UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FRANCES YVONNE SCHULMAN,	:	
	:	
Plaintiff,	:	Civil Action No. 2:22-cv-01351
	:	
vs.	:	
	:	**Return date: June 17, 2024**
ZOETIS, INC. and ZOETIS REFERENCE LABS, LLC,	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff Frances Yvonne Schulman's ("Plaintiff") Partial Motion for Summary Judgment should be denied because the record evidence fails to support her claims under the Federal Equal Pay Act, 29 U.S.C. § 206(d) ("EPA"), New Jersey Equal Pay Act, N.J.S.A. § 10:5-12(t) ("NJEPA") and New Jersey Law Against Discrimination ("LAD"). Rather, the evidence supports summary judgment in favor of Defendants Zoetis, Inc. and Zoetis Reference Labs ("ZRL") (collectively, "Defendants").

Plaintiff's attempt to analogize her claims to those where an employer individually inquires about a person's "prior pay" and relies upon such information to set compensation must be rejected. The 'prior pay" a/k/a "pay inquiry ban" analysis does not apply to this matter. The evidence establishes ZRL[1] did not rely on prior pay. Rather, ZRL inherited salaries pursuant to multiples acquisitions and asset purchase agreements to achieve a legitimate, business objective. Simply stated, the concept of "prior pay" is a red herring, not applicable to the specific facts of this case, and legally and practically worlds apart from ***inheriting over 400 employees*** *and* their salaries pursuant to an acquisition or asset purchase, the purpose of which is entirely business related and gender neutral.

Setting aside the fact Plaintiff's primary argument is misplaced, Plaintiff also cannot otherwise establish claims under either the EPA or NJEPA. Indeed, while Plaintiff had the same job title as Drs. Eugene Ehrhart and Samuel Jennings (collectively, "the Comparators"), discovery has revealed the Comparators were performing additional responsibilities than Plaintiff, including receiving and reading more complex cases from the Ethos specialty hospitals. As such, Plaintiff has failed to establish she was performing "equal" or "substantially equal"

[1] As set forth herein, ZRL was Plaintiff's employer from January 1, 2021 through the date of her voluntary resignation on November 4, 2021. Zoetis, Inc. was never Plaintiff's employer. Zoetis, Inc. should, therefore, be dismissed from this action, with prejudice, as an improper party.

work to her two cherry-picked Comparators. Even so, Plaintiff selectively ignores the female legacy Ethos employees, all of whom were paid substantially more than her, and the legacy male ZNLabs employees, who were paid less than her and all the female legacy Ethos employees.

More importantly, Plaintiff fails to rebut the irrefutable fact that the wage disparity was entirely attributable to the acquisitions of Phoenix Central Laboratory for Veterinarians Health, Inc. ("Phoenix"), ZNLabs, LLC ("ZNLabs"), and the purchase of assets, including labs and employees, from Ethos Veterinary Health, LLC ("Ethos") and the Integration of all three into ZRL on January 1, 2021. The record evidence has established the compensation Ethos paid to its Pathologists, was significantly above market regardless of gender. In advance of and upon Integration, ZRL made the legitimate, business decision not to reduce any legacy salaries in order to further the business goals and to resolve any pay discrepancy through attrition. In fact, the evidence has established that, in 2021 and 2022, post-Integration, ZRL hired *seven* full-time female Pathologists, six with starting salaries higher than Plaintiff and commensurate with the male Pathologists hired during the same period. Further, ***no Pathologist has been hired by ZRL at anywhere near the inherited salaries of the Ethos Pathologists since Integration*** over three (3) years ago. Accordingly, Plaintiff's Partial Motion for Summary Judgment as to her EPA and NJEPA claims should be denied.[2]

Finally, Plaintiff's contention she should be awarded damages certain if successful on her EPA or NJEPA claims is unsupported in fact or law. Defendants respectfully submit, Plaintiff cannot establish liability for these causes of action and, therefore, cannot establish a right to damages. Moreover, Plaintiff improperly seeks damages for the time period prior to her (and Dr.

[2] Plaintiff also argues her claims for discrimination under the LAD related to the unequal pay should be granted as a matter of law. However, Plaintiff has failed to establish she is entitled to the protections of New Jersey law and, therefore, her motion for summary judgment on the NJEPA and LAD claims must be denied. Further, Plaintiff's LAD discrimination claim follows the same framework as her EPA claim and, therefore, her motion for summary judgment on this claim must be denied for the same reasons the motion must be denied as to the EPA claims.

Ehrhart's) employment with ZRL, i.e., before Plaintiff and the Comparators were colleagues. Finally, Plaintiff is precluded from recovering twice, under the EPA and NJEPA, for damages suffered as a result of the alleged disparity. For these reasons, as well as the reasons stated infra, Plaintiff's partial motion for summary judgment should be denied in its entirety.

LEGAL ARGUMENT[3]

POINT I

PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT ON ANY OF HER CLAIMS.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue of material fact as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden in a summary judgment motion is on the moving party to demonstrate the basis for its motion and to identify the portions of the record which show an absence of a genuine issue of material fact. Celotext Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party establishes the absence of a fact issue and that it is entitled to judgment as a matter of law, "the non-moving party must come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). A court "must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor" when deciding a summary judgment motion. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 278 (3d Cir. 2000).

[3] Defendants' Statement of Undisputed Material Facts ("SOMF"), filed and submitted pursuant to Rule 56 in connection with their moving brief, is incorporated into this opposition brief as if set forth herein. Further, Defendants' response to Plaintiff's Statement of Facts ("PSOF") is referred to as "DRSOF". To the extent Defendants rely upon any of Plaintiff's allegations, they are accepted as true solely for purposes of this motion.

Plaintiff is not entitled to summary judgment on any of her claims. Rather, Plaintiff's moving brief (as well as Defendants' motion for summary judgment) clearly establishes **Defendants** are entitled to summary judgment on each of Plaintiff's claims. Accordingly, this Court should deny Plaintiff's motion for summary judgment in its entirety, while granting Defendants' motion for summary judgment.

POINT II

PLAINTIFF FAILS TO ESTABLISH A VIOLATION OF THE EQUAL PAY ACT.

Plaintiff fails to point to any evidence to establish her claims under the EPA. Even if Plaintiff could establish a prima facie case, which she cannot, Defendants satisfy the fourth affirmative defense under the EPA: that any pay disparity was the result of "any other factor other than sex." Accordingly, Plaintiff's motion for summary judgment must be denied.[4]

Claims brought under the EPA follow a two-step burden shifting framework. See Stanziale v. Jargowsky, 200 F.3d 101, 107 (3d Cir. 2000). First, the employee must establish a prima facie case. If successful, the burden then shifts to the employer to establish one of the enumerated affirmative defenses, which include "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) **a differential based on any other factor other than sex** . . . ." 29 U.S.C. § 206(d) (emphasis added). Notably, "the standard for defeating an **employee's** motion for summary judgment on a claim under the [EPA] 'requires only that [the defendant] point to record evidence that creates a genuine issue of material fact ***as to whether factors other than sex explain the pay differential***."

[4] As explained herein, Plaintiff cannot establish her EPA or NJEPA claims and, as such, her request for damages certain as to those claims should be denied. However, should the Court find Plaintiff has established her EPA or NJEPA claim, Defendants maintain that, instead of granting Plaintiff's request for damages certain, the Court should hold a hearing regarding damages.

Cartee-Haring v. Cent. Bucks Sch. Dist., 2022 U.S. Dist. LEXIS 114120, at *14 (E.D. Pa. June 27, 2022) (internal citations omitted) (emphasis added).

A. Plaintiff Has Not Established A Prima Facie Case Under The EPA.

Plaintiff cannot establish a prima facie case under the EPA as she was not performing "equal work" as compared to the Comparators. See Stanziale, 200 F.3d at 107 (noting this requires a showing that "employees of the opposite sex were paid differently for performing 'equal work' – work of substantially equal skill, effort and responsibility under similar working conditions.") (citations omitted). To determine whether employees were performing equal work, the EPA is "more concerned with substance than title." Ingram v. Brink's, Inc., 414 F.3d 222, 232 (1st Cir. 2005) (citing (29 C.F.R. § 1620.17)).

Plaintiff argues she has established her prima facie case because Defendants have admitted "Drs. Schulman, Ehrhart, and Jennings' jobs required equal skill, effort, and responsibility, and were performed under similar working conditions[.]" (Plaintiff's Brief in support of motion for summary judgment, ("Pl.'s Br."), at pp. 10-11). In support of this contention, Plaintiff relies solely on the position statement submitted in response to Plaintiff's Charge of Discrimination, dual-filed in the New Hampshire Commission of Human Rights and the EEOC, without looking at the extensive discovery completed in this case, which clarifies the statements made in the position statement.[5] At the time the position statement was submitted, the parties did not have the benefit of discovery. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ("Rule 56 mandates the entry of summary judgment, **after adequate time for discovery** and upon motion . . .) (emphasis added). As such, rather than rely solely on the statements made in Defendants' position statement to the EEOC, the Court should examine the factual record, in

[5] Plaintiff requested a Right to Sue Letter from the EEOC, which the EEOC provided to Plaintiff on March 8, 2022 before any findings were made, effectively withdrawing her Charge brought in New Hampshire. (DRSOF, ¶95).

its entirety and in a light most favorable to Defendants. Indeed, Fed. R. Civ. P. 56(c) provides that summary judgment 'shall be rendered…if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'").

