ceased selling diacetyl no later than 2006 and that Aaroma did not at any time manufacture or distribute products containing diacetyl.

Emoral filed for bankruptcy under Chapter 7 of the Bankruptcy Code in June 2011. Following an investigation conducted by the trustee for Emoral's bankruptcy estate (the "Estate") concerning potential preference claims relating to the Asset Purchase Agreement, Aaroma and the trustee entered into a settlement agreement, pursuant to which the trustee released Aaroma from the Estate's claims in exchange for almost one million dollars in consideration. The "Released Claims," as defined in the settlement agreement, consist of "any and all liability, claims, actions, causes of action, demands, damages, costs, attorneys' fees, and/or expenses whatsoever, that are property of the Debtor's Estate arising out of, in connection with or relating to any matters occurring before the date of this Agreement, whether known or unknown, direct or derivative, in law or in equity." (R-1, Ex. E at 1-2.)[1] The trustee moved for approval of the settlement pursuant to Bankruptcy Rule 9019, and following a hearing to address objections, including those made by a number of diacetyl injury claimants, the bankruptcy court entered an order on October 7, 2011 approving the settlement. That order states, in relevant part, that "[h]olders of claims against the bankruptcy estate and equity interest in the Debtor are forever barred from asserting the Estate's Release Claims . . . against Aaroma or the Aaroma Releasees."

[1] Citations to the record correspond to the list of items designated by Aaroma to be included in the record on appeal, as set forth in docket entry 2.

(R-6 at 3.) It expressly provides, however, that prosecution of claims that do not fall within the settlement agreement's definition of the Estate's Released Claims would not be barred and, further, that the bankruptcy court retained jurisdiction to enforce the approval order and determine whether any claims by Emoral's creditors brought against Aaroma are barred thereunder. (*Id.*)

In or about the fall of 2011, the Diacetyl Plaintiffs, individuals who handled diacetyl manufactured by Emoral in the course of their employment at food flavoring plants, initiated separate but substantially similar personal injury suits in New Jersey state court against numerous defendants, including Emoral and Aaroma. There is no dispute that the claims asserted against Aaroma are successor liability claims grounded on the theory that Aaroma, having acquired substantially all of the assets of Emoral, is the "mere continuation" of Emoral. Aaroma then brought a motion in the bankruptcy proceedings to enforce the October 7, 2011 order approving the settlement agreement and to bar the Diacetyl Plaintiffs from proceeding with their litigation against Aaroma. The September 26 Order denying that motion is presently on appeal to this Court.

II. DISCUSSION

This Court has jurisdiction to hear appeals of the final judgments and orders of the bankruptcy court pursuant to 28 U.S.C. § 158(a)(1). Orders in

bankruptcy proceedings which do not conclude the entire bankruptcy case but nevertheless finally dispose of discrete disputes within a larger case may be treated as practically final and thus may be immediately appealed. *In re Prof'l Ins. Mgmt.*, 285 F.3d 268, 280-81 (3d Cir. 2002). The September 26 Order is appealable because it determined a discrete issue within the bankruptcy proceedings, specifically that the Diacetyl Plaintiffs' personal injury successor liability claims against Aaroma are not generalized claims belonging to the Estate and therefore not barred by the settlement agreement and court order approving it.

The Court reviews a bankruptcy court's legal determinations *de novo* and its factual findings for clear error. *In re American Pad & Paper Co.*, 478 F.3d 546, 551 (3d Cir. 2007). This appeal concerns one purely legal matter: whether the bankruptcy court properly characterized the Diacetyl Plaintiffs' claims against Aaroma as individualized claims belonging to those particular creditors rather than as generalized claims belonging to the Estate. Thus the Court reviews the Bankruptcy Court's order on a *de novo* standard. *Id.*; *see also* Fed. R. Bankr. P. 8013.

The proper characterization of the claims is dispositive of whether the Diacetyl Plaintiffs may proceed with their litigation against Aaroma because it is axiomatic that "once a company or individual files for bankruptcy, creditors lack standing to assert claims that are the 'property of the estate.'" *Bd. of Trustees of Teamsters Local 863 Pension Fund v.*

Foodtown, Inc., 296 F.3d 164, 169 (3d Cir. 2002) (hereinafter, "*Foodtown*"). The Third Circuit has held that the bankruptcy code's definition of what constitutes "property of the estate" is "given broad application and includes 'all kinds of property, including . . . causes of action. . . .'" *Id.* (quoting *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983)); *see also* 11 U.S.C. § 541(a)(1) (listing broad categories of property comprising a bankruptcy estate). It is the bankruptcy trustee who has the authority and obligation to "collect and reduce to money the property of the estate." 11 U.S.C. § 704(a)(1). Only the trustee may pursue a claim involving a generalized injury common to the estate's creditors, that is, one that could be brought by any creditor of the debtor, for that claim concerns injury to the estate itself and stands to benefit all of its creditors. *Foodtown*, 296 F.3d at 170 (citing *St. Paul Fire and Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 701 (2d Cir. 1989)). Granting the trustee the exclusive right to pursue such generalized claims furthers the bankruptcy code's policy of avoiding a rush to judgment that would give some creditors an advantage over others and, relatedly, of ensuring that all similarly-situated creditors are treated fairly. *St. Paul Fire and Marine Ins. Co.*, 884 F.2d at 679; *Koch Refining v. Farmers Union Cent. Exchange, Inc.*, 831 F.2d 1339, 1344 (7th Cir. 1987). On the other hand, a claim that seeks redress for an injury that is unique to a creditor is not property of the estate and may be pursued by that individual creditor. *Foodtown*, 296 F.3d at 170. "A claim for an injury is personal to the creditor if other creditors

generally have no interest in that claim." *Id.* (citing *Koch Refining*, 831 F.2d at 1348-49). In *Koch Refining*, an opinion followed by the Third Circuit's *Foodtown* decision in distinguishing which creditor claims are property of the bankruptcy estate and which belong to the creditors themselves, the Seventh Circuit provided the following illustration:

> [T]he trustee has no standing to bring personal claims of creditors. A cause of action is "personal" if the claimant himself is harmed and no other claimant or creditor has an interest in the cause. But allegations that could be asserted by any creditor could be brought by the trustee as a representative of all creditors. If the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors, it is a general claim.

Koch Refining, 831 F.2d at 1348-49.

In *Foodtown*, the Third Circuit relied on these basic principles concerning the bankruptcy trustee's standing to pursue claims belonging to the estate but not those of individual creditors. *Foodtown*, 296 F.3d at 169-170. The specific issue before the *Foodtown* court was whether the district court had erred in determining that the plaintiff pension fund, an individual creditor, lacked standing to assert a withdrawal liability claim against the alleged alter ego of the bankrupt corporation which had incurred the withdrawal liability obligation to the pension fund pursuant to its collective bargaining agreements with

the local union associated with the fund. *Id.* at 167-68. The Third Circuit reversed that decision, concluding that the withdrawal liability claim was not property of the bankruptcy estate. *Id.* at 170. It reasoned that the injury at issue in the pension fund's claim against the alter ego was not common to all creditors but rather that the injury was inflicted on the pension fund specifically by the alter ego's evasion of its withdrawal liability obligation. *Id.* The *Foodtown* court held that because there was no general creditors' interest in the relief being claimed by the pension fund against the alter ego, the claim belonged to the pension fund individually not to the overall estate. *Id.*

To determine whether or not the Diacetyl Plaintiffs' successor liability claims against Aaroma are generalized, that is, could be brought by any creditor, or are personal to the Diacetyl Plaintiffs, the Court must examine the nature of the cause of action they assert against Aaroma. *St. Paul Fire and Marine Ins. Co.*, 884 F.2d at 700-01. The Diacetyl Plaintiffs do not contend that Aaroma is liable for their personal injuries based on its sale or manufacture of the diacetyl additive. Indeed, it is not disputed that Emoral, or its predecessor Polarome, ceased selling diacetyl years before Aaroma acquired Emoral's assets, that the Asset Purchase Agreement expressly excluded diacetyl-related assets and liabilities and that Aaroma has never engaged in the sale or manufacture of diacetyl. Rather, the Diacetyl Plaintiffs seek to hold Aaroma liable for their injuries as the alleged successor of

Emoral. Under New Jersey, "[t]he general rule of corporate-successor liability is that when a company sells its assets to another company, the acquiring company is not liable for the debts and liabilities of the selling company simply because it has succeeded to the ownership of the assets of the seller. *Lefever v. K.P. Hovnanian Enters., Inc.*, 160 N.J. 307, 310 (1999); *see also Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 340 (1981) (holding same). New Jersey, however, recognizes five exceptions to this rule of non-liability. *See*, *generally*, *Lefever*, 160 N.J. at 310 (identifying the five exceptions). The Diacetyl Plaintiffs ground their successor liability claims against Aaroma on the "mere continuation" exception, which applies when the purchasing company continues in substance and form the business of the seller. *Ramirez*, 86 N.J. at 342; *see also Bowen Eng'g v. Estate of Reeve*, 799 F.Supp. 467, 487-88 (D.N.J. 1992) (reviewing mere continuation exception to rule of non-liability on successor corporations). To establish successor liability against Aaroma based on "mere continuation," the Diacetyl Plaintiffs must "establish that there is continuity in management, shareholders, personnel, physical location, assets and general business operation between selling and purchasing corporations following the asset acquisition." *Ramirez*, 86 N.J. at 342.

