STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae New Jersey Lawsuit Reform Alliance ("NJLRA") advocates for reforms to guarantee that New Jersey's civil justice system discourages lawsuit abuse while also treating all parties fairly. Founded in 2007, it is a bipartisan, statewide group comprised of New Jersey's leading employers, as well as small businesses, individuals, not-for-profit groups, and many of the State's largest business associations and professional organizations. The NJLRA and its members believe that a fair civil justice system resolves disputes expeditiously, without bias and based solely upon application of the law to the facts of each case. Such a system fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that truly injured people are compensated fairly for their losses.

The NJLRA seeks leave to participate in the within appeal as *amicus curiae* in light of the significance of this matter to its constituent members, and submits this Brief both in support of that application and on the merits.

PRELIMINARY STATEMENT

This matter implicates significant issues that affect the way we "do business" in this State. The New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1, et seq., was intended to protect against deceptive, fraudulent, and misleading conduct relating to the sale and advertisement of merchandise and services. It imposes extreme sanctions, including treble damages and recovery of attorney's fees. As such, the CFA can be misused as a weapon against businesses in New Jersey for technical violations and minor noncompliance with consumer protection rules and regulations. These unintended consequences run afoul of New Jersey's commitment to business prosperity, job creation, and entrepreneurship.

With little analysis, the Appellate Division imposed personal liability upon a corporate employee or shareholder if the corporation violates the regulations promulgated under the CFA. In doing so, the Appellate Division ignored established common-law principles setting the standard for the personal liability of a corporate employee, as well as the limited liability of shareholders established by the Business Corporations Act. Instead, all that the Appellate Division required for CFA liability is the individual's "participation" in the regulatory violation, without any

requirement of fault or culpability. This decision eliminates the long-standing protections afforded to corporate employees and shareholders in determining their personal liability for the torts of their employer.

Much of the Appellate Division's holding appears motivated by the fact that the defendant corporation was a small, closely held entity that (or so it perceived) bore little distinction from its shareholders and employees. But the sweeping nature of the court's holding affects all corporations -- including public companies with thousands of employees. Accordingly, the NJLRA respectfully requests this Court to reverse the Appellate Division's holding.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The NJLRA respectfully accepts the statement of facts and procedural history as presented in the Brief filed by Appellants.

ARGUMENT

I. THERE IS A LONG-STANDING LEGAL TEST IN NEW JERSEY FOR DETERMINING WHEN AN INDIVIDUAL MAY BE HELD PERSONALLY LIABLE FOR THE TORTS OF THE CORPORATION.

A. The traditional legal test guarantees protection against individual liability, and the Appellate Division should have applied this standard.

New Jersey law regards a corporation "as an entity distinct from its individual officers, directors, and agents." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 761 (1989) (citation omitted). However, if the officer, director, or employee commits a tort on the corporation's behalf, existing case law makes clear that both the individual and the corporation may be held individually liable. Ballinger v. Delaware River Port Auth., 172 N.J. 586, 608 (2001); see also Moss v. Jones, 93 N.J. Super 179 (App. Div. 1966). In Ballinger, this Court held that the concept of imposing individual liability in such a situation "comports with the long-standing rule that '[a]n agent who does act otherwise . . . is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal.'" 172 N.J. at 608 (quoting Restatement (Second) of Agency § 343 (1958)).

However, a corporation's liability for tortious conduct does not automatically impute liability to the corporation's officers, directors, and employees. An individual may be held personally liable only when he is "sufficiently involved in the commission of the tort." Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 303 (2002). The legal test for imposing individual liability, commonly

referred to as the "participation theory," provides that the officer is personally liable if he "'acted on behalf, and in the name of, the corporation.'" Reliance Ins. Co. v. Lott Group, Inc., 370 N.J. Super. 563, 581 (App. Div. 2004) (citing Saltiel, 170 N.J. at 303). The fundamental purpose of this test is to impose individual liability only after considering the officer's role in the commission of the tort on behalf of the corporation. Such a fact-based inquiry prevents an officer from evading "the consequences of his individual wrongdoing by saying that he acted on behalf of a corporation in which he was interested." Hirsch v. Phily, 4 N.J. 408, 416 (1950).

While an officer may be held personally liable for the corporation's tort, he is not *automatically* liable. Indeed, individuals are normally held liable when they themselves committed the tort on the corporation's behalf, and are therefore as culpable as the corporation itself. E.g., Charles Bloom & Co. v. Echo Jewelers, 279 N.J. Super. 372, 375, 377 (App. Div. 1995) (holding defendants, who were the sole shareholders and officers of a jewelry store, personally liable for conversion, because in their corporate capacity, they accepted diamonds on memoranda from plaintiff, who was sold diamonds wholesale, and then deliberately never paid plaintiff); Van Dam Egg Co. v.