During discovery, multiple witnesses, ***including Plaintiff***, testified that while the Comparators had the same job title as Plaintiff, they had additional responsibilities when compared to Plaintiff. Dr. Ehrhart, for example, post-Integration, continued to work closely with "Ethos discovery," which focused on research. (Defendants' Statement of Undisputed Material Facts ("SOMF" at ¶ 165). Dr. Jennings continued to develop SOPs for Pathologists post-Integration, which Dr. Mark Ackermann, ZRL's former Director of Anatomic Pathology testified was "a big job." (SOMF, ¶166). Additionally, after Integration, the Comparators continued to receive the "multi-site bizarre" cases, which involved more complex diseases, from the Ethos Specialty Hospitals, in order to maintain continuity of care. (SOMF, ¶¶ 170-171). As such, while employed by ZRL, not only did the Comparators have more responsibility than Plaintiff, but the cases they were responsible for differed from Plaintiff and involved greater complexity. Plaintiff has submitted no evidence to contradict these facts. Therefore, Plaintiff has failed to establish her prima facie case under the EPA, and her motion for summary judgment as to this claim should be denied.

B. Plaintiff Has Failed To Establish Defendants Cannot Satisfy The Fourth Affirmative Defense – The Pay Disparity Was Caused By Any Other Factor Other Than Sex.

Even if Plaintiff could establish a prima facie case under the EPA, Defendants have introduced sufficient evidence to establish the pay disparity was caused by "any other factor other than sex," thereby satisfying the EPA's fourth affirmative defense. Plaintiff argues

Defendants cannot establish this defense because they cannot show that prior salary, the asserted–and erroneous–basis for the differential according to Plaintiff, isn't based on sex, or that the reason for the disparity is job-related. (Pl.'s Br., at p. 10). In her motion, Plaintiff erroneously argues "Zoetis"[6] 1) set her salary, the Comparators' salaries, and the salaries of the other legacy Ethos employees, and 2) considered prior pay. In reality, ***ZRL is not making a "prior pay" defense***, but instead maintains it has established that any wage disparity was the direct result of the acquisitions and Integration of the three labs. After the first pay equity review, conducted in Fall 2020 (before Integration), revealed any disparity resulting from Integration would be attributable to the pay practices of the acquired companies, and not gender, ZRL made the legitimate, business decision to "grandfather" the pre-Integration salaries for **all** legacy Ethos employees, both male and female, which has been recognized as a valid "factor other than sex." Accordingly, Plaintiff's motion for summary judgment should be denied.

1. Defendants Have Established The Pay Disparity Is Based On A Factor Other Than Sex.

Plaintiff incorrectly argues Defendants cannot establish the fourth affirmative defense because it ***relied*** on prior pay to ***set*** the salaries of Plaintiff, Dr. Ehrhart, and Dr. Jennings and "[p]rior pay is not a 'factor other than sex' because it incorporates and perpetuates pervasive patterns of sex discrimination in pay." (Pl.'s Br., at p. 12). However, Plaintiff conflates the concept of a "pay inquiry ban" with the business decision of acquiring companies and inheriting their employees and salaries.

In her moving papers, Plaintiff repeatedly misrepresents that she, as well as Drs. Ehrhart, Jennings, and Gardiner were ***hired*** by "Zoetis." (See PSOF, ¶11, 15-17, 82, 125). However, the record establishes Plaintiff was hired as a full-time Anatomic Pathologist by **ZNLabs**, and

[6] Throughout discovery and her moving papers, Plaintiff improperly conflates the various subsidiaries of Zoetis Inc., including Plaintiff's employer, Zoetis Reference Labs, by simply referring to "Zoetis."

specifically, Dr. David Gardiner, ZNLabs' Director of Anatomic Pathology, not "Zoetis," in September 2020. (SOMF, ¶53, 56, 58). Not only was it Dr. Gardiner's decision to hire Plaintiff, but he also set her annual salary of $125,000. (Id. at ¶47). Importantly, Plaintiff's starting salary with ZNLabs was among the highest of all ZNLabs' Pathologists,[7] second only to Dr. Gardiner, who co-owned the company. (Id. at ¶55). There is nothing in the record to support the proposition Dr. Gardiner inquired about Plaintiff's past salary, let alone relied on her past salary, in deciding what to offer.

Similarly, it is uncontested the Comparators were hired, and their starting salaries were set, by **Ethos** years before the asset purchase and subsequent Integration on January 1, 2021, prior to any relationship with Defendants. (Id. at ¶123, 124, 128). It was not until Integration that Plaintiff and the Comparators became colleagues at ZRL. (Id. at ¶63-65, 145). Plaintiff also continually misstates Defendants' asserted reason for the pay disparity by arguing ZRL ***relied*** on the Comparators' prior salaries when ***setting*** their salaries at ZRL. (Pl.'s Br., at p. 12). Again, Defendants are not asserting a "prior pay" defense and any attempt to equate relying on prior pay to set new salary with inheriting existing salaries pursuant to an asset purchase and/or acquisition is comparing apples to oranges. Here, any difference in pay between Plaintiff and her chosen "Comparators," was the direct result of the acquisitions and Integration of the three labs and the business decision to "grandfather" the compensation of the legacy employee regardless of gender. (DRSOF, at ¶7-24, 62-162, 173-187). The Comparators' salaries were not "set" by ZRL, they were inherited.

a. Congress' Intent In Enacting The EPA.

As stated succinctly in Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974), "Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a

[7] Another female ZNLabs Pathologist also earned $125,000 at the time of Plaintiff's hiring. (SOMF, ¶ 55).

serious and endemic problem of employment discrimination in private industry – the fact that the wage structure of 'many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." As Corning makes clear, the intent of the EPA was to eliminate disparities in pay because of gender, not to limit a business' ability to further their legitimate, non-gender-based interests. As explained in-depth below, the Integration of the three labs into ZRL does not perpetuate the historical discrimination in wages because of gender and, therefore, cannot be perceived as being within the reach of the EPA's restrictions.

b. Prior Pay And/Or Pay Inquiry Bans Are Not Relevant To The Facts In This Case.

Plaintiff cites to a number of cases addressing *reliance* on past salary to set compensation upon hire, i.e. prior pay, to support her erroneous contention that Defendants are asserting a "prior pay" defense. However, that is **not** what occurred here. ZRL did not make any of the pay-setting decisions for either of the Comparators or any other legacy Ethos employees and any attempt to argue otherwise is made in vain.

In her moving papers, Plaintiff relies heavily on Greater Phila. Chamber of Commerce v. City of Phila., 949 F.3d 116 (3d. Cir. 2020), Rizo v. Young, 950 F.3d 1217 (9th Cir. 2020), and Dubowsky v. Stern, Lavinthal, Norgaard & Daly, 922 F.Supp. 985 (D.N.J. 1996) to support her argument that "prior pay" cannot be used to establish the fourth affirmative defense under the EPA. Here, when Plaintiff refers to "prior pay," she is referring to "salary inquiry bans," which prohibit employers from asking job candidates for information about their salary history, then relying on this information in setting their new compensation. This practice did not occur here as the undisputed record evidence makes clear. As such, Plaintiff's reliance on case law prohibiting salary inquires is misguided and not relevant.

Greater Phila. Chamber of Commerce ("Greater Phila."), examined the Constitutionality of an ordinance enacted by the city of Philadelphia in 2017 to address the gender pay gap. Greater Phila., 949 F.3d at 121. The ordinance contained two provisions – "the ***inquiry*** provision," prohibiting an employer from asking about a prospective employee's wage history, and "the ***reliance*** provision," prohibiting an employer from ***relying*** on wage history at any point in the process of ***setting or negotiating*** a ***prospective*** employee's wage. Id. The Greater Philadelphia Chamber of Commerce filed suit, alleging First Amendment violations, which the United States Court of Appeals for the Third Circuit rejected. Id. at 122. In reaching this conclusion, the Court did not conduct an analysis as to how the ordinance related to the EPA. Id. at 133-157.[8] As such, Plaintiff's reliance on Greater Phila. is misplaced.

In Rizo, the plaintiff brought a claim under the EPA after discovering all her male colleagues were paid more than her. Rizo, 950 F.3d at 1220. The defendant moved for summary judgment arguing the disparity was the result of a Standard Operating Procedure ("SOP"), which it argued was a valid factor other than sex. However, the SOP ***relied entirely on prior pay***[9]. Id. The District Court denied the motion, finding the SOP "unavoidably conflicts with" the EPA. Id. at 1221. An *en banc* panel upheld the District Court and overruled Kouba v. Allstate Insurance Co., 691 F.2d 873 (9th Cir. 1982), holding "prior pay" (i.e., relying on past salary to set new salary at the time of hire) does not qualify as "any other factor other than sex". Id. at 1232.

Finally, Plaintiff erroneously argues Dubowsky, which held a prior pay defense was the prohibited market forces theory in disguise, is "the most analogous district court case in this

[8] Though the Court discusses the Rizo matter in its decision, this is nothing more than dicta used to further analyze whether the City met its burden of proof regarding the need to show a nexus between its substantial interest in eliminating the "real phenomenon of a racial and gender based wage gap and the need for the limitations that are at the heart of the Inquiry Provision," which is not at issue in the present matter. 949 F.3d at 148.