As Appellants correctly argue, there is nothing about the Diacetyl Plaintiffs' successor liability claims against Aaroma that is specific to them, as opposed to any other creditor of the Estate. The elements required to establish their successor liability claims

against Aaroma would apply in the same manner to any creditor of Emoral seeking to hold Aaroma liable. Unlike the *Foodtown* case, the injury underlying the Diacetyl Plaintiffs' successor liability claims against Aaroma is common to all creditors. The Court recognizes that in a broad sense, the personal injury allegedly caused by Emoral's manufacture and/or sale of diacetyl is at the root of the Diacetyl Plaintiffs' litigation, and thus it is tempting to conflate the personal injury cause of action against Emoral with the claim against Aaroma. The analysis applied by the bankruptcy court in arriving at the order on appeal indeed reflects that this area of the law, requiring careful distinction between claims belonging to certain creditors individually versus all creditors as a whole, can be fraught with confusion. However, the potential liability of Aaroma to the Diacetyl Plaintiffs does not arise out of the alleged misfeasance of Aaroma as to these creditors individually but rather out of its alleged continuation of the general business operation of the actual alleged wrongdoer, Emoral. Put slightly differently, for purposes of determining whether the cause of action belongs to the Estate, the critical distinction between the personal injury claim against Emoral and the successor liability claim against Aaroma is that establishing the former would benefit only the allegedly injured Diacetyl Plaintiffs whereas establishing the latter – that Aaroma is the "mere continuation" of Emoral and thus should be charged with all of its liabilities – would benefit creditors of Emoral generally. As the Third Circuit's [sic] discussed in *Foodtown*, bankruptcy law is clear that

such generalized claims belong to the Estate and may only be pursued by the trustee. This rule, and its application to the successor liability claims of the Diacetyl Plaintiffs against Aaroma, comports with the fundamental bankruptcy law policy of avoiding a rush to judgment favoring certain creditors over others as to injury – here, the successorship of Aaroma to the bankrupt business – that is common to all creditors.

As causes of action belonging the [sic] Estate, the successor liability claims that the Diacetyl Plaintiffs have filed against Aaroma in New Jersey state court are subsumed by the settlement agreement under which the trustee of the Emoral Estate released all of the Estate's claims against Aaroma. They fall within the agreement's broad definition of "Released Claims," which are "any and all liability, claims, actions, causes of action, demands, damages, costs, attorneys' fees, and/or expenses whatsoever, that are property of the Debtor's Estate arising out of, in connection with or relating to any matters occurring before the date of this Agreement, whether known or unknown, direct or derivative, in law or in equity." (R-1, Ex. E at 1-2.) The bankruptcy court's October 7, 2011 order approving that settlement agreement bars the Diacetyl Plaintiffs from pursuing their claims against Aaroma. Accordingly, the September 26 Order of the bankruptcy court denying Aaroma's motion to enforce the October 7, 2011 order and to compel dismissal of the Diacetyl Plaintiffs' state court actions against Aaroma must be reversed.

III. CONCLUSION

For the foregoing reasons, this Court reverses the bankruptcy court's September 26 Order. This matter will be remanded to the bankruptcy court for an order on Aaroma's motion to enforce the bankruptcy court's October 7, 2011 order that is consistent with this Opinion. An appropriate form of order will be filed.

s/Stanley R. Chesler
STANLEY R. CHESLER
United States District Judge

DATED: January 23, 2013

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

IN RE:	:	Case No. 11-27667
	:	(RG)
EMORAL, INC.,	:	
F/K/A POLAROME	:	Newark, New Jersey
INTERNATIONAL, Inc.,	:	September 18, 2012
	:	2:23 P.M.
Debtor.	:	
	:	

TRANSCRIPT OF DECISION BEFORE THE
HONORABLE ROSEMARY GAMBARDELLA
UNITED STATES BANKRUPTCY JUDGE

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Proceedings were digitally recorded, transcript produced by transcription.

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[3] **Decision**

THE COURT: *Emoral, Incorporated, formerly known as Polarome International.* This is in connection with a motion to enforce a court order approving settlement.

MR. DiFILIPPO: Paul DiFilippo – I'm sorry, Your Honor.

THE COURT: Go ahead.

MR. DiFILIPPO: Wollmuth, Maher & Duetsch, for the moving party, Aaroma Holdings.

MS. STAIANO: Patricia Staiano, Hellring, Lindeman, Goldstein & Siegal, for Benjamin Stanziale, Jr., Chapter 7 Trustee.

MR. MATTOON: Good afternoon, Your Honor. John Mattoon from Ford, Marrin, Esposito,

Witmeyer & Gleser, for Continental Insurance Company.

THE COURT: And on the phone I have an appearance. Counsel.

MR. CIMAK: Yes, good afternoon, Your Honor. J'Nan Kimak on behalf of Diacetyl claimants.

THE COURT: Thank you very much.

I am going to render an oral decision. The date had been adjourned from another date and I understand, just so we have it on the record, Mr. DiFilippo, you had E-mailed all the interested parties to advise of the rescheduling of this decision this afternoon?

MR. DiFILIPPO: Yes, Your Honor, someone actually [4] asked me by E-mail if it was rescheduled –

THE COURT: Yes.

MR. DiFILIPPO: – and I responded yes.

THE COURT: And there was I believe a court notice as well, and I believe we have the interested parties now here, and there will be a transcript available as necessary.

Counsel, you can hear me on the phone?

MS. KIMAK: Yes, thank you, Your Honor.

THE COURT: Thank you. Thank you, Counsel, for being on the phone on a short order.

Before the Court is a motion to enforce a court order approving settlement with the bankruptcy trustee and compelling dismissal of state court actions filed by Aaroma Holding, L.L.C., formerly known as Duane Street, L.L.C. An objection has been filed by certain persons who have filed successor liability claims against Aaroma in the New Jersey Superior Court, and I will refer to them and the Diacetyl plaintiffs.

A hearing was conducted on June 4, 2012 and the Court reserved decision at that time. The following constitutes this Court's finding of fact and conclusions of law.

The Debtor, Emoral, Incorporated, a New York corporation formerly known as Polarome International, Incorporated, was engaged in the business of supplying flavor and fragrance ingredients including food flavoring used to give butter and microwave popcorn among other foods a distinctive [5] buttery flavor and aroma. In or about 2006 Emoral began facing financial difficulties due to both a downturn in the market for its products, as well as potential liability arising from personal injury lawsuits in which it was named as defendant.

The plaintiffs in these suits included workers who, it is alleged, were exposed to a toxic chemical called Diacetyl. As of the petition dates there were approximately 17 pending Diacetyl suits in various states throughout the United States and in the United States District Court for the District of Ohio.

On or about August 13, 2010 Emoral, then known as Polarome, Incorporated, entered into an Asset Purchase Agreement to sell its assets to Aaroma, formerly known as Duane Street, L.L.C. The sale closed on September 28 of 2010. In the Asset Purchase Agreement Aaroma agreed to purchase Emoral's assets and certain "assumed liabilities." Certain assets and liabilities were expressly not assumed, the so-called excluded assets and excluded liabilities. Aaroma asserts that the assumed liabilities excluded any and all Diacetyl liabilities and the excluded assets barred Aaroma's purchase of any product containing Diacetyl or of any insurance policies protecting Polarome from Diacetyl claims.