Allendale Farms, 199 N.J. Super. 452, 454-55 (App. Div. 1985) (refusing to dismiss fraud claims against corporate officer who purchased eggs from plaintiff and then never paid, because the officer had ordered the eggs, arranged for the sale, and represented the corporation would pay for the eggs, despite knowing this representation was false); Robsac Indus., Inc. v. Chartpack, 204 N.J. Super. 149, 156 (App. Div. 1985) (reversing summary judgment entered for defendant corporate officer charged with interference with a public bid contract, fraudulent misrepresentation, and defamation, and holding that it was impossible to decide at this stage whether officer used "fair or foul" means against his dealer-competitor). See also Sensale v. Applikon Dyeing Printing Corp., 12 N.J. Super. 171, 175 (App. Div. 1951) (internal quotations omitted) (dismissing corporate officer from action where his company manufactured a piece of equipment that electrocuted plaintiff, because there was no evidence showing that corporate officer "directed the particular negligent act to be done").

B. Properly Defining the Scope of Individual Culpability Also Protects the Principle of Limited Liability of Corporate Shareholders, Absent Grounds to Pierce the Corporate Veil.

There is also an established legal test for determining when shareholders of a corporation may be held liable for the corporation's torts -- i.e., the piercing the corporate veil test.

The corporate veil shields shareholders from individual liability; however, courts pierce that veil where justice requires holding a shareholder individually liable. Donsco Inc. v. Casper, 587 F.2d 602, 606 (3d Cir. 1978). New Jersey courts have recognized the "'fundamental proposition[]that a corporation is a separate entity from its shareholders, . . . and that a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise.'" Catsouphes v. Atex Assoc., Inc., 287 N.J. Super. 459, 464 (App. Div. 1996) (quoting State Dep't of Envtl Prot. v. Ventron Corp., 94 N.J. 473, 500 (1983)); see also Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001). In other words, a shareholder does not incur personal liability "merely by reason of his official character," but if he "commits the tort or who directs the tortious act to be done, or participates or cooperates therein, is liable to third persons injured thereby[.]" Sensale v. Appilkon Dyeing & Printing Corp., 12 N.J. Super 171, 175 (App. Div. 1951) (citations omitted).

In exceptional cases such as "'fraud, injustice, or the like,'" a court may pierce the corporate veil and impose individual shareholder liability. Catsouphes, 287 N.J. Super. at 464 (quoting Lyon v. Barrett, 89 N.J. 294, 300 (1982)). The rationale for imposing personal liability is to prevent shareholders from committing fraudulent acts but escaping liability by pointing the finger at the corporation, which in reality is nothing more than an extension of the shareholder. Catsouphes, 287 N.J. Super. at 464 (citing Ventron, 94 N.J. at 500).

II. THE APPELLATE DIVISION ABROGATED THE TRADITIONAL LEGAL STANDARDS FOR IMPOSING PERSONAL LIABILITY ON CORPORATE EMPLOYEES AND SHAREHOLDERS, THEREBY VIOLATING THE INTENT OF THE CFA AND PROMOTING BAD PUBLIC POLICY.

A. The Appellate Division's holding abrogates the traditional legal standard for imposing individual liability.

The Appellate Division ruled that corporate employees and shareholders may be held personally liable under the CFA for the corporation's violation of CFA regulations -- specifically, the failure to provide the plaintiff with a written contract for home improvement work. The CFA imposes per se liability for such regulatory violations, irrespective of intent or culpability. And the lower court expanded this per se liability to the corporation's

employees and shareholders, predicated simply upon "proof of personal participation by an individual in a particular regulatory violation." 414 N.J. Super. at 160. In other words, corporate employees and shareholders will now place their own assets at risk if they somehow "participate" -- no matter how unwittingly -- in a regulatory violation.

Accordingly, the decision below abrogates the traditional standards for the liability of a corporation's employees or shareholders. The holding imposes the severe sanction of strict liability upon corporate employees for what may be a minor regulatory violation by a corporation, without any showing of culpable conduct. This effectively eliminates the protections of incorporation that are normally afforded to shareholders when a corporation commits a tortious act. Moreover, an employee who somehow "participates" in the corporation's failure to provide a written contract will put his personal assets at risk. The NJLRA fears that future applications of this holding will result in an unreasonable expansion of individual liability to employees, officers and directors of public companies, who are allegedly to have "participated" in some way in the regulatory violation -- but who in no way acted in a culpable manner.