[9] In Rizo, the defendant, the Fresno County Office of Education calculated a new employee's pay by starting with the applicant's prior wages and increasing those wages by 5%. 950 F.3d at 1220.

circuit." (Pl.'s Br., at p. 15). In Dubowsky, the plaintiff brought a claim under the EPA and the LAD after discovering that, except for one male, she was the lowest paid associate at the defendant law firm. 922 F. Supp. 988-89. The defendant moved for summary judgment, arguing that "market forces drove the salaries paid to plaintiff and comparators." Id. at 993. In denying the defendant's motion, this Court rejected the market forces defense, holding it "may not be used as a disguise for employment decisions based on a belief that women generally come more cheaply than men. Therefore, while an employer may in general vary salaries based on a relative desire to hire a particular individual, this practice runs afoul of the EPA if that desire is ***motivated*** by the prospective employee's gender." Id. (emphasis added).

Here, Defendants are not asserting a prior pay defense as the undisputed record evidence establishes the following in direct contradiction to Plaintiff's argument:

- ZRL did not make any pay-setting decisions with reliance on prior pay (DRSOF, ¶47, 139)
- ZRL did not make any pay-setting decision for Dr. Ehrhart, Dr. Jennings, or any of the legacy Ethos employees acquired through the acquisitions and Integration (Id. at ¶47, 139; SOMF, at ¶123, 124, 128)
- ZRL's decision to not reduce the salaries of the legacy employees was applied uniformly, regardless of gender, ***following the conclusion of a pay equity review which found any pay disparity was the direct result of one company (Ethos) having a much higher pay practice***. (SOMF, at ¶151-162, 173-187)

It is further not disputed ZRL did not negotiate salaries for any of the acquired employees including, but not limited to, the Comparators. Rather the legacy Ethos employees, both male and female, were inherited by ZRL pursuant to the asset purchase agreement between Ethos and ZNLabs. (See Id. at ¶ 18-21). Since ZRL did not (and does not) rely on prior pay to set salaries (and Plaintiff points to no evidence to the contrary) this is not a "prior pay" case. Plaintiff's

attempt to convince this Court that any pay disparity was based on "Zoetis" relying on prior pay to set Pathologists' salaries is erroneous and not supported by the record.

Moreover, there is nothing in the record to support Plaintiff's theory she was paid less *because* of her gender. In fact, Dr. Gardiner, who hired Plaintiff both as a Pathology Contractor and full-time Pathologist at ZNLabs testified he ***did not*** offer Plaintiff her salary because she is a woman. (DRSOF, ¶25). An analysis of all Pathologists employed at ZNLabs at the time of Plaintiff's hiring establishes Plaintiff and another female Pathologist earned the second highest salaries behind only their supervisor, Dr. Gardiner. (SOMF, ¶55). It cannot be disputed that neither gender, nor reliance on prior pay, factored into Plaintiff's starting salary with ZNLabs.

By focusing solely on "prior pay" and citing only to those Circuits that have held "prior pay" is not a valid affirmative defense under the EPA,[10] Plaintiff ignores more analogous case law holding "grandfathering" of salaries pursuant to an acquisition or merger ***is*** a "factor other than sex," and, therefore, can be used to establish the EPA's fourth affirmative defense.

As set forth in Defendants' affirmative motion for summary judgment, in Arthur v. College of St. Benedict, two universities, one with a primarily male faculty and one with a primarily female faculty, merged. 174 F. Supp. 2d 968, 972-74 (D. Minn. 2001). Following the merger, the primary male faculty were permitted to retain certain benefits, but no faculty going forward would receive the same benefits. Id. at 973. The plaintiffs, female professors at St. Benedict, brought suit under the EPA. Id. In granting summary judgment for the defendant, the

[10] The Fourth, Seventh and Eighth Circuits hold prior pay is a valid affirmative defense under the EPA, while the Sixth, Tenth, and Eleventh Circuits hold prior pay, in connection with another factor, is a valid affirmative defense under the EPA. See, e.g., Spencer v. Va. State Univ., 919 F.3d 199, 206 (4th Cir. 2019); Wernsing v. Dept. of Human Services, 427 F.3d 466 (7th Cir. 2005); Taylor v. White, 321 F.3d 710 (8th Cir. 2003); Hicks v. Concorde Career College, 695 F. Supp. 2d 779 (W.D. Tenn. 2010), aff'd, 449 F. App'x 484 (6th Cir. 2011); Riser v. QEP Energy, 776 F.3d 1191 (10th Cir. 2015); Irbi v. Bittick, 44 F.3d 949 (11th Cir. 1995).

court held that "grandfathering" was a legitimate factor other than sex. Id. at 977-78.[11] Specifically, the court stated, "the difference in benefits between St. Ben's and St. John's ***has its origins in the different financial resources and approaches to employee compensation***." Id. (emphasis added).

Here, and analogous to the facts in Arthur, Plaintiff does not dispute, ZNLabs, Phoenix, and Ethos had vastly different approaches to employee compensation. (PSOF, ¶63). Former Head of Compensation at Zoetis Services, LLC, Catherine Matus confirmed, "[A[ll of the [P]athologists at Ethos were paid higher than the [P]athologists at the other companies (ZNLabs and Phoenix), which had nothing to do with race, ethnicity, or gender…***they were not part of the same company. It's separate companies, separate pay philosophies***." (SOMF, ¶91). While Plaintiff attempts to argue "Zoetis" hired her, the fact, as supported by the record, remains, she was hired by Dr. Gardiner, received a ZNLabs offer letter with ZNLabs benefits, and was paid by ZNLabs until Integration on January 1, 2021. (DRSOF, ¶36-50, 52-54, 64). Conversely, pursuant to the terms of the APA and Transaction Services Agreement ("TSA") between ZNLabs and Ethos, Ethos continued to pay its employees, including the Comparators, through January 1, 2021. (SOMF, ¶20-21, 65). As Plaintiff and the Comparators were not colleagues prior to Integration, there can be no dispute any pay disparity was the direct result of Integration and the resulting formation of ZRL. This fact was reinforced by Dr. Gardiner who testified ***integrating*** Pathologists from three different labs with three different compensation structures ***resulted*** in discrepancies across the board and "[O]ne could pick a number of pathologists and

[11] Other courts have found similarly. See, e.g., Russell v. Placeware, Inc., 2004 U.S. Dist. LEXIS 21465 (D. Or. Oct. 15, 2004) (granting employer summary judgment because gender-neutral policy to maintain pre-transfer salary levels was sufficient to establish affirmative defense to unequal pay claim); Wachter-Young v. Ohio Cas. Group, 236 F. Supp. 2d 1157 (D. Or. 2002) (***granting employer summary judgment where employer chose to grandfather salaries of legacy employees pursuant to a purchase agreement with the legacy company, finding this was a legitimate business reason for the disparity that was unrelated to sex***); Pettiford v. N.C. HHS, 228 F. Supp. 2d 677 (M.D.N.C. 2002) (granting employer summary judgment where male employee's higher salary was due to the grandfathering of his pre-transfer salary).

compare them to other pathologists and see a discrepancy." (SOMF, ¶134-135). Moreover, in preparation for Integration, Ms. Matus and Associate Director of Compensation, Phil Hoertz, analyzed the pay of the colleagues acquired from Ethos, ZNLabs, and Phoenix and conducted a pay equity review in October 2020 "to ensure no significant differences related to gender or racial/ethnic diversity." (SOMF, ¶70, 84-87). The pay equity review revealed what has been indisputable since the inception of this case: "[i]n comparison to the ZN(Labs) and Phoenix Labs, the pathologists at Ethos are paid significantly higher" and any discrepancies that may result from Integration had nothing to do with race, ethnicity, or gender, but rather were the result of Ethos paying significantly higher salaries than ZNLabs and Phoenix. (Id., ¶87, 91). Mr. Hoertz testified, "[w]e reviewed everything that we received from the Reference Labs and we found that the one company paid higher…we didn't see it as a gender [issue], but we saw it as a pay practice of the company." (Id., ¶90). Even Dr. Gardiner, who was involved in ZNLabs' due diligence of Ethos in 2019, advised Plaintiff in March 2021, "***all*** Ethos pathologists were on a much, much higher pay scale than ZNLabs and Phoenix folks." (Id., ¶146). Simply stated, **all** ZNLabs' legacy Pathologists, male and female, were paid less than **all** Ethos legacy Pathologists, male and female.

In Hubers v. Gannett Co., the Court found an employer's decision to maintain a male employee's higher salary following a job transfer from a subsidiary of the defendant did not violate the EPA, even though it resulted in a pay disparity with a female colleague performing the same work. 2019 U.S. Dist. LEXIS 38725 (N.D. Ill. March 11, 2019). In granting the defendant's motion for summary judgment, the court emphasized different decision makers were involved in setting the plaintiff's salary (at the defendant company) as well as the salary of the male employee (at the subsidiary), and ***that base salaries for all employees, both male and***

female, at the subsidiary company were generally higher. Id. at *10-11. Further, and analogous to the case at bar, the evidence established the defendant's decision not to lower the male employee's salary was based on the company's need to retain him as an employee, not because of gender. Id. Finally, the court found the defendant had no obligation to increase the female employee's salary to match that of the male employee, as Plaintiff argues here. Id.