Emoral's assets were sold under the Asset Purchase Agreement. The assets received included the trade name Polarome, Incorporated inventory, at least according to the [6] original motion to approve settlement, the inventory valued at approximately $9.96 million; accounts receivable valued at approximately $8.2 million; fixed assets valued at approximately $50,000 and approximately $58,000 in cash. The consideration for those assets included the assumption of Emoral's debt to Israel Discount Bank of approximately $10.2 million, of accounts payable totaling approximately $5.48 million, of accruals of approximately $209,000 and of severance payments to employees whose employment was terminated of approximately $500,000. Six payments totaling $106,666.66 was also made by Aaroma to Emoral, which are alleged to be in connection with Emoral's expenses. That's from the

trustee's original application in support of approval of the settlements.

Within the Asset Purchase Agreement, in addition to paying the purchase price, Aaroma agreed to assume the following liabilities as of the closing of the sale: Only trade payables and accrued expenses incurred in the ordinary course of operation of the seller's business, or which are of the type included as trade payables or accrued expenses in the financial statements other than amounts owed by the company to WOB Real Estate, Incorporated and amounts owed by the company to the shareholders or the company's affiliates. Provided, however, the amount of assumed payables shall not exceed $7 million, paid time off in respect of to the transferred employees and liabilities listed on Schedule 1.01(a)(l) [7] attached.

Assumed liabilities shall not include any Diacetyl claims or any costs incurred by the seller in defense of any Diacetyl claims and overdraft amounts in any of the company's bank accounts. That's the Asset Purchase Agreement at Section 1.01, "Assumed Liability." That's attached to Mr. DiFilippo's declaration filed herein.

The Asset Purchase Agreement also expressly states that, "The purchaser is assuming only the assumed liabilities and not assuming any excluded liabilities." See the Asset Purchase Agreement at Section 3.01 where excluded liabilities are defined as, "Each and every liability and obligation of the seller other than the assumed liabilities and shall include

but are not limited to any and all liabilities associated with the Diacetyl litigation or matters arising under the same set of operative facts; environmental liabilities, pension liabilities or mortgage liabilities." Again, see the Asset Purchase Agreement at Section 1.01.

On June 8, 2011 Emoral filed a petition for relief under Chapter 7 of the bankruptcy code. On or about June 10, 2011 Benjamin A. Stanziale, Jr. was appointed Chapter 7 Trustee. The trustee asserted claims against Aaroma including that the transfer of assets pursuant to the Asset Purchase Agreement was a fraudulent transfer.

On September 21, 2011 the trustee in Aaroma entered [8] into a settlement agreement to resolve all of the trustee's potential claims against Aaroma and thereafter filed a motion to approve settlements pursuant to *Federal Rule of Bankruptcy Procedure* 9019. That motion filed with this court.

At that time, the trustee had also entered into a separate settlement with WOB Real Estate, Incorporated. That settlement is not implicated by the present motion.

The settlement terms provided that Aaroma and the trustee on behalf of the estate and its creditors will give general releases to each other except that the trustee agrees that Aaroma shall have the right to file a general unsecured proof of claim against the debtor's estates and the deadline for filing such proof of claim will be extended to December 30, 2011. The Aaroma release provision provides, "The trustee on

behalf of himself, Emoral, Emoral's estate and their respective successors and assigns hereby remise waive, release, acquit and forever discharge Aaroma, its officers, directors, managers, equity holders, employees, attorneys, agents, affiliates . . . and predecessors-in-interest, the Aaroma releasees, of and from any liability, claims, actions, causes of action, demands, damages, costs, attorneys' fees and/or expenses whatsoever that are property of the debtor's estate arising out of, in connection with or related to any matters occurring before the date of this agreement whether known or unknown, direct or derivative, in law or in equity. That referred to as the [9] estate's released claims.

"The Aaroma releasees shall constitute intended third-party beneficiaries of this agreement and may independently enforce all or any portion of the rights created hereunder without in any way diminishing the rights of any party. The trustee covenants and agrees not to file, commence or assert any of the estate's releases claims against the Aaroma releasees after the effectiveness of the releases granted herein."

Further, the settlement terms provided that the order approving the settlement must, "Provide that holders of claims and equity interests in the bankruptcy case are forever barred from asserting the estate's release claims defined below against Aaroma and the Aaroma releasees and the court will retain jurisdiction to enforce the approval order and to determine whether any such claims brought against Aaroma by creditors or equity interest holders of

Emoral constitute the estate's released claims and are subject to the prohibition of such claims in the approval order."

As part of the same motion to approve settlements the Chapter 7 Trustee sought approval of a separate settlement agreement between himself and WOB Real Estate, Incorporated, formerly known as BRHEBA, Incorporated. WOB was a wholly owned subsidiary of Emoral formed by Emoral's then shareholders to acquire property at 200 Theodore Conrad Drive, Jersey City, New [10] Jersey, to be used by Emoral, according to the trustee, to shelter the property from Emoral's creditors and take advantage of certain favorable tax laws. By the settlement reached with the Chapter 7 Trustee the estate was to receive a portion of the proceeds of the sale of the aforementioned property to Home Essentials and Beyond, Incorporated. That settlement payment being stated as the sum of $450,000 less 50 percent of certain limited adjustments, if any, as defined in the agreement but no less than $250,000 and settlement of the trustee's claims against WOB Real Estate, Incorporated regarding alleged fraudulent transfer of WOB stock and the extension of bankruptcy proceedings to WOB Real Estate, Incorporated.

On September 30, 2011 a group of some 285 Diacetyl creditors represented by the law firms of Humphrey, Farrington & McClain, P.C. and Greenbaum, Rowe, Smith & Davis, L.L.P. who filed proofs of claims alleging lung injury filed an objection to the trustee's motion for entry of an order approving the

settlements. Two hundred eighty-five members of this group have filed proofs of claims many of which include copies of summons issued to Emoral, among multiple other defendants, in personal injury cases filed in the state courts throughout the United States.

In the objection the Diacetyl creditors argued in part that they disagreed with the trustee's valuation of the settlements and further argued that the settlements, both the [11] settlements, may prevent the estate from funding its obligations under its liability insurance policies and thus prevent the Diacetyl creditors from being compensated at all.

The Court, after a hearing conducted on October 7, 2011 approved both the Aaroma settlement agreement and the WOB Real Estate settlement agreement over the objections of the Diacetyl claimants, and on that same date, October 7, 2011 entered an order approving the settlements pursuant to *Federal Rule of Bankruptcy Procedure* 9019. The settlement order provides, "Holders of claims against the bankruptcy estate and equity interest holders in the debtor are forever barred from asserting the estate's release claims as defined in paragraph 2 of the settlement agreement between Aaroma and the trustee and the Court will retain jurisdiction to enforce this approval order and to determine whether any such claims brought against Aaroma by creditors of and equity interest holders in the debtor constitute the estate's released claims as defined in paragraph 2 of the settlement agreement between Aaroma and the trustee dated September 21, 2011 and are subject to

the prohibition against prosecution of such claims in this approval order.

"Nothing contained in this order or in the Aaroma settlement agreement will operate as a release of or a bar to prosecution of any claims held by any person which do not constitute "estate's released claims," as defined in the Aaroma [12] settlement agreement." And that's the settlement approval order at paragraph 3.

The parties agreed to add certain language in the settlement approval order to address certain concerns of the Diacetyl creditors. The language which reads, "Nothing contained in this order in the Aaroma settlement agreement will operate as a release of or a bar to prosecution of any claims held by any person which do not constitute estate's released claims as defined in the Aaroma settlement agreement, "To express the intended understanding of the parties and the court that the trustee would not be releasing claims that rightly belong not to the estate but to individual third parties."

On April 12, 2012 Aaroma filed the instant motion to enforce the court order approving the settlement with the bankruptcy trustee and compelling dismissal of certain state court actions arguing that the Diacetyl plaintiffs are barred and enjoined from asserting mere continuation successor liability claims against Aaroma in litigation pending in the New Jersey Superior Court because those mere continuation claims are property of Emoral's bankruptcy

estate that were released by the trustee in the settlement agreement.

In the motion Aaroma asserts that it was served with some 15 complaints alleging that Aaroma is a mere continuation of Emoral and therefore liable for the injuries allegedly caused by Emoral's sale of Diacetyl to their employees. In [13] those complaints these plaintiffs allege bodily injury from exposure to Diacetyl. These actions would seek to recover damages from Aaroma and other defendants for the injuries are, according to representations made by Aaroma's counsel and by a review of the complaints, essentially identical in their relevant provisions and seek recovery from Aaroma because as a mere continuation of Polarome it is liable for the acts and omissions and/or products sold by that entity under the theory of successor liability.