The Appellate Division reached this unwarranted result through its reading of the CFA. The CFA states, in pertinent part:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . . .

N.J.S.A. 56:8-2. The court below held that "any person" includes not just the corporation, but also its employees and shareholders. But in the case of a corporation selling its goods or services, the "person" is the corporation itself. Indeed, to hold otherwise disrespects the corporate form established by the Business Corporations Act.

Of course, that does not mean that an employee should never be held liable if he violates the CFA on behalf of the corporation. Indeed, the well-known principal of agency law provides that "when an employee performs an act that is otherwise a tort, the employee is not relieved of liability simply because he or she acted on behalf of the

employer." Printing Mart, 116 N.J. at 42 (citations omitted).

Determining when an employee or shareholder should be held liable under the CFA does not warrant a departure from the traditional legal tests for such liability. There is nothing fundamentally inconsistent with holding a corporation liable for a regulatory violation under the CFA, while simultaneously applying the traditional fault-based standard for determining the employee's personal liability. Indeed, the traditional test promotes the goals of the CFA by imposing liability on those who act deceitfully and maliciously. New Jersey courts are mindful of the statute's intent, and they have imposed individual liability in those cases where the participation theory yields a finding of such liability. Saltiel, 170 N.J. at 305 (citing Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 253-56 (Ch. Div. 1972)); but see Cardillo v. Bolger, 2009 N.J. Super Unpub. WL 62866, at *5 (App. Div. Jan. 12, 2009) (questioning whether the participation theory should limit the CFA's scope). But the Appellate Division rejected the theory, instead blindly applying the CFA's explicit language and disregarding both the long-standing participation theory and the intent of the CFA.

B. The Appellate Division's decision promotes bad public policy.

Affirming the Appellate Division's holding will hurt both consumers and businesses alike. The court below held that the Saltiel decision was not applicable to the case at hand. However, Saltiel encompasses the sound public policy aims of protecting officers and directors from individual liability in every case where their corporation committed a tortious act. In Saltiel, this Court reminded the lower courts that corporate officers should not be held liable unless there is sufficient evidence of the officer's involvement in the corporate conduct.

> [T]he essence of the participation theory is that a corporate officer can be held personally liable for a tort committed by the corporation when he or she is sufficiently involved in the commission of the tort. A predicate to liability is a finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct.

Saltiel, 170 N.J. at 303.

New Jersey rightfully touts itself as a trailblazer in promoting business prosperity, job creation, and entrepreneurship. However, the holding below runs afoul of these principles, and its implications will deter

businesses from coming to New Jersey, causing harm to both consumers and job-seeking citizens.

The negative impact to the livelihood of New Jersey businesses is readily apparent. In fact, the decision flies in the face of an important reason for businesses to incorporate -- to limit liability. To say that an individual officer is subject to strict liability for the corporation's regulatory violation, strips away any protection afforded by incorporation, thereby leaving employees and shareholders exposed to potentially expansive liability, without the benefit of the court conducting any sort of threshold analysis of their own culpability. Indeed, the NJLRA fears that corporations, employees, and shareholders will take their business elsewhere.

CONCLUSION

While the importance of consumer protection should not be understated, the Appellate Division's approach is misguided. The participation theory is an established tool for courts to ensure that justice is properly served.

For all these reasons, and in order to avoid manifest injustice to Appellants and all businesses subject to the CFA, the NJLRA respectfully submits that its Motion to Appear as *Amicus Curiae* should be GRANTED and, in

anticipation thereof, it joins Appellants in urging that the decision of the Appellate Division be REVERSED.

Respectfully submitted,

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By:_____
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Dated: January , 2011

WILLIAM W. ALLEN AND VIVIAN ALLEN, Plaintiffs/Appellants, v. V AND A BROTHERS, INC., D/B/A CALIPER FARMS NURSERY AND LANDSCAPING SERVICES; ANGELO DIMEGLIO, THE ESTATE OF VINCENT DIMEGLIO, AND THOMAS TAYLOR, Defendants/Respondents Petitioners.	PETITIONING FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-004427-08T1 APPELLATE PANEL: JUDGES CUFF, PAYNE AND WAUGH ON APPEAL FROM AN ORDER OF THE LAW DIVISION – MERCER COUNTY CIVIL ACTION DOCKET NO.: MER-L-1290-04 MOTION JUDGE BELOW: HON. PAUL INNES, J.S.C.

BRIEF ON BEHALF OF THE NEW JERSEY LAWSUIT REFORM ALLIANCE IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* AND ON THE MERITS

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