Just as in Arthur and Hubers, the record evidence here establishes the pay disparity upon which Plaintiff relies, was based on a factor other than sex – specifically, the acquisitions and Integration. Plaintiff's fruitless attempt to argue reliance on "prior pay" is simply not applicable here. Plaintiff has also failed to point to any evidence to suggest the pay practices employed by the three acquired entities, prior to their acquisition, were discriminatory or in any way resulted in a pay disparity. Arguing to the contrary is a futile attempt to create an issue of fact that does not exist. As stated in Defendants' affirmative motion for summary judgment, prior to Zoetis Lab Holdings' ("ZLH")[12] acquisition of ZNLabs, ZNLabs, in 2019, sought to purchase certain Ethos assets, including their Pathologists. (SOMF, ¶7). As part of its proposed purchase, ZNLabs conducted a due diligence review of the Ethos assets. (Id., ¶ 11-12). Following ZLH's acquisition of ZNLabs in November 2019, and prior to the February 2020 asset purchase, ZNLabs advised ZLH that the Ethos salaries – all of them – were "outliers." (Id., ¶ 14-15). However, ZNLabs' (Plaintiff's employer at the time) due diligence of Ethos did not show pay inequity on the basis of gender. (Id., ¶15; DRSOF, ¶57).

These uncontested facts confirm any pay disparity only exists when you compare a Pathologist from ZNLabs and/or Phoenix with an Ethos Pathologist, regardless of gender. As such, the decision to "grandfather" the salaries of the Ethos legacy employees, male or female,

[12] As previously stated in Defendants' affirmative Statement of Undisputed Material Facts, ZRL was previously ZLH. (SOMF, ¶1).

which were determined, set, and implemented by Ethos prior to Integration, qualifies as a factor other than sex for any resulting pay disparity following Integration. There can be no dispute the decision to enter the field of laboratory diagnostic services was a ***business decision*** and it is well-settled that Courts should not act as "super-personnel departments" or otherwise question the legitimate business decisions of a company. See Taylor v. White, 321 F.3d 710, 719 (8th Cir. 2003); Russell, 2004 U.S. Dist. LEXIS 21465, at *27. As Defendants' legitimate business decision to "grandfather" the salaries of Ethos employees satisfies the fourth affirmative defense under the EPA, Plaintiff's motion for summary judgment as to this claim should be denied.

2. Job-relatedness Is Not A Factor Under The EPA's Fourth Affirmative Defense.

Plaintiff argues Defendants cannot show the reason for the disparity is "job-related," and, therefore, cannot establish its affirmative defense. (Pl.'s Br., at pp. 16-20). Specifically, Plaintiff relies on Rizo and the complicated "canons" of *ejsudem general* and *noscitur a sociis* to argue that because the first three affirmative defenses require pay to be "determined through job-related systems", the fourth affirmative defense also contains a job-related requirement. (Pl.'s Br., at pp. 16-20). This interpretation of the EPA is contrary to the express language of the statute and should not be followed.

Where a statute's text is "unambiguous and expresses [Congress'] intent with sufficient precision, [the Court] need not look further." Allen v. LaSalle Bank, 629 F.3d 364, 367 (3d Cir. 2011). Here, there is no ambiguity in the express language of the EPA and, as such, the Court need not engage in further analysis of statutory construction with respect to the fourth affirmative defense as Plaintiff suggests. Moreover, Courts have been hesitant to interpret the EPA as to limit a company's legitimate business activities, further evidencing that the fourth affirmative defense is properly interpreted as a true "catch all." See Eisenhauer v. Culinary Inst. of Am., 84

F.4th 507, 519 (2d Cir. 2023) ("As the Supreme Court has described it, the exception for 'any other factor other than sex' is a '*catch-all* exception': it catches ***all*** remaining factors that are not based on sex.") (emphasis added) (citing Corning Glass, 417 U.S. at 204)).

Regardless, even if the fourth affirmative defense required the factor that caused the pay disparity to be job-related, it cannot logically be argued that the pay disparity here is not job-related. As stated repeatedly, the sole reason for any disparity was the acquisition and Integration of the three labs, i.e., but for Integration, there is no disparity. (DRSOF, at ¶47; SOMF ¶145). The express goal of the Integration was for ZRL to enter the field of laboratory diagnostic services. (SOMF, ¶72). To do so, labs and manpower were needed. As such, a business decision was made. (Id. at ¶185). Put simply, and as Plaintiff made clear in her testimony, but for the acquisition and Integration of Ethos by ZRL, Drs. Jennings and Ehrhart would not have been employed by ZRL and, therefore, no disparity would have existed. (Id. at ¶145; DRSOF, ¶47). Since the Comparator's ***jobs*** at ZRL only existed as a result of the asset purchase of Ethos, to argue Defendants' asserted reason for the disparity – Integration – is not "job-related" defies logic.

3. The Integration Accounts For The Entire Wage Disparity.

Plaintiff's contention that Defendants cannot establish that "sex provided no part of the basis for the wage differential" is not supported in fact or law. See Balmer v. HCA, Inc., 423 F.3d 606, 612 (6th Cir. 2005) (holding that in order to establish the fourth affirmative defense under the EPA, "the employer must prove that 'sex provides *no part* of the basis for the wage differential'") (citing Timmer, 104 F.3d at 844). Specifically, Plaintiff argues Defendants cannot explain "why it paid Dr. Schulman *such* a low salary (other than to 'save the company' money), when it hired less-experienced pathologists after her at higher salaries". (Pl.'s Br., at pp. 20-21). Plaintiff's argument not only misconstrues the facts, but it only tells part of the story.

Defendants have introduced sufficient evidence to establish gender played no part in the wage differential. At the time of Integration, the decision was made to not reduce legacy Ethos salaries, regardless of gender. (DRSOF, ¶129-140). Therefore, Defendants have established "sex provided no part of the basis for the wage differential" since the decision to "grandfather" was gender neutral. Plaintiff's contention that Integration does not explain the entire disparity because ZRL hired "less-experienced male pathologists at higher salaries" ignores the female Pathologists hired at ZRL after Integration and ZRL's efforts to determine the reason for the disparity and business decision on how to address it: attrition. (DRSOF, ¶83, 90, 92).

In July 2021, Dr. Mark Ackermann was hired by ZRL as Director of Anatomic Pathology. (SOMF, ¶113). In line with ZRL's efforts to address pay through attrition, Dr. Ackermann sought to increase Pathologist salaries, with the exception of legacy Ethos. (Id., ¶71). To do so, Dr. Ackermann sought to *nominally* increase *starting* salaries of newly hired Pathologists – male and female. (DRSOF, ¶83, 90, 92). While Dr. Ackermann hired two male Pathologists at higher starting salaries than Plaintiff – and all other legacy ZNLabs Pathologists - Plaintiff ignores that during Dr. Ackermann's tenure with ZRL, *five* female Pathologists were hired, four with starting salaries higher than Plaintiff and commensurate with the males hired during the same period. (Id., ¶83, 92). After Dr. Ackermann's resignation, ZRL hired a female Pathologist at a starting salary of $145,000 on February 14, 2022. (Id., ¶92). Two weeks later, ZRL hired a male Pathologist at the **same** starting salary. (Id.). Moreover, on September 13, 2021, ZRL hired a male and female Pathologist. (Id.). The male's starting salary was $118,000. (Id.). The female's starting salary was $130,000. (Id.). Notably, and significantly, ***no one has been hired anywhere near the inherited salaries of Ethos Pathologists since Integration***. (Id.).

Importantly, Plaintiff fails to reference the progressively increased salaries were not limited to new hires. (Id., ¶90). It was always the intent of ZRL to rectify the difference in pay resulting from acquisition and Integration, through time and attrition. (SOMF, ¶133). ZRL's compensation structure, post-Integration, includes a yearly bonus based on company, division, and individual performance. (Id., ¶48). However, because the legacy employees would not be on ZRL benefits until January 2021 (post-Integration), they were not bonus eligible until Spring 2022. (Id.). Plaintiff has affirmed this bonus was going to be "sizable." (Id., ¶101). However, Plaintiff resigned effective November 4, 2021 and, consequently, was not employed when these bonuses were paid. (Id., ¶101, 188-89). As stated, Plaintiff and another female legacy ZNLabs Pathologist each earned $125,000 pre-Integration, second only to Dr. Gardiner. (Id., ¶55). That female Pathologist, as of January 1, 2023, earns $155,250 at ZRL. (DRSOF, ¶90). Another female legacy ZNLabs Pathologist who earned $115,000 pre-Integration earns $160,160 as of January 1, 2023. (Id.). Contrarily, a male legacy ZNLabs pathologist who earned $120,360 pre-Integration earns $136,677 as of January 1, 2023. (Id.). Had she not resigned, Plaintiff's salary would be commensurate with her peers, male and female.

Therefore, Dr. Ackermann did, in fact, seek to increase Pathologists' salaries at ZRL. Plaintiff, however, ignores that Dr. Ackermann also made clear at his deposition that, during his six months as ZRL's Director of Anatomic Pathology, he did not believe there was a pay discrepancy amongst the Pathologists due to gender at any time. (Id., ¶187). Defendants have, therefore, clearly established any wage disparity was based on a factor other than sex, the fourth affirmative defense under the EPA. Accordingly, Plaintiff's motion for summary judgment should be denied with respect to this claim.

POINT III

PLAINTIFF'S CLAIMS UNDER NEW JERSEY'S DIANE B. ALLEN EQUAL PAY ACT FAIL AS A MATTER OF LAW.

Plaintiff has failed to establish her claims under the NJEPA. Specifically, and contrary to Plaintiff's argument, New Hampshire law, not New Jersey law, should apply to the claims in this matter. However, even if New Jersey does apply, Plaintiff has failed to establish her claim under the NJEPA as she did not perform substantially similar work to the Comparators. Moreover, Defendants are able to establish the second affirmative defense under the NJEPA. Accordingly, the Court should dismiss Plaintiff's motion with respect to her NJEPA claim.