Aaroma states that it sent communications to counsel for the Diacetyl plaintiffs stating that Polarome ceased manufacturing and distributing Diacetyl in 2005. That Aaroma never manufactured, processed or sold products containing Diacetyl and that pursuant to the settlement order's provisions barring and enjoining persons from bringing such actions against Aaroma the state court action should not be permitted to go forward. Aaroma states that in response it received a letter from counsel for the Diacetyl plaintiffs which stated that the settlement agreement made between Aaroma Holding, L.L.C. and the bankruptcy trustee did not discharge any third-party claims against Aaroma. In fact, it is urged

in that letter, and I believe citing from a letter of Kenneth B. McClain to Paul R. DiFilippo dated February 15, 2012, the letter read, "The settlement agreement made between Aaroma Holding, L.L.C. and the bankruptcy trustee did not discharge [14] any third-party claims against Aaroma. In fact, the Court specifically stated that, "Nothing contained in this order or in the Aaroma settlement agreement will operate as a release of or as a bar to prosecution of any claims held by any person which do not constitute estate's release claims as defined." Further, Polarome stopped selling Diacetyl in 2005. Therefore, Aaroma is merely a continuation of Polarome International, Incorporated and is therefore liable." That's taken directly from the letter.

Aaroma argues that the Diacetyl plaintiffs are barred and enjoined from asserting mere continuation claims against Aaroma as a result of Aaroma's purchase of certain of Polarome's assets in August of 2010 by this Court's settlement approval order and the settlement agreement with the trustee because such claims are property of the estate and because Aaroma already settled all of the trustee and the estate's claims, and therefore any mere continuation claims have been released and may not be asserted by the Diacetyl plaintiffs. Aaroma argues that in order for creditors to have standing to bring individual claims there must be a particularized injury to the creditors not merely a generalized injury to the corporation that could be asserted by any of the creditors.

Here, it is argued by the movant that the Diacetyl plaintiffs' standing is via their status as creditors of Emoral and that no particular injury to the plaintiffs by Aaroma is [15] alleged. Aaroma asserts that a ruling or judgment that Aaroma is a mere continuation of Emoral would benefit all creditors of the estate because it would make third-party funds available for distribution to creditors. There citing among other cases *In Re: Keene Corporation,* 164 B.R. 844 (B.C.S.D.N.Y. 1994), *LaBabera v United Crane and Rigging Services,* 2010 U.S.D.Lex. 141765 (E.D.N.Y. Sept. 10, 2010), and *In Re: OODC, L.L.C.,* 321 B.R. 128 (B.C.D.Del. 2005).

Looking at Section 541 of the bankruptcy code and the applicable New Jersey and New York case law, Aaroma asserts that the trustee has the ability to settle derivative claims brought against the purchaser of the debtor's assets where the trustee seeks to settle only derivative claims brought by plaintiffs on behalf of the corporation. Aaroma points out that here the trustee specifically settled claims arising from the transfer of assets from Polarome to Aaroma; that the settlement agreement was approved by the Court over the objection of the Diacetyl claimants; that no appeal has been taken from the settlement approval order. Therefore, it argues that the Diacetyl plaintiffs continued prosecution of the state court actions constitutes a blatant violation of the settlement order. Aaroma, therefore, seeks an order permanently enjoining the Diacetyl plaintiffs from litigating the state court actions, compelling Aaroma's dismissal

with prejudice from the state court actions, barring institution of any claims based on [16] the allegation that Aaroma is a mere continuation of Polarome and any relief this Court deems appropriate.

On May 8, 2012 the Diacetyl plaintiffs filed opposition to Aaroma's motion to enforce arguing that while this Court has continuing jurisdiction to enforce the settlement agreement this court does not have jurisdiction to dismiss the Diacetyl plaintiffs' state court proceedings against Aaroma, and as well arguing that this Court has already ordered or ruled that the successor liability claims asserted here were not and could not be part of the estate's property and, therefore, the plaintiffs are not enjoined from pursing the referenced state court actions, and that Aaroma is liable under successor liability doctrine irrespective of the Asset Purchase Agreement and settlement approval order.

In the opposition, the Diacetyl plaintiffs argue that this Court has no jurisdiction over a third-party non-debtor's property, which it argues would properly describe the state court actions or causes of action. The Diacetyl plaintiffs assert that before determining whether the Court should enforce the settlement agreement it must first determine whether the matter presented is a core proceeding under 28 U.S.C. Section 157(b)(2) or a non-core related to proceeding under 28 U.S.C. Section 157(c)(1).

The Diacetyl plaintiffs urge that the Court lacks jurisdiction to hear and decide matters relating to

non-core, [17] non-estate personal claims of creditors. Citing among other cases *In Re: Raimondo,* 2007 W.L. 2248068 (B.C.D.N.J. 2007) and *In Re: Ennis,* 50 B.R. 119 (B.C.D.Nev. 1985).

Here, the Diacetyl plaintiffs argue that there is no impact on the estate if the state court actions are pursued because the state court actions are individual cases of personal claims against Aaroma, a non-debtor third party.

As well, the Diacetyl plaintiffs argue that the matters in Aaroma's motion to enforce have previously been argued and that the Court has already held that the claims at issue here are not part of Emoral's bankruptcy estate. Essentially, they argue that the issue has already been raised and acknowledged by parties and the Court during the October 7, 2011 hearing where the Diacetyl plaintiffs urge that parties discussed exactly what the trustee was releasing on behalf of himself and the estate. They cite specifically to the October 7, 2011 hearing transcript at page 40, lines 14-20 and pages 52 as well as page 145, and the particular citations are in the record to the transcript.

They asked the Court to consider that at that hearing counsel for Aaroma stated that Aaroma is getting a general release from the trustee of all of the estate's causes of action and the Diacetyl plaintiffs argue that the Court clarified its understanding of the releases of any future claims including alter ego claims asking, "If the claims are [18] asserted and the

plaintiffs in that action convince a court of competent jurisdiction that the claims are not within the releases and are not property of the estate the claims are not released under the order; and, they argue that counsel for Aaroma agreed with Court's understanding and added that the settlement agreement would reserve the right for this Court to determine in the first instance whether the claims had been released as the estate's causes of action.

The Diacetyl plaintiffs in essence argue that the discourse between the Court, trustee's counsel and Aaroma's counsel evidence the Court's prior consideration and determination of whether the trustee was releasing the particular claims at issue here. As further evidence of this alleged prior determination, the Diacetyl plaintiffs set forth their position that the trustee did not and does not have standing to bring these claims on behalf of the Diacetyl plaintiffs. They distinguish the Diacetyl actions from the released claims arguing that Aaroma is the successor-in-interest and mere continuation to Emoral and, therefore, liable for individual injuries caused to each person by products made or sold by Emoral. They argue that personal injury claims unlike those for fraudulent transfer or other types of common veil piercing actions are not a claim of Emoral against its successor-in-interest Aaroma but are personal in nature and, therefore, argue that the trustee cannot release personal [19] injury claims under successor liability theories because those claims are not owned by Emoral and, therefore, the trustee does not have

standing to assert them. In so arguing, they cite *RDM Holding v Continental Plastic,* a Michigan case, 762 N.W. 2d 529 (Mich. Ct. App. 2008), a case decided under Michigan law holding there that the plaintiff's successor liability claims and alter ego claims were not property of the estate.

The Diacetyl claimants argue that if the estate does not or did not own the Diacetyl plaintiffs' successor liability claims here that this Court does not have jurisdiction to decide whether the actions should be enjoined or whether Aaroma should be dismissed as a defendant in the state court actions. They also argue under New Jersey law that Aaroma should be liable for injuries suffered by the Diacetyl plaintiffs as a result of exposure to Diacetyl manufactured by Polarome, International because Aaroma is a mere continuation of Polarome.

In so arguing, they rely on the New Jersey State law theories of a successor liability which essentially state that when a company sells its assets to another, the acquiring company is liable for the debts and liabilities of the selling company if one of five exceptions is found; the successor expressly or impliedly assumes the predecessor's liabilities; there is an actual or defacto consolidation of the seller and purchaser; the purchasing company is a mere continuation of the [20] seller; the transaction is entered into fraudulently to escape liability; or, under the product line exception by purchasing a substantial part of the manufacturer's assets and continuing to market goods in the same product line a corporation

may be exposed to strict liability in tort for defects in the predecessor's products. There citing *LaFever v K.P. Hovnanian Enterprises,* 160 NJ 307 (1999). They also rely on the *Mickowski v Visa Track Worldwide,* 321 F.Supp 2d. 878 (N.D.Oh. 2003), arguing that courts have held that asset sales pursuant to Section 363 do not preclude creditors from bringing successor or liability claims, but see that case as well, noting and conditioning that holding absent an order of the bankruptcy court making the sale free and clear of unsecured claims.

On May 11, 2012 Aaroma filed a reply memorandum in further support answering the Diacetyl plaintiffs' arguments and further arguing that the central issue for this Court to decide is whether the Diacetyl plaintiffs' claims that Aaroma is liable for the debts of Emoral as the mere continuation of Emoral constituted property of the bankruptcy estate which the trustee released upon entering into the settlement agreement with Aaroma. Aaroma argues that if the claims belonged to the estate before the releases in the settlement agreement took effect the trustee released those claims pursuant to the language in the settlement agreement and the settlement [21] approval order. In order to determine to whom the claims belong, the estate or the individual Diacetyl plaintiffs, that is whether the trustee had standing to bring the mere continuation claims on behalf of the estate, the Court must look to whether based on state law the debtor had the right to bring such claims prior to the bankruptcy filing.

Aaroma asked the Court to look to both New Jersey and New York law and argues that under the laws of both states such claims are property of the estate and only the trustee has standing to bring such claims because corporations are allowed to pierce their own veils in order to recover for the benefit of all creditors, and therefore, individual creditors do not have the standing to bring mere continuation claims. There citing, among other cases, *Gosconsert v Hillyer,* 158 B.R. 24 (S.D.N.Y. 1993) applying New York law; *Tsai v Buildings by Jamie,* 230 B.R. 36 (B.C.D.N.J. 1998) applying New Jersey law.

Aaroma also relies on *National American Insurance Company v Ruppert Landscaping,* 187 F.3d 439 (4th Cir. 1999); *St. Paul Fire & Marine Insurance Company v Pepsico,* 884 F.2d 688 (2nd Cir. 1989); *Koch Refining v Farmers' Union Centennial Exchange,* 831 F.2d 1339 (7th Cir. 1987), arguing that the proper question for the Court is whether there is a particularized injury to the plaintiffs and if there is only a generalized injury then the claim is estate property. Aaroma further argues that the Diacetyl plaintiffs do not plead any [22] reason why the alleged injuries are personal to the plaintiffs rather than general to the entire creditor body.

With respect to the Diacetyl plaintiffs' argument that this Court does not have proper jurisdiction to grant the relief requested by the motion because the issues raised are non-core matters, Aaroma argues that the Court is not being asked to determine the merits of the claims but whether they belong to the

estate and were released. Aaroma contends that the Court is being asked to do something that it indisputably has the power to do and which it reserved jurisdiction to do in the settlement order, rule that the Diacetyl plaintiffs' mere continuation claims against Aaroma constitute property of the bankruptcy estate which were released by the trustee, and thereafter interpret and enforce the settlement order enjoining creditors from suing Aaroma on claims that were released by the trustee.

Aaroma argues that the Diacetyl plaintiffs actually have conceded that the Court can interpret and enforce its own orders and that is all that is being requested pursuant to the settlement approval order. Citing among other cases *Travelers Indemnity v Bailey,* 129 S.C. [sic] 2195 (2009), and *In Re: Howard,* 2012 W.L. 601124 (3rd Cir. Feb. 24, 2012).

With respect to the enforcement of the settlement agreement, Aaroma argues that if the Court determines that the claims asserted were property of the estate then it has the [23] power to order the Diacetyl plaintiffs as creditors of Emoral to dismiss those claims because the continued prosecution of those claims would violate the injunction in the settlement order. Citing as well, *Agnes v E.I. DuPont,* 2011 W.L. 1322043 (D.N.J. Mar. 31, 2011).

With respect to the plaintiffs' argument that the Court has already ruled on the issues because of the language in the settlement approval order, Aaroma argues that the quoted portions of the October 7, 2011

hearing transcript demonstrate only that the Court deferred a decision until one of Emoral's creditors asserted the estate's released claims. It argues that the Court did not specifically rule on the question presently before the Court, but rather just ordered that if any creditors hold a personal claim which does not constitute estate property then those claims would not be enjoined, and that, therefore, the Court has not previously decided whether the claims in the current state court actions belong to the estate or to the individual Diacetyl plaintiffs.

Finally, Aaroma argues that the Diacetyl plaintiffs conflated their personal injury claims which are personal to the individuals with their efforts to make Aaroma liable for the debts of Emoral, which is not a particularized injury and should according to Aaroma be a cause of action for the trustee on behalf of the estate and all of Emoral's creditors. Aaroma also contends that as to the merits of the successor liability [24] claims that New Jersey's product line exception does not apply because Aaroma did not continue to sell the same Diacetyl-containing products after the asset sale closed. There citing *Coleman v Fisher Price,* 954 F.Supp. 835 (D.N.J. 1996) and again, *LaFever v K.P. Hovnanian,* 160 NJ 307 (1999).

The Court held a hearing on this present motion on June 4 of 2012. At the hearing the parties reiterated their positions and identified issues upon which they believe the Court's determination of the motion to enforce settlement turns. Counsel for Aaroma argued that the provisions of the settlement approval

order provide that the Trustee cannot assert the estate's released claims against Aaroma and since it argues the successor liability claims are property of the estate those claims have been released by the trustee. Aaroma emphasized that a key term of the settlement was the agreement that the trustee would release all of the estate's claims against Aaroma and that the Court approve the settlement over the objection of the Diacetyl claimants including some of the Diacetyl plaintiffs here. Aaroma argued that the settlement approval order and its handwritten addendum contain not only the injunction preventing the trustee from asserting the estate's claims against Aaroma, but also provision for retention of jurisdiction by the Court to determine whether a claim brought against Aaroma falls within the injunction.

With respect to the jurisdictional arguments, counsel [25] for Aaroma pointed out that the Diacetyl plaintiffs again admit or concede in their opposition that this Court has jurisdiction to enforce its own order and to determine whether the claims asserted against Aaroma are covered by the injunction contained in the settlement approval order. The only remaining issue, it argued, is whether the Court has the jurisdiction to enter an injunction enjoining the plaintiffs from pursuing the state court actions. Aaroma characterized this issue as one of asking the Court to enforce its own order. In support, it drew the Court's attention to the case of *In Re: Semicrude, L.P.,* 2011 W.L. 4711891 (B.C.D.Del. 2011), as well as *Agnes v E.I. DuPont* and the Supreme Court case of

Travelers Indemnity Company v Bailey, 557 U.S. 137 (2009), arguing that *Travelers* in particular stands for the proposition that a court should enforce its own orders when that order is clear and unambiguous on its face.

Here, Aaroma argued the settlement approval order is clear and unambiguous on its face and restrains prosecution against Aaroma of claims released by the trustee. Further, it argued there can be no collateral attack on the Court's jurisdiction over the enforcement of the orders because the time to appeal the settlement order has long expired. Aaroma's counsel also argued that there was nothing in the transcript of the October 7, 2011 hearing that demonstrates this Court made a prior determination of whether the Diacetyl plaintiffs' claims [26] belong to the estate. Rather, it argued Aaroma reserved its rights on that issue until such time as claims were brought against it. Now, it asserted Aaroma is exercising those rights and seeks a determination by this Court that the Diacetyl plaintiffs' claims against it for successor liability as a mere continuation of Aaroma are property of the estate and as such have been released by the trustee under the settlement approval order.

Aaroma argues that the determination is whether the claims are property of the estate which Aaroma again states turns fundamentally on the fact that Aaroma's potential for liability is based solely on its dealings with the debtor. Because there has been no contact between Aaroma and the Diacetyl plaintiffs it

argued any personal injury claims are derivative of what happened between Aaroma and the debtor and depend entirely on the Diacetyl creditors' status as creditors of Emoral. Further, Aaroma, through its counsel, has argued that any success by the Diacetyl creditors in the state court actions will result in more assets to be distributed to all of the creditors of the debtor and, therefore, the claims would benefit all creditors making it by definition property of the estate. Aaroma likened the present claims to other alter ego and veil piercing claims, the latter of which are generally held to be property of the estate.