A. New Hampshire Law, Not New Jersey Law, Applies To Plaintiff's Claims.

Plaintiff was at all times employed and paid in New Hampshire pursuant to New Hampshire tax and employment laws. Thus, New Hampshire has the most significant relationship to Plaintiff's claims. It is well-established the LAD does not extend to employment that is exclusively based outside of New Jersey. See, e.g., Seibert v. Quest Diagnostics, Inc., 2012 U.S. Dist. LEXIS 42708, at *15 (D.N.J. March 28, 2012) ("[T]he opinions are explicit that **the []LAD does not apply to the discrimination claims of . . . (3) non-residents of New Jersey who work outside of the state for companies headquartered in New Jersey** . . . ").[13] (emphasis added). Contrary to Plaintiff's assertion, this Court's decision on Defendants' motion to dismiss only found–without the benefit of a complete factual record–New Jersey law *could* apply, not that it *should* apply. Schulman v. Zoetis, Inc., 2023 U.S. Dist. LEXIS 121702 (D.N.J. July 14, 2023). Given the record evidence, the answer to this question is decidedly no.

[13] The interpretive guidance regarding the NJEPA issued by the New Jersey Division on Civil Rights unequivocally states the NJEPA **does not** apply to out-of-state employees. See DCR, Guidance on the Diane B. Allen Equal Pay Act, March 2020, available at https://www.nj.gov/lps/dcr/downloads/DCR-Equal-Pay-Guidance-3.2.20.pdf (last visited May 14, 2024) (""[e]mployees can bring a claim under the [NJEPA] **as long as they have a primary place of work in New Jersey**.") (emphasis added).

Here, because there is a conflict between the laws of New Hampshire and New Jersey, which Plaintiff concedes, see Pl.'s Br., at pp. 27, a choice of law analysis reviewing the relevant factors under Section 6, 145, and 146 of the Second Restatement of Conflict of Laws is required to determine which state has the "greater interest" in governing – or, stated differently, the most significant relationship to– the specific issue in the litigation. P.V. ex Rel. T.V. v. Camp Jaycee, 197 N.J. 132, 159 (2008) (quoting Fu v. Fu, 160 N.J. 108, 118 (1999)).

A choice of law analysis begins with section 146 of the Second Restatement "and the presumption that the law of the state where the injury occurred applies." In re Accutane, 235 N.J. at 259 (citations omitted). Here, Plaintiff, in a footnote, states consideration of "where the injury occurred" is neutral because the "place of injury" is not "easily identified." (See Pl.'s Br., at p. 27, n. 8). This is not true, as the injury *is* easily identified. It is Plaintiff's receipt of her paycheck, which she asserts is discriminatory and in violation of the EPA and NJEPA and forms the basis of her claims. Notably, Plaintiff's damages calculation includes the difference in her pay from the time she was employed by ZNLabs in 2020 through her resignation from ZRL in 2021, confirming the bases of her claims are her paychecks, not the decision not to increase her– or anyone else's–salary. (PSOF, ¶99). Plaintiff further argues in her moving papers Defendants cannot explain "why it paid Dr. Schulman *such* a low (starting) salary" as evidence of Defendants' discriminatory actions. (Pl.'s Br. at p. 20-21). Clearly, Plaintiff believes her alleged EPA and NJEPA claims originated when her starting salary was set by Dr. Gardiner. As such, the "injury" in question is Plaintiff's receipt of pay, which occurred exclusively in New Hampshire, subject to New Hampshire tax withholdings. (SOMF, ¶59).

Plaintiff further argues "the undisputed facts show that Zoetis' essential conduct in this case was overwhelmingly centered in New Jersey–and did not involve New Hampshire, Dr.

Schulman's home state, at all." (Pl.'s Br. at p. 26). Plaintiff's argument is without merit. First, no ZRL employees were involved in "putting together Dr. Schulman's salary offer." In fact, it is uncontested Plaintiff was hired at ZNLabs by Dr. Gardiner, who lives and works in Utah. (SOMF, ¶31, 34). While Dr. Gardiner discussed Plaintiff's starting salary with Ms. Winder, Dr. Gardiner testified the decision to hire Plaintiff, as well as to set her salary was ultimately his decision. (Id. at ¶36-57). Accordingly, the Section 146 factors weigh in favor of applying New Hampshire law.

The presumption the Court should apply the law of the state where the injury occurred created by Section 146 may only be overcome if "some other state has a more significant relationship with the part[y] and the occurrence based on an assessment of each state's contacts' viewed through the prism of section 145 . . . and section 6." In re Accutane Litig., 235 N.J. 229, 259 (2018) (citations omitted). Accordingly, after the Court determines the state where the injury occurs, it must analyze the Section 6 and 145 factors.

The Section 6 factors favor application of New Hampshire Law. Indeed, in incorrectly asserting these factors weigh in favor of application of New Jersey law, Plaintiff's arguments that ZRL is headquartered in New Jersey; that certain executives were based in New Jersey; and the job posting for an Anatomic Pathologist position, which was admittedly not the posting for Plaintiff's position, but a subsequent replacement position, listed the primary location as "US NJ Remote," are misplaced and ignore the fact that Plaintiff's **daily employment and responsibilities had no connection to New Jersey whatsoever. In fact, Plaintiff had not been to New Jersey during the entirety of her employment with ZNLabs and ZRL**. (Pl.'s Br., at pp. 29-30). Indeed, the facts establish:

- Prior to commencing full-time employment with ZNLabs, Plaintiff completed required paperwork noting she worked and lived in New Hampshire. (SOMF, ¶59)

- Plaintiff received her paychecks and relevant tax documents from ZNLabs and ZRL at her New Hampshire address, and her pay was subject to tax withholdings consistent with New Hampshire law. (Id.). During her employment, Plaintiff reported to Dr. Gardiner and Dr. Mark Ackermann, who was based in Iowa (Id., ¶113)[14]
- ZRL operated primary labs in Louisville, Kentucky and Mukilteo, Washington, with its central lab in Kentucky. (Id., ¶2, 107; DRSOF, ¶112). ZRL also operated locations in California, Colorado, Florida, Illinois, Kentucky, Massachusetts, Texas, Utah and Washington. (SOMF, ¶105)
- The labs (in Kentucky and Washington) would receive samples from Clinicians from across the United States. Once processed by the labs, the samples would be scanned, and the scanned images would be posted to the internet where Plaintiff accessed and reviewed them (SOMF, ¶108)
- Plaintiff did not receive any cases or samples to review from a ZRL location in New Jersey at any time during her employment and, to the best of her knowledge, ZRL does not have any labs in New Jersey (SOMF, ¶110)
- While Plaintiff's internal complaint regarding pay disparity was initially raised to Dr. Goldstein, her primary contact with respect to the complaint was Ms. Williams, who was based in Virginia. Ms. Williams further communicated the companies' decision with respect to the complaint to Plaintiff (SOMF, ¶150, 185)
- The compensation team performing the pay equity review both prior to Integration was comprised of Ms. Matus, who was based in New Jersey, and Mr. Hoertz, who was based in Pennsylvania. Further, Mr. Hoertz was the primary contact on the compensation team for the pay equity review following Integration. (SOMF, ¶39, 69, 75, 152-54).

These facts underscore Plaintiff had no significant connection to New Jersey during the course of her employment with ZNLabs, and subsequently ZRL, when she worked exclusively in New Hampshire. Plaintiff's public policy argument that "the policies and interests of this state and other jurisdictions are fairly accommodated by applying" New Jersey law, instead of New Hampshire law, to Plaintiff's claims ignores relevant case law. See Diana v. AEX Group, 2011 U.S. Dist. LEXIS 100928, at *7 (D.N.J. Sept. 7, 2011) (rejecting public policy arguments urging application of the LAD to out-of-state employees, reasoning that "***the law of the state of the employee's workplace applies to claims arising from his employment because the state has an unusually strong interest in applying its own law to employment contracts involving work in***

[14] While Plaintiff asserts she sent her "Compliance Exit Checklist back to the Compliance team in New Jersey," that is simply not the case. Rather, Plaintiff returned the "Compliance Exit Checklist" to her supervisor at that time, Dr. Ackermann. (DRSOF, ¶109).

[its] state.”). (emphasis added). In fact, Calabotta, which Plaintiff cites to, makes clear that “[a] key purpose of our multi-factor choice-of-law jurisprudence . . . is to promote interstate comity and due respect for the laws and interests of sister states, rather than **automatically** impose New Jersey law in some provincial or overly aggressive fashion”. Calabotta v. Phibro Animal Health Corp., 460 N.J. Super. 38, 45 (App. Div. 2019) (emphasis added). Predictability and uniformity as set forth in Section 6 are best preserved by applying New Hampshire law here.

Plaintiff also incorrectly argues the Section 145 factors tip decidedly toward New Jersey. (Pl.’s Br., at p. 27). In making this argument, Plaintiff again improperly urges the Court to ignore the place of injury, New Hampshire, by stating it is “unclear” or “unimportant.” (Id.). As explained above, the alleged injury, based on her Amended Complaint, motion for summary judgment, and arguments contained therein, is her pay. Accordingly, Plaintiff has failed to meet her burden to show that New Jersey had the most significant relationship to her claims and, therefore, the law of the place of injury (New Hampshire) must be applied. See Donovan v. W.R. Berkley Corp., 566 F. Supp. 3d 224 (D.N.J. 2021); see also Chinchilla v. Geo Dis Am., Inc., 2024 U.S. Dist. LEXIS 38658, at *24 (D.N.J. Mar. 5, 2024) recognizing the LAD only applies to out-of-state plaintiffs that have the most significant relationship to New Jersey).