Counsel for the Diacetyl creditors at the hearing [27] responded that it agreed that the Court had the ability to enforce its own orders and determine what assets constituted assets of the estate. The majority of Diacetyl plaintiffs' arguments, however, were focused on the Court's determination of whether the successor liability claims herein belong to the estate or to the plaintiffs individually. The Diacetyl plaintiffs argued that the handwritten provisions in the settlement approval order was a result of extensive negotiation and that the plaintiffs agreement was based in part upon representations made by trustee's counsel to the Court during the October 7, 2011 hearing, that the trustee did not consider the claims being asserted by the Diacetyl plaintiffs to be property of the estate and, thus, could not be released.

Beyond the trustee counsel's representations, however, the Diacetyl plaintiffs also argued that successor liability claims against Aaroma based on

mere continuation are tied to the underlying personal claims each Diacetyl plaintiff had against the debtor. They argued that those claims cannot be asserted by the trustee because those claims would, but for the automatic stay, be rightly asserted against the debtor as a direct tort claim.

It was argued that while there was a common denominator, that being that plaintiffs were all exposed to Diacetyl, the injuries complained of which are the basis of the successor liability claims against Aaroma it was argued all [28] allege particularized individual injury. Such claims according to the plaintiffs cannot be asserted on behalf of all creditors. The Diacetyl creditors also argued that to the extent Aaroma would assert the October 7, 2011 order as a bar it should more properly be asserted as an affirmative defense in the state court actions.

In response, Aaroma's counsel argued that the representations of trustee's counsel at the October 7, 2011 hearing were more akin to a red herring and that the comments with respect to the subject claims were made in the midst of oral argument and, thus, would not change the substance and should not change the substance of the negotiated and court ordered settlement approval order. Aaroma also directed the Court to another point in the hearing transcript after the argument of the trustee's counsel, at which point Aaroma's counsel elucidated the point of the argument was that there was a release of all causes of action belonging to the estate. Aaroma also argued that the Court should look to whether the

injuries to the Diacetyl claimants were the result of conduct by Aaroma as successor when making its determination of whether the claims belong to the estate because the Diacetyl plaintiffs did not suffer those injuries as a result of Aaroma's conduct and, therefore, the claims are really derivative. Finally, the Diacetyl creditors argued that the motion to enforce the stay was not the proper procedural vehicle for determination of [29] whether those claims are assets of the estate but rather one might argue that they should be raised in the context of a declaratory judgment action in an adversary proceeding before this Court.

At the June 4, 2012 hearing trustee's counsel advised the Court that the trustee had not taken a position on the motion, as the trustee considered the issue to be a matter of law to be decided by the Court. Counsel for the trustee however noted that he considered the language in the settlement approval order to be clear, to the extent that if such claim was an estate's released claim then it is included within the injunction and if it is not an estate's released claim it is not included, pursuant to the handwritten addendum to this Court's settlement approval order.

In moving to the legal standards here, pursuant to 28 U.S.C. Section 157(a), United States District Courts may refer any and all proceedings arising under Title 11 or arising in or related to cases under Title 11 to the United States Bankruptcy Court for this district. The United States District Court for the District of New Jersey has referred such proceedings

to this court by a standing order of reference dated July 23, 1984.

The Third Circuit has determined that once such order is present the bankruptcy court has jurisdiction over four types of Title 11 matters; cases under Title 11, proceedings [30] arising under Title 11, proceedings arising in a case under Title 11 and proceedings related to a case under Title 11. See *In Re: Guild and Gallery Plus,* also referred to as *Torkelson v Maggio,* 72 F.3d 1171 (3rd Cir. 1996). See also the case of *In Re: Raimondo,* 2007 W.L. 2248068 (B.C.D.N.J. July 31 2007), decision of Bankruptcy Judge Steckroth discussing bankruptcy courts' jurisdiction generally.

A proceeding is a core proceeding if it invokes a substantive right provided under Title 11 or if it is a proceeding that by nature could only arise in the context of a bankruptcy case. See, *Marcus Hook Development Park,* 943 F.2d 261 (3rd Cir. 1991).

A proceeding is a non-core related to proceeding if its outcome could conceivably have any effect on the estate, including if the outcome could alter the debtor's rights, liabilities, options or freedom of action either positively or negatively and which in any way impacts upon the handling and administration of the bankruptcy estate. See, *In Re: Combustion Engineering,* 391 F.3d. 190 (3rd Cir. 2004).

If the action does not involve property of the estate then not only is it a non-core proceeding it is an unrelated matter completely beyond the bankruptcy court's subject matter jurisdiction. Again, see,

Guild and Gallery Plus, 72 F.3d at 1181. See also, *Stern v Marshall,* 131 S.C. [sic] 2594 (2011), for a general discussion of bankruptcy court jurisdiction.

[31] Bankruptcy courts plainly have jurisdiction to interpret and enforce their own prior orders. See, *Travelers Indemnity v Bailey,* 557 U.S. 137 (2009).

The Court also has independent discretionary authority to review, amend, correct or clarify its own orders under its inherent equitable powers. See, *Utica Leaseco, L.L.C. v GMI Land,* 2011 W.L. 2458065 (W.D.Pa. June 16, 2011). See also, *Rodriguez v EMC Mortgage,* 252 F.3d at 435 (5th Cir. 2011), There, the Court noting that the bankruptcy court has jurisdiction to interpret its own orders thereby giving it the power to entertain a motion for clarification.

The bankruptcy court's jurisdiction to issue an injunction against a third party depends upon whether the action to be enjoined would negatively impact the administration of the bankruptcy estate. See, *In Re: Ennis,* 50 B.R. 119 (B.C.D.Nev. 1985). Where the proceedings do not relate to or affect the administration of the bankruptcy estate the bankruptcy court does not have such jurisdiction. Again, see, *Ennis* at page 121 to 122.

As well, interpretation and enforcement of settlement agreements and accompanying releases is generally governed by state law. See, *Agnes v E.I. DuPont,* 2011 W.L. 1322043 (D.N.J. 2011), citing *Exclesior Insurance Company v Pennsbury Pain Center,* 975 F.Supp. 342 (D.N.J. 1996). Further, when the settlement

agreement specifies which state law governs federal [32] courts are generally bound by that specification. Again, see *Agnes v E.I. Dupont,* at page 5.

Further, the enforceability of contracts or settlement agreements are also governed by state contract law. Again, see, *Agnes v E.I. DuPont* citing *Met Life Insurance v Hayes Green,* 2008 W.L. 2119976 (D.N.J. May 2008).

In New Jersey courts have given weight to signed releases including broad, general releases in furtherance of the state's strong public policy in favor of enforcing settlements. Again, see, *Agnes v. E.I. DuPont,* at page 6, as well as the case of *Cooper v Borough of Winonah,* 977 F.Supp. 305 (D.N.J. 1997) and *Brundage v Estate of Carambio,* 951 Atl. 2d 947 (N.J. 2008).

Where there is a disagreement between the parties as to which state law applies the choice of law principles of the forum state determine applicable law. See, *Automated Salvage Transport v N.V. Koninklijke,* 1997 W.L. 576402 (D.N.J. Sept. 12, 1997). As that case noted, New Jersey's choice of law rule applies a flexible governmental interest standard which applies the law of the state with the greatest interest in resolving the issues in the underlying litigation. *Id*.

Generally, a business entity that purchases the assets of another entity is not automatically liable for the debts and liabilities of the seller company simply because the purchaser company has succeeded to the

ownership of the assets [33] of the seller. See, *LaFever v K.P. Hovnanian,* 734 Atl.2d. 290 (N. J. 1999).

Both New York and New Jersey have recognized four exceptions to that general rule. First, impliedly or expressly assuming liabilities of the seller company; second, a merger of the two entities; third, where the purchaser company was created as a mere continuation of the seller; and, fourth, where the sale was a fraudulent transaction to escape liability.