B. Even If New Jersey Law Applies, Plaintiff Cannot Establish Her Claims Under The NJEPA.

Even applying New Jersey Law, Plaintiff cannot establish she was performing substantially similar work to that of the Comparators for the same reasons stated in Point II, infra. Further, the evidence establishes any wage differential was based on legitimate, non-discriminatory factors, and Defendants can therefore establish the second affirmative defense under the NJEPA.

1. Plaintiff Cannot Establish A Prima Facie Case Under the NJEPA.

For the same reasons argued at length in Point II, infra, and in Defendants' affirmative motion for summary judgment, Plaintiff cannot establish she performed substantially similar work to the Comparators and, therefore, cannot meet her burden for summary judgment on her NJEPA claims. Therefore, Plaintiff's motion for summary judgment should be denied.

2. Even If Plaintiff Can Establish A Prima Facie Case Under The NJEPA, Defendants Have Introduced A Triable Issue Of Material Fact With Respect To The NJEPA's Affirmative Defense.

Even if Plaintiff could satisfy her prima facie case, Defendants have introduced sufficient evidence to establish the second affirmative defense under the NJEPA. Specifically, Defendants have established all five of the following requirements:

> (1) That the differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production;
> (2) That the factor or factors are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class;
> (3) That each of the factors is applied reasonably;
> (4) That one or more of the factors account for the entire wage differential; and
> (5) That the factors are job-related with respect to the position in question and based on a legitimate business necessity. A factor based on business necessity shall not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential.

N.J.S.A. § 10:5-12(t).

First, Plaintiff's argument that Defendants cannot show the differential is "not based on 'characteristics of members of the protected class'" again misstates Defendants' articulated reason for the pay disparity; that the ***entire*** wage differential was caused by a legitimate, bona fide factor other than gender - the acquisitions and Integration. (SOMF, ¶7-24, 62-162, 175-187). To achieve its business objective of entering the field of laboratory diagnostic services,

ZRL, as early as October 2020, outlined four discrete goals, including the retention of talent and personnel from the legacy companies. (Id., ¶80). After concluding any pay disparity was the direct result of Ethos having a much higher pay scale than ZNLabs or Phoenix, it was decided the Ethos salaries for **all** pathologists – both male and female – would not be adjusted down, in large part for fear of losing these individuals. (Id., ¶79-81, 84-99). It is important to note that reducing Dr. Ehrhart and/or Dr. Jennings's salaries is prohibited under the NJEPA as a means of rectifying any pay discrepancy. See N.J.S.A. § 10:5-12(t).

Second, Defendants have shown the reason for the pay disparity is not based on, nor does it perpetuate, a wage differential **based on sex**. Plaintiff argues that "given pervasive gender pay gaps in the economy broadly . . . salary history *is* 'based on,' and *does* 'perpetuate, a differential in compensation based on sex" (Pl.'s Br. at p. 23), but this again misconstrues the factual reason for the disparity – the Integration. As previously stated, and conceded by Plaintiff, the three labs integrated into ZRL each had different approaches to compensation. (PSOF, ¶63). It has been established ZRL decided to "grandfather" the salaries for **all** legacy Ethos employees – both male and female, thereby establishing its business decision was gender-neutral. (SOMF, ¶97). The Compensation Team conducted two separate pay equity analyses, one pre-Integration and one post-Integration which confirmed any pay disparity was not the result of sex, or any other protected characteristic – a fact Plaintiff ignores, but rather solely attributable to Ethos paying its employees, male and female, substantially more than the other two labs. (Id. at ¶84-99, 114-120, 129-140, 156-162, 173-187). Accordingly, Defendants have sufficiently introduced evidence to establish the Integration does not perpetuate a wage differential based on sex when all female employees with significantly higher salaries were also not reduced.

Third, Plaintiff argues Defendants "did not apply any factor reasonably." (Pl.'s Br. at p. 23), and specifically that it was not reasonable to pay Plaintiff less than the Comparators because she (i) had the most experience, (ii) ZRL hired male pathologists at higher salaries than Plaintiff after the Integration, and (iii) because Dr. Ackermann said he could not "in good conscience" hire a board-certified Pathologist at Plaintiff's salary. (Id.).

Plaintiff's argument that "obviously" ZRL "could have kept Drs. Ehrhart and Jennings salaries and just paid Dr. Schulman the salary it paid Dr. Ehrhart – a salary that *it determined* was worth paying to an experienced pathologist" is belied by the record. First, Drs. Ehrhart and Jennings' compensation were set by Ethos in 2016 and 2018 respectively. (SOMF, ¶123, 128). Contrary to Plaintiff's mistaken assertion, ZRL did not *determine* Drs. Ehrhart's salary was worth paying a Pathologist, as an examination of all Pathologists hired post-Integration confirms no Pathologist has been hired at a salary anywhere near the legacy Ethos salaries, including Dr. Ehrhart post-Integration. (DRSOF, ¶92).

Plaintiff relies exclusively on her definition of "experience" in an attempt to justify why she, ***and she alone***, should have been raised to Dr. Ehrhart's salary. Plaintiff claims she was the most "experienced" solely because she has been board certified for longer than the Comparators. (P.'s Br. at p. 23; PSOF, ¶81). However, "experience" is subjective, and Plaintiff provides no support as to why *objectively* she was more experienced than either Drs. Ehrhart or Jennings.[15]

Notwithstanding, experience was not factored into Dr. Ehrhart's compensation, which was set by Ethos in 2016. Like "prior pay," "experience" is a red herring. Plaintiff ***assumes*** Dr. Ehrhart's compensation was due to his "experience," and, more specifically, the number of years Dr. Ehrhart has been board certified, which is how Plaintiff defines "experience." (SOMF, ¶142-

[15] Contrary to Plaintiff's opinion, Chief Medical Officer of Global Diagnostics for Zoetis, US, LLC, Dr. Richard Goldstein, referred to Dr. Ehrhart, not Plaintiff, as ZRL's "best known" and "most experienced" Pathologist. (SOMF, ¶140).

143). However, Plaintiff's assumption is not supported by the record. Plaintiff has no knowledge of the facts and circumstances that went into Dr. Ehrhart's Ethos offer letter from 2016 or Ethos' rationale as to his compensation. (Id., ¶144). Further it is not disputed it would not have been financially feasible for ZRL to raise compensation of *all* Pathologists to the Ethos levels. (SOMF, ¶186). When asked during her deposition, whether ZRL considered raising ***all*** salaries to the level of Ethos Ms. Winder testified, "we would not have been able to afford to do that." (Id.). Plaintiff has not and cannot offer any evidence to contradict Ms. Winder's testimony.

As such, knowing reducing salaries of male employees to rectify a pay inequity is prohibited under the NJEPA, and knowing ZRL, a new company, could not afford to pay all Pathologists significantly above market, which is where the Ethos compensation was (nor would anyone consider it a sound business practice to do so), Plaintiff attempts to subjectively invent a reason as to why she – ***and she alone***[16] – should have been paid as much as Dr. Ehrhart – her "experience." Further, Plaintiff cannot have it both ways: she cannot, on the one hand, assert ***all*** Pathologists were performing the same jobs, while, on the other hand argue ***only she*** should be increased due to "experience," especially since it is not disputed "experience" was not considered in ZRL's decision to maintain the Ethos compensation, regardless of gender. Finally, increasing Plaintiff's salary to the level of Dr. Ehrhart's does nothing to remedy the number of other discrepancies created by Integration and which are appropriately being addressed by ZRL through attrition.

Similarly, Plaintiff's argument and reliance on a single comment from Dr. Ackermann that he could not "in good conscience hire a board-certified pathologist" at Plaintiff's salary and the subsequent hiring of male pathologists at higher salaries, as the basis for showing

[16] Dr. Gardiner testified, at no time, did Plaintiff advocate for a higher salary for anyone, other than herself. (DRSOF, ¶74).

unreasonableness also is without merit for the reasons asserted by Defendants in Point II, infra, and need not be repeated here.

Plaintiff cites to a November 2020 email, written by Dr. Gardiner, in which he refers to "the discrepancy as 'absurd' and 'unethical.'" (PSOF, ¶57). However, relying on cherry-picked, out-of-context, statements is nothing more than an attempt to cloud the entirety of the record. When specifically asked during his deposition "what were the serious ethical implications that you felt existed," Dr. Gardiner replied, "[T]here was a number of widely discrepant salaries across pathologists." (DRSOF, ¶72). Moreover, Dr. Gardiner testified if he could go back to August 2020, when he hired Plaintiff into ZNLabs, with all the knowledge and information he has subsequently learned regarding the terms and conditions of the acquisitions, he "would have offered (Plaintiff) the same salary ($125,000)." (Id.).

Plaintiff also ignores the fact ZRL had a contractual obligation to not reduce compensation post-acquisition. (SOMF, ¶19). Even if ZRL could reduce the salaries of the Comparators following the conclusion of the 12-month period, there was justifiable concern that doing so would limit ZRL's ability to retain the Ethos colleagues; an express goal of the acquisition and Integration. (Id., ¶80-82, 930. Therefore, it cannot logically be argued the decision not to reduce salaries, which was applied uniformly to males and females, was not based on a legitimate business interest. In fact, this decision was essential to the success of ZRL as a new venture.

Fourth, Plaintiff argues ZRL cannot show the difference accounted for the entire wage differential for the same reasons Plaintiff stated in her EPA argument. (See Pl.'s Br. at p. 23). As explained in-depth in Point II(B)(iii), the acquisitions and Integration account for the entire wage differential. Finally, Plaintiff incorrectly argues that Defendants cannot establish the

decision not to lower the Ethos employees' salaries is "job-related" or "based on a legitimate business necessity." (Id. at p. 23). In support, Plaintiff relies on the reasons stated in her EPA argument. (Id.). Unlike the EPA, the NJEPA does require that the employer show the reason for the wage disparity was related to the jobs of the employee and/or the comparators. See N.J.S.A. 10:5-12(t)(v). In publishing guidance on the NJEPA in March 2020, the New Jersey Division on Civil Rights explained that "[a] factor is job-related with respect to the position in question and ***based on a legitimate business necessity*** ***when it has both a direct relationship to the position and a direct relationship to the employer's legitimate business interests***."[17] Since the Comparators' jobs with ZRL only existed because of the Integration, any resulting pay disparity was clearly job-related. While Plaintiff claims the *only* purported business necessity is that salaries had to be maintained to retain talent, the true legitimate business necessity was to acquire and Integrate the three labs in a manner that would allow ZRL to enter and ultimately compete in the market of diagnostic laboratory pathology services and retention of talent was key to accomplishing the business goals of Integration. (SOMF, ¶72, 73).

Plaintiff incorrectly argues ZRL could have followed the recommendation of Dr. Gardiner by adopting a "case-based" pay system. (Pl.'s Br., at p. 24).[18] However, Dr. Gardiner's proposal, and Plaintiff's reliance on same, only takes into account Pathologists, who, under a "pay by case" methodology, theoretically, could read more cases to earn more. Further, Dr. Goldstein testified, he disagreed with the ZNLabs' model because, in his opinion, paying per case emphasized quantity of production, not quality of work. (SOMF, ¶131). Moreover, Dr.

[17] See DCR, Guidance on Diane B. Allen Equal Pay Act, March 2020, available at https://www.nj.gov/lps/dcr/downloads/DCR-Equal-Pay-Guidance-3.2.20.pdf (last visited May 3, 2024) (emphasis added).

[18] As an aside, Plaintiff's contention that ZRL determined Drs. Ehrhart and Jennings' salaries were worth paying is a direct misrepresentation of the facts. (Pl.'s Br. at p. 24). It is undisputed that Ethos, not ZRL (or Zoetis, Inc. or any other Zoetis subsidiary), determined these salaries, as well as the salaries of the other Ethos employees. (DRSOF, ¶123, 124, 128). No matter how much Plaintiff wishes the opposite were true, Plaintiff has not – and, in fact, cannot – point to any record evidence to the contrary.

Gardiner was looking at the situation solely from a Pathologist perspective and did not consider the fact the ***over 400*** employees from the three labs were integrated on January 1, 2021. (DRSOF, ¶67). Veterinary Technicians ("Vet Techs"), for example, cannot read more cases to earn more money the same way Pathologists might be able to. The fact is business acquisitions, and integrations of multiple companies are far more complex than Plaintiff wants to believe.

For these reasons, Defendants have established there was no viable alternative business practice and, therefore, have established the fifth prong of the affirmative defense under the NJEPA. As established, ZRL sought to harmonize the different pay practices of the acquired companies through time and attrition, which it is doing, as opposed to immediately raising all salaries to a level multiple witnesses characterize as an "anomaly" and "outliers." Since Defendants have established each element of the second affirmative defense under the NJEPA, Plaintiff's motion for summary judgment on this claim should be denied.[19]

POINT IV

ZOETIS, INC. IS NOT A PROPER PARTY.

As set forth in Defendants' affirmative motion for summary judgment, to maintain a claim under the Federal EPA, Title VII, and the LAD, a plaintiff must first establish the existence of an employment relationship with the defendant. See 29 U.S.C. §206(d), et seq.; 42 U.S.C. §2000e-2(a); N.J.S.A. § 10:5-12(a). The absence of an employment relationship will preclude liability under the Federal EPA, Title VII and the LAD. See, e.g., Thomas v. Cnty. of

[19] Plaintiff also alleges that a violation of the federal EPA is also a violation of the NJLAD and, specifically, Section 10:5-12(a) and, therefore, she should be granted summary judgment on her LAD discrimination claims. As an initial matter, and as explained in-depth in Point III(A), supra, New Jersey law does not apply to Plaintiff's claims and, therefore, her LAD discrimination claim should be dismissed. Even if New Jersey law could apply, this claim will still fail. Claims for discrimination based on unequal wages under the LAD generally follow the framework of the EPA. See Spiewak v. Wyndham Destinations, Inc., 2023 U.S. Dist. LEXIS 14473, at *26-27 (D.N.J. Jan. 26, 2023) ("[]LAD claims based on gender discrimination in wages are analyzed under the [Federal] EPA or Title VII framework."). Since Plaintiff's EPA claims will fail, her LAD claim for gender discrimination based on unequal wages must also fail.

Camden, 386 N.J. Super. 582, 594 (App. Div. 2006); see also Tyrrell v. City of Scranton, 134 F. Supp. 2d 373, 380 (M.D. Pa. 2001) ("the lack of an employment relationship between the plaintiff and the defendant will preclude liability under Title VII") (citing United States v. Bd. of Educ. for Sch. Dist. of Phila., 911 F.2d 882, 891 (3d Cir. 1990)). Here, in recognition of the lack of any evidence to support an employment relationship between Plaintiff and Zoetis, Inc. Plaintiff attempts to create liability by arguing Zoetis, Inc. is liable under either a single or joint employer theory. Both arguments fail.[20]

A. Zoetis, Inc. Is Not Liable Under A Single Employer Theory.

Plaintiff incorrectly asserts she meets the factors set forth in Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 85-86 (3d Cir. 2003) to hold Zoetis, Inc. liable under a single employer theory, but she does not point to any evidence that Zoetis, Inc. directed any alleged discriminatory act. As stated, neither Zoetis, Inc. nor ZRL engaged in any pay-setting decisions with respect to the Comparators, whose salaries were set by Ethos, or Plaintiff, whose salary was set by ZNLabs. (SOMF, ¶47, 123, 124, 128). Further, Zoetis, Inc. had no role in the investigation of Plaintiff's internal complaint, which was investigated by employees of ZRL, Zoetis Services, LLC, and Zoetis U.S., LLC. (Id., ¶141-162, 173-187). Moreover, the decision to not raise Plaintiff's pay following her internal complaint involved multiple individuals, including employees from ZRL, Zoetis Services, LLC, and Zoetis U.S. LLC. (Id., ¶182-184).

Zoetis, Inc. and ZRL are also not so intertwined as to be substantively consolidated into a single entity, despite Plaintiff's improper attempts to conflate the two throughout discovery. Courts in this Circuit generally use the "integrated enterprise" test in the employment

[20] Plaintiff's contention that Zoetis, Inc. has admitted to being Plaintiff's employer in a position statement submitted to the New Hampshire Human Rights Commission disregards the entirety of the record in this matter. However, this statement cannot be seen as the totality of the record, as it was drafted and submitted prior to Defendants conducting any discovery, which has established that Zoetis, Inc. did not employ Plaintiff at any period of time. (SOMF, ¶25-33, 103).

discrimination context to determine whether a parent company is so intertwined with a subsidiary that the two should be substantively consolidated into a single entity and, therefore, the parent can be held liable for actions of the subsidiary. See Martin v. Safeguard Scientifics, Inc., 17 F. Supp. 2d 357, 363 (E.D. Pa. 1998); Johnson v. Cook Composites & Polymers, Inc., 2000 U.S. Dist. LEXIS 2330, at *10 (D.N.J. March 3, 2000) (finding the "integrated enterprise test is the most appropriate test to determine whether a parent corporation is an 'employer' in the employment discrimination context").[21] The "integrated enterprise" test is comprised of an examination of four factors: "(1) the inter-relation of operations; (2) [c]ommon management; (3) centralized control of labor relations; and (4) common ownership or financial controls." Johnson, 2000 U.S. Dist. LEXIS 2330, at *10 (quoting McNeal v. Maritank Philadelphia, Inc., 1999 U.S. Dist. LEXIS 895, at *7 (E.D. Pa. Jan. 29, 1999). Notably, holding a parent company and its separate subsidiary as one is "an equitable remedy and **is difficult to achieve**." Nesbit, 347 F.3d at 87 (emphasis added).