Additionally, New Jersey has adopted a product line exception under which if the purchaser acquires a substantial portion of the manufacturer's assets and continues to market goods in the same product line the purchaser may be exposed to strict liability in tort for the manufacturer's product. Here see generally again *LaFever v K.P. Hovnanian.*

The Third Circuit has noted that there is no substantial substantive difference in the law of New Jersey and the law of New York with respect to the mere continuation exception to the imposition of successor liability. See, *Marshak v Treadwell,* 595 F.3d 478, 490 at footnote 9 (3rd Cir. 2009) where the Court noted, "We note that the differences between the New Jersey and New York law on this subject are minimal and would not have affected the outcome." Here, compare *Bowen Engineering v Estate of Reeve,* 799 F.Supp. 467 (D.N.J. 1992) discussing factors influencing the mere successor [34] exception under New Jersey law with *Nettis v Levitt,* 241 F.3d 186 (2nd Cir. 2001). That latter case overruled on other grounds by

Slayon v American Express, 460 F.3d 215 (2nd Cir. 2006). There, the Second Circuit noted, "The parties agree that New Jersey and New York law are the same for these purposes."

In both states where a successor acquires substantially all the predecessor's operations the successor may be held to have assumed its predecessor's tort liabilities notwithstanding the traditional rule that a purchaser of corporate assets does not assume the seller's liabilities. See, *Nettis,* 241 F.3d at 193.

It is clear however that in order to determine whether the mere continuation or defacto merger exception applies courts have to examine the substance of the transaction to ascertain its purpose and true intent. See, *Bowen Engineering,* 799 F.Supp. 487. Therefore, courts look to several factors relevant to the mere continuation exception which are set forth in the case law, including continuity of ownership, management, personnel, physical assets, general business obligations, whether the predecessor ceased to exist after the successor was formed, among other factors that, again, are set out in the case law.

The trustee in bankruptcy is generally responsible for examining the estate's assets, marshaling the estate's [35] property, liquidating the assets and distributing it to creditors in accordance with the priorities delineated in 11 U.S.C. Section 726. See, again, *Buildings by Jamie,* 230 B.R. 36 (B.C.D.N.J. 1998).

In order to fulfill those duties a trustee may succeed to the existing rights of an actual unsecured creditor including bringing legal claims so long as the claims are property of the estate. Again, see the case cited. Property of the estate is defined as all legal or equitable interests of a debtor in property as of the commencement of the case under Section 541(a)(1). The Third Circuit has observed that the legal claims can be some of the most important and valuable assets that a bankruptcy estate has, particularly as respects the debtor's unsecured creditors and equity holders since liquidating such claims may be their only chance at significant recovery. See, *LaSala v Bordier,* 519 F.3d 121 (3rd Cir. 2008).

Thus, whether the trustee has standing to assert a claim on behalf of a debtor depends on whether the debtor has a legal or equitable interest in asserting that particular claim. See, *Buildings by Jamie,* 230 B.R. at 41. It has also been held that estate's property rights and interests are generally determined by state law. See, *Buttner v United States,* 440 U.S. 48 (1979). Whether an action is characterized as direct or derivative is correspondently, generally a question of state law. See, *In Re: Franklin Mutual Funds Fee Litigation,* 388 [36] F.Supp.2d 451 (D.N.J. 2005).

Courts in New Jersey have found that trustees have standing to bring alter ego claims on behalf of the estate against the debtor's principals. See, again, *Buildings by Jamie,* 230 B.R. at 43. There, the Court holding that since New Jersey allows corporations to pierce their own veils and since there is a general

rather than a particularized injury that could be brought by the debtor or any creditor the trustee properly has standing to bring the claim. See, also, *Farmore, Incorporated v Coopers & Lybrand,* 22 F.3d 1228 (3rd Cir. 1982).

Courts in New York along with the Second Circuit have concluded that as well under New York State law a trustee may bring an alter ego cause of action on behalf of a corporate debtor where the cause of action is an attempt to collect property of the estate for the benefit of all creditors and where there is no particularized injury to a specific creditor or creditors. See, *Gosconcert v Hillyer,* 158 B.R. 24 (S.D.N.Y. 1993. See also, *St. Paul Fire & Marine Insurance Company v Pepsico,* 884 F.2d 688 (2nd Cir. 1989).

In *St. Paul Fire & Marine Insurance* the Second Circuit found that where there was a cause of action that was a general one with no particularized injury arising from it which does not accrue to a plaintiff individually and may be brought by any creditor the cause of action properly belonged to the estate and the trustee should assert the claim. The *St. Paul* [37] court noted that this reason, "Extends to common claims against the debtor's alter ego or others who have misused the debtor's property in some fashion." Thus, however, if a cause of action could not be asserted by any creditor but is specific to a claimant personally the claim may be pursued by the claimant and the trustee does not have standing to pursue such a claim. See the discussion in *LaBarbera v United Crane Riggings,* 2010 U.S.D.Lex. 141765

(E.D.N.Y. 2010), there claiming that allowing the trustee to proceed with a generalized claim is consistent with the fundamental bankruptcy policy of equitable distribution among creditors.

In this matter, both Aaroma and the Diacetyl plaintiffs rely on both New Jersey and New York law to support their arguments with respect to the trustee's standing. See Aroma's reply memoranda. As well, see the opposition filed of the Diacetyl plaintiffs.

Aaroma asserts that under New Jersey's flexible governmental interest standard either the laws of New Jersey or New York, Emoral's state of incorporation, would apply. Citing *Las Vegas Sands Corporation v Ace Gaming,* 713 F.Supp.2d 427 (D.N.J. 2010).

Aaroma argues nonetheless that the relevant laws of the states on these issues are the same to the extent state law applies and so the Court need not decide the conflict at issue here. This Court agrees. As the Third Circuit noted in [38] *Marshak v Treadwell,* the differences between New York and New Jersey law are minimal with respect to the imposition of successor liability under the mere continuation exception. Again, see *Marshak* at 595 F.3d 490 at footnote 9. Further, both parties here rely on law from both states and as both New York and New Jersey law do not conflict the Court finds that it does not need to decide the conflicts of law issue here.

The Court will, however, next address the Court's jurisdiction over the subject motion. When analyzing this issue the case of *In Re: Semicrude, L.P.* is

instructive. That's cited at 2011 W.L. 4711891 (B.C.D.Del. 2011). In that case the Bankruptcy Court for the District of Delaware rejected plaintiff's arguments that there cannot be related to jurisdiction where the subject matter of the state court litigation was direct claims of a non-debtor against a non-debtor. In so holding, the Court noted that the subject motion to enjoin affected integral aspects of the bankruptcy process, there the interpretation and administration of the debtor's confirmed plan which established the bankruptcy court's jurisdiction to rule on the motion. Further, the Court held that the core/non-core determination turned on the subject matter of the motion before it rather than the subject matter of the litigation in state court, and since the determination of whether property including legal causes of action is within the bankruptcy estate pursuant to Section 541 of the bankruptcy [39] code is a core proceeding the motion to enjoin was also a core proceeding under 28 U.S.C. Section 157(b)(1) and properly before the bankruptcy court. And see specifically the discussion in the *Semicrude* case at pages 4 and 5.

Thus here, the question is not whether this Court has jurisdiction to issue an injunction to the parties that will compel the dismissal of Aaroma from the Diacetyl actions. Rather, the issue before the Court in the instant motion turns on a determination first of whether the Diacetyl claims here are property of the estate belonging to Emoral's estate or not. That determination is properly before this Court and as set forth in the *Semicrude* case the Court finds that it

would be a core proceeding. Further, pursuant to *Travelers* this Court has the authority to interpret its own orders. Here, the Court is being asked to interpret and enforce its own order approving the settlement agreement.

Having determined that the matter before the Court, that is the motion to compel, is a core proceeding the Court must determine whether the trustee released the Diacetyl creditors' claims as part of the Aaroma settlement. In order for the trustee to release claims on behalf of Emoral the claims must be property of the estate rather than causes of action belonging to estate creditors individually, here, the Diacetyl plaintiffs.

Preliminarily, the Court finds based on a review of [40] the October 7, 2011 transcript, the portions both cited herein and the entire transcript which is part of this record, that the Court made no definitive ruling or finding at that time as to whether the claims at issue here fell within the estate's released claims under the approved settlement but rather reserved for a future date when that issue would arise. That issue is now squarely raised in Aaroma's present motion.

In reviewing the case law on this subject, the majority of cases cited by the parties address alter ego claims which are applicable where one party had such control over a corporate entity that the corporate entity was essentially the alter ego of the original controlling party. Here, the underlying state court

litigation seeks to impose successor liability under the theory that Aaroma is a mere continuation of Emoral or Polarome.