Plaintiff has failed to introduce evidence to establish these factors. Rather, throughout the entirety of this litigation, Plaintiff has conflated Zoetis, Inc. and ZRL as a single entity, improperly referring to "Zoetis" as opposed to the distinct legal entities at issue and despite repeated objections. Such an approach is improper and cannot serve as a basis for extending liability to a parent corporation. See Ingris v. Borough of Caldwell, 2015 U.S. Dist. LEXIS 74255, at *5 (D.N.J. June 9, 2015) ("[T]o the extent Plaintiff seeks to lump several defendants together without setting forth what each particular defendant is alleged to have done, he has

[21] Though the Third Circuit has not yet endorsed a single employer theory under the EPA, Courts in this District have endorsed such a theory under the FLSA, of which the EPA is a part. See Walsh v. Innovative Design & Dev. LLC, 2023 U.S. Dist. LEXIS 39563, at *28 (D.N.J. Mar. 8, 2023). Specifically, Courts who recognize single employer liability under the FLSA apply similar factors to the integrated enterprise test used in Title VII and LAD matters, specifically: "interrelation of operations; common management; centralized control of labor relations; and common ownership or financial control." Id.

engaged in impermissibly vague group pleading."). Plaintiff also takes this same approach in her papers by repeatedly citing to deposition testimony wherein Plaintiff improperly conflated Zoetis, Inc. and ZRL when questioning witnesses. Thus, Plaintiff's contention that Zoetis, Inc. and ZRL share HR, finance, legal, and IT services is a blatant misrepresentation. While ZRL consulted with non-ZRL employees for general Human Resource and Compensation issues, those employees all worked for either Zoetis Services, LLC or Zoetis U.S., LLC (other separate Zoetis subsidiaries). (DRSOF, ¶128-135). Further Plaintiff's (and the other ZRL Pathologists) supervisors were employees of ZRL, not Zoetis, Inc. (SOMF, ¶33, 112, 113, 129). Zoetis, Inc. and ZRL are not a single employer.

B. Zoetis, Inc. Is Not Liable Under A Joint Employer Theory.

Plaintiff has failed to introduce sufficient evidence to establish Zoetis, Inc. qualifies as a joint employer of Plaintiff. First, Zoetis, Inc. did not hire Plaintiff. Plaintiff was hired by ZNLabs and integrated into ZRL on January 1, 2021. (SOMF, ¶58-61, 102-110). Any decision with respect to hiring or firing would have been made by the leadership within ZRL, not by Zoetis, Inc. (Id., ¶7-24, 62-162, 175-187). Notably, Plaintiff concedes that Zoetis, Inc. was not involved in her day-to-day supervision. (Pl.'s Br., at p. 40).

Plaintiff also misstates that Catherine Matus was employed as Head of Compensation by Zoetis, Inc. (Pl.'s Br., at p. 39). Ms. Matus, however, was employed by Zoetis Services, LLC. (SOMF, ¶68). Further, Zoetis, Inc. did not set Plaintiff's compensation, make the decision as compensation of the Comparators, or decide to maintain salaries after Plaintiff's internal complaint, and Plaintiff points to no evidence to support these assertions. (Pl.'s Br., at p. 39-40). Zoetis, Inc. and ZRL operated as two separate, distinct entities, and Zoetis, Inc. had no control over Plaintiff's employment. Accordingly, Zoetis, Inc. is not a proper party.

POINT VI

PLAINTIFF IS NOT ENTITLED TO DAMAGES.

As Plaintiff has failed to establish she is entitled to summary judgment, damages cannot be awarded. Even if Plaintiff could establish liability, this Court should deny her request for damages under the EPA or the NJEPA.[22]

A. Plaintiff Is Not Entitled To Damages Under The EPA.

The EPA states that "[a]ny employer who violates the provisions of section 206 . . . of this title shall be liable to the employee . . . affected in the amount of their unpaid minimum wages . . . and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). However, Congress enacted the Portal to Portal Act in 1947 to provide courts with discretion over whether to award liquidated damages and the amount of liquidated damages to award. Specifically, the Act introduced a "good faith defense," such that courts need not award liquidated damages for violations if "[t]he employer shows to the satisfaction of the Court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation[.]" 29 U.S.C. § 260. The Third Circuit has explained that to meet its burden, the employer must have "an honest intention to ascertain and follow the dictates of the Act" which were reasonable when judged under an objective standard. Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 907-08 (3d Cir. 1991). Put simply, "[t]o carry his burden, a defendant employer must show that he took affirmative steps to ascertain the Act's requirements, but nonetheless, violated its provisions." Id.

As an initial matter, Plaintiff's calculation of her unpaid minimum wages is inaccurate. Plaintiff claims she is entitled to damages beginning in 2020 for the 15-week period that she was

[22] Plaintiff does not move for summary judgment with respect to damages in connection with her LAD claim and, as such, Defendants do not address this herein.

employed by ZNLabs. (PSOF, ¶99). However, Plaintiff and Dr. Ehrhart, who was employed by Ethos during this time period, were not colleagues, and therefore, not Comparators until Integration, which did not take place until January 1, 2021. (DRSOF, ¶99). As such, because no wage disparity existed prior to January 1, 2021, the 2020 wages claimed by Plaintiff should not be included in any damages calculation should Plaintiff succeed on her underlying claims.

Defendants have also introduced sufficient evidence to create a material issue of fact with respect to whether they had a reasonable belief as to their decision with respect to the disparity. Here, Defendants took affirmative steps, which were objectively reasonable, to determine whether ZRL was in violation of the EPA. Specifically, and as Plaintiff notes, Defendants conducted two separate pay equity analyses, one before Integration and one after Integration. (Id., ¶84-99, 156-162, 173-187). During these reviews, the compensation team specifically examined whether any alleged pay discrepancy was related to gender (or any other protected characteristic). (Id.). Both analyses determined the discrepancy was not based on gender (or any other protected characteristic) but, instead, was the result of Ethos' practice of paying higher than market. (Id.).[23] Further, the compensation team reviewed and determined Plaintiff's salary was in line with the market for the position. (SOMF, ¶156-159).

Plaintiff relies on multiple cases in arguing this burden of establishing good faith and reasonableness is high but fails to recognize the factual differences in these cases that make them inapplicable to what occurred here. See Sec'y United States DOL v. AM. Future Sys., Inc., 873 F.3d 420, 434 (3d Cir. 2017) (no abuse of discretion in granting the plaintiff's partial summary judgment motion and awarding liquidated damages because the defendant may have

[23] Further, Plaintiff's reliance on comments made by Dr. Ackermann and others is insufficient to eliminate any issue of material fact. Indeed, Dr. Ackermann was aware of the pay gap when hiring the less-experienced Pathologists (which Plaintiff conveniently fails to recognize were both male and female) and used these new hires as an opportunity to address the disparity. (DRSOF, ¶90, 92).

implemented a new break policy "**despite being told by one or more of its lawyers that the policy violated the FLSA**.") (emphasis added); Rood v. R&R Express, Inc., 2022 U.S. Dist. LEXIS 66852, at *26-27 (W.D. Pa. Apr. 11, 2022) (finding the defendant did not meet its burden to establish an affirmative defense because there was no evidence to show it consulted counsel or the DOL or to show what materials it relied on to determine policy complied with FLSA); Mozingo v. Oil States Energy Servs., L.L.C., 2017 U.S. Dist. LEXIS 196424, at *7 (W.D. Pa. Nov. 30, 2017) (the defendant did not meet its burden on affirmative defense because it offered no evidence it independently researched whether the industry standard salary and job pay plan for crane operators complied with the act); Krause v. Cherry Hill Fire Dist. 13, 969 F. Supp. 270, 280 (D.N.J. 1997) (an award of liquidated damages was mandatory because the defendant "apparently took no steps to obtain an authoritative review of its planned reorganization."). Here, Defendants have introduced sufficient evidence as to the reasonableness of the legitimate, non-discriminatory business decision, and Plaintiff's motion for summary judgment for liquidated damages under the EPA should be denied.

B. Plaintiff Is Not Entitled To Damages Under The NJEPA.

The NJEPA requires an award of liquidated damages in an amount of three times any monetary damages for a violation of the act. See N.J.S.A. §10:5-13(a)(2)(d). However, Plaintiff is only entitled to a damages award if she can successfully establish Defendants violated the NJEPA, which, as set forth above, Plaintiff has not done. Even so, Plaintiff's calculation of non-liquidated damages under the NJEPA suffers from the same faults as her calculation for such damages under the EPA. Further, Plaintiff's contention that she should be awarded damages under the EPA ***and*** NJEPA is illogical. Although Plaintiff contends cases support "double recovery," that is simply not the case. See Smith v. Millville Rescue Squad, 225 N.J. 373, 390 (2016) (discussing a marital status discrimination claim, not whether a Plaintiff can receive

"double damages" for an unequal pay claim). Indeed, Courts in the Third Circuit have made clear that where a state and federal statute govern the same type of conduct, a successful plaintiff can only be awarded damages under one statute. See E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 297 (2002) ("[I]t goes without saying that the courts can and should preclude double recovery by an individual.") (internal citations omitted); Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 218 (3d Cir. 1992) (holding the plaintiff must elect between a punitive damages award and a statutory, trebled damages award because "a plaintiff whose case concerns a single course of conduct . . . and a single injury . . . [may not] recover those profits twice or thrice over for each legal theory advanced in favor of liability").

This is also true of civil rights litigation, similar to the NJEPA and EPA, where a plaintiff maintains that identical misconduct violated similar federal and state anti-discrimination laws. See Hailey v. City of Camden, 650 F. Supp. 2d 349, 357 (D.N.J. 2009) (denying plaintiff's claim for "double damages" under the LAD and Sections 1981 and 1983 because the alleged wrongful conduct arose from the same facts and injuries and the claims seek the same remedy) (citations omitted). By Plaintiff's own admission, her EPA and NJEPA claims seek to hold Defendants liable for the same alleged wrongful conduct and, therefore, allowing Plaintiff to recover separate, liquidated damage awards under both statutes would allow Plaintiff to "double dip," a practice that is expressly prohibited by the Third Circuit.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's partial motion for summary judgment in its entirety.

Respectfully Submitted,

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