The Court turns to whether the Diacetyl plaintiffs are attempting to assert causes of action for successor liability under a mere exception theory directly or derivatively on behalf of Emoral. Derivative liability is found where the shareholders are attempting to assert a claim for an injury suffered by all shareholders in proportion to their pro rata share of ownership that should more properly be brought by the corporation itself. Direct liability is found where there is particularized personal injury to the parties that is not in proportion to their pro rata ownership share.

[41] In reviewing the case law before it, the Court finds that the cases relied upon by Aaroma in its motion while instructive do not ultimately support its position. In *In Re: OODC, L.L.C. v Majestic Management,* 321 B.R. 128 (B.C.D.Del. 2005), the Court held that a Chapter 11 Trustee had standing to bring successor liability or alter ego actions on behalf of the unsecured creditors. A Chapter 11 Trustee brought an adversary proceeding to challenge the leveraged buyout by which the debtor acquired assets of the selling companies at allegedly inflated prices and assumed their debts. The moving defendants asserted that the trustee was pursuing causes of action belonging to the unsecured creditors of the selling companies which the trustee had no standing to assert.

The Court found that the trustee alleged facts that implicated all of the exceptions to the general rule against successor liability which would result in the debtor being liable to the unsecured creditors of the selling companies. The moving defendants asserted however that the claims of the unsecured creditors under successor liability theories were personal to them and could not be prosecuted by the trustee.

The Court noted that most courts have found that the trustee in bankruptcy has standing to bring successor liability or alter ego suits on behalf of all creditors and held that in order to bring an exclusive alter ego action under Section 541 a trustee's claim should (1) be a general claim that is common to [42] all creditors; and, (2) be allowed by state law. See the discussion at 32 B.R. at 136.

The Court went on to find that the allegations of the trustee were that all the unsecured creditors of the selling companies and the debtors were harmed by the LBO and that, therefore, it was a general claim common to all unsecured creditors and that no state law was cited that would bar such suit by the trustee or debtor on behalf of all creditors.

In *LaBarbera v United Crane and Riggings,* 2010 U.S.D.Lex. 141765 (E.D.N.Y. 2010), the Court distinguished between general and personal claims holding that an individual creditor with a general claim may not proceed before the bankruptcy trustee's work has come to a close. The Court distinguished between general and personal claims, "A cause of action is

personal if the claimant himself is harmed and no other claimant or creditor has an interest in the cause, but allegations that could be asserted by any creditor, therein action to enforce a judgment in favor of a pension trust fund on a theory of successor liability, could be brought by the trustee as a representative of all creditors." See, *LaBarbera,* 2010 U.S.D.Lex at 4.

The Court found that if the claim is general and not personal the trustee is the proper person to assert the claim. Again as well, see, *St. Paul Fire & Marine v Pepsico,* 884 F.2nd 668 (2nd Cir. 1989). There the Second Circuit noting, "If a [43] claim is a general one with no particularized injury resulting from it and if that claim could be brought by any creditor of the debtor the trustee is the proper person to assert the claim."

Also, in *In Re: Keene Corporation,* 164 B.R. 84 (B.C.S.D.N.Y. 1994), the Court held that only the trustee had standing to bring claims related to fraudulent transfers of assets and breach of fiduciary duty by debtor's officers and directors. The Chapter 11 debtor-in-possession sought declaratory and injunctive relief preventing continuation of approximately 1600 lawsuits challenging legality of the debtor's transfer of over $200 million in assets to its affiliates and the subsequent spinning off of some affiliates. The Court held there that only the trustee had standing to bring the claims related to fraudulent transfers of assets and breach of duty by debtor's officers and directors. The Court found that the class action

plaintiffs that invoked the remedy of successor liability alleged general injury such that those claims based upon successor liability should be asserted by the trustee on behalf of all creditors. See, *Keene* at 853.

In *Buildings by Jamie,* 230 B.R. 36 (B.C.D.N.J. 1998), the Court held that under New Jersey law the Chapter 7 Trustee of a closely held corporate debtor had standing to assert an alter ego action on behalf of the estate against non-debtor defendants asserting claims including fraudulent concealment, [44] fraudulent transfer and breach of fiduciary duty, but creditor co-plaintiffs lacked such standing. In that case the Court conducted a personal general claims analysis and noted, "The case law has distinguished alter ego claims that cause harm to the creditors generally from those which cause harm to a particular creditor or creditors." The Court concluded that the trustee is the proper party to assert an alter ego action on behalf of the estate but that the creditors with a general claim lack proper standing.

Ultimately, the Court finds here that the Diacetyl plaintiffs have alleged a particular injury not generalized injury suffered by all shareholders or creditors of Emoral. While successor liability has been imposed derivatively, this Court finds that the underlying injury that is alleged to be the basis and premise of the state court actions is personal harm by exposure to Diacetyl by the individual plaintiffs or harm to the individual plaintiffs. The Court finds that the personal injury claims cannot belong to the estate and thus

the trustee many not stand in the shoes of the unsecured creditors generally as to these claims.

In this matter, Emoral has not suffered any personal harm nor have the creditors as a general whole. The trustee, therefore, would be barred from asserting the state court claims because the Court finds that these claims are not property of the estate and the trustee has no standing to [45] assert these claims on behalf of Emoral or on behalf of an unsecured creditor of Emoral. Because the state court claims are not property of the estate the trustee may not release those claims on behalf of the estate. Thus, we find as the claims do not belong to the estate the Diacetyl plaintiffs' right to assert those claims is not affected by the settlement agreement nor the settlement approval order.

The Court makes clear in this ruling that while making this finding it makes no finding on the substantive law addressing the issue of successor liability as it's been outlined both in the briefs and in part as background in the Court's own opinion today. Since the Court finds that the trustee did not release the claims the Court will not enforce the settlement by issuing an injunction against the Diacetyl creditors as requested to dismiss Aaroma as a defendant in the state court actions. Any and all rights, remedies or defenses regarding the state court action are properly preserved to the parties in that action. The Court makes no ruling on a substantive basis again on that as it finds that its chore here has, in fact, been limited to a ruling on whether or not the state court

claims articulated in the Superior Court actions came within the estate's released claims. So that is my only ruling here.

Aaroma's motion to enforce the settlement, therefore, is denied and an order should be submitted in accordance with [46] this decision.

MALE VOICE: Thank you, Your Honor.

THE COURT: Thank you, Counsel.

MS. KIMAK: Thank you, Your Honor.

MS. STAINAO: Thank you, Your Honor.

THE COURT: Thank you for your patience in listening to this.

I want to reserve the right to edit the transcript and issue a written opinion in the event of an appeal or otherwise.

Thank you. Have a good day.

MS. STAIANO: Thank you, Your Honor.

THE COURT: Hopefully there's no tornado outside. My goodness.

You have a lot of patience to listen to that. Have a good evening.

MS. STAINAO: Have a good evening.

THE COURT: Have a good evening.

MS. STAIANO: Thank you, Your Honor.

THE COURT: Good to see you all.

(Adjourned 3:39 p.m)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-1467

In re: EMORAL, INC.,

Debtor

DIACETYL PLAINTIFFS,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 12-cv-07085)
District Judge: Honorable Stanley R. Chesler

Present: McKEE, *Chief Judge,* RENDELL,
AMBRO, FUENTES, SMITH, FISHER, CHAGARES,
JORDAN, HARDIMAN, GREENAWAY, Jr.,
VANASKIE, SHWARTZ, COWEN* and BARRY,*
Circuit Judges

SUR PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC

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* The votes of Senior Judges Cowen and Barry are limited to panel rehearing only.

The petition for rehearing en banc filed by Appellants Diacetyl Plaintiffs and Response filed by Appellee, Aaroma Holdings, having been submitted to the judges who participated in the decision of this Court, and to all the other available judges of the Court in regular active service, and a majority of the judges of the Court in regular active service not having voted for rehearing by the Court *en banc,* the petition for rehearing en banc is DENIED. Judges Rendell, Ambro, Jordan and Vanaskie would grant rehearing by the Court en banc. Judge Cowen would grant rehearing by the panel.

BY THE COURT:

s/ Maryanne Trump Barry
Circuit Judge

Dated: March 20, 2014
DWB/cc:

Paul Basta, Esq.
Liam P. Hardy, Esq.
Christopher Landau, Esq. Nancy Isaacson, Esq.
Kenneth B. McClain, Esq. Andrew Dash, Esq.
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